

<b>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO</b> 1313 Sherman Street, Room 315 Denver, Colorado 80203	<b>Docket No.: 78445</b>
Petitioner:  <b>KOHL’S DEPARTMENT STORES, INC.,</b>  v.  Respondent:  <b>ADAMS COUNTY BOARD OF EQUALIZATION</b>	
<b>FINAL AGENCY ORDER</b>	

**THIS MATTER** was heard by the Board of Assessment Appeals (“Board”) on August 27, 2020, Gregg Near and Samuel Forsyth presiding. Petitioner was represented by Sarah Kellner Esq. Respondent was represented by Meredith P. Van Horn Esq. Petitioner protests the actual value of the subject property for tax year 2019.

**EXHIBITS**

The Board admitted into evidence Petitioner’s Exhibit 1, 2, 3, 4, 8, 10 and 25 and Respondent’s Exhibit B.

**DESCRIPTION OF THE SUBJECT PROPERTY**

12090 Colorado Boulevard  
Thornton, CO 80241  
Adams County Parcel No.: 0157131326008

The subject property is a retail building constructed in 1999 containing 85,800 square feet of building area. The subject property’s actual value, as assigned by the County Board of Equalization (“CBOE”) below and as requested by Petitioner, are:

CBOE’s Assigned Value:	\$7,011,086
Respondent’s Recommended Value:	\$7,011,086
Petitioner’s Requested Value:	\$6,200,000
Board’s Concluded Value:	\$6,200,000

## **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, 204 (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 Comm'n*, 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 this Board, 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 determination of the degree of comparability of land sales and the weight to be given to the various physical characteristics of the property are questions of fact for the Board to decide. *Golden Gate Dev. Co. v. Gilpin Cty. Bd. of Equalization*, 856 P.2d 72, 73 (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, the 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 county board of equalization (CBOE) proceeding may be presented to this Board for a new and separate determination. *Id.* However, the Board may not impose a valuation on the property in excess of that set by the CBOE. § 39-8-108(5)(a), C.R.S.

## **APPLICABLE LAW**

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.

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.*

## **EVIDENCE PRESENTED BEFORE THE BOARD**

### **Petitioner's Market and Income Approaches**

Petitioner's witness Kiernan "KC" Conway, MAI, CRE, CCIM Georgia License No. GC-1354, testified as an expert regarding the retail industry related to "Big-Box" store trends, market conditions for this property type, current lease arrangements for such structures and the appropriate methodology and valuation approaches to determine market value. Mr. Conway noted the differences between fee simple and leased fee transactions. The witness indicated a reliable fee simple comparable for this type of property is unencumbered and available for lease or occupancy. As regards the income approach, Mr. Conway maintained the rent for a comparable property must not be influenced by intangibles such as facade, layouts, fixtures and contents of leases. The witness pointed to the 6,985 major store closures in 2017 resulting from competition by "e-commerce" retailers not encumbered by the "sticks and bricks" structures. (Pet. Ex. 1, p. 16-17.)

Petitioner's witness, Kevin A. Kernen, MAI, Colorado license CG100030986, presented an appraisal report developing all three approaches to value. The witness focused on the market and income approaches, ultimately concluding the cost approach to be unreliable due to the necessity of estimating depreciation in an older structure. In addition, Mr. Kernen noted that market participants place little weight on this approach.

Mr. Kernen presented a market approach containing five comparable sales ranging in sale price from \$4,000,000 to \$9,100,000 and in size from 60,660 to 118,465 square feet. After adjustments were made, the sales ranged in unit price from \$64.34 to \$77.78 per square foot of building area. Adjustments were applied for market conditions (time), location, building size and condition. The witness concluded a unit value of \$72.00 per square foot and a value by the market approach of \$6,200,000.

Petitioner presented an income approach utilizing six comparable leases ranging from \$5.00 to \$12.00 per square foot of building area. All leases were on a triple net (NNN) basis whereby the owner has limited expenses. Lease No. 2 and Lease No. 5 were adjusted for owner provided tenant improvements. The leases were adjusted for market conditions, location, size of leased area, condition, and other factors such as free rent and tenant improvements. After all adjustments, Mr. Kernen concluded a NNN lease rate of \$8.00 per square foot. Expenses were applied for vacancy including credit loss to develop a Net Rental Income of \$645,216 and tenant reimbursement revenue resulting in an Effective Gross Income (EGI) of \$786,357. The EGI was then adjusted for the owner's operating expenses such as Common Area Maintenance, insurance, management and reserves for replacement for a Net Operating Income (NOI) of \$583,303. To derive a value from the NOI the witness researched and derived a capitalization rate from published sources, research of local market participants, use of the Band of Investment and analysis of the projected property tax expense to conclude to a weighted capitalization rate of 9.19%. The capitalization rate was applied to the NOI for a value opinion by use of the income approach of \$6,300,000.

Mr. Kernan reconciled the value opinions developed through the income and market approaches and, giving most weight to the market approach, concluded a market value opinion of \$6,200,000 for the subject property.

### **Respondent's Cost, Market and Income Approaches**

Respondent's witness, Valerie Ferguson, Certified Residential Appraiser for the Adams County Assessor's office, presented an appraisal report developing all three approaches to value.

Ms. Ferguson presented a cost approach to derive a market-adjusted cost opinion for the subject property of \$8,599,321. The witness presented three comparable land sales ranging in sale price from \$2,481,700 to \$5,900,000 and in size from 8.8 to 17.6 acres. After adjustment was made for market conditions the sales ranged from \$7.05 to \$8.47 per square foot of land area. The witness concluded to a land value of \$3,716,681. The contributory value of the improvements was determined by a computerized cost service to derive a depreciated cost of \$4,882,640.

Ms. Ferguson presented a market approach containing five comparable sales ranging in sale price from \$6,093,385 to \$18,710,000 and in size from 50,000 to 118,465 square feet. The sales ranged in unit price from \$109.74 to \$217.24 per square foot of building area. No adjustments were applied. The witness concluded a unit value of \$118.00 per square foot and a value opinion by the market approach of \$10,124,400. (NOTE: Pet. Ex. B, p. A30 indicates a final market value, apparently determined by the Assessor's computerized program, of \$7,011,086 or \$81.71/SF.)

Respondent's witness presented an income approach utilizing six comparable leases ranging from \$7.98 to \$13.98 per square foot of building area. Leases No. 4, 5 and 6 were reported to be on a NNN basis. The witness-referenced data was developed relating typical rent by location (underline by the witness) and referenced typical local rental, vacancy, expense and capitalization rates. Other references reported published sources along with questionnaires and taxpayer interviews. Ms. Ferguson adopted a weighted rental rate of \$9.00 per square foot and a vacancy/collection loss of 6% deriving an EGI of \$725,868. Subtracting expenses of 5% of EGI resulted in an NOI of \$689,575. The witness applied a 6.6% capitalization rate and derived a value opinion by the income approach of \$10,448,106.

Ms. Ferguson reconciled the value opinions developed through the three approaches to determine a value of \$10,200,000 in support of the CBOE value of \$7,011,086.

### **FINDINGS AND CONCLUSIONS**

The primary issue before the Board revolves upon the distinction between the fee simple estate and the leased fee interest. According to the Dictionary of Real Estate Appraisal, 6<sup>th</sup> Edition by the Appraisal Institute the interests are defined as follows:

**fee simple estate.** Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat. (p. 90.)

**leased fee interest.** The ownership interest held by the lessor, which includes the right to receive the contract rent specified in the lease plus the reversionary right when the lease expires. (p. 128.)

Colorado law requires the fee simple estate to be determined in regard to property tax matters. *See* §39-1-106, C.R.S. The Board finds the testimony provided by Petitioner's witness, Mr. Conway, and the appraisal report prepared by Mr. Kernen to be compelling. Mr. Conway provided convincing evidence regarding the appropriate valuation approach to determine fee simple value. Mr. Kernen's appraisal report credibly supported Mr. Conway's testimony. The Board turned to the 14<sup>th</sup> Edition of the Appraisal of Real Estate, page 406, as quoted below:

If the sale of a leased property is to be used as a comparable sale in the valuation of the fee simple estate of another property, the comparable sale can only be used if reasonable and supportable market adjustments for the differences in rights can be made.

The citation continues:

To compare this leased fee interest to the fee simple estate of the subject property, the appraiser must determine if the contract rent of the comparable property was above, below or equal to market rent.

In contravention of these guiding precepts, Respondent's witness provided minimal analysis of the sale and lease comparables regarding the existence, or lack of, contract leases for the sales and no analysis that contract rent was equal to market rent, for half of the comparables presented.

Further, the Board found the cost approach developed by Respondent's witness to have insufficient credibility. No analysis was presented regarding how the land value was determined leaving the Board with no confidence in the cost approach conclusion. The Board also finds the witness's Conclusion of Value to be unconvincing as there was no reconciliation of the conclusions reached in each of the approaches to value and no explanation was provided for ignoring the conclusion reached in the cost approach in determining the final value opinion.

The Board concludes that Petitioner has met its burden of proving the assigned value for tax year 2019 is incorrect.

### **ORDER**

The Petition is **GRANTED**. Respondent is ordered to reduce the 2019 actual value of the subject property to \$6,200,000. The Adams 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 19th day of January, 2021.

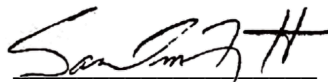
**BOARD OF ASSESSMENT APPEALS:**

Drafting Board Member:



Gregg Near

Concurring Board Member:



Samuel Forsyth

*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.

*Cesenia Araujo*  
Cesenia Araujo