

IN THE SUPREME COURT OF OHIO

Meijer Stores Limited Partnership, :
Appellant, : Case No. 2008-1248
v. :
Franklin County Board of Revision, et al, :
Appellees. : Appeal from the Ohio Board of
Tax Appeals
Case No. 2005-T-441 and 443

MERIT BRIEF OF APPELLEE BOARD OF EDUCATION OF
THE LICKING HEIGHTS LOCAL SCHOOL DISTRICT

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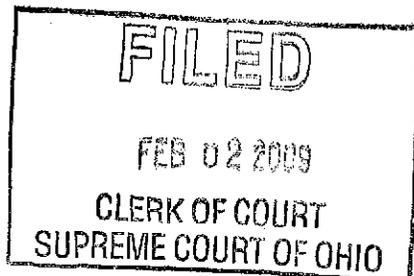


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STATEMENT OF THE CASE AND FACTS

This issue in this appeal is the determination of the true and taxable value of a brand new Meijer superstore for tax year 2003. The appeal involves dueling MAI appraisers, Sam Koon for the Board of Education and Robin Lorms for the property owner, Meijer. The BTA accepted Koon's appraisal and determined the true value of the brand new property to be \$14,850,000. The BTA rejected Meijer's fairly wild claim that the brand new 192,977 square foot store was 66 percent obsolete (at least for real property tax purposes) the moment it opened its doors in 2002. Meijer's appraiser, Robin Lorms, claimed that the brand new superstore, which cost about \$50 per square foot to build had to be valued for real property tax purposes at \$14.77 per square foot.

Because the BTA quite reasonably and lawfully would not accept Meijer's claim for a massive reduction in its real property taxes, Meijer now asks this Court to substitute its judgment for that of the BTA.

1. The Property

The property involved in this appeal is a brand new Meijer superstore having 192,977 square feet of space, with a 2,500 square foot convenience store and gas station with 13 pumps (Appellant's Supplement (Supp.), p. 80), all of which is located on 32.508 acres of land at the intersection of East Broad Street and Waggoner Road. Meijer purchased the land for \$4,100,000 in August, 2000. (Lorms report, Supp. p. 82; Koon report, Supp. Vol. II, p. 278). Meijer then sold a 2.48 acre tract to Max & Erma's for \$775,000 in January, 2003 (Lorms report, Supp. p. 82). The sale of this out-lot by Meijer accounts for the difference in value established by the BTA for tax years 2003 and 2004.

The Meijer store appears to have been finished in July, 2002, and the store opened in August, 2002, making it less than one year old as of tax lien day (January 1, 2003). The Architect's final

draw on the construction of the improvements was dated July 31, 2002 (Architect's final draw, Appellant's Exhibit; BTA Tr. p. 65; Supp. p. 19).

A partial accounting of the actual construction costs and land purchase price are as follows:

Partial Construction costs*	\$9,021,483
Meijer's Land cost in August, 2000	<u>\$4,100,000</u>
Total	\$13,121,483

*The "final costs of construction" of the new Meijer store, according to the Architect's final draw, was \$9,021,483(BTA Tr. p. 65; Supp. p. 19). It is not known whether this cost figure includes the service station and convenience store. The \$9,021,483 cost figure includes only the contractor's actual hard costs or direct construction costs, and does not include any of the soft costs or indirect costs. Thus, the cost figures given above are not the total construction costs of the Meijer improvements, but rather are significantly less than the actual costs of the property.

2. The BTA Was Provided With Two Appraisals

The Appellee Board of Education engaged Sam Koon to appraise the new Meijer property. The Appellant property owner engaged Robin Lorms to appraise the property. A comparison of Koon's and Lorms' final value conclusions are as follows:

	<u>Sam Koon</u>	<u>Robin Lorms</u>
Store and main site land	\$11,850,000	\$6,754,195
Convenience store/gas	1,300,000	\$268,367
Outlots (surplus land)	<u>1,700,000</u>	<u>1,739,730</u>
Final Value	\$14,850,000	\$8,762,292

2. The Franklin County Auditor's Value - \$13,290,000

The Franklin County Auditor appraised the property for tax year 2003 at \$13,290,000. The Auditor appraised the land at \$4,607,400 and the new improvements at \$8,682,600. Both appraisers agreed that the County Auditor undervalued the property because the Auditor's land value is substantially less than the land value estimate of the two appraisers. Meijer's appraiser, Lorms, estimated that the market value of the land was \$5,643,480 (Lorms' appraisal report, Supp. p. 148). Sam Koon estimated the land had a market value of \$5,817,500 (Supp. Vol. II p. 322 and 323).

3. Meijer Claims A Nominal Value On Its Brand New Store For Tax Purposes

Meijer claimed a grossly low value for the property based on the argument that its brand new store, which cost \$50 per square foot to build, can only be valued for \$14.77 per square foot for Ohio real property tax purposes, and that the store was 66 percent "obsolete" for tax purposes the moment it opened its doors in the summer of 2002 (for tax year 2003). Robin Lorms, Meijer's appraiser, reached this result because he applied a flat \$35 per square foot value to the 192,977 square-feet of space in the superstore, which included the value of what Lorms called the "primary site" of 26.025 acres of land (Lorms report, Supp. p. 148 and 163). The \$35 per-square -foot value gives a value of only \$6,754,195 to the new store and the 26 acres of land (Lorms report, Supp. p. 163). Lorms concluded that the 26 acres of land included in this value was itself worth \$3,903,750 (Lorms' report, Supp. p. 148). This means that Lorms valued the brand new Meijer superstore at only \$2,850,445 (final value of \$6,754,195 minus primary site land value of \$3,903,750 - Lorms report, Supp. p. 148, 163, and 179).

This is how Lorms manages to value the brand new store that cost \$50 per square foot to build at only \$14.77 per square foot! (\$2,850,445 divided by 197,977 SF). Consistent with his claim

that obsolescence is “inherent” in a Meijer store regardless of the age or condition of the store, Lorms testified that this purported “obsolescence” exists the moment the new Meijer store opened its doors. On page 34 of his report (Supp. p. 113), Lorms wrote that “[t]his obsolescence occurs the day [the stores] are completed, thus even brand new big box store are worth less than their cost to develop” and he then testified as follows on this point:

“Q. And that paragraph [report, p. 34] essentially states that the moment the doors open, this building is worth 60 to 75 percent less than its cost to build?

A. I think substantial - Yes, probably in that range.” (BTA (Tr. p. p. 122; Supp. p. 33).

As will be noted below, there is no evidence in the record to support Lorms’ claims and such a grossly low valuation of a brand new building would violate the “uniform rule” of valuation set forth in Article XII, Section 2 of the Ohio Constitution.

4. BTA Rejects Meijer’s Claim of “Obsolescence”

As the BTA noted in its Decision and Order, there is little difference between the two appraisals if Lorms’ claim of “obsolescence” is rejected on the grounds that there is no proof to show that any such “obsolescence” ever existed. Even using Lorms’ figures (except for his obsolescence claims), a value of \$13,875,298 is produced for the property (Lorms’ land value of \$5,643,480 plus Lorms’ “depreciated” value of the improvements as of tax lien day, \$8,231,818; Supp. p. 156). The following is part of the BTA’s decision where it noted the similarities between the two appraisals, except for the single issue of “obsolescence”:

“We find that the appraisers essentially agree on a number of aspects. Their valuation of land is similar, with Mr. Lorms at \$ 5,643,480 and Mr. Koon at \$ 5,817,500. Both agree that the highest and best use of the subject property is its continued use as a retail storeroom. Both also agree that

the subject's market area is both vibrant and growing. The key difference between the two opinions of value before us is essentially the impact of obsolescence on the subject property. Mr. Lorms has taken the view that the subject suffers from significant inherent obsolescence ***." (BTA Decision and Order, pp. 22-23)

The BTA had more than ample evidence in the record before it to reject Meijer's claim that its brand new store was 66 percent obsolete for valuation purposes. Sam Koon, the Board of Education's appraiser, specifically disagreed that any such "obsolescence" exists. Sam Koon wrote the following in his appraisal report of the new Meijer store:

"The design of the subject property is functional and provides current amenities sought by tenants within the subject's market. Therefore, no functional obsolescence is considered to exist. Based on rental rates achieved by properties such as the subject, current market occupancy rates, and changes occurring within the subject's immediate neighborhood, economic obsolescence is not considered to exist." (Koon report, Supp. Vol. II, p. 323).

Koon provided more than sufficient evidence in his appraisal report to support his opinion in terms of cost data, comparable sales of other first-generation stores, and actual rents of first-generation properties.

None of Lorms' claims relating to "obsolescence" of a brand new Meijer store make any sense, and the BTA rejected the "claimed obsolescence." The BTA held as follows:

"Under *Meijer*, and *Rollman*, supra, Meijer now has the burden to present sufficiently probative evidence to support both the existence and the extent of the claimed obsolescence. We are unable to conclude, however, that Meijer has met this burden. Instead, we find that Mr. Lorms' facts and

figures have been successfully refuted by the facts and figures presented by the BOE. ***.” (BTA Decision and Order, p. 26).

The BTA accepted Koon’s opinion of value of \$14, 850,000 for tax year 2003, and reduced that value to \$14,075,000 for tax year 2004 based on the sale by Meijer of part of the land for \$775,000 during 2003.

LAW AND ARGUMENT

Introduction

The present appeal is the second time that Meijer has attempted to obtain an improper reduction in the true value of its brand new superstores in the State of Ohio: this time, the property is a brand new 192,977 square-foot superstore and a 2,500 square-foot convenience store/gas station located on East Broad Street in the City of Columbus and the Licking Heights Local School District. The prior litigation in 1996 (for tax year 1993) involved three brand new superstores in Montgomery County.

Both the BTA and this Court in 1996 rejected the exact same claims now being made by Meijer in the present appeal. As the BTA noted in its latest decision, the previous appraisal report that was prepared for Meijer in the 1996 appeals and Meijer's appraisal in the present appeal are almost identical, and the arguments made by Meijer in both the previous appeals and in the present appeal are the very same. In *Meijer, Inc. v. Montgomery County Board of Revision, et al.* (February 8, 1995), BTA Case Nos. 93-M-731; 93-M-732; 93-M-733, unreported, 1995 Ohio Tax Lexis 249; affirmed in *Meijer, Inc. v. Montgomery Cty. Bd. of Revision* (1996), 75 Ohio St. 3d 181, 1996 Ohio 223; 661 N.E.2d 1056, the BTA and this Court previously:

(1) Rejected Meijer's claim that a brand new Meijer store suffers from substantial economic and/or functional "obsolescence" that reduces its true value by 66-70 percent the moment the new store opened its doors;

(2) Rejected Meijer's claim that a brand new Meijer store must be valued for real property tax purposes by using the sale and leases of abandoned, vacated, and defunct stores and the sales of other abandoned stores that constituted economic mis-improvements on the land; and

(3). Rejected Meijer's claim that it is an unconstitutional "value in use" to value a brand new Meijer store by using the standard cost approach to value (although the BTA did not use a cost approach to value the Meijer store in the present appeal).

In the following sections of this Brief, Appellee Board of Education will show that the BTA had ample evidence before it to reject Lorms' appraisal of the brand new Meijer property and ample evidence before it to prove that the BTA's acceptance of the Sam Koon appraisal report was reasonable and lawful.

Reply To Appellant's Propositions of Law No. 1:

The Supreme Court Is Not A Super-BTA Or A Trier Of Fact De Novo, And It Will Not Disturb The BTA's Decision To Accept One Appraisal And To Reject Another Absent An Abuse Of Discretion.

Almost all of Appellant Meijer's merit brief is devoted to the related claims that the BTA should have accepted the appraisal of Robin Lorms, Meijer's appraiser, and rejected the appraisal of Sam Koon, the appraiser for the Board of Education. In this respect, Appellant Meijer is simply demanding that this Court do what it has previously refused to do several dozens times before: that is, to act as a "super BTA."

The BTA clearly did not abuse its discretion or error in any manner in accepting the appraisal of Sam Koon and rejecting the appraisal of Robin Lorms. The BTA was not obligated to adopt the appraisal of Meijer's appraiser and cannot be forced to do so. *Cardinal Federal S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St. 2d 13, 73 O.O.2d 83, paragraph two of the syllabus. Moreover, the BTA possesses wide discretion in evaluating the weight of evidence and credibility of witnesses which come before it. *Cardinal Federal S. & L. Assn.*, supra, paragraph three of the syllabus. In

Natl. Church Residence v. Licking Cty. Bd. of Revision (1995), 73 Ohio St. 3d 397, 398, 653 N.E.2d 240, 241, the Court stated that: “We will not reverse the BTA’s determination on credibility of witnesses and weight given to their testimony unless we find an abuse of this discretion.”

This Court has already given a response to all of Meijer’s claims in the present appeal in the following quotation from the Court’s prior decision in *Meijer, Inc. v. Montgomery County Bd. of Revision*, 75 Ohio St. 3d 181, 185, 1996 Ohio 223; 661 N.E.2d 1056: “Basically, Meijer’s argument is an attempt to refute the testimony of the appraisers for the county and the school board ***”. This court is not a ‘super’ board of tax appeals.” This Court also stated the following:

“A great deal of appellants’ argument is devoted to the rebuttal of appellees’ expert’s testimony. Ultimately they conclude that none of his conclusions is credible enough to be relied on by the BTA. However, such a determination is precisely the kind of factual matter to be decided by the BTA.”

In *WJJK Investments, Inc. v. Licking Cty. Bd. of Revision* (1996), 76 Ohio St. 3d 29, 1996 Ohio 437, 665 N.E.2d 1111, this Court stated that “[t]his court is not a ‘super’ Board of Tax Appeals.” More recently, in *DAK, PLL v. Franklin County Bd. of Revision*, 105 Ohio St. 3d 84, 2005 Ohio 573, 822 N.E.2d 790, this Court stated at [P16]: “DAK is asking this court to review the evidence presented to the BTA, act as a super board of tax appeals, and reweigh the evidence. This court does not sit either as a super BTA or as a trier of fact de novo.” In *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 112 Ohio St.3d 309, 2007 Ohio 6, 859 N.E.2d 540, P22, this Court held the following:

“We will defer to the BTA’s choice of appraisal. With respect to the valuation of real property, it is the ‘BTA’s task * * * to determine the fair market value of the property,’ and that issue is ‘a question of fact, the determination of which is primarily within the province of the taxing

authorities.’ *DAK, PLL v. Franklin Cty. Bd. of Revision*, 105 Ohio St.3d 84, 2005 Ohio 573, 822 N.E.2d 790, P 14. In reviewing the BTA’s disposition of the factual issues in a property valuation case, ‘[t]his court does not sit either as a super BTA or as a trier of fact de novo.’ *Id.* at P 16. Deference is proper in this case because we hold that the BTA did not abuse its discretion in reaching its decision.” [P22]

In *EOP-BP Tower, L.L.C. v. Cuyahoga County Bd. of Revision*, 106 Ohio St. 3d 1, 2005 Ohio 3096, 829 N.E.2d 686, the following was said:

“The BOE asks in essence that this court reevaluate the evidence considered by the BTA. This court, however, is not a super BTA or a trier of fact de novo. “The fair market value of property for tax purposes is a question of fact, the determination of which is primarily within the province of the taxing authorities, and this court will not disturb a decision of the Board of Tax Appeals with respect to such valuation unless it affirmatively appears from the record that such decision is unreasonable or unlawful.’ [P17; citations omitted]

Comparison Of The *Meijer* Decisions - In rejecting Meijer’s appraisal in the present appeal, the BTA cited its prior *Meijer* decision involving three brand new Meijer superstores in Montgomery County and this Court’s 1996 *Meijer* decision, *supra*, which affirmed the BTA’s decision. A comparison of the original *Meijer* decisions involving the Montgomery County Meijer stores with Robin Lorms’ current appraisal of the Franklin County Meijer store involved in the present appeal shows that the claims made by the Meijer appraisers have not changed at all in the 10 years since the first *Meijer* decisions. The Montgomery County Meijer appraisals were prepared by an appraiser named Ron Davis, who had appeared before the BTA on countless occasions. Robin Lorms in the present appeal used the exact same methodology as did Davis in the 1993 appeals. The fundamental

points of the original Meijer appraisals compared to Lorms' current appraisal of the new Meijer stores are as follows.

	<u>Montgomery -Meijer</u>	<u>Franklin-Meijer</u>
Age	Less than one year old	Less than one year old
Size	194,922 square feet	193,170 square feet
Additions	Conv. Store/gas station	Conv. Store/gas station
Replacement cost	\$7,847,172	\$8,780,399

The Comparable Sales and Income Approaches used by Meijer's appraisers in the two appeals were based on the following:

	<u>Montgomery-Meijer</u>	<u>Franklin-Meijer</u>
Sales Used	Abandoned Gold Circle Stores	Abandoned K-Mart Stores
Value	\$33.75 per square foot	\$35.00 per square foot
Market Rent	\$3.75 per square foot	\$4.00 per square foot
"Feasibility Rent"	\$6.25 per square foot.	\$6.42 per square foot
Lost Value	\$4,782,902	\$4,196,624

Obsolescence and Lost Value - In the first *Meijer* case, Meijer's appraiser Davis claimed that a brand new Meijer store suffers from "obsolescence" due to its "design" and "size" of the property and due to the inability of the property to command market rents sufficient to justify the construction of the property (the rent based on the construction costs of the property is the "feasibility rent"). In the present appeal, Meijer's appraiser, Lorms, claims that the brand new Meijer store suffers from "obsolescence" due to the "size and design" of the property and due to the inability of the property

to command market rents sufficient to justify the construction of the property (market rent compared to “feasibility rent” - see Lorms’ report, Supp. p.152).

Each appraiser concluded that the difference between what the appraiser claimed was “feasibility rent” and the appraiser’s claim of “market rent” for the new Meijer store was the measure of the amount of “obsolescence” or lost value of the property for real property tax purposes. Lorms concluded that the “obsolescence” proven to exist by these figures was “\$4,196,624” - Davis claimed it was “\$4,782,902.” All Lorms’ figures are set forth in his report, p. 73 and 74 (Supp. p. 152 and 153) and the Davis figures are quoted in the BTA’s first *Meijer* decision.

Refusal To Use First-Generation Store Sales And Rents - In the first *Meijer* case, Meijer’s appraiser, Davis, acknowledged that there were actual sales of first-generation retail stores, such as the brand new Meijer store, but he refused to use of these sales to value the new Meijer store because the properties were being leased by the first-generation occupants and the rents being paid did not reflect what Davis claimed was “market rent” for the properties. According to Davis (as cited by the BTA in its Decision):

“While listing nine sales, Mr. Davis discounted the comparability of the first four listings. Mr. Davis testified that buildings under lease to three Wal-Marts and one K-Mart which sold in January of 1990 were comparable properties in terms of use. However, Mr. Davis testified that the sales did not fit the definition of ‘arm’s length’ because the purchase prices obtained by the sellers tracked the ‘long bond corporate rates’ of the lessees. Because of the quality of the lessees, it was Mr. Davis’ opinion that the sale prices obtained were not indications of the value of the subject property. (H.R. p. 101)”

In the present appeal, Lorms, likewise, acknowledged that there is a well-established market for first-generation stores, which consists of the sales and rentals of first-generation properties by

first-generation retail buyers and tenants, and by third-party owners and investors. Lorms calls this market the “build to suit market” (report, p. 54; Supp. p. 133), but obviously the market for first-generation stores includes far more types of sales and leases than simply Lorms’ “build to suit” properties. Many of the first generation retailers, such Kmart, Wal-Mart, and others, are active in this market. For instance, Lorms cites “ six first generation lease rates for Wal-Mart stores in Ohio” (report, p 74; Supp. p. 153) and the sale of a Lowe’s in this market (Supp. p. 141). In the appendix of his report, Lorms cites numerous sales of numerous first-generation stores. However, as Davis did in the original Meijer decisions, Lorms refuses to use this market to value the new Meijer property because he claims that “[t]he lease terms agreed upon by owner and tenant do not typically reflect market rent” for the property (Lorms’ report, p. 86; Supp. p. 165), and because the rent reflects the actual construction costs of the property (“an amortization of building improvements”). Lorms claims that the sales and rents are based on the actual construction costs of the new properties, and construction costs do not reflect Lorms’ opinion of the “market value” of the new properties. According to Lorms:

“*** the [actual] rent is, in effect, an amortization of building improvements over the lease term. The lease rate that is factored by such costs often develops a rental rate that exceeds what other tenants are willing to pay on the open market for the same property. Although lease data for newly developed discounts stores are available, the rental rates are not applicable for providing an opinion of market value for the fee simple estate. (report, p. 86; original emphasis; but added in the last sentence).

Resolving this issue depends on determining why any appraiser would conclude that the true value of a brand new Meijer store must be based on the sale and rentals of abandoned, vacated, and

defunct Kmart stores! Of course, the correct answer to both Lorms and Davis is that if a well defined “market” exists for first-generation big box stores - no matter what Meijer’s appraisers may think of the market - then the “market value” of these properties is based on the normal or typical value produced by these sales. A “market” is a “market.” A market that takes into account the construction costs of a new Meijer store, for instance, is a perfectly proper market in which to determine the true value of the new Meijer store. As the BTA holds in its decision, there is nothing wrong with using a cost approach to value the brand new Meijer property (in addition to the other approaches, as well). While there are consistent and predicable values produced for a new Meijer superstore in the first-generation market, Meijer’s appraisers somehow conclude that these values are not the “market value” of these properties. These appraisers claim that another and different market - the market for abandoned, dilapidated, defunct, and vacant Kmart stores - must be used to value a brand new 192,777 square-foot Meijer superstore. The BTA properly rejected this claim.

Reply To Appellant’s Propositions of Law No. II:

A Property Owner Who Claims That The True Value Of Its Brand New Property Is Subject To Substantial Amounts Of Obsolescence Has The Burden To Prove Its Claim.

In citing to this Court’s decisions in *Rollman & Sons Co. v. Hamilton Cty. Bd. of Revision* (1955), 163 Ohio St. 363, 56 Ohio Op. 337, 127 N.E.2d 1, and in the prior *Meijer, Inc. v. Montgomery Cty. Bd. of Revision* (1996), 75 Ohio St. 3d 181, the BTA held that Meijer “has the burden to present sufficiently probative evidence to support both the existence and the extent of the claimed obsolescence.” The BTA then stated that “[w]e are unable to conclude, however, that Meijer has met this burden.”

In *Meijer*, supra, for instance, this Court stated the following:

“In *Rollman & Sons Co. v. Hamilton Cty. Bd. of Revision* (1955), 163 Ohio St. 363, 56 Ohio Op. 337, 127 N.E.2d 1, we stated in paragraph one of the syllabus, ‘Where a taxpayer asserts that functional depreciation should be considered in valuing his property for the purpose of taxation, the burden is upon the taxpayer to prove such depreciation.’ *** In paragraph two of the syllabus in *Rollman*, we held: Where the only evidence as to functional depreciation is the opinion of the taxpayers witness, which opinion the witness fails to substantiate with facts or figures, a decision of the Board of Tax Appeals that the taxpayer failed to sustain his burden of proof as to functional depreciation and excluding such depreciation in valuation for tax purposes is neither unreasonable nor unlawful.”

The BTA also concluded that Meijer had not “shown that the obsolescence factors advanced by the appraiser” did, in fact, “exist.” The BTA refused to rely on the sales and rentals of abandoned, vacated, and defunct properties to value the new Meijer store because the abandoned properties were not comparable to a brand new Meijer store. According to BTA, in citing to one of its prior decisions on point:

“*** we declined to limit the valuation of a big-box retail storeroom to only second-generation lease and sale comparables where the building continued to be utilized by a first-generation user and where evidence was introduced indicating that comparable first-generation leases and sales existed” (Decision, p. 24)

1 The Sales And Rent Comparables Used By Meijer's Appraiser Were
Not Comparable In Any Sense To The Brand New Meijer Store.

The BTA was correct in rejecting the opinion of value of Meijer's appraiser, Robin Lorms, because Lorms' value did not reflect the true value in money of Meijer's new property. Meijer's appraiser, Robin Lorms, produced an incredibly low value - the BTA held it was an "artificially" low value - for the brand new Meijer store (Decision, p. 29) because he claimed that the brand new property was 66 percent obsolescent the moment it opened its doors. Lorms valued the brand new Meijer store by using:

(1) The sale and rentals of defunct, abandoned, and vacated Kmart stores. Four of the eight comparable sales relied on by Lorms are abandoned and vacated Kmart stores (Supp. p. 161). These were "under-performing" and then defunct stores that Kmart abandoned during the course of its several bankruptcy proceedings. Five of the other seven sales that Lorms used to calculate "obsolescence" were more abandoned and vacated Kmart stores (Supp. p. 75). Lorms even used the abandoned Kmart stores to calculate his market expenses in his income approach (Supp. p. 171); and

(2) The sales of properties that were actually land only sales. Lorms relied on the sales of two Ames stores that were demolished as part of the sale and that had been abandoned as an economic mis-improvement on the land. One of Lorms' Kmart sales was also a land only sale, as Lorms said that the store was to be demolished by the buyer (No. 6, a Kmart sale). These buildings were admittedly worthless. That someone would use the sales of demolished stores to value a brand new Meijer store seems to be quite incredible.

As indicated above, Lorms placed a nominal value on the brand new Meijer store by placing a value of \$35 per square foot on the 192,977 square foot store, and this value included the value all

of the other site improvements and the value of what Lorms calls the “primary site” of 26.025 acres of land (out of 32.508 acres of land) on East Broad Street. By doing this, Lorms arrived at a value of \$14.77 square foot for the brand new Meijer store and the other site improvements (not including the convenience store and gas station) that everyone agrees cost at least \$45 to \$50 per square foot to build (Supp. p. 72).

The abandoned and vacated properties are referred to by both Lorms and Koon as “second and third generation” properties, meaning that they were abandoned and vacated by the major national retailer who first used the property and are now being used, if at all, by second and third generation users (Lorms report, Supp. p. 153). Properties that are occupied by the first major retail user are called first-generation properties. The sales used by Lorms are the following (Supp. p. 161):

<u>No. - Comparable Sales</u>	<u>Condition at Sale</u>	<u>Use by Buyer</u>
1. Kmart - Maple Heights	Abandoned and vacated	Car Dealership
3. Kmart - Mill Run	Abandoned and vacated	None
5. Kmart - Cincinnati	Abandoned and vacated	None
6. Kmart - Gahanna	Abandoned and vacated	Will be Demolished
2. Ames - Broad Street	Abandoned and vacated	Was Demolished as part of sale
4. Ames - Canal Winchester	Abandoned and vacated	Was Demolished as part of sale
7. Wal-Mart - Troy	Abandoned and vacated	Deed Restricted as to Users
8. Sam’s Club - Toledo	Abandoned and vacated	Was purchased by Kroger - Deed Restrictions Governed Uses

Under no circumstances are any of these properties truly comparable to a first-generation on-line, brand new, Meijer superstore. First, the sale properties are not remotely comparable to a new

Meijer store in an economic sense. The Meijer store is brand new and is currently being used for retail sales by a major first-line national retailer: not a single one of the sales or rental properties relied on by Lorms are being used in the same or similar manner. Only one of the eight sale properties appears to be used for retail sales, which Lorms agreed was the highest and best use of the Meijer property. There is certainly no evidence that the abandoned, vacated, and defunct Kmart stores and the other dilapidated and abandoned or demolished properties, are physically comparable to the brand new Meijer store. No one would agree that the land only sales (the sales of the two Ames stores that were torn down as part of the sale and the Kmart store that will be torn down by the buyer) are physically comparable to the new Meijer store.

All of the rental comparables used by Lorms were abandoned and vacated properties that were used by second and third generation users (Supp. p. 167). Five of the six rent comparables were vacant due to bankruptcies of their former users. The former Home Quarters properties (Comparable Rental No. 4 and No. 5 - Supp. p. 167) were abandoned when their owner, the Hechinger Company, went bankrupt; and Comparable Rental No. 2, the Garden Ridge store, was a former Incredible Universe property which was abandoned when Incredible Universe went bankrupt in 1996. The former Builders Square property (Rent Comparable No. 2) was owned by Kmart, which abandoned the property in bankruptcy. The Ames store (No. 7) was likewise abandoned in bankruptcy. The only property not abandoned in bankruptcy was Comparable Rental No. 1, a former Sam's Club, which was abandoned when Sam's Club built a new store nearby, and Sam's Club then limited the use of the property by placing use restrictions in the deed such that the property could not be put to any use that would have competed with Sam's Club. There is no evidence to suggest that any of the rental comparables could be occupied by a first-generation national retailer, like Meijer.

Sam Koon properly stated that these second-generation properties were not comparable to the brand new Meijer store. According to Koon: "Second generation retail properties are available due to circumstances which generally tend to indicate functional or economic deficiencies" in the properties, not to be found in the new Meijer property (report, p. V-25). In the same light, Robin Lorms admitted that his abandoned and vacated Kmart properties were abandoned and were vacant because they were "underperforming" properties. He testified as follows on this critical point:

"Q. Now, they [Kmart] certainly closed their underperforming stores, did they not?

A. ***But the lion's share of the time they closed stores, the reason they are closing them is because they are underperforming stores and that's why they are closing them(Tr I, p. 164)

Q. So the majority of the K-Mart closing are underperforming stores?

A. That's exactly right." (BTA Tr. p. 164; Supp. p. 43)

Meijer appears to claim that all of these defunct properties are comparable to a brand new Meijer store because the properties had "failed tenants" but were not "failed properties" (Merit Brief, p. 9). There is nothing to show that this was the case, however.

2. Lorms' Comparable Sales Were Not Used For Same Highest and Best Use As The New Meijer Store.

Meijer claims that it was proper to use all of the abandoned, vacated, and defunct properties to value the brand new Meijer store because it claims that the properties relied on by Lorms were used for the same "highest and best use" as the brand new Meijer store (Brief, p. 11). According to Meijer's appraiser, Robin Lorms, the highest and best use of the brand new Meijer store was "the continued discount storeroom use" and that no other use "could provide a higher present value" for the Meijer store (Lorms' appraisal report, p. 52; Supp. p. 131). According to Sam Koon, the Board

of Education's appraiser, the highest and best use was the "continued utilization as a discount store and convenience store/gas station" and development and sale of the additional out-lots on the site (Koon appraisal report, Supp. Vol. II, p. 314). The difference between the two appraisers is that Koon valued the brand new Meijer store on the basis of its highest and best use, while Lorms did not, despite Meijer's claims to the contrary (Merit Brief, p 11). This fact accounts for most of the substantial difference in the value of the property determined by the two appraisers.

As indicated above, Lorms' Sale Comps 2 and 4 were abandoned Ames stores which were "subsequently torn down." The Ames store located in Canal Winchester (Comp. 4) sat vacant for "approximately four years" according to Lorms (Supp. p. 161), but it appears to have been vacant for a longer period than that, and the owner eventually tore the building down and sold part of the land to Home Depot. Comps No. 6 and 8 were sold to Kroger and it demolished one of the abandoned stores (Comp. 6) and was apparently using the other for grocery sales (Lorms' report, Supp. p. 161). Lorms' Comp. No. 3, the old Big K Store (Kmart) at Mill Run in Columbus, was abandoned and vacant when it was sold and is still empty. According to Lorms, Sale Comp. No. 5 (an old Kmart store on Ridge Road in Cincinnati) was abandoned long before the sale and this property appears to be vacant and dilapidated at the present time based on Lorms testimony and photographs (Supp. p. 209). Only Comp. No. 7 appears to be partially used for retail sales (apparently there is a Hobby Lobby and a Bed & Bath store in part of this former Wal-Mart store). This property cannot, in fact, be used as a discount store, which is the highest and best use of the Meijer property, because of the deed restrictions which Wal-Mart places in all the deeds to its properties which are put on the market. Lorms acknowledged that this particular property was sold

subject to a deed restriction which prevents its use for “general merchandise” purposes (Supp. p. 161 and 211).

Not a single one of Lorms’ eight comparable sales were being used for the same highest and best use of the Meijer store at the time of their sale; seven of the eight sales were not being used for that purpose after the sale; and only one of the eight comparable sales even appears to have been purchased for use for that same highest and use. All of Lorms’ comparable sales were vacated and abandoned former first-generation stores.

For instance, Lorms’ Sale Comp. No 1 is used by its buyer as a “indoor car dealership.” The difference between the two appraisers is demonstrated by the fact that Sam Koon specifically disagreed that this property was being used for the same highest and best use as the new Meijer store. Koon testified as follows:

Q: Would you consider a car dealership to be the same use as the subject property is being used for?

A. As a discount store?

Q. Correct.

A. No.

Q. You consider that to be a different highest and best use of a particular piece of property?

A. Absolutely. (BTA Tr. p. 32-33; Supp. Vol. II, pp. 416-417)

3. The BTA Was Entitled To Rely On Sam Koon’s Appraisal Report To Value The New Meijer Property.

As indicated above, Sam Koon arrived at a final conclusion of value for the property of \$14,850,000 (report, p. VII-2; Supp. Vol. II, p. 39), which the BTA accepted. The BTA was correct in its agreement with Sam Koon’s value for the property. According to the BTA, “Mr. Koon’s

market data and income approaches provide a reliable indication of value for the subject property” (Decision, p. 34).

Sam Koon looked at some of the same sales and rental comparables that Lorms included in his appraisal report (Koon report, Supp. Vol. III, p. 384). In fact, Koon used the sale of the defunct Big K store in Mill Run for \$47.59 per square foot, just as Lorms did. However, Koon concluded that the brand new Meijer store was substantially more valuable than the abandoned, vacated, and dilapidated Big K store (Supp. Vol. II, p. 385), while Lorms concluded that the abandoned, vacated, and defunct Big K store was actually “superior” to the brand new Meijer store! (Lorms’ report, Supp. p. 162). Koon correctly concluded that a vacant and abandoned store typically “does not represent a product which is well suited to a viable user” and is “inherently less desirable” than the brand new Meijer property (report, p. VI-32; Supp. Vol. II, p. 385). The BTA was well within its rights to agree with Koon in this regard and to conclude that Robin Lorms was wrong. After adjusting his comparable sales data, Koon arrived at a market approach value of \$62.50 per square foot for the Meijer store, or \$12,073,125 (report, p. VI-35), not including the value of the excess land and convenience store/gas station.

In his income approach, unlike Lorms, Sam Koon considered both first-generation leases (Supp. Vol. II, p. 341) and second-generation leases (Supp. Vol. II, p. 344). Koon’s estimate of market rent for the Meijer property was \$6.75 per square foot (Supp. Vol. II, p. 348). Lorms’ data actually support this conclusion in that Lorms admits that he found “lease rates for Wal-Mart stores in Ohio” in the range of “\$5.26 to \$6.74 per square foot” (Lorms’ report, Supp. p. 153). Lorms determined that what he called “feasibility” rent for the Meijer property (which is, in fact, the “market rent” for the property in the absence of any “obsolescence”) would be \$6.42 per square foot

(Supp. p. 73), which is essentially the same as Koon's estimate. If the BTA rejected Lorms' claim that the brand new Meijer store suffered from massive obsolescence, then it would accept Koon's estimate of market rent of \$6.75 per square foot.

Appellant claims that Koon "ignores the market evidence that obsolescence exists" (Brief, p. 13). However, neither Koon nor the BTA ignored the obsolescence claims made by Meijer: in fact, both correctly concluded that no such "obsolescence" exists in the brand new Meijer property. Appellant claims that Koon's value is inconsistent with the fact that only a small number of retailers would want to use the Meijer property (Brief, p. 13). Both Koon and Lorms agreed that there was a market for brand new properties like the Meijer property: so that the fact that only a small number of potential users would want the property is taken into account by the market place and is reflected in the actual sale prices and lease rates for these properties.

Appellant claims that some of Koon's comparables were what it calls "build to suit" properties and it claims that the sale or rental of these properties cannot be used to value the Meijer property (Brief, p. 14). This is totally incorrect. The sale and rentals of first-generation properties, whether what Appellant calls build to suit or not, provide clear evidence of the market value of these properties, despite Appellant's claims to the contrary. Koon concluded that the sale prices and rental rates of the brand new properties provided good evidence of the market value of the Meijer property. Meijer's appraiser, instead, claimed that the prices paid for new properties and the rentals of new properties did not reflect the "market value" and "market rents" for the new Meijer property. This is a factual dispute that the BTA properly and easily resolved.

Appellant's major objection to Koon's appraisal is that based on the claim that Koon had "absolutely no idea in each case how the rental rate was determined" with respect to the rent

comparables relied on by Koon (Appellant's Brief, p. 14). This claim has no merit. Meijer's appraiser, Robin Lorms, never claimed to know how the rental rates in the leases he relied were actually "determined" because Lorms was not a party to any of these leases. Koon's response was based on the fact that neither he, nor any other appraiser, is party to the leases that are used to determine market rent for the property being appraised, and the appraisal profession does not anticipate that the appraiser will actually know how a particular lease rate was "determined." The point of an appraisal is to determine what the "market" rents for a property may be, no matter how the universe of leases may have been put in place by the different landlords and tenants. Koon testified that in his opinion many leases of new properties were based on the actual construction costs of the property, which is exactly what Lorms also noted in his appraisal report.

Appellant also claims that Koon should have relied on the rental rates of the inferior properties included in his rental study, instead of the more valuable properties (Brief, p. 14). Koon properly concluded that the rents being paid for an old Garden Ridge store, an old Burlington Coat Factor store, and a JC Penney store would be less than rents for the new Meijer store (the inferior properties rent for \$3 to \$4 per square foot, while the better properties rented for \$6 to \$9 per square foot; Supp. Vol. II, p. 344). Koon explained in detail in his appraisal report why the Meijer property would rent for more than \$3 to \$4 per square foot, but less than the highest rent for similar properties. Appellant may disagree with Koon's opinions, but there is more than ample evidence in Koon's report to support his opinions.

None of the claims made by Appellant relating to Koon's appraisal have merit. The BTA was correct in accepting Koon's value for the Meijer property.

Reply To Appellant's Propositions of Law No. III:

The Valuation Of Real Property For Real Property Tax Purposes Based On The Highest And Best Use Of The Property Cannot Constitute An Impermissible Value In Use.

The last 15 pages of Meijer's brief deal with the claim that the BTA used an impermissible value in use methodology to value the Meijer property. With these claims, Appellant combines claims about something called a "net lease market" and business value, value in use leases, and sales involving non-real estate items. Many of these claims go beyond the material set forth in Meijer's appraisal report, so there is no evidence to support the claims in the first place. In fact, there is absolutely nothing about the valuation of Meijer's property by Sam Koon or the BTA that involves a illegal current use value or an impermissible value in use. There is nothing in Appellant's value-in-use arguments that even apply to the valuation of its property by the BTA.

At the outset, Appellant appears to claim that there is something wrong with Mr. Koon's statement that the brand new Meijer property appears to be "inherently more valuable" than abandoned and vacated second-generation properties (Merit Brief, p. 25). Koon's statement was proven to be true by the market data that was included in both Koon's and Lorms' appraisals.

1. A Valuation Based On The Highest And Best Use Of The Property Is Not, By Definition, An Impermissible Value In Use.

The valuation of the brand new Meijer property on the basis that it would be occupied by a typical first-generation user cannot possibly constitute an impermissible value in use. This much was decided by this Court in *Meijer, Inc. v. Montgomery Cty. Bd. of Revision* (1996), supra. In *Meijer*, this Court rejected Meijer's claim that a "value in use" resulted when the BTA rejected Meijer's

claim that “obsolescence” existed in its property. This Court defined a “use value” as follows at pp. 184-185:

“However, ‘use value’ as defined in *The Appraisal of Real Estate* (American Institute of Real Estate Appraisers, 9 Ed. 1987) 20, is:

‘The value a specific property has for a specific use. Use value focuses on the contributory value of real estate to the enterprise of which it is a part, without regard to its highest and best use or the monetary amount that might be realized upon its sale.’” (emphasis added.).

The true value of real property is, by definition, based on one use of the property or another. A value in use is a value that is based on a use other than the “highest and best use” of the property. So long as the Meijer property is valued at its “highest and best use” then it is impossible for a impermissible value in use to exist. Appellant claims that a value based on the “current use” of the property is not permitted (Brief, p. 27), but Appellant fails to realize that the “current use” of the property is most often the “highest and best use” of the property. When Appellant cites this Court as stating that a “current use method of evaluation” is not permitted (Brief, p. 27), Appellant fails to note that the current use of the property being discussed was not the highest and best use of the property. For instance, in *State, ex rel. Park Investment Co. v. Board of Tax Appeals* (1972), 32 Ohio St. 2d 28, 61 Ohio Op. 2d 238, 289 N.E.2d 579, cited by Appellant, the “current use value” was based on the current use of the property as farm land, while the true value was many times greater based on the land’s potential for commercial use, which was the highest and best use of the land. It is not possible for a property owner, such as Appellant, to claim that the current use value of the property is greater than the “highest present value” of the property, based on the highest and best use of the property. Appellant’s claim cannot be correct merely by definition.

Under standard appraisal theory, market value and true value must be based on “the highest and best use” of the property. The *Appraisal of Real Estate* (11th Ed., 1996), at 297, defines “highest and best use” as “the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value” (emphasis added). “Highest and best use” is defined by *The Dictionary of Real Estate Appraisal*, published by the American Institute (1984), p. 152, in part as follows:

“Highest and best use. 1. The reasonable and probable use that supports the highest present value of vacant land or improved property, as defined, as of the date of appraisal.”

The “highest and best use” of property was defined in the *Youngstown Sheet & Tube Co. v. Bd. of Revision* (1981), 66 Ohio St. 2d 398, 399-340, 20 Ohio Op. 3d 349, 422 N.E.2d 846, footnote 3, to be “[t]hat reasonable and probable use that will support the highest present value *** as of the effective date of the appraisal.” In the same sense, this Court defined “market value” in *Youngstown Sheet & Tube Co. v. Bd. of Revision*, supra, in footnote 2, as follows: “‘Market value’ has been defined for appraisal purposes as: ‘The highest price in terms of money which a property will bring in a competitive and open market ***.’”

Appellant’s example of a current use value of a manufacturing plant with a unique manufacturing process (Brief, p. 28) can have nothing to do with the valuation of Meijer’s property. So long as an appraiser values the Meijer property based on market data taken from the sales and leases of other similar properties, then nothing unique about the Meijer property can have an affect on the value of the property. The evidence clearly shows that there is nothing unique about the Meijer property that could possibly affect its value, contrary to what Appellant appears to be claiming in its brief (p. 29). The actual construction costs of the Meijer property match the costs

taken by both appraisers from the standard cost manuals used by all appraisers (Marshall Valuation or Marshall & Swift) for a typical "discount store" (see, for instance, Lorms report, Supp. p. 151). Sam Koon's Marshall & Swift cost for a Class C discount store was \$9,076,479 (Supp. Vol. II, p. 320) compared to the actual costs for the Meijer store of \$9,021,483. Whenever an appraiser uses a standard cost manual for a C-Class discount store, for instance, the cost estimate will not include any costs that would reflect any unique features, superadequacies, or additional costs due to special features of the property. Consequently, there is nothing unusual, unique, or atypical in the Meijer property: it is simply a standard brand new "discount store" that has no functional or economic obsolescence and that can be valued using the sales and lease data taken from the market for first-generation discount stores. Appellant cannot have it both ways. If the Meijer property is truly unique, as Appellant appears to claim, then the cost approach is the only viable approach to use in valuing the property. This is standard operating procedure. On the other hand, if market data exists from the sale and lease of similar first-generation properties, then that data must be used to value the property.

In order to appraise the Meijer property, the appraiser has to determine what is the highest and best use of the property, which is that use that provides the "highest present value" for the property. Both Sam Koon and the BTA concluded that the highest present value for the property would be produced by market data taken from the sale and lease of other similar first-generation properties. Of course, Meijer claims that its property must be valued as if it were abandoned and vacated and marketed to some second and third generation users at nominal values, rather than valued on the basis of the sale prices and rental rates actually being paid for other first-generation

stores. Consequently, it claims that it is illegal to value its property in the first-generation market. There is no merit to this claim.

Appellant claims that Koon “envisioned” no other tenant for the Meijer property other than Meijer (Merit Brief, p. 26). This claim is, likewise, incorrect. Appellant fails to consider that Koon determined market rents for the Meijer property based on the actual rents being paid for comparable properties (Supp. Vol. II, p. 344). Based on this data, he concluded to market rent of \$6.75 per square foot for the Meijer property (Supp. p. 348). That conclusion is well supported by Koon’s data and his analysis of the data. Appellant also claims that Koon’s rejection of “obsolescence” was based on the fact that Meijer was using the property. This is clearly not correct. Koon rejected any claim of obsolescence because there was no data to support such a claim and because the actual sale prices and rentals for first-generation stores supported Koon’s value for the new Meijer property.

Appellant also appears to claim that it is impermissible to use what it calls a “net lease market” or a “value in use lease” to value real property for tax purposes (Merit Brief, p.32), although the term “net lease market” and the term “value in use lease” do not appear to have a standard meaning or to be terms that are used in the appraisal profession, other than by Appellant’s appraiser. While the meaning of these terms is unclear, Appellant appears to be claiming that any sale of a property that is subject to a lease cannot be used to value other real property. This is simply not correct. Many commercial properties are leased at the time of sale. It is a standard appraisal principle that any sale of a property subject to a lease is a valid sale if the rents being paid under the lease are market rents at the time of sale.

Sam Koon examined the actual sales of first-generation properties and found that the rents being paid for the property clearly reflected market rents for the properties at the time of sale. On

the other hand, Robin Lorms rejected the use of all such sales because he concluded that the rents being paid for the properties were not market rents, because he claimed that market rents had to be taken from the leases of abandoned, vacated, and defunct Kmart stores and other abandoned properties. This is a purely factual and appraisal issue. The BTA agreed with Koon, and there is ample evidence to show that its decision was correct in all respects.

Appellant cites the sales of some Walgreen stores and other stores (Merit Brief, p. 34 and 35) as evidence of its claim fact that leases can have an effect on the sale price of real property. It is obviously not necessary to disagree with this claim in order to show that Appellant's data have no application to the valuation of the brand new Meijer property involved in the present appeal. Appellant cites the sale of two Walgreen stores (Brief, p. 34) and claims that one store is more valuable than another, but that store sold for much less than another. The claim that the sale prices were based on things other than "real estate fundamentals" cannot be supported by the evidence. For instance, there is no evidence to support the claim that one property is in a "far superior location" and has a "greater population" and better "income levels" and better "housing values" and such, and there is no evidence that the sale prices of the property were not affected by other things not referred by Appellant in its brief. The same thing applies to the other properties referred to by Appellant on page 35 of its brief. Some of this data appears to have come from Lorms, and the BTA rejected Lorms' conclusions as to the proper procedure to be used to value the Meijer property. There is no evidence, for instance, to show that the lease on one property had any effect on the sale price compared to the lack of a lease on the other property. The abandoned and vacated Big K store at Mill Run could simply be worth much less than the Lowe's store on Brice Road.

Finally, Appellant claims that a value that is based on market data taken from the sale and lease of other similar first-generation properties would be a value-in-use that is “completely unrelated to the value of the underlying, fee simple real estate” (Brief, p. 36). This cannot be the case. Meijer’s own appraiser admits that leases in the market for brand new first-generation stores are based on the actual construction costs of the property. This is clearly, and obviously, based on the “value of the underlying, fee simple real estate.”

Reply To Appellant’s Propositions of Law No. IV:

The Valuation Of Convenience Stores Based On The Sales Of Similar Convenience Stores Is Proper and Lawful.

In the last section of its brief, Appellant claims that Sam Koon erred because he relied on the actual sales of convenience stores and gas stations on the open market to value the Meijer convenience store and gas station (Brief, p. 38). In his appraisal, Koon set forth the sale of eight convenience store/gas station properties that were similar to the Meijer property (Supp. Vol. II, pp 355 to 371). After adjusting each sales for market conditions of the sale property, location , age and condition, and for “Property-Specific Considerations” (Supp. Vol. II, p. 372). Koon concluded to value for the Meijer store/gas station of \$450 per square foot, or \$1,296,000. This essentially matched the value produced by Koon’s cost approach for the property (\$1,100,000 - Supp. Vol. II, p. 323). As would be expected, there is nothing wrong with using actual sales of similar properties to value real property for tax purposes. In explaining the eight sales, Koon noted that there appeared to him to be a “correlation between the sale price” of the property “and gallons sold, gross profit, or inside sales figures” (Supp. Vol. II, p. 354).

The mere fact that Koon noted that in his opinion there was a “correlation” between the actual sale prices of these properties and the amount of sales taking place on the properties allows Appellant to waste another four pages of its brief on more meaningless arguments over Koon’s appraisal. In this instance, Appellant appears to claim that the use of the actual sales of convenience store/gas stations is improper because Koon noted that there appeared to him to be a “correlation” between the actual sale prices of these properties and the amount of retail sales made from the properties, citing this Court’s decision in *Higbee Co. v. Cuyahoga Cty. Bd. of Revision*, 107 Ohio St. 3d 325, 2006 Ohio 2, 839 N.E.2d 385. In *Higbee*, this Court held that the true value of real property should not be based on the “business” that is conducted on the property.

Whatever may be the case with using gross sales, for instance, to value real property for tax purposes, Koon did not use gross sales from the convenience store/gas station to value the property, and no one can properly object to Koon’s use of actual sales of similar properties, notwithstanding the fact that the appraiser may have perceived a “correlation” between sale prices of the real estate and sales taking place on the property. If the appraiser discovers a “correlation” between factors that would help explain the actual sale prices of the properties, then more power to the appraiser. Such a “correlation” can have no affect of any kind on the use of such sales to value similar properties. The use of actual sales of similar properties is precisely what the “uniform rule” of Article XII, Section 2 of the Ohio Constitution would require. While Appellant appears to have some objections to some of the actual sales cited by Koon in his appraisal, there is no merit to Appellant’s objections and no evidence to support the claims made by Appellant in its brief.

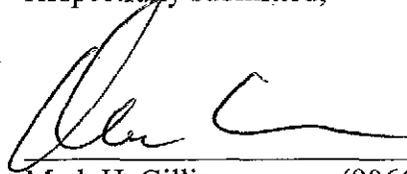
Appellant’s claim that Sam Koon “values [the Meijer] property based upon the business success of the tenant” (Merit Brief, p. 39) is totally incorrect. Nothing in Sam Koon’s appraisal of

the Meijer property had anything to do with the “business success of the tenant” (because there is no tenant) or with the “business success” of Meijer, the owner and user of the property. Appellant’s claim that Koon’s appraisal was based on the value of “non-real estate business value of the owner occupant” (Brief, p. 40) has no basis in fact or in the evidence.

CONCLUSION

For the reasons set forth herein, this Court is respectfully requested to affirm the decision of the Ohio Board of Tax Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing brief was served upon Nicholas M.J. Ray, 3001 Bethel Road, Suite 208, Columbus, Ohio, 43220, William J. Stehle, 373 South High Street, 20th Floor, Columbus, Ohio 45215, and Richard Cordray, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215 by regular U.S. mail, postage prepaid, this 2nd day of February, 2009.



Mark H. Gillis



2 of 250 DOCUMENTS

Meijer, Inc., Appellant, v. Montgomery County Board of Revision, et al., Appellees.

CASE NO. 93-M-731; 93-M-732; 93-M-733 (REAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

1995 Ohio Tax LEXIS 249

February 8, 1995

[*1]

APPEARANCES

For the Appellant - Annrita S. Johnson, Fred Siegel Co., L.P.A., 2700 National City Center, 1900 East Ninth Street, Cleveland, Ohio 44114-3499 and Michael B. Shapiro, Honigman, Miller, Schwartz, and Cohn, 2290 First Nation Building, Detroit, Michigan

For the County Appellees - Matthias B. Heck, Montgomery County Prosecuting, Attorney, By: Marcell N. DeZarn, Assistant Prosecuting Attorney, Montgomery County Courthouse, 301 West Third Street, Dayton, Ohio 45402

For the Appellee School Boards - James R. Gorry, Attorney at Law, 20 East Broad Street, Third Floor, Columbus, Ohio 43215

OPINION:

DECISION AND ORDER

These causes and matters come on to be considered by the Board of Tax Appeals upon notices of appeal filed by appellant herein under date of July 12, 1993, from decisions of the Montgomery County Board of Revision, appellee herein, dated June 18, 1993.

Three appeals have been consolidated for the present purposes by agreement of the parties. A full hearing was held and arguments submitted supporting differing valuations for one of the three properties. That property is located in the Randolph Township, Englewood Corporation taxing district of Montgomery County, Ohio, and [*2] further identified as Parcel No. M57-8-21-1. The other properties presently consolidated with the fully presented property, those being a 31.616 acre plat of land located in Miami Township, West Carrollton City School District and identified by the Montgomery County Auditor as Parcel No. K47-265-21-1 and two parcels comprising 32.597 acres located in the Dayton Corporation, Mad River Local School District and further identified by the Montgomery County Auditor as Parcel Number R722-173-3-19 and Parcel Number R722-173-3-21. Said additional parcels shall be valued in accordance with stipulations agreed to by the parties and presented at the conclusion of the present decision.

The Montgomery County Auditor found the true and taxable value of the Englewood, property for tax year 1992 to be as follows:

PERMANENT PARCEL NO. M57-8-21-1

	TRUE VALUE	*2*TAXABLE VALUE		
Land	\$ 2,708,200	Land	\$ 947,870	
Building	7,803,200	Building	2,731,120	
Total	\$ 10,511,400	Total	\$ 3,678,990	

Upon consideration of the complaint filed by the appellant, the Montgomery County Board of Revision determined there should be no change in value.

In its notice of appeal, the appellant [*3] has alleged that the correct value for the parcel for tax year 1992 to be as follows:

PERMANENT PARCEL NO. M57-008-21-0001

	TRUE VALUE	*2*TAXABLE VALUE		
Land	\$ 2,708,200	Land	\$ 947,870	
Building	4,791,800	Building	1,677,130	
Total	\$ 7,500,000	Total	\$ 2,625,000	

The matter was submitted to the Board of Tax Appeals pursuant to R.C. 5717.01 upon the notices of appeal, the statutory transcripts certified by the Montgomery County Board of Revision (sometimes referred to as "BOR"), the testimony adduced at two days of hearing before this Board (H.R. I and H.R. II), and the briefs of the parties.

The property under consideration is a 41.826 acre plat of land located at the intersection of State Route 48 and Interstate 70 in the city of Englewood, Ohio, a suburb of Dayton. The property was purchased in early 1989 and construction of the improvements was completed in 1991. Major improvements consist of two commercial buildings. The building contains approximately 194,922 square feet and is constructed of concrete panels covering steel Joists. The building has a mezzanine area of approximately 5,120 square feet and elevator servicing said mezzanine. The [*4] interior finish is described as "typical discount store finish" (county appellee's Exh. "A"), except for the ceiling, which is only partially finished.

The second building contains 1,604 square feet and contains what one appraiser described as "retail finish." While the large building is constructed to contain both a first floor and a mezzanine, the smaller building is one story with twelve feet high concrete block outer walls.

Both buildings are currently owner occupied. The large building is used by the owner and contains a Meijer discount/grocery store. The smaller building currently houses a Meijer service station/convenience mart. Other site improvements support the buildings' uses. There are approximately 800,000 square feet of asphalt paving and 25,200 square feet of concrete paving. There also is a significant amount of chain link fencing.

At the hearing on this matter all interested parties offered the testimony of appraisers. The appellant offered the testimony and written appraisal report of Mr. Ronald P. Davis of Pickering Valuation Group. The appellee Montgomery County Board of Revision offered the testimony of Mr. Earl P. Williams, an appraiser for Sabre Systems, [*5] the county's contracted mass appraisal firm. Finally, the Northmont Local Board of Education offered the testimony of Mr. Edward Orlett, who also appeared before the Board of Revision and offered a written appraisal for the BOR's consideration.

Each appraiser offered an opinion of value on subject property, ranging in value from \$ 7,100,000 (spined by appellant's appraiser) to \$ 11,580,700 (spined by the Northmont Local School's appraiser). All three appraisers testified that each considered all three accepted forms of property valuation, that is, the market value, the cost approach and the income capitalization approach. Only Mr. Davis concluded to a value using all three approaches. Both Mr. Williams and Mr. Orlett researched the market and were unable to find sales of properties comparable with the subject either in size or during a relevant time period. Therefore, neither Mr. Williams nor Mr. Orlett considered the market approach a viable method of valuation.

Appellant's appraiser researched the market and listed nine properties which sold during a time period he considered relevant. While listing nine sales, Mr. Davis discounted the comparability of the first four listings. [*6] Mr. Davis testified that buildings under lease to three Wal-Marts and one K-Mart which sold in January of 1990 were comparable properties in terms of use. However, Mr. Davis testified that the sales did not fit the definition of "arm's length" because the purchase prices obtained by the sellers tracked the "long bond corporate rates" of the lessees. Because of the quality of the lessees, it was Mr. Davis' opinion that the sale prices obtained were not indications of the value of the subject property. (H.R. p. 101)

The final five properties on which appellant's appraiser relied were the purchases of buildings which currently house five Kohl's stores in the Columbus, Ohio area. While Mr. Davis testified that the properties were purchased in late 1988 and early 1989, the three properties he found most comparable were purchased in late 1988. (H.R. I p. 52; Appellant's Exh. "1", p. 35, 36) Mr. Davis further testified that extensive remodeling was performed on the properties during 1991, and therefore adjusted the 1988 purchase prices to take into consideration remodeling completed three years later. After adjustment, Mr. Davis testified that such adjusted sales offered support [*7] for his opinion that the subject property would sell for \$ 33.75 per square foot, or \$ 6,780,000.

All three appraisers presented opinions of value based upon the income capitalization approach. Appellant's appraiser considered leases of properties in Bellefontaine, Ohio and Wilmington, Ohio containing both grocery stores and discount-type department stores, and three Kohl's stores in the Columbus area. While the property's net leasable space comprised almost 200,000 square feet, appellant's appraiser's comparables ranged from leases of approximately 86,000 square feet to leases of approximately 118,000 square feet. Appellant's appraiser adjusted both downward for size and upward for location and concluded that, after consideration of the comparables, it was his opinion that the main building would rent for \$ 4.50 a square foot, or a gross rent of \$ 877,500. While appellant's appraiser testified that he considered leases on Columbus, Ohio gas station/convenience stores to estimate a lease rate of \$ 4,000 per month or \$ 48,000 per year, Mr. Davis did not identify those properties either in his testimony or within his report.

After estimating a potential gross income of \$ 925,500 [*8] at 100 per cent occupancy, appellant's appraiser made what he considered to be appropriate deductions from income to arrive at net operating income. Mr. Davis projected a five per cent vacancy and credit allowance, a two per cent administrative expense, a one per cent leasing commission, as well as a reserve for replacement, concluding to a net income of \$ 3.76 per square foot, or \$ 733,284.

Appellant's appraiser then derived a capitalization rate of 10.3 per cent, using both the "band of investment" method and the "debt coverage ratio" method. The appraiser, considering his indicated net operating income of \$ 733,284 and capitalization rate of 10.3 per cent opined value under the income capitalization method of \$ 7,100,000.

The appraiser for Montgomery County based his rent estimate upon rent surveys published in "Dollars and Cents of Shopping Centers: 1990." Considering the property to be a national chain department store, Mr. Williams considered market rent to fall in the range of \$ 4.51 to \$ 5.68 per square foot. Mr. Williams considered a \$ 5.00 per square foot rent appropriate and estimated a gross rental income of \$ 975,860 rental per year. The county's appraiser also [*9] estimated a rent for the convenience store but did not substantiate that rent either in his testimony or through his written report. Total income was estimated to be \$ 1,004,860. From the total gross income estimated, Mr. Williams deducted 5 percent for administrative expenses and concluded to a market net income of \$ 954,617.

Mr. Williams derived a capitalization rate by referring to rates published for the north central region in "The Investment Bulletin, First Quarter, 1992." The county's appraiser determined that an appropriate capitalization rate would be 9.7 per cent. Capitalizing the estimated net income, Mr. Williams derived a value under the income capitalization method of \$ 9,841,412. Adding the value of land considered to be unused and therefore capable of further development, Mr. Williams opined a value for the subject property of \$ 10,060,000.

The school board's appraiser also opined value under the income approach. Mr. Orlett testified that he researched the local market by canvassing commercial realtors in the area to determine a reasonable rental rate for the subject property, finding that rent would fall in the range of \$ 4.50 to \$ 5.00 per square foot. Mr. [*10] Orlett utilized the mid-range of \$ 4.75 per square. Mr. Orlett concluded that the service station/convenience mart would rent for approximately \$ 3,000 per month, calculating to an annual income of \$ 926, 100. Mr. Orlett found it appropriate to take no deductions from gross income. At hearing Mr. Orlett explained that in his opinion a comparable property would rent for more than \$ 4.75 per square foot. It was Mr. Orlett's testimony that a property comparable to the subject would rent for a base of \$ 4.75 per square foot plus a percentage of gross sales. Because Mr. Orlett was not provided with gross sales from which he could estimate percentage rent, the appraiser concluded that any expense deduction was unnecessary since the additional income from rent would effectively cancel out any expenses. Therefore, Mr. Orlett capitalized his estimated gross income.

Mr. Orlett considered an appropriate capitalization rate to be 9.75 per cent. Considering his gross income and his capitalization rate, the school board's appraiser opined value under the income method of \$ 9,867,700.

All three appraisers considered value through the cost approach. The first step in such an approach is [*11] to value the land separately, as if unimproved. Mr. Davis reviewed the market and found six sales of tracts ranging in size from 31 acres to approximately 42 acres, sold during the period of April, 1986 to May, 1992. The purchaser of all six tracts was the appellant. Two purchases were of tracts in the Columbus, Ohio area, three purchases were of land in the Dayton, Ohio area and one purchase was of property located in Middletown, Ohio. Appellant's appraiser, comparing the subject to the more recent, higher priced sales, valued the land as if unimproved at \$ 80,000 per acre, or \$ 3,350,000. (Appellant's Ex. "1")

Mr. Williams valued the land according to its present utilization, valuing the property dedicated to the service station/convenience mart separately from the property dedicated to the discount/grocery store. Mr. Williams also considered approximately ten acres currently to be unused by the present improvements. The county's appraiser added value for the unused land. His total valuation for the subject property equalled \$ 2,443,160.

Mr. Orlett's valuation of the land mirrored Mr. Williams' valuation in that Mr. Orlett valued the property in smaller sections. However, [*12] rather than consider the use of the property, Mr. Orlett considered the characteristics thereof, valuing more highly unused frontage and considering unlevelled land as having a lower value. Mr. Orlett also considered approximately 2.75 acres as having little or no value. Mr. Orlett's final opinion of land value equaled \$ 2,681,700.

All three appraisers utilized the Marshall & Swift Valuation Service and calculated value under the replacement method. All appraisers identified costs relating to the discount/grocery store, the service station/convenience mart as well as costs relating to asphalt and concrete paving and chain link fencing. The cost estimates for improvements only were as follows: Mr. Davis - \$ 7,847,172, Mr. Williams \$ 7,735,288, Mr. Orlett - \$ 12,153,000. Only Mr. Davis then increased his base costs with estimates for such items as construction interest, points, and appraisal costs. The additional "soft costs" increased Mr. Davis' base cost to \$ 8,079,692.

Deductions for depreciation were then considered. As the property was less than a year old at the time of valuation, all appraisers made some deductions for physical depreciation -- the physical deterioration [*13] of the property over the period of time from date of completion of construction to date of valuation.

After deducting for physical depreciation, functional and external obsolescence were considered. Both Mr. Williams and Mr. Orlett testified that they could not find any indication of either functional or external obsolescence and therefore deducted for none. (H.R. I, p. 213, H.R. II, p.44) Mr. Davis, on the other hand, testified that he considered the property to have significant functional obsolescence in design. When asked to identify the functional obsolescence, he stated that he considered the storeroom too deep for its width, and not easily divided into multi-tenant space. (H.R. I p. 23) He also testified that economic obsolescence resulted from " * * * the fact that the income available to the subject property is insufficient to cover the cost of the property * * * ." (H.R. I p. 60)

Mr. Davis testified that no investor would build such a building with the intent of leasing to the general marketplace. (H.R. I p. 62) It was Mr. Davis' opinion that in order to purchase land at market rates and replace the building as of the tax lien date, the costs would require an investor [*14] to attain a square foot rental of \$ 6.25 to make the project feasible. Using market rents derived from his income capitalization approach, Mr. Davis testified that market rent for the subject property would approximate only \$ 3.75 per square foot after deduction for all expenses. Therefore, Mr. Davis projected a rent loss of \$ 2.50 per square foot, which he adjusted for vacancy and credit loss, to equal \$ 463,125. Mr. Davis capitalized his rent loss and deducted \$ 4,782,902 as obsolescence. Mr. Davis did not further identify what portion of his deduction was attributable to functional obsolescence and what portion of his deduction was attributable to economic obsolescence. Adding both land and improvements costs and deducting for obsolescence estimated, Mr. Davis concluded to a value of \$ 7,050,000 under his cost approach.

In reconciling all approaches used, Mr. Davis placed the greatest weight on the income approach, opining that the property is investment property and therefore the income which the property is capable of generating is the best indication of value. (Appellant's Exh. 1, p. 46) His opinion of value was \$ 7,100,000. Mr. Williams placed the greatest weight on [*15] the cost approach, reasoning that the building was nearly new as of the effective date of the appraisal. (County Appellee's Exh. "A", p. 29) His opinion of value was \$ 10,178,500. Mr. Orlett's final opinion of value was \$ 11,580,700. Mr. Orlett placed slightly greater weight on the income approach. However, Mr. Orlett cautioned that his income valuation approach could not be relied upon without actual income figures. Therefore, his valuation was weighted towards the income approach, but significant weight was given to the cost approach. (S.T. Exh. "A")

Prior to consideration of the valuation of the subject property, the Board first notes a procedural objection made by the appellant. During its case in chief and over objection by the appellees, appellant was permitted to call the expert witnesses attending the hearing on behalf of the county and school board and subject the two witnesses to examination. Appellant was then given a second opportunity to examine the witnesses after direct examination of each. However, the presiding attorney examiner limited further examination of the witnesses to redirect by the parties calling said witnesses. Appellant objected to the attorney [*16] examiner's denial of its request to question the witnesses after redirect.

As the appellant notes in its brief, although not bound by the rules of evidence, this Board will rely on said rules where appropriate. To that end, Evid. R. 611 provides, in pertinent part:

"(A) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

Our review of the record as a whole supports the action of the presiding attorney examiner. The appellant was given two opportunities to show what it believed were inconsistencies or irregularities with the appraisals of the opposing parties. While the evidentiary hearing is for the purposes of presenting evidence, this Board notes that counsel for the appellant spent significant time presenting arguments which are more appropriately made through brief. Therefore the actions of the attorney examiner did not restrict appellant's opportunity to fully present its case.

We [*17] begin our review of the valuation issue by noting that a party who asserts a right to an increase or decrease in the value of real property has the burden to prove the right to the values asserted. Cleveland Bd. of Edn. v.

Cuyahoga Cty. Bd. of Revision (1994), 68 Ohio St. 3d 336; *Crow v. Cuyahoga Cty. Bd. of Revision* (1990), 50 Ohio St. 3d 55; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St. 3d 318. Consequently, it is incumbent upon an appellant challenging the decision of a board of revision to come forward and offer evidence which demonstrates its right to the value sought. *Cleveland Bd. of Edn. supra*; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St. 3d 493. Once competent and probative evidence of value is presented by an appellant, other parties asserting a different value then have the corresponding burden of providing evidence which rebuts appellant's evidence. *Springfield Local Bd. of Edn. supra*; *Mentor Exempted Village Bd. of Edn., supra*.

We further note that the issue in an appeal from a board of revision is the true value of the subject property. Accordingly, this [*18] Board will proceed to examine the available record and determine value based upon the evidence before us. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St. 3d 120. In doing so, we will determine the weight and credibility to be accorded to the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St. 2d 13.

The Ohio Constitution provides the authority that empowers the state to tax real property within its borders. Article XII, Section 2 provides in pertinent part:

"Land and improvements thereon shall be taxed by uniform rule according to value."

Upon consideration of the above, the General Assembly enacted R.C. 5713.01, which provides:

"The auditor shall assess all the real estate situated in the county * * * at its true value in money * * *."

"True value in money" has been the subject of court consideration. The Ohio Supreme Court in *State, ex. rel. Part Investment Co. v. Board of Tax Appeals* (1964), 175 Ohio St. 410, determined the best evidence of a property's true value for tax purposes:

"In the last analysis the value or true value in money of any property is the amount for which that property [*19] would sell on the open market by a willing seller to a willing buyer. In essence, the value of the property is the amount of money for which it may be exchanged, i.e., the sales price."

Absent a recent sale, appraisal evidence provides indication of true value in money. The Ohio Administrative Code provides three alternative methods for finding true value: 1) the market data approach, which compares recent sales of comparable properties, 2) the income approach, which capitalizes the net income from property, and 3) the cost approach which depreciates the improvements to land and then adds such value to land value. Ohio Adm. Code 5705-03-03.

While there are three accepted methods of valuing real property for the purposes of determining true value in money, value itself is a question of fact. *American Steel & Wire Co. v. Bd. of Revision of Cuyahoga County* (1942), 139 Ohio St. 388. Moreover, when differences of opinion of values are offered by expert witnesses, this Board is mindful that expert opinion evidence, under any circumstances, is but an opinion, and the reliability of that opinion depends upon the skill and ability demonstrated by the expert as well as the expert's [*20] ability to find truly comparable properties in the marketplace. In such cases, the Board of Tax Appeals is vested with wide discretion in determining the weight to be given to the evidence before us and the credibility of the witnesses. *Cardinal Federal S & L Assn. v. Bd. of Revision, supra*; *Wynwood Apartments, Inc. v. Bd. of Revision* (1979), 59 Ohio St. 2d 34.

We have reviewed the entire record, including the Statutory Transcript, the oral testimony of the appraisers and the written support offered at the evidentiary hearing. Based upon that record, this Board finds that the value opinion of Mr. Williams, the appraiser for Montgomery County, is best supported by the evidence presented in his appraisal as well as the evidence presented by the other two appraisers.

While appellant's appraiser attempts to value the property under the market method of valuation, we are unable to

consider Mr. Davis' comparable properties truly comparable. Mr. Davis himself questioned the reliability of the sales of properties leased to Wal-Marts in Oskaloosa, Iowa, Boone, Iowa and Midland, Texas as well as a K-Mart in Bay City, Texas, testifying that the price paid was based upon the [*21] "net bond" type leases in effect at the time of the sale. (Appellee's Exh. "1", p. 33) Even if such sales were not discounted for the reasons given, there has been no testimony presented which would allow this Board to conclude that the cities of Oskaloosa and Boone, Iowa and Midland and Bay City, Texas are in any way comparable to the metropolitan Dayton area in size, cost of building construction, cost of land, etc.

Mr. Davis then relied upon the sales of five Kohl's Department Store locations in Columbus, Ohio taking place in 1988. The Kohls properties, ranging in size from 86,479 square feet to 136,622 square feet, are substantially smaller than the subject. They are also substantially older than the subject, having been constructed during a period from 1967 through 1975. The properties are, further, not located in areas comparable to the location of the subject. All appraisers agreed that the subject is in an above average location. (Appellant's Exh. "1", p. 10; Appellee's Exh. "A", p. 11; S.T. Exh. "A", p. 7) The evidence concerning the Kohl's properties does not indicate that the comparables can also be considered in above average locations. Of the three properties [*22] the appellant's appraiser considered most comparable, one location, on Olentangy River Road, sits behind other buildings and has no exposure to any major thoroughfare. A second location, on South High Street, is adjacent to Southland Shopping Center, which appellant's appraiser admitted at hearing has a significant and growing vacancy rate. (H.R. P. 99)

The circumstances surrounding the purchase of the Kohl's locations by their present owner in 1988 also must be considered. The original purchase was made as a bulk sale of 44 locations. (Appellee Bd. of Ed. Exh. "A-1") Appellant's appraiser admitted that he did not review the allocations made by the owners to the 44 locations but instead relied upon the owner's assertions of market value. In Consolidated Aluminum Corp. v. Bd. of Revision (1981), 66 Ohio St. 2d 410, the Court stated, "The Board of Tax Appeals is not required, in every instance, and in all events, to accept as the true value in money of real property, an allocation of a portion of a lump-sum purchase price paid for a group of assets * * *." Without such review of the underlying allocations, we have no indication that the reported value of the individual [*23] properties used as comparables were themselves reflective of the actual market. Therefore, the use of unsubstantiated bulk allocations adds yet another layer of supposition to sales comparables which this Board finds do not reasonably reflect the condition, location or age of the subject.

Given the problem with finding sales of truly comparable properties, this Board is not persuaded by Mr. Davis' opinion of value based upon the market approach. We are similarly not persuaded by his income capitalization approach to value. Once again, an attempt to fix a market rent was based upon properties that were not truly comparable. Appellant's appraiser relied on properties of approximately 100,000 square feet located in Bellefontaine and Wilmington, Ohio, neither of which can be compared to the metropolitan Dayton area in either population or ability to command rental rates. Mr. Davis' remaining comparables are leases of Kohl's locations, which are significantly smaller, in less desirable locations, and do not offer the same product mix as the subject.

The county appraiser's market rent indication was developed through the use of The Urban Land Institute's "Dollars & Cents of Shopping [*24] Centers: 1990." Mr. Williams considered the subject comparable to a "national chain department store." That identification is supported by the subject's size. No other classification includes rents for properties containing gross leasable area approximating 200,000 square feet. Although appellant criticizes the "national chain department store" classification, contending that the subject should be classified as a "discount department store," the properties within that survey classification contain gross leasable area of only 50,000 square feet. Mr. William's use of \$ 5.00 per square foot is also supported by Mr. Orlett's survey of the actual Dayton market, which this Board finds is the most probative evidence of rental income.

We are not persuaded by Mr. Orlett's conclusion that any expenses to a property would necessarily be "washed" by overage rents. While we agree that it would not be unusual for an owner of property of this type to contract with a lessee for payment of additional rents on the basis of sales over a certain dollar amount, it is not certain that such a property would reach sales of the dollar level necessary to incur liability for overages in its first years [*25] of

operation. A tenant's ability to reach overage requirements would have no effect upon the owner's expenses in owning such a property.

While this Board places some weight on Mr. Williams' income approach, we find the most reliable evidence of value in the present matter is presented through the cost approach. The fact that the building is less than one year old at the time of valuation supports the use of the cost method. Moreover, the costs testified to were derived by similar methods and the opinions expressed by the experts tend to support each other. In fact, the replacement cost estimates before soft costs and depreciation presented by Mr. Davis and Mr. Williams are within \$ 200,000.

This Board also notes that the Ohio Supreme Court has embraced the cost method as a viable indication of value because of the theory of "substitution." In *Dinner Bell Meats, Inc. v. Cuyahoga Cty. Bd. of Revision* (1984), 12 Ohio St. 3d 270, the Court in a footnote, defined the cost approach and, in so defining, provided rationale for its use:

"For purposes of appraisals, 'cost approach' has been defined as:

"That approach in appraisal analysis which is based on the proposition that [*26] the informed purchaser would pay no more than the cost of producing a substitute property with the same utility as the subject property. It is particularly applicable when the property being appraised involves relatively new improvements which represent the highest and best use of the land or when relatively unique or specialized improvements are located on site and for which there exist no comparable properties on the market.' Encyclopedia of Real Estate Appraising (3 Ed. 1978) 65, quoting Boyce, *Real Estate Appraisal Terminology* (1975) at 53." at 271, 272

(Emphasis removed from original)

Having been persuaded by the recent completion of the property and the ability of the appraisers to estimate value relying on costs of construction, this Board must consider the depreciation deductions taken or discounted. Initially, we find a deduction for physical depreciation is appropriate. It is factually supportable that certain improvements have differing physical lives. It is also factually supported that the subject was less than one year old at the time of valuation. Therefore, the deductions taken for physical depreciation are reasonable and supported by the record.

We now consider [*27] both functional and economic obsolescence claimed by appellant. The appraisers differ on the amounts deducted for such obsolescence and therefore create a disputed factual situation. *Dinner Bell Meats*, at 272. While this Board would agree that functional and economic obsolescence are both appropriate deductions to the cost method of valuation when surrounding market forces support such deductions, in this case, care must be given to review both the subject and the market and consider whether reductions are appropriate.

Functional obsolescence is defined by *The Appraisal of Real Estate*, 10th Ed. as "a loss in value resulting from defects in design." at 352. The appellant claims the building's configuration, the fact that it is "too wide for its depth", is a defect in design, arguing that the building is unsalable or unrentable in its present condition. Functional obsolescence was considered in *B.F. Keith Columbus Co. v. Bd. of Revision of Franklin Cty.* (1947), 148 Ohio St. 253. In that case, the owners of the Palace Theatre in Columbus, Ohio, argued that the large dressing rooms and backstage facilities necessary for vaudeville performances were no longer needed [*28] in a theatre presently used mainly for motion picture showings. Therein, the Court stated the following:

"Functional depreciation occurs where property, although still in good physical condition, has become obsolete or useless due to changing business conditions and thus to all intents and purposes valueless to the owner."

Mr. Davis claimed that similarly configured properties cannot be sold or subdivided but has not supported his claim by identifying a single property currently on the market with a similar configuration which remains unsold because of its shape. Moreover, the appellant does not claim it is unable to use the property as a whole or any particular part because of its configuration. To the contrary, the appellant's construction of the property was consistent with the use thereof. Therefore, we can find nothing about the present property which is obsolete or useless to the owner due to

changing business conditions.

Appellant also argues that the building suffers from "economic obsolescence." To give a value to such economic obsolescence, appellant's appraiser calculated an amount he attributed to the rent loss the building would suffer because of its inability [*29] to command necessary rents. The Appraisal of Real Estate identifies this method of capitalizing rent loss as an appropriate measure of "external obsolescence". However, we are unable to agree that the fact a building is unable to command a certain level of rent in itself indicates "external obsolescence." External obsolescence, as defined by The Appraisal of Real Estate is:

"* * * the diminished utility of a structure due to negative influences emanating from outside the site [which] is usually incurable on part of the owner, landlord, or tenant. External obsolescence can be caused by a variety of factors -- e.g. neighborhood decline; the property's location in a community, state, or region; or market conditions. An estimate of external obsolescence should be based on thorough neighborhood or district analysis, and justified in the neighborhood data section of the appraisal report." at 358

(Emphasis Added)

The three appraisers agreed that the building was well suited to its location and in an area which supports its use as a retail structure. There has been no identification of any outside force, such as depressed economic conditions or change in zoning or site [*30] usage, which would support a finding of external obsolescence.

Appellant's appraiser did argue that the building could not be leased for the cost of construction. We must note that this Board did not accept Mr. Davis' income capitalization approach and therefore does not place any weight on his use of \$ 3.74 per square foot, net, as the building's income potential. Notwithstanding the lack of proof as to potential income, we cannot agree that Mr. Davis' opinion supports a finding of external obsolescence.

Appellant's appraiser supported his valuation conclusions by testifying that an owner would build a building worth significantly less on the market than its cost of construction because the owner's use of the building would support its building outlay. However, Mr. Davis argued, such use cannot be considered by this Board because valuing the use of the building would be "value in use" as opposed to the appropriate valuation method of "value in exchange." By valuing the property at its cost of construction, appellant argues, the value assessed becomes "value in use," which, under State, ex rel. Park Invest. Co. v. Bd. of Tax Appeals (1971), 26 Ohio St. 2d.161 and Dinner [*31] Bell Meats, Inc. v. Cuyahoga Cty. Bd. of Revision, supra, is an unconstitutional form of valuing real property within this state.

We agree that the Supreme Court has held that "value in use" is an unconstitutional form of valuing real property in this state. In this case, however, we do not agree that by finding value through the cost approach, this Board is employing an unacceptable form of valuation. As the Court noted in Dinner Bell Meats, the Ohio Constitution does not "* * * prohibit altogether any consideration of the present use of a property." at 271. Therein, the Court held that the valuation of a property cannot be limited to the current use only, to the exclusion of all other relevant factors.

As stated earlier, in Dinner Bell Meats, the Supreme Court acknowledged the applicability of the theory of substitution, that a knowledgeable buyer would pay no more for a property than the cost of producing a substitute property, and noted that such a theory was particularly applicable to new improvements which represent the highest and best use of the land. Such is the case herein.

All appraisers agreed that the highest and best use of the property was its present [*32] use as a discount retail/grocery store. Under the theory of substitution, this Board may safely assume that if a similar property existed which could have been purchased for less than the costs of construction, the appellant would have purchased such property. However, appellant constructed this property. Without evidence of sales of this or other similar properties, its claim that it would be unable to recoup its cost of construction is merely speculation.

The owner, by purchasing the land and constructing the building, evidences a market need for such a property.

Therefore, the costs of purchase and construction evidence that a prospective purchaser was willing to pay at least the costs of the property as newly constructed. Without evidence of an aging or non-functional building or a changing market, cost valuation is a supportable method of valuation and, properly presented, indicates market value.

Based upon the record as a whole, the Board of Tax Appeals finds and determines that the appellant has failed to prove the depreciation deductions taken for functional and economical obsolescence are market based. Therefore, we are unable to rely on appellant's cost approach [*33] as a reliable indication of market value. Rather, we find that Mr. Williams' cost approach is supported by Mr. Davis' cost approach without deductions for functional or economic obsolescence and therefore Mr. Williams' valuation is relied upon by this Board to determine value.

Given the full record before us, we find Mr. Williams' value opinions are entitled to the greatest weight, and therefore, we find the value of the subject property is equal to Mr. Williams' final value determination of \$ 10,178,500.

Upon consideration of the existing record and the applicable law, the Board of Tax Appeals finds and determines that the value of the subject property as of January 1, 1992 was:

PERMANENT PARCEL NO. M57-8-21-1

	TRUE VALUE		TAXABLE VALUE
Land	\$ 2,443,160	Land	\$ 855,100
Building	7,735,340	Building	2,707,380
Total	\$ 10,178,500	Total	\$ 3,562,480

As stated above, it was the agreement of the parties that the values of the two additional properties located in Montgomery County and consolidated herein, shall be a percentage of the values determined for the Englewood property. (H.R. II p. 173) Therefore, in accordance with the agreement of the parties, [*34] the values of the property identified as Parcel K47-265-21-1 and located in the Miami Township West Carrollton City School District, are 2.5 per cent less than the value found for parcel number M57-8-21-1 and, as of January 1, 1992, are as follows:

PERMANENT PARCEL NO. M57-008-21-001

	TRUE VALUE		TAXABLE VALUE
Land	\$ 2,382,100	Land	\$ 833,740
Building	7,541,940	Building	2,639,670
Total	\$ 9,924,040	Total	\$ 3,473,410

It is the further finding of the Board of Tax Appeals that the values of the properties identified as Parcel Nos. R722-173-3-19 and R722-173-3-21 and located in the Dayton Corporation, Mad River Local School District are 11 per cent less than the value found for parcel number M57-8-21-1 and, as of January 1, 1992, are as follows:

PERMANENT PARCEL NO. R722-173-3-19

	TRUE VALUE		TAXABLE VALUE
Land	\$ 332,040	Land	\$ 116,210
Building	-0-	Building	-0-
Total	\$ 332,040	Total	\$ 116,210

PERMANENT PARCEL NO. R722-173-3-21

	TRUE VALUE		TAXABLE VALUE
Land	\$ 1,842,380	Land	\$ 644,830
Building	6,884,450	Building	2,409,560

Total \$ 8,726,830 Total \$ 3,054,390

It is the order of the Board [*35] of Tax Appeals that the Auditor of Montgomery County list and assess subject real property in conformity with this decision and order. It is further ordered that this value be carried forward in accordance with the law.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law State & Local Taxes Administration & Proceedings Judicial Review Tax Law State & Local Taxes Income Tax General Overview Tax Law State & Local Taxes Real Property Tax Assessment & Valuation Valuation

—The—
Dictionary
of
Real Estate
Appraisal

45



American Institute of Real Estate Appraisers
430 North Michigan Avenue • Chicago, Illinois

hereditaments. All inheritable property, e.g., real, personal, corporeal, incorporeal.

highest and best use

1. The reasonable and probable use that supports the highest present value of vacant land or improved property, as defined, as of the date of the appraisal.
2. The reasonably probable and legal use of land or sites as though vacant, found to be physically possible, appropriately supported, financially feasible, and that results in the highest present land value.
3. The most profitable use.

Implied in these definitions is that the determination of highest and best use takes into account the contribution of a specific use to the community and community development goals as well as the benefits of that use to individual property owners. Hence, in certain situations the highest and best use of land may be for parks, greenbelts, preservation, conservation, wildlife habitats, and the like.

high-rise apartment building. An indefinite term popular since World War II that is used to distinguish the modern, elevator apartment building from its prewar counterpart; usually a high building, but this standard varies in different areas.

high water line. The point on the shore to which the tide normally rises; varies with seasons, time, wind, and other causes. *See also* mean high water line.

highway capacity. The capacity of a roadway to accept traffic, expressed as a number; controlled by the types of vehicles using the highway, the number and width of travel lanes, the allowable speed, road curvature and topography, and the limitations of access and development controls of adjacent real estate.

highway easement. A right granted or taken for the construction, maintenance, and operation of a highway; in the case of a public thoroughfare, the abutting landholders are ordinarily assumed to own the fee to the center line of the right-of-way.

highway frontage. Land that is adjacent to and abuts a highway way.

highway line. The outside limits of a highway right-of-way; as distinct from the limits of actual construction, e.g., curbs, shoulders, so-called right-of-way line.

hilly land. Uneven land with dominant slopes between 16% and 30%.

hindsight rule. A rule that permits the admission of evidence of events subsequent to the date of taking to prove or disprove the value of any claim of value.

hip. The inclined ridge formed by the intersection of two sloping surfaces with unparallel eave lines.

hip roof. A roof with sloping sides and end slopes that are connected by a ridge, the length of which is called a run; distinguished from a gable roof in which all slopes meet so that virtually no ridge remains.

histogram. A set of vertical bars that are proportionate in size to the frequencies represented. *See also* frequency distribution.

historical cost. The cost of a property when it was originally constructed, distinguished from original cost, the actual cost to the present owner who may have purchased at a price greater or less than his first cost. In assembled property, e.g., a public utility, the first cost is defined, plus subsequent additions and betterments, minus depreciation.

historic district. An area designated by municipal zoning to preserve its historic quality.

historic preservation. The preservation of historic sites and structures through regulation or rehabilitation.

historic site. A parcel that is distinguished because an important event occurred on or near the site.

hog factory. In agriculture, a hog-feeding facility where hogs are raised from farrowing to slaughter size under controlled conditions.