

COUNTY APPELLANTS' MOTION FOR RECONSIDERATION

Now come Appellants Washington County Auditor and Washington County Board of Revision (the “County Appellants”) and respectfully request that this Honorable Court reconsider its decision issued on February 4, 2016 in this appeal. *Rite Aid of Ohio, Inc. v. Washington Cty. Bd. of Revision*, Slip Op. 2016-Ohio-371. The reason for this request is that the Board of Tax Appeals (the “BTA”) has not yet had an opportunity to address the applicability of the special purpose doctrine, and since the record contains evidence to support its application, the Court should remand this appeal to the BTA consistent with its decision in *Lowe’s Home Centers, Inc. v. Washington Cty. Bd. of Revision*, Slip Op. 2016-Ohio-372, ¶ 23, issued on the same day.

THE APPEAL SHOULD BE REMANDED TO THE BTA AS THE APPLICABILITY OF THE SPECIAL PURPOSE DOCTRINE MUST BE MADE BY THE BTA AS THE FINDER OF FACT.

As the Court acknowledged here and in *Lowe’s*, the BTA’s analysis was “terse.” *Rite Aid*, ¶ 16; *Lowe’s*, ¶ 11. In each decision of the BTA’s decisions, issued before this Court’s recent decision in *Steak ‘N Shake, Inc. v. Warren Cty. Bd. of Revision*, Slip Op. 2015-Ohio-4836, the BTA did not make a determination as to whether the property before it qualified for treatment under the special purpose doctrine.¹ *Rite Aid*, ¶ 16; *Lowe’s*, ¶ 23. Rather than remanding to the

¹ Since *Steak ‘N Shake* constitutes a substantive change in the law (see *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St. 3d 516, 2008-Ohio-1473, 885 N.E.2d 222; *Rhodes v. Hamilton Cty. Bd. of Revision*, 117 Ohio St. 3d 532, 2008-Ohio-1595, 885 N.E.2d 236; *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 118 Ohio St. 3d 45, 2008-Ohio-1588, 885 N.E.2d 934; *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; *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St. 3d 481, 2010-Ohio-687, 923 N.E.2d 1144; *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 138 Ohio St. 3d 223, 2014-Ohio-523, 5 N.E.3d 637), or at a minimum, a modification or clarification of *Meijer Stores Ltd. Partnership v. Franklin Cty. Bd. of Revision*, 122 Ohio St. 3d 447, 2009-Ohio-3479, 912 N.E.2d 560, the County Appellants should be

BTA for further consideration, as it did in *Lowe's* and *Steak 'N Shake*, the Court concluded that it was “unlikely” the special purpose doctrine applied here. *Rite Aid*, ¶ 41. But because the record contains evidence to enable the BTA to find that the doctrine applies, the Court should remand to the BTA for a proper factual determination. *See Lowe's*, ¶ 23. Specifically, the BTA could easily determine that: (1) evidence in the record supports the three factors enumerated in *Lowe's* for special purpose application; and (2) Ms. Blosser's highest and best analysis supports a special purpose application.

A. Evidence in the record supports the application of the special purpose doctrine under the *Lowe's* factors.

Although the Court determined that special purpose treatment of the Subject Property was unlikely, the BTA must make such determination as the finder of fact if any evidence in the record potentially enables it to do so. *Lowe's*, ¶ 23; *Target Corp. v. Greene Cty. Bd. of Revision*, 122 Ohio St. 3d 142, 2009-Ohio-2492, 909 N.E.2d 605, ¶ 17. In *Lowe's*, the Court set forth several significant factors in determining whether a property qualifies for special purpose treatment: (i) the age of the property as of the lien date; (ii) the property was used successfully for the business for which it was built; and (iii) the size of the property raising the inference that it was not easily marketed for general retail use. The following evidence in the existing record supports each of these factors:

i. AGE OF THE PROPERTY AS OF THE LIEN DATE.

- **Most likely occupant as of the lien date is Rite Aid:** both the County's and Rite Aid's appraisers agree that the most likely occupant of the Subject Property as a build-to-suit drug store built by Rite Aid as of the lien date was Rite Aid itself. BTA H.R. at pp. 46:16-25; 47:1-25; 48:1; 70:5-25; 71:1-10; *see also Meijer*, at ¶ 8, 10.

afforded an opportunity to present their factual arguments to the finder of fact if *Steak 'N Shake* is to be applied.

- **The Subject Property is “relatively new”:** Ms. Blosser repeatedly testified before the BTA that the Subject Property was “relatively new” and in good condition. *Id.* at p. 70:14-21; 77:18-21; 111:20-22.
- **Rite Aid would be in initial lease term:** both appraisers also agree that if Rite Aid leased the property (and the record reveals that Rite Aid does often lease property), Rite Aid would be only eleven (11) years into an initial lease term of twenty (20) to twenty-five (25) years. *Id.* at p. 46:7-10; 70:13-25; 71:1-4; 75:6-11; 87:2-5; 96:9-11; 113: 13-17; 118:8-14;128:9-13; 131:17-25; 132:1-3; 135:10-13.

ii. **PROPERTY PUT TO SUCCESSFUL USE BY THE BUSINESS FOR WHICH IT WAS BUILT.**

- **Rite Aid successfully operated the property as of the lien date:** as noted above, the record is abundantly clear that Rite Aid occupied the property as of the lien date and equally devoid of any evidence that Rite Aid plans to vacate the property at any time in the future.
- **Rite Aid’s extraordinary measures to build the Subject Property in this location:** the record also reveals that Rite Aid was required to undergo extraordinary (and likely extremely expensive) flood mitigation measures to develop the Subject Property, including raising the site elevation and utilizing special impermeable materials to build exterior walls to obtain a flood development permit upon purchasing the subject site for \$850,000 in 1998. Hatcher Appraisal at pp. 7; 28-29.
- **Subject Property is a specific prototype of Rite Aid:** Ms. Blosser repeatedly acknowledges in her appraisal that the Subject Property is a specific prototype designed by and for Rite Aid (Blosser Appraisal at pp. II-11, II-12, emphasis added):

The subject improvements consist of a free-standing, one-story drug store. The subject contains a net rentable area of 11,052 square feet and is occupied by a Rite Aid. The building was developed specifically for Rite Aid.

The exterior is a combination of brick and stucco. This is a prototype store developed for Rite Aid.

This is a prototype store developed specifically for the occupant; Rite Aid. The building is well maintained and in average condition. The property is functionally designed for its corner location. The building has a two-lane, drive-up window for prescription drug delivery, and traffic flow throughout this lot is efficient.

- **Not one of Mr. Hatcher’s sales comparables could have been used as a drug store:** the record also reveals that in addition to not ever being used as a drug store, none of Mr.

Hatcher's alleged comparable sales could have actually been successfully used as a drug store without significant modification since not one had a drive-through. Hatcher Appraisal at pp. 31-32; Addendum; BTA H.R. at pp. 64:9-15.

- **Aging population of Marietta supports future success of drug store:** despite not appraising the Subject Property at its highest and best use as a build-to-suit drug store, Mr. Hatcher acknowledges the aging population in the subject's location, the City of Marietta, is likely to contribute to continued and successful use as a drug store (Hatcher Appraisal at p. 14, emphasis added):

The median age in Marietta is projected to increase to 40.5 years of age by 2017. Based on the Median Age and Median Age projections, it can be assumed that there is a higher percentage of the population above that of the United States and the State of Ohio within the Parkersburg MSA, Washington County and the City of Marietta. As the population ages, demand for health care related properties generally increases. Although the subject is not considered a health care property, its current use as a Retail Drug store provides support for the health care industry.

iii. SIZE OF PROPERTY AND LACK OF MARKETABILITY FOR GENERAL RETAIL.

- **“Gone dark” second-generation value will never reflect inherent value to first-generation occupant:** just as the board of education's appraiser testified in *Meijer*, Ms. Blosser repeatedly testified that the value after the first-generation build-to-suit user vacates the property will never reflect the inherent value to the first-generation occupant:

Again, to me, if you went to Rite Aid today and said I want to buy your building for “x” amount, they're not going to sell it for a million dollars because they're using it and it's functional, and you know, they need that real estate and it's going to be worth more as of that date [the lien date] because they are using it. Now certainly, if Rite Aid suddenly goes out of business and we're sitting there with an empty building, you've got a different story. Again, what was it as of the date of value. It was being used for its intended use. What would a buyer – you know, market value is willing buyer and willing seller. You have to have both. Now, you might have a builder that says I'll pay you a million dollars for that, but if it's being used for its intended use, the seller is not going to sell it for that, and that's what you're trying to balance within an appraisal is market value. Willing buyer, willing seller. Not dysfunctional, not distressed. Willing buyer, willing seller. So that's what we tried to do present. *Id.* at p. 128:14-25; 129:1-11.

If a bank had hired me to go appraise this building as of January 1, 2010 and it was owner-occupied, I certainly wouldn't be looking at distressed sales unless they said I want you to also give me a go dark value.

Typically they're going to say give me, you know, a market value and they might ask for a go dark value. But that's a distressed situation. We don't have a distressed situation. *Id.* at p. 112:14-22.

Now as I discussed earlier, a bank might sometimes say, okay, I also want you to give me a dark value, which implies that whatever it was originally planned for, it's not anymore, and that's when you would maybe go more into looking at, okay, you know, the other sales that took place. Again, in my mind, that feels appropriate because if I was trying to loan – if the bank is trying to loan on this and it's a drugstore and it's operating as a drug store, it's going to be under [different] dynamics than if it's a former drugstore that's now a pizza place. They're two different distinct things. Again, my feeling is, that as of that date [the lien date], it was doing what it was intended to do, so I should be looking at what it was intended to do. *Id.* at p. 1217:9-25.

This building as of the valuation date was being used for its purpose. Therefore, looking at sales that were being used for their purpose is more applicable than looking at sales that are vacant and are going to be converted to another use. *Id.* at p. 114:20-25.

Hypothetically could it be used for something else? Certainly. But it was being used for its intended use. Again, our job is to say what's the most likely value as of that date [the lien date]. The property was being used for the function for which it was built. Therefore, the most appropriate sales and rent data is similar buildings, similar uses. BTA H.R. at p. 111:2-9.

But again, our feeling was that as of the date of value, it was a relatively new building that had been built for and was being used as a drug store, and – and therefore it was our opinion that looking at buildings that were used for their intended use was the most appropriate method of valuing the property. *Id.* at p. 111:19-25; 112:1.

- **Second-generation lease rates do not reflect what Rite Aid itself is willing to pay in rent:** the record unequivocally reveals that Rite Aid is willing to pay far higher in rent to occupy its stores than Mr. Hatcher's selected rent of \$12.00 per square foot. Ms. Blosser located ten (10) rent comparables of Rite Aid itself in Ohio, ranging from a low of \$13.37 per square foot to a high of \$34.48 per square foot. Ms. Blosser's selected rental rate of \$21.00 per square foot fits squarely within this range and near the average. Blosser Appraisal at p. III-111.
- **Purchase prices of operating Rite Aid's reflect the inherent value when Rite Aid is occupying the property:** Ms. Blosser also located five (5) sales of operating Rite Aid stores in Ohio, ranging from a low purchase price of \$112.35 per square foot to a high of \$300.95 per square foot. Mr. Hatcher's value of \$100.00 per square foot does not even

fall within this range and does not recognize the inherent value to Rite Aid. Blosser Appraisal at p. VI-2.

- **Limited market for the property if Rite Aid vacates:** the record also reveals that there is a limited market for the Subject Property if Rite Aid were to vacate. Consistent with Ms. Blosser's testimony, she included a sale of a former Rite Aid that sold after it vacated the property for a mere \$12.52 per square foot in 2010 in an auction sale, presumably after the property was previously marketed by the seller and failed to sell prior to going to auction. *Id.*

In sum, evidence in the existing record undoubtedly enables the BTA to find that the Subject Property should be treated as a "special purpose" property as of the applicable lien date. Since the BTA did not directly make this finding below, the Court must remand the appeal to the BTA for a proper factual determination as the finder of fact as it did in *Lowe's*.

B. Ms. Blosser's highest and best use analysis supports a special purpose application.

The Court implied here that Ms. Blosser concluded to a general highest and best use for the Subject Property as "a retail store." *Rite Aid*, ¶ 35. However, a closer analysis of her analysis reveals that she did not conclude that its highest and best use was general retail, but rather "a continuation of the existing use" as a build-to-suit drug store. Blosser Appraisal at p. IV-3. First, in discussing the highest and best use as vacant, Ms. Blosser noted that general retail development would not be financially feasible, unless a build-to-suit tenant was found." *Id.* at p. IV-2. Further, in evaluating the highest and best use of the property as improved, Ms. Blosser concluded that there was no alternative use for the property that would justify a conversion of the existing improvements to any other use:

Since the improvements, as they currently exist, continue to make a substantial contribution to the overall value of the property, the continuation of the existing use is justified. There is no alternative, economically feasible use that could justify removal or conversion of the existing improvements at this time.

Id. at p. IV-3 (emphasis added).

Accordingly, Ms. Blosser selected operating build-to-suit retail drug stores as both her sales comparables and rent comparables. Blosser Appraisal at pp. III-11, VI-2, VI-3-12, VI-18. As the Court noted in *Steak 'N Shake*, it would not be surprising that Ms. Blosser selected build-to-suit retail drug stores as her comparable properties since that is consistent with her highest and best use conclusion. *Steak 'N Shake*, at ¶ 31. Unlike Mr. Hatcher, Ms. Blosser did not believe that the highest and best use was general retail so she did not select a video store, a shoe store, a furniture store or a doctor's office as comparable properties like Mr. Hatcher did for this build-to-suit drug store. Hatcher Appraisal at Addendum. Moreover, in discussing the "market demographics" for the Subject Property, Ms. Blosser concluded:

Unlike other classes of retail, drug stores are more sustainable and sound investments. Regardless of the strength of the immediate retail market, the need for daily goods and services, including prescription drugs, will exist. Drug store investment is still considered a strong investment as the need for drug store services is inelastic.

Blosser Appraisal at p. III-10 (emphasis added).

Since Ms. Blosser concluded that the highest and best use of the Subject Property was a continuation of the existing build-to-suit drug store use, and that conversion to any other use was not financially feasible due to the subject improvements' substantial contribution to overall value (i.e. achieving the highest value as is required by a proper highest and best use analysis), the BTA could very well adopt Ms. Blosser's analysis on remand and determine that the special purpose doctrine applies.

CONCLUSION

In conclusion, the County Appellants respectfully request that this appeal be remanded back to the BTA for a proper factual determination regarding the applicability of the special purpose doctrine, consistent with *Lowe's* and *Steak 'N Shake*. See *Lowe's*, ¶¶ 18, 23; *Steak 'N*

Shake, ¶ 42. As *Steak 'N Shake* was issued subsequent to the BTA's decision in this appeal and constituted a substantive change in the law or a limitation of *Meijer*, the BTA should be afforded an opportunity to review the existing record and issue findings of fact if *Steak 'N Shake* is to be applied. Since the County Appellants have demonstrated that the BTA could find that the special purpose doctrine applies from evidence in the record, a remand to the BTA is warranted.

Respectfully Submitted,

s/ Kelley A. Gorry
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing was served, by regular U.S. Mail, postage prepaid and/or electronic mail transmission, upon: Stephen Swaim, Esq., Attorney at Law, 370 South Fifth Street, Suite G7, Columbus, OH 43215; and Honorable Michael DeWine, Esq., Ohio Attorney General, 30 East Broad Street, 14th Floor, Columbus, OH 43215, this 12th day of February, 2016.

s/ Kelley A. Gorry
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