

<b>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO</b> 1313 Sherman Street, Room 315 Denver, Colorado 80203	<b>Docket No.: 77318</b>
Petitioner:  <b>ENCINA PROFESSIONAL BUILDING, LLC,</b>  v.  Respondent:  <b>DOUGLAS COUNTY BOARD OF EQUALIZATION.</b>	
<b>FINAL AGENCY ORDER</b>	

**THIS MATTER** was heard by the Board of Assessment Appeals (“Board”) on July 7, 2020, Valerie C. Bartell and Sondra Mercier presiding. Petitioner was represented by Richard G. Olona, Esq. Respondent was represented by Carmen N. Jackson-Brown, Esq. Petitioner is protesting the 2019 actual value of the subject property.

**EXHIBITS AND EXPERT WITNESSES**

The Board admitted into evidence Petitioner’s Exhibit 1, and Rebuttal Exhibits 1, 2, and 3. Also admitted was Respondent’s Exhibit A and Rebuttal Exhibit B. Aaron Anderson, Certified General Real Estate Appraiser with Real Analytic Advisors, and Carlos U. Diaz, Certified General Appraiser with the Douglas County Assessor’s Office were admitted as expert witnesses.

**DESCRIPTION OF THE SUBJECT PROPERTY**

**1341 New Beale Street, Castle Rock  
Douglas County Schedule No. R0496501**

The subject is an 8,318-square foot multi-tenant retail strip center situated on a 1.352-acre lot. The building was constructed in 2016 and was fully leased to five tenants as of the date of value.

The subject property’s actual values, as assigned by the County Board of Equalization (“CBOE”) below and as recommended and requested by each party, are:

CBOE’s Assigned Value:	\$5,048,400
Respondent’s Recommended Value:	\$5,000,000

Petitioner's Requested Value: \$4,600,000

### **BURDEN OF PROOF AND STANDARD OF REVIEW**

In a proceeding before this Board, the taxpayer has the burden of proof to establish, by a preponderance of the evidence, that the assessor's valuation is incorrect. *Bd. of Assessment Appeals v. Sampson*, 105 P.3d 198 (Colo. 2005). Proof by a preponderance of the evidence means that the evidence of a circumstance or occurrence preponderates over, or outweighs, the evidence to the contrary. *Mile High Cab, Inc. v. Colorado Public Utilities Commission*, 302 P.3d 241, 246 (Colo. 2013). The evaluation of the credibility of the witnesses and the weight, probative value, and sufficiency of all of the evidence are matters solely within the fact-finding province of the BAA, whose decisions in such matters may not be displaced on appeal by a reviewing court. *Gyurman v. Weld Cty. Bd. of Equalization*, 851 P.2d 307, 310 (Colo. App. 1993).

The Board reviews every case de novo. See *Bd. of Assessment Appeals v. Valley Country Club*, 792 P.2d 299, 301 (Colo. 1990). In general, a de novo proceeding before the Board "is commonly understood as a new trial of an entire controversy." *Sampson*, 105 P.3d at 203. Thus, any evidence that was presented or could have been presented in the board of equalization proceeding may be presented to the Board for a new and separate determination. *Id.*

### **APPLICABLE LAW AND AUTHORITATIVE SOURCES**

The market approach relies on comparable sales, as required under section 39-1-103(8)(a)(I), C.R.S., which states:

Use of the market approach shall require a representative body of sales, including sales by a lender or government, sufficient to set a pattern, and appraisals shall reflect due consideration of the degree of comparability of sales, including the extent of similarities and dissimilarities among properties that are compared for assessment purposes.

"Market rent is the rental income a property would command in the open market. It is indicated by the current rents that are either paid or asked for comparable space with the same division of expenses as of the date of the appraisal. . . ." The Appraisal Institute, *The Appraisal of Real Estate*, 14th Edition, p. 447. "Market rents vary with economic conditions." *Id.* "Economic conditions change, so leases negotiated in the past may not reflect current prevailing rents." *Id.* at 466.

The cost approach involves estimating the cost of replacing the improvements to the property, less accrued depreciation. *Bd. of Assessment Appeals v. E.E. Sonnenberg & Sons, Inc.*, 797 P.2d 27 (Colo. 1990). Colorado law mandates that depreciation in the valuation of a taxpayer's personal business property be allowed annually from the base year to the date of assessment. *BQP Industries v. State Bd. of Equalization*, 694 P.2d 337 (Colo. App. 1984).

The income approach is a common method for calculating the value of commercial properties, especially apartment buildings, office buildings and shopping centers. *Sonnenberg*, 797 P.2d at 31. It generally involves calculating the income stream (rent) the property is capable of generating, capitalized to value at a rate typical within the relevant market. *Id.* As a rule, §39-1-106, C.R.S., requires that the fee simple estate in property be valued for property tax purposes. Market value of the fee simple estate should reflect market assumptions, including market rent, market expenses, and market occupancy. Division of Property Taxation, *Assessor's Reference Library – Volume 3, Real Property Valuation Manual*, Page 2.2, Dated 1-89, Rev. 4-20.

## **FINDINGS AND CONCLUSIONS**

After consideration of the testimony and exhibits presented, the Board places significant weight on the following findings and conclusions. After consideration of all three approaches to value, both parties concluded that the sales comparison and income approaches provided the best indications of value for the subject. The Board concurs.

### **I. Sales Comparison Approach**

Petitioner, Encina Professional Building LLC, purchased the subject via Special Warranty Deed recorded April 19, 2018, which is within the statutory base period. The recorded purchase price was \$5,000,000, as reported by both parties.

Petitioner's witness, Mr. Anderson, reported three sales located near the subject that occurred during the 18-month base period. (Exhibit 1, p. 50.) The sales indicated unadjusted prices ranging from \$552.25 to \$630.80 per square foot, with an indicated average of \$599.99 per square foot.

Mr. Anderson testified that the three highest priced sales were purchased by buyers that were not aware of a likely increase in property taxes; therefore, he concluded they were not knowledgeable buyers in these three transactions, and that the sales were not arm's-length sales.

At the same time, Mr. Anderson acknowledged that "three of the offering memorandums (OM) included statements that the taxes were based on the seller's current budget assumptions and could increase upon reassessment of the property." He suggests that the developer should somehow have known and disclosed the precise impact of these sales on the reassessment of the subject property and accurately predict subsequent increases in effective taxes for the subject. He notes in his report that "While the OM indicated that the taxes may increase, they did not present the severity of the likely significant increases." (Exhibit 1, pp. 50-51.)

County assessors are required to value commercial property "by appropriate consideration of the cost approach, the market approach, and the income approach to appraisal." Colo. Const. Art. X, §3(1)(a); § 39-1-103(5)(a), 15, C.R.S. "Use of the market approach shall require a representative body of sales...sufficient to set a pattern, and appraisals shall reflect due consideration of the degree of comparability of sales..." § 39-1-103(8)(a)(I), C.R.S. The purpose of analyzing whether a sale is an "arm's-length transaction" is to determine whether the sale was completed under conditions that disqualify it from consideration as a comparable sale within an ad valorem market approach to value,

or whether it may be deemed a comparable sale indicative of market value. See *C.P. & Son, Inc. v. Bd. of Cnty. Comm'rs of the Cnty. of Boulder*, 953 P.2d 1303, 1305 (Colo.App.1998); Division of Property Taxation, *Assessors' Reference Library, Vol.3 – Real Property Valuation Manual* (Rev 11-20), p. 3.25. Market value is broadly defined as “what a willing buyer would pay a willing seller under normal economic conditions.” *Bd. of Assessment Appeals v. Sampson*, 105 P.3d 198, 203 (Colo. 2005), citing *Bd. of Assessment Appeals v. Colorado Arlberg Club*, 762 P.2d 146, 151 (Colo. 1988). The expert witness appraisers' appraisals of the subject both included a definition of “market value,” which were essentially identical and are also considered by the Board in its analysis. Both definitions substantially mirror, and contain parts of, the lengthy definition contained in the Appraisal Institute's *The Dictionary of Real Estate Appraisal*, (5th ed. 2010).

Neither appraisal included, and neither witness testified to, a definition of an “arm's length transaction.” The Appraisal Institute defines “arm's-length transaction” as, “A transaction between unrelated parties who are each acting in his or her own best interest.” Appraisal Institute, *The Dictionary of Real Estate Appraisal*, (5th ed. 2010). The same definition is quoted by the Assessors' Reference Library (“ARL”), a binding guide for county assessors in Colorado. Division of Property Taxation, *Assessors' Reference Library, Vol.3 – Real Property Valuation Manual* (Rev 11-20), p. 3.13. A division of the court of appeals in *CTS Investments v. Garfield Cnty. Bd. of Equalization*, 342 P.3d 451 (Colo. App. 2013), remarked that “no other Colorado case or statute directly addresses the meaning or definition of ‘arm's-length transaction’ in the context of tax valuation.” *CTS Investments v. Garfield Cnty. Bd. of Equalization*, 342 P.3d 451, 457 (Colo. App. 2013). The court looked to the ARL's definition of a non-arm's length transaction for guidance, and the Board does likewise.

The Board was not persuaded that the three sales located nearest the subject should be dismissed, as there was insufficient evidence that multiple buyers were not knowledgeable when they purchased respective properties. Furthermore, the Board determines that even if accepted as true, the claimed failure of the developer to accurately predict and convey the future assessment and subsequent increases in effective taxes by the Assessor for the subject property does not mean the sale was transacted with a poorly informed buyer and should have been disqualified by the Assessor. There was no evidence presented that the parties were related or were not acting in their own best interest. As Mr. Diaz testified, the same information about the Assessor's real property valuation and assessment process is available to all real property purchasers on the Douglas County website. The Board rejects the Petitioner's argument that the sale of the subject property is not an arm's-length transaction. The Board finds that the sale was completed under normal economic conditions, was between unrelated, motivated parties acting in their own best interest, and that the sale meets the definition of an arm's length-sale at market value.

Of the sales located nearest the subject, Mr. Anderson only considered the sale of 820 New Memphis Court as comparable to the subject. That sale transacted at an unadjusted price of \$552.25 per square foot. This property had considerable vacancy of 66% at the time of sale; not reflective of the subject, which was 100% leased. Two additional sales were analyzed by Mr. Anderson; one located in Castle Rock but outside the immediate neighborhood, and one located in southeast Aurora. (Exhibit 1, p. 55.) The Board did not find Petitioner's two sales located outside the subject's neighborhood compelling.

Respondent considered six sales, including those nearest the subject which had been dismissed by Mr. Anderson. Respondent's analysis also included the sale of the subject. After adjustment, Mr. Diaz narrowed the range to \$548.19 to less than \$630.80 giving the greatest weight to sales 1, 3 and 4. (Exhibit A, p. 42.) Mr. Diaz concluded to a unit value of \$600.00 per square foot, which was applied to a gross square footage of 8,414 square feet. This produced a value indication of \$5,048,000 within the sales comparison approach.

The Board gives significant weight to the actual sale of the subject for \$5,000,000 or approximately \$600.00 per square foot. The actual sale of the subject was shown as reasonable based on the sales of nearby properties, which were considered at some level by both parties.

## **II. Income Approach**

Both parties estimated the value of the subject based on the income approach. Contract rent for the subject units ranged from \$35.00 to \$40.00 per square foot net of all expenses, which produced average rent of \$36.89 per square foot. Four of the five leases were signed during the base period. Mr. Anderson compared actual rent to that of competitive properties and determined that the subject was leased at market rent. Gross rental revenue was estimated at \$306,857 (EXH1, PG 78).

Petitioner's expense reimbursement was estimated at \$48,706, not including taxes. Vacancy of 5.0% plus credit loss of 1.0% was deducted from both rental revenue and landlord reimbursement. This resulted in effective gross revenue of \$334,229. In the analysis of expenses, consideration was given to the subject's historical operating history, which was compared to that of five comparable properties located throughout the metro area. Mr. Anderson concluded to total operating expenses of \$6.86 per square foot, including a \$1.00 per square foot replacement reserve that is not reimbursed. This resulted in net operating income of \$277,205.

Mr. Anderson considered capitalization rates from his three comparable sales, data from CoStar for the Denver retail market, and national survey data to conclude to a capitalization rate of 6.00%. Petitioner's income approach indicated a value for the subject of \$4,625,000. (Exhibit 1, p. 78.)

Respondent considered the actual rent for the subject; but concluded to a higher market rate of \$38.25 per square foot based on data from seven comparable lease transactions, producing rental income of \$318,164. (Exhibit. A, p. 24.) Mr. Diaz analysis indicated a range of greater than \$35.00 per square foot and less than \$38.50, with Comparable 2 identified as most similar, indicating a rental rate of \$37.00 per square foot. (Exhibit A, p. 20.)

Mr. Diaz did not add reimbursement for expenses as income, nor did he make a deduction for non-reimbursed expenses. Rather, he deducted vacancy of 5% from rental income and deducted 5% of effective gross income as landlord expenses. Respondent's analysis produced net operating income of \$287,143. Mr. Diaz considered the actual capitalization rate indicated for the subject based on the April 2018 sale. This was compared to rates indicated by the Burbach & Associates survey and that of

three comparable sales. Mr. Diaz concluded to a capitalization rate of 5.50%. Respondent's income approach indicated a value for the subject of \$5,220,000.

The Board was convinced that the four lease transactions that occurred within the subject during the base period were highly relevant. Further, Respondent's comparable data indicated a relatively narrow range, but comparable 2 was in fact identified as most similar. Based on the four leases signed within the subject as well as the comparable data presented by both parties, the Board was convinced that a rental rate of \$37.00 was indicative of market for the subject. This equates to potential gross rental income of \$307,766. Applying the 5% deduction for vacancy and 5% deduction for owner's expense, the Board recalculated net operating income of \$277,759, which is nearly identical to that concluded by Petitioner.

Applying the Board's revised net operating income to the actual sales price of \$5,000,000 would indicate a capitalization rate of 5.6%.

As rates indicated by both parties were somewhat supported by market data, applied to the Board's revised net operating income produced a range in value of \$4,629,300 (\$277,759/6.0%) to \$5,050,200 (\$277,759/5.5%) rounded.

### **III. Taxes**

Petitioner contends that the subject's taxes have a direct impact on value. The level of taxes incurred by a property is a result of a combination of the (1) actual value placed on a property; as well as (2) the mill levy required by each taxing entity. Mr. Anderson notes within the appraisal that the subject is within a metro district (Promenade at Castle Rock Metro District 3) which will continue to experience a significant mill levy rate while infrastructure for the larger development is completed. (Exhibit 1, pp. 8-9.) Comparable properties located proximate to the subject are likely taxed under the same jurisdictions, and there was insufficient evidence to support that the subject would be operating at a tax rate atypical of the competition. There was no support to suggest that the subject's high taxes were actually putting the subject at a competitive disadvantage as of the date of value. The Board has no authority to make adjustments to the mill levy, which is set by individual taxing jurisdictions.

Mr. Anderson acknowledges that under the subject's current lease agreements, the tenants are responsible for reimbursement of all expenses including taxes. He contends that the higher taxes would put significant pressure on tenants to be able to pay their base rent plus expenses and still turn a profit; and, that this significant increase in the real estate tax expense will force some tenants, whose leases will expire within 2-3 years, to reconsider whether or not they will extend their leases at the subject.

There was no dispute that the subject's tenants were responsible for reimbursing the landlord for taxes as part of their lease contracts, a lease structure identified as typical of the market. The Board finds Petitioner's contention highly speculative as of the date of value. The Board was not convinced that an unexpected tax amount would automatically cause the subject not to be competitive within the marketplace or that it would result in turnover of tenants. Petitioner presented no evidence that as of the date of value tenants were in fact vacating their lease agreements or forced out of

business. In fact, the subject and all but one nearby sale were shown to be 100% leased. Only one property, 820 New Memphis Court, reported vacancy at the time of sale. (EXH. A, pgs29-40) (See §39-1-106, C.R.S., and *Assessor's Reference Library – Volume 3, Real Property Valuation Manual*, Division of Property Taxation, Page 2.2, Dated 1-89, Rev. 4-20.)

The Board was not persuaded that as of the date of value, the prospect of higher future taxes would directly result in a lower value compared to the purchase price of \$5,000,000. While it is possible that future changes in tenancy might occur as a result of higher taxes, any market-wide changes would be reflected in future value estimates; speculation as to what might occur is not reasonable.

The Board finds the actual sale of the subject during the base period to be the most compelling evidence as to value. A value of \$5,000,000 or approximately \$600.00 per square foot was well-supported by comparable sales data and the income analysis.

Based on the findings and conclusions presented, the Board finds that Petitioner has not met its burden of proof to show that the subject property was incorrectly valued for tax year 2019. However, the Board accepts the recommendation of Respondent to reduce the value to \$5,000,000.

### **ORDER**

The Petition is **GRANTED**. Respondent is ordered to reduce the 2019 actual value of the subject property to \$5,000,000.

The Douglas County Assessor is directed to change his/her records accordingly.

### **APPEAL RIGHTS**

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation of the respondent county, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law within thirty days of such decision when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation of the respondent county, Respondent may petition the Court of Appeals for judicial review of such questions within thirty days of such decision.

See § 39-8-108(2), C.R.S. (rights to appeal a tax protest petition); *see also* § 39-10-114.5(2), C.R.S. (rights to appeal on an abatement petition).

**DATED and MAILED** this 26th day of February, 2021.

**BOARD OF ASSESSMENT APPEALS:**

Drafting Board Member:



Sondra W. Mercier  
Sondra Mercier

Concurring Board Member:

Valerie C. Bartell  
Valerie C. Bartell  
*Concurring without modification  
pursuant to § 39-2-127(2), C.R.S.*

I hereby certify that this is a true and correct copy of the order of the Board of Assessment Appeals.

Yesenia Araujo  
Yesenia Araujo