ORIGINAL

IN THE SUPREME COURT OF OHIO

RITE AID OF OHIO, INC., et al.,	:	
		Case No. 2014-0828
Appellees,	:	
		Appeal from Ohio Board of Tax Appeals
v.	:	BTA Case No. 2011-1760
WASHINGTON COUNTY AUDITOR and WASHINGTON COUNTY BOARD OF REVISION,	:	
	:	
Appellants.	:	

MERIT BRIEF OF APPELLANTS WASHINGTON COUNTY AUDITOR AND WASHINGTON COUNTY BOARD OF REVISION

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STATEMENT OF THE CASE AND FACTS

Appellee Rite Aid of Ohio, Inc. ("Rite Aid") filed a complaint with the Washington County Board of Revision (the "BOR") for tax year 2010 seeking a reduction in value on that certain real property it owns located at 301 Greene Street in Marietta, OH and identified as Auditor's Parcel Numbers 24-00-07944.000, 24-00-00152.000, 24-00-04592.000, 24-00-04596.000, 24-00-04656.000, 24-00-04668.000, 24-00-07948.000, 24-00-07956.000, 24-00-07960.00, 24-00-0796.000, 24-00-025492.000, 24-00-04652.000 and 24-00-07952.000 (the "Subject Property"). The Subject Property is improved with a 11,052 square foot freestanding retail drugstore constructed in 1999 and was owner-occupied by Rite Aid as of the applicable lien date of January 1, 2010.

At the hearing before the BOR, Rite Aid presented an owner's opinion of value containing comparable sales but did not present an appraisal. *See* BOR Hearing Record, Record. The BOR declined to grant a reduction in value from the Auditor's original valuation and Rite Aid appealed to the Ohio Board of Tax Appeals (the "BTA").

At the hearing before the BTA, both Rite Aid and the County Auditor and BOR (collectively, the "County Appellants") presented appraisals. Rite Aid presented an appraisal of Geoffrey A. Hatcher, MAI, of Hatcher & Associates with an effective date of January 1, 2010 (the "Hatcher Report"). *See* Hatcher Report, Record. Mr. Hatcher utilized both the sales comparison and income approaches to value. While acknowledging that Rite Aid was one of the three "major" drugstores, Mr. Hatcher testified that he focused his search for sales comparables for properties "unencumbered by a lease" (i.e. vacant). BTA Hearing Transcript ("Transcript") at p. 19:16-17, Record. While "considering" sales of drugstores, he rejected such sales if they were

"sale leasebacks" which in his opinion, are based upon contract rent and the credit rating of the tenant. *Id.* at p. 29:18-23. None of Mr. Hatcher's comparable sales were located in the Subject Property's immediate market area of Marietta or were an existing or former freestanding drugstore. Hatcher Report at p. 31-33, Addenda. These sales are summarized as follows:

Sale 1: a 7,488 SF multi-tenant retail building demised for three tenants, including Little Ceasar's pizza, in Zanesville, Ohio.

Sale 2: a 11,473 SF single tenant retail building occupied by a furniture store built in 1974 in Zanesville, Ohio.

Sale 3: a 6,486 SF single tenant retail building occupied by Family Dollar in Zanesville, Ohio.

Sale 4: a 15,708 SF single tenant retail building built in 1994 and occupied by Kroger with a base rent of $5.32/SF (44% of Mr. Hatcher's proforma "market" rent in the income approach) in Nelsonville, Ohio.

Sale 5: a 4,600 SF single tenant retail building built in 1956 and occupied by a shoe store in Parkersburg, West Virginia.

Sale 6: a 6,982 SF single tenant retail building built in 1965 and formerly occupied by a doctor's office in Vienna, West Virginia.

Id. at Addenda. Although all sales are incomparable and far inferior to the Subject Property, Mr. Hatcher made minimal adjustments and concluded to a value of $100 per square foot via the sales comparison approach. Hatcher Report at p. 31-33.

For his income approach, Mr. Hatcher similarly relied upon older multi-tenant commercial leases and two recent leases of very small spaces in a Marietta multi-tenant retail

center. Hatcher Report at p. 36. He also relied on commercial retail shopping center listings in Marietta. *Id.* He listed several old (1996 through 1998) leases of Rite Aids in the Parkersburg, West Virginia market. *Id.* None of his selected rent comparables included free-standing drugstores. *Id.* He deducted for vacancy and collection loss at 10% of effective gross income and for expenses of a management fee and miscellaneous expenses. *Id.* at p. 40. He arrived at a proforma net operating income of $112,322 which he then capitalized at a 9.5% capitalization rate to arrive at a value of $1,115,000 via the income approach. *Id.* He reconciled his values via the sales comparison and income approaches to arrive at an overall value of $1,150,000 as of January 1, 2010. *Id.* at p. 41.

In contrast, the County Appellees submitted an appraisal of Karen Blosser, MAI, of US Realty Consultants with an effective date of January 1, 2010 (the "Blosser Report"). *See* Blosser Report, Record. Ms. Blosser also utilized the sales comparison and income approaches to value. For her sales comparison approach, Ms. Blosser reviewed recent sales of Rite Aid, CVS and Walgreens drugstores in Ohio, both occupied and vacant at the time of sale. Blosser Report at p. VI-2. As Rite Aid was occupying and using the Subject Property as of the applicable lien date, Ms. Blosser selected sales of two occupied Walgreens, one occupied CVS, one occupied Rite Aid and one former Rite Aid. *Id.* at p. VI-18. After adjustments, including location adjustments which specifically considered traffic counts, median household income, and population surrounding each comparable, she concluded to a value of $2,200,000 ($200 per square foot) via the sales comparison approach. For her income approach, Ms. Blosser again surveyed many recent leases of Rite Aid, CVS and Walgreens drug stores in rural and metropolitan areas throughout the state. Blosser Report at p. III-111. She then considered information received

from a local real estate broker regarding downtown Marietta commercial and retail rents and concluded that market rent for the Subject Property was $21 per square foot noting that the selected rent was below the average of drug store rents but above asking rents for general retail space in the Marietta area. *Id.* at pp. III-11, 12. She deducted for vacancy and credit loss at 5% and reviewed two expense comparables, one of which was a drugstore, and arrived at a net operating income of $211,110. *Id.* at p. V-2, 3. She capitalized her net operating income at an overall rate of 8.07% (including a vacancy-weighted tax additur) to arrive at a value of $2,600,000 via the income approach. She reconciled both approaches to arrive at an overall value of $2,400,000 as of January 1, 2010. *Id.* at p. VII-1.

On April 22, 2014, the BTA issued its boiler-plate four paragraph decision accepting the Hatcher Report. In a single sentence, it stated its basis for the decision as the "comparability" to the Subject Property of Mr. Hatcher's sales and lease comparables. *See* BTA Decision at ¶ 3. Ironically, and while Ms. Blosser extensively discussed another CVS in Washington County at the hearing, the BTA faulted her for failing to include the leases of the Marietta CVS and Walgreens in her report. *Id.* at n. 3. It failed to mention Mr. Hatcher's exclusion of these properties in his report, or his exclusion of a single sale comparable as an existing or former freestanding first-generation drugstore. Finally, the BTA concluded that this Court's decision in *Meijer, infra,* did not require an appraiser to rely upon only leased fee sales. *Id.* at n. 4. The County Appellants timely appealed to this Court.

LAW AND ARGUMENT

Introduction

At issue in this appeal is whether the BTA erred in failing to apply this Court's decision

in *Meijer Stores Limited Partnership v. Franklin County Board of Revision*, 122 Ohio St. 3d 447, 2009-Ohio-3479, 912 N.E.2d 560, in accepting an appraisal that not only deliberately excluded consideration of any first-generation freestanding drugstore sales, but also failed to value the Subject Property as it actually existed on the applicable lien date as a build-to-suit owner-occupied freestanding drugstore. The BTA's sole basis for accepting the Hatcher Report, that Mr. Hatcher's sales and lease comparables were more "comparable" to the Subject Property, is unlawful and constitutes an abuse of discretion. The BTA's decision must be reversed and the Blosser Report accepted, or in the alternative, this matter remanded to the BTA with instruction that it adequately consider the Blosser Report and independently determine the Subject Property's true value as of January 1, 2010.

Proposition of Law No. 1:

This Court's decision in *Meijer* precluded the BTA from adopting the Hatcher Report as the Subject Property's true value.

The BTA was precluded from adopting the Hatcher Report pursuant to *Meijer*, *supra,* for the following reasons: (1) this Court has repeatedly held that "leased fee" sales of freestanding first-generation drugstores constitute true value; (2) the Hatcher Report does not comply with *Meijer*; and (3) the Blosser Report complies with *Meijer*.

In *Meijer,* this Court considered the valuation of a newly constructed Meijer store with competing appraisals presented by Meijer and the board of education that bear striking similarities to the appraisals at issue herein. *Meijer, supra,* at ¶ 1. Meijer's appraiser valued the property as vacant or occupied by a second-generation user whereas the board of education's appraiser valued it as if Meijer was the occupant. *Id.* at ¶¶ 7-8. The Court succinctly summarized the differences between each appraiser's selection of comparables in the sales

comparison and income approaches as follows:

> The selection of other properties as comparables bears out this general point of contrast. For his sales comparison approach, Lorms [Meijer's appraiser] used eight properties that included four Kmarts that had been abandoned by that entity during its bankruptcy, two Ames stores that had also been abandoned during bankruptcy, a WalMart abandoned by the retailer when it moved into a new supercenter, and a Sam's Club that 'went dark' in 1995 and took five years to sell. On the other hand, Koon's [the board of education's appraiser] comparable properties included seven properties, four of which were purchased subject to long-term leases. Koon opined that the value of the Meijer store is 'at some point which lies somewhere between selling prices of properties which are leased to first generation users *** and prices of properties which are vacant and available for occupancy.
>
> Similar differences pervade the rent comparables used by the two appraisers. Lorms used a 'market rent' approach that deliberately excluded data derived from build-to-suit leases and newly developed discount stores because under Lorm's theory, the rent in such cases reflected values other than the market rent that pertained to the fee-simple estate. Koon took the contrary approach: by viewing Meijer itself as the potential lessee of the property, Koon justified using seven first-generation properties and five second-generation properties as rent comparables. The first-generation comparables were all build-to-suit properties.

Id. at ¶¶ 9-10.

The Court rejected Meijer's two principal arguments: that the board of education's appraiser valued the "leased fee" rather than the "fee simple" estate; and that such appraisal constituted a constitutionally prohibited "value-in-use" appraisal. Regarding the "leased fee" argument that Rite Aid will likely raise here, the Court recognized that Meijer was owner-occupying the property without a lease. *Id.* at ¶ 23. It rejected Meijer's contention that the valuation of the "fee simple" estate required valuing the property as vacant:

> Moreover, by drawing the distinction between 'fee simple' and 'leased fee,' Meijer predicates its argument on a legal premise that our cases have rejected. We have held that a recent arm's-length sale price should not be adjusted to remove the economic effect of such encumbrances when they exist. And we have also determined that a sale price does not have to be adjusted to remove the effect of above-market rent paid by a creditworthy tenant. It follows that an appraiser,

> when determining the value of a Meijer's store, may take into account the possibility that at some point, the store could be held as a rental property subject to an above-market lease that would enhance its value.

Id. (internal citations omitted). Regarding Meijer's value-in-use argument, the Court held that application of the special-purpose doctrine was appropriate and that present use may be considered when 'a building in good condition [is] being used currently and for the foreseeable future for the unique purpose for which it was built.' *Id.* at ¶ 25, *citing Dinner Bell Meats, Inc. v. Cuyahoga Cty. Bd. of Revision,* 12 Ohio St. 3d 270, 466 N.E.2d 909 (1984). Accordingly, the Court affirmed the BTA's decision accepting the board of education's appraisal.

A. *Meijer* applies here as this Court has held that sale-leaseback sales of freestanding national drugstores constitute true value.

Meijer must apply here as the Court has held that the sale-leaseback sales of freestanding national drugstores, namely CVS and Walgreens, constitute true value. First, in *Rhodes v. Hamilton County Board of Revision*, 117 Ohio St. 3d 532, 2008-Ohio-1595, 885 N.E.2d 236, the Court held that a sale of a Walgreens subject to a long-term above-market lease reflected true value. *Id.* at ¶ 11. The purchaser made similar arguments to those advanced in *Meijer,* i.e. that the sale was subject to an above-market lease, that the sale was of the "leased fee" rather than the "fee simple" estate, and that the sale included Walgreens' "business value." *Id.* at ¶¶ 3-5. The Court rejected all three arguments and declined to adjust the sale price based upon Walgreens' above-market rent. *Id.* at ¶ 4. Moreover, it noted that while Walgreens' business may have affected the value of the fee simple interest, the purchaser did not purchase any interest in such business. *Id.* at ¶ 6.

Next, in *CCleveland OH Realty, L.L.C. v. Cuyahoga County Board of Revision*, 121 Ohio St. 3d 253, 2009-Ohio-757, 903 N.E.2d 622, the Court also adopted a sale price of a CVS subject

to a long-term above-market lease. *Id.* at ¶ 10. The purchaser alleged that the sale should not constitute true value as it was based upon the lease and such lease was not arm's-length. *Id.* at ¶ 6. The Court noted that the concern with sale-leasebacks was to artificially depress value for ad valorem tax purposes and that the sale-leaseback at issue did just the opposite: "indeed, CCleveland's [purchaser] main objection arises because the parties succeeded in maximizing the value of the realty; the seller received an elevated sale price and, as consideration, committed to paying the purchaser a stream of elevated lease payments, which in turn allowed the purchaser to fetch a greater sale price later on." *Id.* at ¶ 7, *citing AEI Net Lease Income & Growth Fund v. Erie Cty. Bd. of Revision*, 119 Ohio St. 3d 563, 2008-Ohio-5203, 895 N.E.2d 830.

Since the Court has held that sales of national freestanding drugstores constitute true value, *Meijer* applies here. Accordingly, an appraisal valuing the Rite Aid at issue may *not* deliberately exclude build-to-suit and sale-leaseback comparable sales and rents as Meijer's appraiser did in *Meijer*. Furthermore, an appraiser is fully justified in valuing the Subject Property taking into account "the possibility that at some point, the store could be held as a rental property subject to an above-market lease that would enhance its value." *Meijer, supra,* at ¶ 23.

B. <u>The Hatcher Report does not comply with *Meijer*.</u>

The BTA erred in adopting the Hatcher Report as it does not comply with *Meijer*. But even if the Court finds that the inclusion of *some* first-generation data in the Hatcher Report satisfies *Meijer*, Mr. Hatcher admitted that he did not rely upon such data and it is too remote from the applicable lien date.

Mr. Hatcher's sales comparison approach irrefutably fails to comply with *Meijer*. He failed to include *any* first or second-generation sales of freestanding drugstores. The sales

included are multi-tenant and single tenant retail stores, not one of which was currently or formerly used as a freestanding drugstore, or could likely be used as a drugstore without a drive-through for the pharmacy. *See* Hatcher Report at Addenda. His repeated basis for rejection of such sales is identical to that of Meijer's appraiser in *Meijer*:

> I considered them, uh, but like I said, most of them were sale leaseback transactions. Like I said, CVS or Walgreens, they're going to be higher credit rated tenants trading on a lower capitalization rate which skews that up. The lease rate is based on contract rent. So people buy it – it's not based on what market rent is. It's based on the contract terms. It's not based on market rent. We're coming up with a fee simple value, so we want to use market rates and terms and market sales.

Transcript at p. 29:18-25 – 30:1-4. Similarly, Mr. Hatcher testified that he would not "use a leased Walgreens sale as an indication of value of a fee simple interest on a property" or "CVS or Walgreens because those don't sell based on the real estate. They're selling based on the contract rent and based on the credit rating of the tenant." *Id.* at p. 50:19-21, 59:8-11. He also specifically acknowledged the scenario contemplated by the Court in *Meijer* for an owner-occupied property:

> So if Rite Aid would go out and say, hey, we want to raise some capital, let's see if we can sell some cash flow at $30 a [square] foot [lease rate], uh, maybe we can get nine and a half, 10 percent [capitalization rate] out of that. That's going to be a leased fee interest which is going to be above the fee simple.

Id. at p. 65:20-25 – 66:1.

Mr. Hatcher's income approach includes *some* first-generation rent comparables provided to him by Rite Aid, but if the BTA had actually reviewed the transcript prior to issuing its decision, it would have discovered that Mr. Hatcher did not rely upon the Rite Aid rent comparables. *See id.* at p. 31:24-25 – 32:1-12 (primary reliance upon "retail space" within subject's broad market area); p. 49:9-17 (primary reliance upon asking rates for inline

commercial space in Marietta); p. 53:16-22 ("most" of his consideration based upon current offerings and conversations with market participants); *see also* Hatcher Report at p. 37 ("In developing an opinion of the subject's market rent, most consideration is given to retail comparables within the subject's market area). Moreover, all of Mr. Hatcher's rent comparables for Rite Aid were negotiated and commenced between 1996 and 1998, with only one comparable commencing in 2006. Hatcher Report at p. 36. When cross-examined regarding his other older rent comparables from 1989 and 1990, Mr. Hatcher indicated that those leases "may or may not be indicative of market" as of the lien date and that's why he relied upon the asking rents for the inline commercial space since those were most recent to the lien date. Transcript at p. 48-49. Finally, of the Rite Aid rent comparables in the report, despite not reflecting market rent as of the lien date, only two (2) of the ten (10) comparables support his market rate conclusion at $12.00 per square foot and all of the other comparables exceed his market rent. Hatcher Report at p. 36.

In sum, the Hatcher Report fails to comply with *Meijer* in that Mr. Hatcher deliberately excluded from consideration any build-to-suit or sale-leaseback rents sales and did not rely upon the remote first-generation rents as he clearly explained at the BTA hearing. Just as in *Meijer*, Mr. Hatcher relies upon the "leased fee" and "fee simple" distinction that the Court unequivocally rejected. For these reasons, the BTA's decision adopting the Hatcher Report was unreasonable and unlawful.

C. The Blosser Report complies with *Meijer.*

On the other hand, the Blosser Report complies with *Meijer* in both of its approaches. For her sales comparison approach, Ms. Blosser searched for both occupied and vacant national chain drugstores selling within two years prior or after the January 1, 2010 lien date. Forty (40)

such sales were identified of Rite Aid, CVS and Walgreen stores, of which three (3) of those sales were second-generation sales where the build-to-suit occupant vacated. Blosser Report at p. VI-2. From those forty (40) sales, with primary emphasis upon age and condition of the store, Ms. Blosser selected five (5) comparables sales, two Walgreens, one former Rite Aid, one Rite Aid and one CVS. Ms. Blosser also selected sales with leases in place similar to her proforma market rent of $21.00 per square foot. *Id.* at pp. VI-3 – VI-12. Her concluded value at $200 per square foot was significantly lower than the average of all forty (40) sales of $297.66 per square foot, but only slightly lower than the sale of the former Rite Aid (Sale 3) with a base rent under the original Rite Aid lease of $20.14 per square foot which sold at $229.38 per square foot. *Id.* at pp. VI-1, VI-7-8.

For her income approach, as Ms. Blosser acknowledged that the Subject Property was specifically designed and built for Rite Aid, with a typical original lease term of twenty (20) to twenty-five (25) years, Rite Aid would be occupying the property as of the January 1, 2010 lien date. Transcript at p. 71:6-20.[1] She selected thirty-one (31) rent comparables of Rite Aid, CVS and Walgreens commencing between 1995 to 2011, with sixteen (16) commencing within three (3) years of the applicable January 1, 2010 lien date. *Id.* at p. III-11. Again, her selected rent of $21.00 per square foot was significantly lower than the average at $25.09 per square foot, and the median of $26.09 per square foot. *Id.*

The Blosser Report undoubtedly complies with *Meijer* and the BTA erred in holding that *Meijer* did not compel it to reject the Hatcher Report in favor of the Blosser Report. While

[1] Mr. Hatcher also acknowledged that Rite Aid would likely be the occupant as of the lien date if it did not own the Subject Property since the property was built for it. Transcript at p. 47:22-25 – 48:1.

Meijer may not require an appraiser to utilize all leased fee or first-generation sales and leases, it does require an appraiser not to *deliberately exclude* them which is exactly what Mr. Hatcher admittedly did. Accordingly, the BTA's decision should be reversed and the Blosser Report accepted by this Court.

Proposition of Law No. 2

The BTA's finding that Mr. Hatcher's rent and sales comparables were more "comparable" to the Subject Property constitutes an abuse of discretion.

The BTA's sole holding in its decision that Mr. Hatcher's rent and sales comparables were more "comparable" to the Subject Property is unreasonable and unlawful. As of the applicable lien date, the Subject Property was an eleven (11) year old owner-occupied first-generation Rite Aid. As repeatedly noted above, not one of Mr. Hatcher's sales comparables is a first-generation freestanding drugstore. *See* Hatcher Report at Addenda. Mr. Hatcher placed primary reliance upon inline commercial space asking rents for his rent comparables, and again, deliberately excluded any recent leases to first-generation freestanding drugstores if they resulted from a build-to-suit or sale-leaseback arrangement. *Id.* at p. 36.

The BTA faulted Ms. Blosser for failing to include the leases to the Marietta CVS and Walgreens in her report but failed to similarly admonish Mr. Hatcher (or acknowledge that Mr. Hatcher failed to include a single recent lease of a freestanding drugstore). BTA Decision at ¶ 3. Yet, Ms. Blosser extensively discussed another drugstore in Washington County [a CVS in Belpre, Ohio][2] and that it supported her market rental rate:

---

[2] The tenant, CVS, was not known specifically by Ms. Blosser at the time of the BTA hearing but she later became aware when appraising the property for the County. The Marietta CVS is leased for $34.54 per square foot triple net, which is far above Ms. Blosser's market rent conclusion. *See* Rent Comparable Data Sheets, Appendix.

> We did also have another drugstore in Washington County that was built in the late 1990's similar to the subject. It was considered to have an inferior condition and location in respect to the subject and it was rented for $17.18 [per square foot].

Transcript at p. 72:12-16. Ms. Blosser also acknowledged that the lease was an older lease, and commenced when the property was built in the late 1990's. *Id.* at p. 116:12-17. The Blosser Report also discusses the lease as follows:

> We were also made aware of the lease of another drug store in Washington County. The property was constructed in the late 90's and is inferior in condition and location to the subject. The property was reportedly leased for $17.18 per square foot double net with the landlord responsible for roof and structural repairs. The lease is for an approximately 20-year term.

Blosser Report at p. III-8.

Finally, the BTA failed to acknowledge that Ms. Blosser made specific adjustments to her sales comparables and selected the very low end of the range for her market rent to account for locational differences. For each comparable sale, Ms. Blosser adjusted for median household income, population and traffic count. *Id.* at pp. VI-14 – VI-17. She noted that while population and median household income were relatively low surrounding the Subject Property, it is located in one of the main retail areas in Marietta and has a very high traffic count to reflect that. Transcript at p. 83:15-25 – 84:1-11. For her rent comparables, she selected leases in both dense urban areas and more scarcely populated rural areas. Blosser Report at p. III-11. She also testified at the hearing, as supported by her rent comparable chart within her report, that the amount of rent that Rite Aid was willing to pay varied *little* by location and that four rent comparables within her report in Grafton, Mt. Gilead, Oregon and Waverly, were similar rural communities and had equally as high rent as in more urban locations. Transcript at p. 74:3-11. Moreover, its rent in Oregon, Ohio, was the highest in the state at $32.55 per square foot. *Id.*

Accordingly, in addition to failing to comply with *Meijer*, the BTA abused its discretion in determining that Mr. Hatcher's comparables valuing the property as if vacant, or as if the first-generation user who built the property was not occupying it, are more similar or "comparable" to the Subject Property than Ms. Blosser's first-generation comparables. Ms. Blosser selected properties comparable in age, size and condition, far more comparable than those selected by Mr. Hatcher, and then adequately adjusted for location.[3] Accordingly, the Court must reverse the BTA's decision.

Proposition of Law No. 3

In the alternative, there was ample evidence in the record for the BTA to independently determine value and this matter must be remanded for the BTA to independently determine value in accordance with *Meijer*.

If the Court determines not to accept the Blosser Report in its entirety, it must remand the case back to the BTA for it to independently determine value based upon the ample evidence in the record. This Court has long held that the BTA is required to "independently weigh and evaluate all evidence properly before it in arriving at its own decision." *Vandalia-Butler City Schools Bd. of Edn. v. Montgomery Cty. Bd. of Revision,* 130 Ohio St. 3d 291, 2011-Ohio-5078, 958 N.E.2d 131, ¶ 13 (citations omitted). As *Meijer* does not authorize the BTA to completely ignore the Blosser Report containing the only requisite first-generation data reflecting the Subject Property's value as of the applicable lien date, a remand would be proper for the BTA to consider the data in the Blosser Report, along with its hearing transcript, and issue a decision stating specific reasons for its independent valuation. *See General Motors Corp. v. Cuyahoga Cty. Bd. of Revision*, 53 Ohio St. 3d 233, 235, 559 N.E.2d 1328 (1990). With ample sales

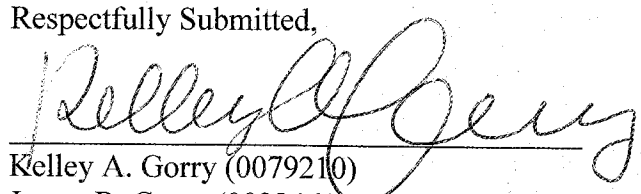
[3] In addition to the Marietta and Belpre leases which support Ms. Blosser's market rent. Blosser

comparables, rent comparables, expense and capitalization rate data in both reports, the BTA may issue a decision fully complying with *Meijer* upon remand

CONCLUSION

The BTA's decision is unreasonable and unlawful and must be reversed. The Court's decision in *Meijer* applies to the resolution of this appeal and the BTA abused its discretion when it concluded that Mr. Hatcher's deliberate exclusion of all first-generation freestanding drugstore sales and rent comparables resulted in comparables that were "comparable" to the Subject Property. The Blosser Report complies with *Meijer* and is competent and probative evidence of the Subject Property's true value as of January 1, 2010. The County Appellants therefore respectfully request that the Court reverse the BTA's decision and direct it to value the Subject Property in accordance with the Blosser Report. In the alternative, the County Appellants contend that at a minimum, a remand is required with instruction to the BTA to consider the data set forth in the Blosser Report and independently determine value.

Respectfully Submitted,



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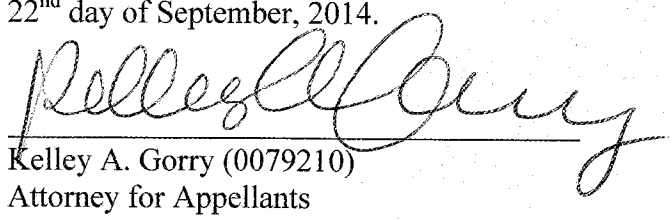
---

Report at p. III-111, Transcript at pp. 72:12-1; *see also* Rent Comparable Data Sheet, Appendix.

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Merit Brief was served, by regular U.S. Mail, postage prepaid, upon: Stephen Swaim, Esq., Attorney at Law, 600 S. High St., Columbus, OH 43215; and the Honorable Michael DeWine, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, OH 43215, this 22nd day of September, 2014.



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Attorney for Appellants

IN THE SUPREME COURT OF OHIO

RITE AID OF OHIO, INC., et al.,	:	
		Case No. 2014-0828
Appellees,	:	
		Appeal from Ohio Board of Tax Appeals
v.	:	BTA Case No. 2011-1760
WASHINGTON COUNTY AUDITOR and WASHINGTON COUNTY BOARD OF REVISION,	:	
	:	
Appellants.	:	

APPENDIX

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Attorney for Appellee Rite Aid of Ohio, Inc.

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IN THE SUPREME COURT OF OHIO

RITE AID OF OHIO, INC.,	:	
Appellee,	:	Case No. 14-0828
v.	:	Appeal from the Ohio Board of Tax Appeals BTA Case No. 2011-1760
WASHINGTON COUNTY AUDITOR AND WASHINGTON COUNTY BOARD OF REVISION,	:	
Appellants,	:	
and	:	
TAX COMMISSIONER OF OHIO,	:	
Appellee.	:	

FILED
MAY 21 2014
BOARD OF TAX APPEALS
COLUMBUS, OHIO

NOTICE OF APPEAL OF THE WASHINGTON COUNTY AUDITOR AND WASHINGTON COUNTY BOARD OF REVISION

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FILED
MAY 21 2014
CLERK OF COURT
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

RITE AID OF OHIO, INC.,	:	
Appellee,	:	Case No. _____
v.	:	Appeal from the Ohio Board of Tax Appeals BTA Case No. 2011-1760
WASHINGTON COUNTY AUDITOR AND WASHINGTON COUNTY BOARD OF REVISION,	:	
Appellants,	:	
and	:	
TAX COMMISSIONER OF OHIO,	:	
Appellee.	:	

NOTICE OF APPEAL OF THE WASHINGTON COUNTY AUDITOR AND WASHINGTON COUNTY BOARD OF REVISION

Now come Appellants Washington County Auditor and Washington County Board of Revision and give notice of their appeal to the Supreme Court from the decision of the Ohio Board of Tax Appeals in the case of *Rite Aid of Ohio, Inc. v. Washington Cty. Bd. of Revision, et al.*, BTA Case No. 2011-1760, rendered on April 22, 2014, a copy of which is attached hereto as Exhibit B. The Errors complained of are set forth herein as Exhibit A.

Respectfully Submitted,

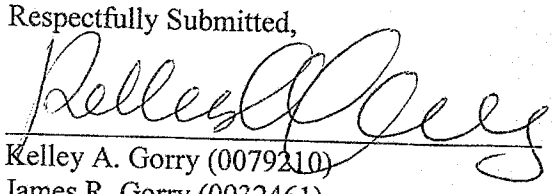

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EXHIBIT A – STATEMENT OF ERRORS

The decision of the Ohio Board of Tax Appeals (the "BTA") was unreasonable and unlawful for the following reasons:

(1) The BTA erred in determining that the comparables of the appraiser of Appellee Rite Aid of Ohio, Inc. ("Rite Aid") were more comparable to the subject property than that of Appellant's appraiser when none of Rite Aid's appraiser's comparables were actually free-standing retail pharmacies as is the subject property.

(2) The BTA erred in adopting an appraisal that failed to appraise the subject property as it actually existed on the applicable lien date as an owner-occupied first-generation retail pharmacy.

(3) The BTA erred in determining comparability of the appraisers' comparables to the subject property based solely upon proximity to the subject property.

(4) The BTA erred in finding that Appellant's appraiser failed to include any comparables in the immediate vicinity as the subject property as Appellant's appraiser specifically discussed two comparables in the vicinity that were ignored as part of a portfolio sale purchased with the assumption of existing debt.

(5) The BTA erred in failing to account any weight at all to Appellant's appraisal solely based upon proximity of location of comparables to the subject property when Appellant's appraiser adequately and specifically adjusted for location by considering median household income, population and traffic counts for each and every comparable.

(6) The BTA erred in failing to adopt Appellant's appraisal when Appellant actually valued the subject property as it existed on the applicable lien date.

(7) The BTA's decision is unlawful as it failed to specifically hold that the Court's decision in *Meijer Stores Ltd. Partnership v. Franklin Cty. Bd. of Revision*, 122 Ohio St. 3d 477, 2009-Ohio-3479, 912 N.E.2d 560 (2009) applies to the resolution of this matter.

(8) The BTA erred in adopting an appraisal that fails to consider any "leased fee" sales when this Court has repeatedly held that such sales constitute the true value of real property in *Rhodes v. Hamilton Cty. Bd. of Revision*, 117 Ohio St. 3d 532, 2008-Ohio-885 N.E.2d 236 (2008) and *CCleveland OH Realty I, L.L.C. v. Cuyahoga Cty. Bd. of Revision,* 121 Ohio St. 3d 253, 2009-Ohio-757, 903 N.E.2d 622 (2009).

(9) The BTA erred in impliedly holding that *Meijer, supra,* authorizes it to accept Rite Aid's appraisal when Rite Aid's appraisal failed to use any comparable sales of "leased fee" or "build-to-suit" properties.

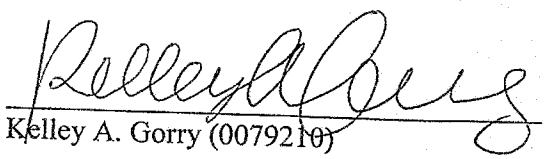
(10) The BTA's decision accepting Rite Aid's appraisal over Appellant's appraisal was unreasonable and unlawful in that it fails to comply with *Meijer, supra.*

(11) The BTA erred in failing to specifically address Appellant's arguments set forth in its brief.

(12) The BTA erred in failing to independently determine value by summarily accepting Rite Aid's appraisal without sufficient rationale for rejecting Appellant's appraisal.

PROOF OF SERVICE ON BOARD OF TAX APPEALS

I hereby certify that a true and complete copy of the foregoing notice of appeal was served upon the Clerk of the Board of Tax Appeals as evidenced by its filing stamp set forth hereon.



Kelley A. Gorry (0079210)

CERTIFICATE OF SERVICY BY CERTIFIED MAIL

I hereby certify that a true and complete copy of the foregoing notice of appeal was served by certified mail, postage prepaid, with return receipt requested, this 21st day of May, 2014, upon:

Steven Swain, Esq.
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600 South High Street
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Attorney for Appellee Rite Aid of Ohio, Inc.

The Honorable Mike DeWine, Esq.
Ohio Attorney General
30 East Broad Street, 17th Floor
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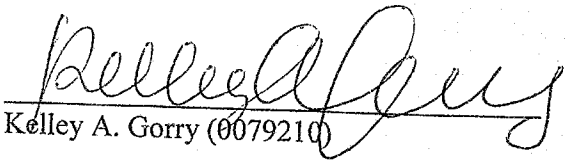
Attorney for Appellee Ohio Tax Commissioner



Kelley A. Gorry (0079210)

IN THE SUPREME COURT OF OHIO

RITE AID OF OHIO, INC.,	:	
Appellee,	:	Case No. _____
v.	:	Appeal from the Ohio Board of Tax Appeals BTA Case No. 2011-1760
WASHINGTON COUNTY AUDITOR AND WASHINGTON COUNTY BOARD OF REVISION,	:	
Appellants,	:	
and	:	
TAX COMMISSIONER OF OHIO,	:	
Appellee.	:	

REQUEST TO CERTIFY ORIGINAL PAPERS TO THE SUPREME COURT OF OHIO

TO: The Clerk of the Ohio Board of Tax Appeals:

The Appellants, who have filed a notice of appeal with the Supreme Court of Ohio, make this written demand upon the Clerk and this Board to certify the record of its proceedings and the original papers of this Board and statutory transcript of the Board of Revision in the case of *Rite Aid of Ohio, Inc. v. Washington Cty. Bd. of Revision, at al.*, BTA Case No. 2011-1760, rendered on April 22, 2014, to the Supreme Court of Ohio within 30 days of service hereof as set forth in R.C. 5717.04.

Respectfully Submitted,

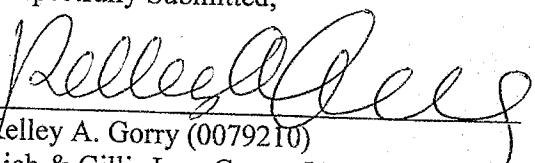


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EXHIBIT B

OHIO BOARD OF TAX APPEALS

Rite Aid of Ohio Inc.,	)	CASE NO. 2011-1760
	)	
Appellant,	)	(REAL PROPERTY TAX)
	)	
vs.	)	DECISION AND ORDER
	)	
Washington County Board of Revision and Washington County Auditor,	)	
	)	
Appellees.	)	

APPEARANCES:

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600 S. High Street
Columbus, Ohio 43215

For the County Appellees - James E. Schneider
Washington County Prosecuting Attorney
Kelley A. Gorry
Rich & Gillis Law Group, LLC
6400 Riverside Drive, Suite D
Dublin, Ohio 43017

Entered APR 22 2014

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellant appeals a decision of the board of revision ("BOR") which determined the value of the subject parcels[1] for tax year 2010. This matter is now considered upon the notice of appeal, the transcript certified by the BOR pursuant to R.C. 5717.01, the record of the hearing before this board, and the parties' briefs.

The subject property, located in Marietta, is improved with a retail drugstore owned and operated by Rite Aid. The subject parcels' total true value was initially assessed at $3,319,600. A decrease complaint was filed by the appellee owner seeking a reduction in total value to $1,396,920. The BOR ultimately issued a decision making no changes in the values of the parcels, and the present appeal ensued.

[1] Appellant has appealed decisions pertaining to the following parcel numbers: 24-00-07944.000, 24-00-04592.000, 24-00-04656.000, 24-00-04668.000, 24-00-07956.000, 24-00-07964.000, 24-00-04652.000, 24-00-00152.000, 24-00-04596.000, 24-00-07952.000, 24-00-07948.000, 24-00-07960.000, and 24-00-25492.000.

When cases are appealed from a board of revision to this board, an appellant must prove the adjustment in value requested. See, e.g., *Shinkle v. Ashtabula Cty. Bd. of Revision*, 135 Ohio St.3d 227, 2013-Ohio-397. It has long been held by the Supreme Court that "the best evidence of 'true value in money' of real property is an actual, recent sale of the property in an arm's-length transaction." *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129. Then, typically, "the only rebuttal lies in challenging whether the elements of recency and arm's-length character between a willing seller and a willing buyer are genuinely present for that particular sale." *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, at ¶13.

Here, none of the subject parcels have recently sold in an arm's-length transaction. We therefore turn to the parties' appraisal evidence. See *Pingue v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St.3d 62. At this board's hearing, the owner presented the appraisal report and testimony of Geoffrey A. Hatcher, MAI, who opined a value of $1,150,000 as of January 1, 2010. The county appellees presented the appraisal report and testimony of Karen L. Blosser, MAI, who opined a value of $2,400,000 as of January 1, 2010. Both appraisers used the sales comparison and income capitalization approaches to value; however, they differed in their selection of comparable sales and leases. Mr. Hatcher looked primarily to other retail properties and leases in the surrounding area,[2] while Ms. Blosser looked to sales and leases of other major drugstores, i.e., CVS, Walgreens, and Rite Aid, throughout the state.[3] Upon review of the evidence presented, we find Mr. Hatcher's sale and lease comparables more comparable to the subject property, and therefore, find his value

[2] Mr. Hatcher's six sale comparables were from areas surrounding Marietta, including Zanesville, Nelsonville, Parkersburg, and Vienna, West Virginia. His lease comparables were of other retail properties in Marietta in the surrounding area; he also included data regarding leases of other Rite Aid stores in the area.

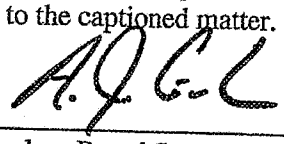
[3] Ms. Blosser's five sale comparables (chosen with age similarity a primary factor) were in Canton, Medina, Columbus, Englewood, and Dayton. Her lease comparables came from throughout Ohio, including major cities such as Cleveland, Columbus, and Cincinnati. Noticeably absent from her lease comparables are the leases of the CVS and Walgreens located in close proximity to the subject property.

conclusion more persuasive.[4] It is therefore the order of this board that the subject parcels' true and taxable values, as of January 1, 2010, were as follows[5]:

Parcel no.	True Value	Taxable Value
24-00-07944.000	$1,029,350	$360,270
24-00-04592.000	$3,600	$1,260
24-00-04656.000	$7,920	$2,770
24-00-04668.000	$27,640	$9,670
24-00-07956.000	$5,020	$1,760
24-00-07964.000	$6,830	$2,390
24-00-04652.000	$2,910	$1,020
24-00-00152.000	$13,620	$4,770
24-00-04596.000	$10,810	$3,780
24-00-07952.000	$2,950	$1,030
24-00-07948.000	$9,270	$3,250
24-00-07960.000	$13,510	$4,730
24-00-25492.000	$16,570	$5,800

It is the order of the Board of Tax Appeals that the Washington County Auditor list and assess the subject parcels in conformity with this decision and order.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



A.J. Groeber, Board Secretary

[4] Mr. Hatcher testified that he did not use any leased fee sales as comparables, as he felt they were not appropriate in a fee simple appraisal analysis. While we acknowledge decisions of the Supreme Court and this board holding that leased fee sales are appropriate to use in such an analysis, see, e.g., *Meijer Stores Ltd. Partnership v. Franklin Cty. Bd. of Revision*, 122 Ohio St.3d 477, 2009-Ohio-3479, an appraiser is not required to rely only upon leased fee sales.

[5] The beginning point of the board's value findings is the auditor's original assessments for tax year 2010. We have utilized the percentages reflected therein to allocate value among the parcels. See *FirstCal Industrial 2 Acquisition LLC v. Franklin Cty. Bd. of Revision*, 125 Ohio St.3d 485, 2010-Ohio-1921.

BOARD OF REVISION
WASHINGTON COUNTY, OHIO
c/o WASHINGTON COUNTY AUDITOR
205 Putnam Street
Marietta, Ohio 45750
740-373-6623 ext. 339

Certified Notice To: 6-20-11

Rite Aid of Ohio Inc
110 Pleasant Ave.
Upper Saddle River, NJ 07458

RE: Board of Revision complaint # 2011-220
Hearing date: May 24, 2011

In accordance with the Ohio Revised Code, the Washington County Board of Revision hereby certifies its action in the matter of the above complaint, relating to property on the tax lists of Washington County in the name of: Rite Aid of Ohio Inc. An Ohio Corp

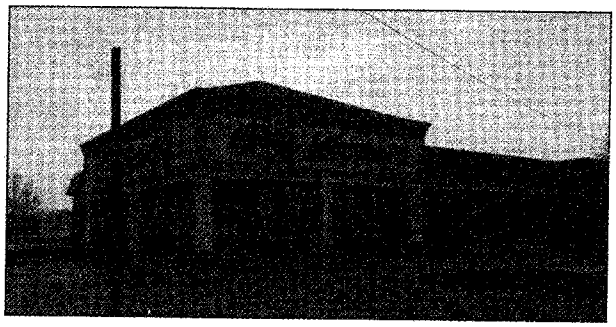
Said case having been presented by complainant and after due consideration and review of evidence presented, the board has arrived at the following decision,

PARCEL#	TOTAL MARKET VALUATION BEFORE	TOTAL MARKET VALUATION AFTER	CHANGE-/
24-00-07944.000	No change in value	24-00-00152.000	No change in value
24-00-04592.000	No change in value	24-00-04596.000	No change in value
24-00-04656.000	No change in value	24-00-07952.000	No change in value
24-00-04668.000	No change in value	24-00-07948.000	No change in value
24-00-07956.000	No change in value	24-00-07960.000	No change in value
24-00-07964.000	No change in value	24-00-25492.000	No change in value
24-00-04652.000	No change in value		

The results here reported are the final action of this board. Further appeal as to this decision may be made to the Board of Tax Appeals or Common Pleas Court as specified in the Ohio Revised Code. Appeal forms will be furnished to you upon request. The appeal must be filed within 30 days after this notification is mailed.

Washington County Board of Revision

William D. Wesfall
Washington County Auditor
Secretary



RENT COMPARABLE #1

PROPERTY:	CVS - Belpre
LOCATION:	1013 Washington Boulevard, Belpre, Washington County, OH
AGE:	1998
NET RENTABLE AREA:	10,125 square feet
BUILDING DATA:	This is a single-tenant, freestanding brick and masonry retail pharmacy store located at the southeast corner of Washington Boulevard and Lee Street. The property has approximately 14 feet of ceiling clearance in the storeroom. As of the effective date of this lease comparable, the property was considered to be in average condition.
QUALITY/CONDITION:	Average / Average
ASKING RENT:	N/A
CONTRACT RENT:	$17.18 per SF, net

Tenant	Size	Date of Lease	Rent Structure	Rent ($/SF)
CVS	10,125	11/16/1998	Net	$17.18

LEASE LENGTH:	20 years, 2 months
EXPENSE STRUCTURE:	Net
LANDLORD PAYS:	None
TENANT PAYS:	All fixed and variable operating costs
EXPENSES (PER SF):	$1.72 per SF
VACANCY RATE:	0.0%
COMMENTS:	This represents the current lease of the CVS store located at the southeast corner of Washington Boulevard and Lee Street in Belpre, Ohio. The lease rate is flat for the initial term of the lease. The tenant pays a percentage rent of 2.5% of annual gross sales above $6,957,902. The initial term of the lease is 20 years and 2 months but there are four five-year renewal options thereafter. Rent remains flat throughout the renewal options.

RENT COMPARABLE #1

PROPERTY:	CVS - Marietta
LOCATION:	131 Third Street, Marietta, Washington County, OH
AGE:	2001
NET RENTABLE AREA:	10,125 square feet
BUILDING DATA:	The improvements consist of a freestanding, one-story, single-tenant retail building containing approximately 10,336 square gross square feet, of which approximately 10,125 are considered rentable. The property features a brick and masonry exterior with a insulated, aluminum framed glass window entry areas. The roof is flat rubber membrane over steel roof trusses and metal decking. The property features a drive through window for pharmacy service. As of the effective date of this lease comparable, the property was considered to be in average condition.
QUALITY/CONDITION:	Average / Average
ASKING RENT:	N/A
CONTRACT RENT:	$34.54 per SF, net

Tenant	Size	Date of Lease	Rent Structure	Rent ($/SF)
CVS - Marietta	10,125	2/14/2001	Net	$34.54

LEASE LENGTH:	23 years
EXPENSE STRUCTURE:	Net to landlord
LANDLORD PAYS:	None
TENANT PAYS:	All fixed and variable operating expenses
EXPENSES (PER SF):	N/A
VACANCY RATE:	0.0%
COMMENTS:	This represents the in place lease of the CVS strore located at the southwest corner of Butler Street and Third Street in Marietta. The store opened in July 2001, but the lease commenced in February 2001. The initial term of the lease runs through January 2024 and does not have any escalations. Following the initial term of the lease, there are 10 five-year options to renew.