

OHIO BOARD OF TAX APPEALS

Northwest Local School District Board) CASE NOS. 2006-N-1782
of Education,) 2006-N-2153
)
Appellant/Appellee,) (REAL PROPERTY TAX)
)
Kmart Corporation as successor by) DECISION AND ORDER
merger with Troy CMBS Property)
LLC,)
)
Appellee/Appellant,)
)
vs.)
)
Hamilton County Board of Revision)
and Hamilton County Auditor,)
)
Appellees.)

APPEARANCES:

For the Property Owner -	Siegel Siegel Johnson & Jennings Co., L.P.A. Nicholas Ray 3001 Bethel Road, Suite 208 Columbus, Ohio 43220
For the County Appellees -	Joseph T. Deters Hamilton County Prosecuting Attorney Thomas J. Scheve Assistant Prosecuting Attorney 230 East Ninth Street, Suite 4000 Cincinnati, Ohio 45202
For the Bd. of Edn. -	Ennis, Roberts & Fischer C. Bronston McCord III 121 West Ninth Street Cincinnati, Ohio 45202

Entered January 27, 2009

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

This matter is before the Board of Tax Appeals as a result of notices of appeal filed by the Northwest Local School District Board of Education (“BOE”) and

Kmart Corporation as successor by merger with Troy CMBS Property LLC (“Kmart”).¹ The BOE’s notice of appeal was filed November 3, 2006, and Kmart’s notice of appeal was filed November 14, 2006. Each appeal challenges a decision of the Hamilton County Board of Revision (“BOR”), which, in its decision dated October 20, 2006, determined the value of parcel number 591-0027-0065-00 for tax year 2005.

Counsel for each party appeared at hearings convened before this board on August 29, 2007 and September 11, 2007. Accordingly, we proceed to consider this appeal based upon the notices of appeal, the statutory transcript (“S.T.”), the testimony and evidence adduced at the hearing before this board (“H.R.”), and the briefs submitted by counsel.

The subject property consists of approximately 16.878 acres, and is improved with a building that is approximately 122,694 square feet in size. The one-story building, of brick and masonry construction with a steel frame, was erected in 1995, and operates as a retail store. Additional improvements to the subject include 696 parking spaces, a garden center, lighting, a sprinkler system, and standard equipment and mechanical systems found in buildings of this type. The subject property, which is currently vacant, also includes approximately 3 acres of surplus land.

The true and taxable values, as originally determined by the Hamilton County Auditor (“auditor”), are as follows:

¹ The record indicates that these matters were consolidated by order of this board on April 13, 2007. *Northwest Local School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (Apr. 13, 2007), BTA No. 2006-Z-1782, 2153, unreported.

Parcel No. 591-0027-0065-00	TRUE VALUE	TAXABLE VALUE
LAND	\$4,031,700	\$1,411,100
BUILDINGS	<u>\$4,455,400</u>	<u>\$1,559,390</u>
TOTAL	\$8,487,100	\$2,970,490

A total true value of \$6,500,000 was asserted by Kmart in its complaint to the BOR, while the BOE, in its counter-complaint, claimed a value of \$8,487,115. At the October 5, 2006 hearing before the BOR, Kmart presented the testimony of Robin M. Lorms, a state-certified general appraiser employed by Integra Realty Resources. Antoinette J. Ebert, an employee of the auditor's office and also a state-certified general appraiser, appeared on behalf of the auditor. Mr. Lorms testified regarding an appraisal report, prepared as of the subject's January 1, 2005 tax lien date, that opined a value of \$5,200,000 for the subject property.² S.T, Ex. A. During his testimony, Mr. Lorms summarized his appraisal report, discussing the values derived using the sales comparison approach, the income approach, and the cost approach. S.T., BOR Hearing Record at 3-7, Ex. A. Ms. Ebert's testimony generally related to an auditor's report that she prepared on June 6, 2006, which concluded to a value of \$8,333,000 for the subject. S.T., Ex. 1. Ms. Ebert further testified regarding the sales comparison approach and how it is applied to "big-box" retailers, relying upon a document that contained information related to the sales comparison approach, market sales, market leases, and other data. S.T, Ex. 2. Upon review of the testimony

² The report is a self-contained appraisal report and was prepared by Mr. Lorms, Curtis P. Hannah, and Nathan D. Briscoe. Mr. Hannah is a state-certified general real estate appraiser, and Mr. Briscoe is a licensed real estate appraiser assistant. S.T., Ex. E at Addendum A.

and evidence before it, the BOR voted to reduce the auditor's value of \$8,487,100 to the following:

Parcel No. 591-0027-0065-00	TRUE VALUE	TAXABLE VALUE
LAND	\$5,000,000	\$1,750,000
BUILDINGS	\$ <u>770,000</u>	\$ <u>269,500</u>
TOTAL	\$5,770,000	\$2,019,500

We begin our review of this matter by noting that “[w]hen cases are appealed from a board of revision to the BTA, the burden of proof is on the appellant, whether it be a taxpayer or a board of education, to prove its right to an increase or decrease from the value determined by the board of revision.” *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564, at 566. *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318. In determining value, we will determine the weight and credibility to be accorded the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

It is not enough, however, to simply come forward with some evidence of value. Neither is it sufficient to grant the requested increase or decrease merely because no evidence is offered to challenge the claim. *W. Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340; *Hibschman v. Bd. of Tax Appeals* (1943), 142 Ohio St. 47. An appellant must present competent and probative evidence to make its case. *Columbus*, supra, at 566; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493.

In the absence of a recent arm's-length sale, as in the case before us, an appraisal or other relevant evidence is necessary to determine the true value of real property. *First Union Real Estate Equity & Mtg. Investments v. Morrow Cty. Bd. of Revision* (1990), 53 Ohio St.3d 236; *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 412. Under such circumstances, true value in money can be calculated by applying any of three alternative methods provided for in Ohio Adm. Code 5703-25-07: 1) the market data approach, where the value of property is estimated through a comparison of the subject to recent sales of comparable properties in the market area, 2) the income approach, which capitalizes the net income attributable to the property, and 3) the cost approach, which depreciates the improvements to the land and then adds them to the land value.

At this board's hearing, the county appellees and the BOE again presented the testimony of Ms. Ebert, but submitted a separate appraisal report from that produced at the BOR hearing.³ This report, completed by Ms. Ebert, was prepared

³ Although the auditor voted to reduce the value of the subject property to \$5,770,000 in the proceedings before the BOR, county appellees again asserted a value similar to the auditor's original value. As a member of the BOR, it is presumed that the auditor's designee had the opportunity to review the evidence presented before the BOR. R.C. 5715.01(B), 5715.02. This raises the issue whether the auditor, as a consenting party to a substantial reduction in the subject's value, has waived his right to challenge or review the decision of the BOR. This board has held that an auditor lacks standing to file an appeal from a decision of a BOR if the auditor has acquiesced in said decision. *Perk v. Cuyahoga Cty. Bd. of Revision* (Aug. 24, 1971), BTA Nos. 71-01-0195, 71-01-0199, 71-01-0206, 71-01-0204, unreported; *Rhodes v. Hamilton Cty. Bd. of Revision* (Mar. 2, 2001), BTA Nos. 2000-T-1382, et seq., unreported; *Curtiss v. Fairfield Cty. Bd. of Revision* (Mar. 8, 2002), BTA No. 2001-T-1095, unreported; *Bd. of Edn. for the Berea City School District v. Cuyahoga Cty. Bd. of Revision* (May 24, 2002), BTA Nos. 1999-J-1920, et seq., unreported, fn. 1. See, also, *Vogelgesang v. Clermont Cty. Bd. of Revision* (Aug. 12, 1994), BTA No. 1993-M-671, unreported (citing *Perk* as an alternative grounds for the dismissal of the auditor's appeal from the unanimous decision of the board of revision). However, in comparison, this board has proceeded to review an auditor's evidence of value upon appeal to this board despite the auditor voting in favor of a value assigned by the BOR. *EOP-BP Tower, L.L.C. v. Cuyahoga Cty. Bd. of Revision* (Dec. 14, 2001), BTA Nos. 1999-M-1594, et seq., unreported; *The Cincinnati Gas & Electric Co. v. Clermont Cty. Bd. of Revision* (May 10, 2002), BTA Nos. 1998-K-707, 708, 1998-A-725, unreported, fn. 9 (citing R.C. 5717.03 in determining that the board will consider each party's evidence in reaching a decision).

as of the subject's January 1, 2005 tax lien date. Kmart submitted the same appraisal report as produced at the BOR, but, instead of calling Mr. Lorms to testify, presented the testimony of Curtis P. Hannah. As noted above, Mr. Hannah also participated in the preparation of Kmart's appraisal report.

Initially, we note that Kmart's appraisal report gives a general overview of "big-box" retail stores. H.R., Ex. E at 18. This overview states that the supply of "big-box" properties continues to increase, due to the continual development and planning of new stores of this type. However, according to the overview, demand is limited for these stores, as retailers rarely relocate to existing stores. H.R., Ex. E at 19. With regard to the issue of an oversupply of "big-box" stores, various news articles are quoted that relate to the problems associated with ownership and sale of these properties. Id. at 21-24. The section concludes by stating that significant obsolescence can be attributed to "big-box" stores, not only because of increased supply and limited demand, but also because these stores "lack functionality in both size and design." Id. at 24.

During his testimony before this board, Mr. Hannah stated that there have been a large number of "big-box" stores constructed in Ohio. H.R. 1 at 187. Specifically, Mr. Hannah notes that "approximately 143 big boxes, totaling 20 million square feet [were] built in Ohio from January 2000 through the end of 2005." Id. Mr. Hannah, in explaining why it is uncommon for a retailer to purchase a "big-box" store of a competitor, notes that "[one] of those examples is one of our sales comparisons [sic] a K-Mart in Akron that Kohl's purchased. They paid – they paid \$3,850,000. But they had to make the store look like a Kohl's inside and out. Put a significant

amount of work in the property and spent \$4,200,000 just to make it look like one of their own prototypes. And the reason for the costs in that Kohl's store, the reason why there has been two out of 143 instances where big boxes – where these big box retailers purchase another big box is due to the fact that they rely on their efficiencies and product distribution, the layout of the store for product placement and their own business efficiency. They have to have a certain store prototype, a certain store format so they can keep those efficiencies. They don't want 100 different store formats to have to work with and design the stores for it.” H.R. 1 at 190.

In describing other instances that demonstrate the unwillingness of a “big-box” retailer to purchase an existing “big-box” store, Mr. Hannah notes that “big-box” retailers will purchase stores of this type, only to demolish new or relatively new buildings and construct new “big boxes” that fit their prototype at that location. H.R. 1 at 193. In short, “the fee simple market value of these properties is substantially lower than replacement costs, not only due to physical depreciation but also obsolescence. This obsolescence occurs the day they are completed, thus even brand new big boxes are worth less than their cost to develop.” H.R., Ex. E at 24. Upon cross-examination and redirect, Mr. Hannah further testified to the articles contained in his appraisal report that support the aforementioned theory. H.R. 2 at 17-36, 83-92.

During cross-examination, counsel for the county appellees addressed build-to-suit issues with Mr. Hannah. Specifically, counsel asked Mr. Hannah about the sale of a Wal-Mart to J.C. Penney, and a K-Mart to a Kohl's, apparently both “as-is” purchases of “big boxes” between first-tier retailers. H.R. 2 at 24-25. Mr. Hannah testified as to the net purchase price per square foot for the Wal-Mart sale, and noted

that J.C. Penney has not typically been considered a “big-box retailer.” Id. Mr. Hannah acknowledged that these sales occur, but, according to his data, only two such sales occurred out of 143 transactions. Id. at 25. Mr. Hannah also noted that these sales occurred after the effective date of the appraisal in issue. Id. at 26. Upon redirect, Mr. Hannah again detailed the circumstances surrounding the Wal-Mart sale mentioned above. Id. at 88-90. Mr. Hannah reiterated that if the terms of a lease “are significantly above market, for instance, build-to-suit leases, we would not want to use those types of leased fee transactions.” Id. at 103, H.R. 1 at 213-214. In his appraisal report, Mr. Hannah compared the sale price of two “big boxes” that were nearly identical in terms of land size, building size, date of construction, and sale dates, but one sale was subject to a build-to-suit lease and the other was no longer subject to a lease. H.R. 1 at 214. The sale price of the property subject to the build-to-suit lease was 78% higher than the fee simple sale, even though the location and construction quality were inferior. Id. at 215. Finally, Mr. Hannah testified that “[b]y definition of build-to-suit lease [sic], it is not typically indicative of market rent.” Id. at 242.

Recently, this board has rejected the position set forth by Mr. Hannah’s appraisal firm regarding the non-use of build-to-suit properties in determining a value, where it has been shown that first-generation sales do exist. Thus, in *Meijer Stores L.P. v. Franklin Cty. Bd. of Revision* (May 27, 2008), BTA Nos. 2005-T-441, 443, unreported, on appeal, Sup. Ct. No. 2008-1248, we held:

“We must stress, however, that this theory has not always been accepted by this board where it has been shown that the obsolescence factors advanced by the appraiser do not exist in a particular market. The issue before us in any appeal is the true value of the subject property. We must

weigh the evidence on a case-by-case basis, taking into account differences in both the property at issue and the circumstances specific to its place in its market. Thus, in *South-Western City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision* (July 15, 2005), BTA No. 2002-R-1929, unreported, we declined to limit the valuation of a big-box retail storeroom to only second-generation lease and sale comparables where the building continued to be utilized by a first-generation user and where evidence was introduced indicating that comparable first-generation leases and sales existed.” Id. at 17.

See, also, *Retail Trust IV v. Wood Cty. Bd. of Revision* (Jan. 13, 2009), BTA Nos. 2006-T-1130, 1134, unreported (holding, inter alia, that if the price paid for build-to-suit properties is the true value of those properties, such properties should not be summarily excluded from consideration by appraiser). In *Meijer*, the appellee board of education presented appraisal evidence, including sales of leased build-to-suit properties. We determined “that the existence of comparable first-generation sales and leases successfully refutes any evidence that suggests that the subject is marketable only to second-generation users.” Id. at 19.

It is evident from Mr. Hannah’s testimony, and from the data included in his appraisal report, that he generally does not consider build-to-suit properties as valid comparables when determining a value for a “big-box retailer” such as the appellant. The county appellees’ brief cites *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, where the Ohio Supreme Court reaffirmed the long-standing proposition that “when the property has been the subject of a recent arm’s-length sale between a willing seller and a willing buyer, the sale price of the property shall be ‘the true value for taxation purposes.’” Id. at ¶13. In

Berea, the court rejected the contention that a “below-market” lease rendered a sale of the property unreflective of value. Appellees’ brief at 2.

Recently, and subsequent to the hearings convened in this appeal, the Ohio Supreme Court issued a series of decisions relating to the sale of encumbered property. See *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-473, *Rhodes v. Hamilton Cty. Bd. of Revision*, 117 Ohio St.3d 532, 2008-Ohio-1595, and *AEI Net Lease Income & Growth Fund v. Erie Cty. Bd. of Revision*, 119 Ohio St.3d 563, 2008-Ohio-5203. In *Rhodes*, supra, the court addressed the sale of a build-to-suit property subject to a long-term lease. Relying on *Cummins*, supra, the court held that the existence of the encumbrance, whether in the form of an “above-market” or a “below-market” lease, “did not prevent the recent, arm’s-length sale price from constituting the true value of the property for tax purposes.” *Rhodes*, supra, at ¶4. The court emphasized that the purchaser of the fee simple interest had acquired all the component rights of that interest, including the right of the lessor to collect payments from the tenant. *Id.* at ¶6.

While this appeal does not involve the sale of the subject property, we must consider the court’s pronouncements regarding the viability of a sale price when applied to the valuation of real property. Following the review of the respective appraisal reports, we will proceed to consider the apparent build-to-suit properties used by Ms. Ebert in determining a value for the subject property.

Our review of the appraisal report submitted by Kmart begins with an analysis of the highest and best use of the subject property. Mr. Hannah indicates that “[c]onsidering all reasonably probable development scenarios and potential values that

could be created versus the cost of development of each, we conclude that no use of the site would be as profitable as retail use. Thus, retail use is the maximally productive use of the property.” H.R., Ex. E at 40. Mr. Hannah further states that “[w]e conclude that continued discount storeroom use is maximally productive as improved and therefore the highest and best use of the site as improved.” Id. at 41. In considering who would be the most probable buyer of the subject property, Mr. Hannah states that “[b]ased on the size and class of the property and its single use occupancy characteristics, the likely buyer is an owner-user or a local or regional investor such as an individual or partnership.” Id.

Turning to the appraisal report’s valuation analysis, Mr. Hannah determined values for the subject property using the cost approach, sales comparison approach, and income capitalization approach. Mr. Hannah also completed a land value analysis for the subject property, including a separate analysis for the surplus acreage located on the property. H.R. 1 at 209. A land value was determined by using comparable land sales that occurred between April 2001 and November 2005.⁴ Based on these sales, Mr. Hannah developed a range of value from \$112,771 to \$277,659 per acre, opining to a final unit value of \$200,000 per acre. H.R. at 219, Ex. E at 47. This resulted in an indicated land value for the subject property, rounded, of \$3,400,000. H.R., Ex. E at 47.

Following the land value calculation, Mr. Hannah next estimated the replacement cost of the existing improvements. Both direct and indirect costs were estimated, using Marshall Valuation Service. H.R., Ex. E at 48. This estimate totaled

⁴ Comparable sale number six was removed from consideration by Mr. Lorms during his testimony before the BOR, as according to Mr. Lorms, it was a duplication. S.T., BOR Hearing Record at 3-4.

\$6,437,719. Id. at 49. Once depreciation deductions for deferred maintenance, age-life depreciation, and functional and external obsolescence were accounted for, Mr. Hannah was able to calculate a figure of \$2,373,834 for the depreciated replacement cost. This amount was added to the aforementioned land value of \$3,400,000 to reach a value of \$5,800,000, rounded, for the cost approach to value. H.R., Ex. E at 55.

Mr. Hannah's sales comparison approach utilized five comparable sales, in addition to one property currently available on the market. The sale dates for these five comparable sales ranged from May of 2001 to August of 2005. These sales had prices of \$33.10 to \$55.56 per square foot of gross leasable area. Under the analysis of sales portion of Mr. Hannah's sales comparison approach, adjustments were made for location, size, age and condition, and build-out. This resulted in an overall adjustment to each sale of either inferior, slightly inferior, similar, or superior. The report stated that "although we have noted differences in build-out between the sales and the subject property, minimal consideration is given to this fact as buyers of discount storerooms give build-out minimal consideration. ***" H.R., Ex. E at 58. A rounded, adjusted final value of \$5,200,000 was opined after accounting for these adjustments.⁵

The appraisal report next turned to the income capitalization approach to estimate a value for the subject property. Nine comparable properties were used to estimate market rent, with each comparable constituting a discount storeroom. The summary for each comparable listed the year built, the storeroom depth, demographics/population/household income, current tenant(s), leasable area, lease start date, lease term, base rent per square foot, and lease type. Market rent per square

⁵ The value of the subject property's surplus land was also taken into consideration when formulating an estimate of value based upon the sales comparison approach. H.R., Ex. E at 59.

foot ranged from \$1.25 to \$4.80. Accounting for adjustments to location, size, age and condition, and build-out, Mr. Hannah concluded to a value of \$4.00 per square foot. H.R., Ex. E at 65. This resulted in a potential gross rent of \$490,776. *Id.* Effective gross income was determined to be \$678,773, once figures for expense reimbursements were added and vacancy and collection loss were subtracted. Next, expenses including real estate taxes, insurance, common area maintenance, administrative costs, management fees, and replacement reserves were deducted to arrive at a value of \$364,320 for net operating income. This amount was capitalized at 8.50%, which resulted in a value of \$4,300,000, rounded, via the income approach. H.R., Ex. E at 73.

Mr. Hannah's final conclusion of value for the subject property, as of the January 1, 2005 tax lien date, was \$5,200,000, which was the value concluded for his sales comparison approach. The reconciliation section of Mr. Hannah's report states that the cost approach to value, due to the age of the subject property and the amount of obsolescence, was given the least amount of reliance. With regard to the income approach, it was given secondary consideration and was used to support the sales comparison approach, due to several factors. H.R., Ex. E at 74. As "an adequate number of sales were available to support a value conclusion," and "several of these sales are highly comparable to the subject property and require few adjustments," the sales comparison approach was given the greatest weight. *Id.*

We next review the appraisal report and associated documents prepared by the auditor's appraiser, Ms. Ebert. Initially, we begin with Ms. Ebert's analysis of

the subject property's highest and best use.⁶ Ms. Ebert indicates that, as vacant, the highest and best use of the subject is “[c]urrent improved retail use,” and as improved, is “continued retail use.” H.R., Ex. 1 at 27.

Ms. Ebert analyzed the value of the subject property using two of the three traditional approaches to valuation of real property; the sales comparison approach and the income approach. The cost approach was not utilized due to the difficulty in estimating depreciation. H.R., Ex. 1 at 28. Ms. Ebert first completed an analysis of land values, utilizing three vacant land sales. *Id.* at 33-35. In her summary of these sales, Ms. Ebert listed the location, sale date, sale price, price per square foot, intended use, and location/topography ratings. These sales took place from January 2000 to March of 2002, with an unadjusted price range of \$8.24 to \$10.04 per square foot. Instead of adjusting for size, Ms. Ebert created a chart comparing price per square foot to land size, apparently correlating the variables included. H.R., Ex. 1. Ms. Ebert then determined a value, rounded, of \$7,352,000 based on a price per square foot amount of \$10.

Ms. Ebert's report next discusses sales of “big-box” stores in general, noting that these sales are “Credit Tenant Net Lease Properties,” and categorizing these stores into four groups. These groups include “[d]iscount department stores, [c]ategory killers, [o]utlet stores, and [w]arehouse clubs.” H.R., Ex. 1 at 37. She states that capitalization rates for these properties have continued to decline, and sales to investors of new projects are “brisk.” *Id.* This analysis also indicates that the

⁶ The table of contents for Ms. Ebert's appraisal report lists page 30 as the beginning of her analysis and conclusions. However, this section of the report begins on page 27. Additionally, other page numbers of this section do not appear to correspond with their respective headings. H.R., Ex. 1.

market for these properties is “driven by location,” and “[l]ocations, when measured to be under-performing, are abandoned by first generation users as a business decision, but still controlled as a business decision by not allowing competitors the opportunity to occupy the location.” Id.

Following this discussion, Ms. Ebert presented eight comparable properties for use in her sales comparison approach. A summary of these properties is included in her report, which lists location, tenant, sale price and date, total square footage of gross leasable area, year built, price per square foot, data resources, and number of acres.⁷ Again, a graph was included with price per square foot amounts and size information. H.R., Ex. 1 at 39. No adjustments were made to these sales, with Ms. Ebert only noting that “[a]ccording to the six sales, the properties built after 1990 show a market \$ per square foot range of \$106.89 to \$221.49. The two sales below that range were much older [sic] built in the 1960’s.” Id. at 45. Ms. Ebert then calculated a market value of \$8,588,500, based on a price per square foot value of \$70. Id.

Ms. Ebert next analyzed the value of the subject property using the income approach, first estimating market rent by utilizing three comparable rentals and one “[s]ub.” H.R., Ex. 1 at 47. These comparables yielded a market rental range of \$6.36 to \$7.95 per square foot. Id. No adjustments were noted. A graph was included that set forth price per square foot and size, with a “gross rent indicator” calculation of \$797,511, based upon an amount of \$6.50 per square foot, listed below the graph.

⁷ Photographs and other data for five of the eight comparables are contained in the appraisal. However, no such data is found for the remaining three properties in the report. At the hearing before this board, an exhibit was submitted that contained data for the three properties omitted in the appraisal report. H.R., Ex. 2.

H.R., Ex. 1 at 47. A nominal vacancy and collection rate of 4% was used by Ms. Ebert, which was not based upon expense data of the subject, but of three properties located in Cleveland, Ohio, Lebanon, Ohio, and St. Charles, Illinois. *Id.* at 48. A capitalization rate of 8.2% was opined by Ms. Ebert, based upon capitalization rates of six property sales in Ohio. *Id.* at 49. Market income and expenses were summarized by utilizing the aforementioned \$797,511 amount as potential gross income, and subtracting \$31,900 based upon a 4% vacancy and credit allowance. This resulted in an effective gross income of \$765,610. 4% was also used to estimate expenses under a triple-net lease, resulting in an amount of \$30,624, which, subtracted from \$765,610, yielded \$734,986 as net operating income. Multiplying this amount by the 8.2% capitalization rate, a value of \$8,963,000, rounded, was estimated by Ms. Ebert using the income approach.

Ms. Ebert's reconciliation concludes to \$8,600,000, relying most heavily upon the sales comparison approach. H.R., Ex. 1 at 51. This is Ms. Ebert's estimate of value of the fee simple estate as of the January 1, 2005 tax lien date. *Id.*

As we have been presented with two separate opinions of value, we note that the valuation of real property is an inexact science. It is instead an opinion, the reliability of which depends upon the basic competence, skill, and ability demonstrated by the appraiser. *Cyclops Corp. v. Richland Cty. Bd. of Revision* (May 30, 1985), BTA No. 1982-A-566, et seq., unreported. In addition to specific data, ultimate conclusions involve hearsay, suppositions, and subjective mental impressions. *Id.* at 6. "Valuations of real property *** are inherently imprecise. Opinions realistically may differ, depending upon the method of valuation used and the nature of assumptions

adopted.” *In re Montgomery Court Apts. of Ingham Cty.* (Bankr. S.D. Ohio 1992), 141 B.R. 324, at 337.

In reviewing the appraisal evidence before us, this board may accept all, part, or none of an appraiser’s opinion of value. *Witt Co. v. Hamilton Cty. Bd. of Revision* (1991), 61 Ohio St.3d 155; *Fawn Lake Apts. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 609. Several factors may be considered and evaluated when reviewing conflicting appraisal evidence, such as the appraiser’s training, experience, familiarity with the subject property, underlying theories of valuation as applied to the subject, the methods employed in conducting the appraisal, the testimony before this board, and the overall ability to substantiate the basis of the opinion of value. See *In re Smith* (Bankr. S.D. Ohio 2001), 267 B.R. 568, at 572, and *Buckland v. Household Realty Corp.* (Bankr. S.D. Ohio 1991), 123 B.R. 110, at 112.

Prior to beginning our review of the appraisal reports before us, we examine the apparent reasoning behind the BOR’s decision to value the subject property at \$5,770,000. As the BOR’s hearing worksheet does not provide any details regarding why this value was assigned to the subject, we turn to the BOR hearing record. S.T., BOR Hearing Record and Ex. V. Following its deliberations, and prior to voting on the aforementioned value, the BOR stated that it reviewed each approach to value presented by the parties, in addition to thoroughly reviewing the evidence and testimony before it. S.T., BOR Hearing Record at 25. It noted that it had concerns regarding locations of stores outside Hamilton County, and whether these locations were inferior or superior to the subject’s location. *Id.* However, aside from this limited information, nothing in the BOR hearing record reveals why the BOR voted to

assign this value. The BOR's decision resulted in a value of approximately \$47 per square foot for the subject property, which is very close to the per square foot value of the second comparable included in the sales comparison approach of Kmart's appraisal. H.R., Ex. E at 57. However, aside from the BOE's comments regarding this comparable at the close of the BOR hearing, there is no evidence that the BOR relied on this comparable specifically. S.T., BOR Hearing Record at 24.

While the record does not clearly reflect the BOR's rationale in assigning its value, it valued the subject almost identically to Kmart's cost approach value of \$5,800,000.⁸ H.R., Ex. E at 74. Additionally, the BOR value is much closer to Kmart's sales comparison and income approach values as opined in Kmart's appraisal report, as opposed to the values now asserted by the county appellees and the BOE before the BOR. *Id.* As noted above, the BOE requested that the auditor's value of \$8,487,100 be maintained, and Ms. Ebert, on behalf of the auditor, also stated that no change was warranted, but included a separate value of \$8,333,000 in her report based on the income approach. S.T., BOR Hearing Record at 24, Ex. 1 at 1, 5.

In reviewing the arguments set forth by the county appellees and the BOE in their briefs submitted to this board, we note that this board has, on several previous occasions, been presented with similar arguments and criticisms with respect to "big-box" retailers. Counsel for the county appellees and the BOE, in addition to criticizing Mr. Hannah's general theory on valuing "big-box" retailers, stress that the location of the subject property requires a higher value than that set forth by Mr. Hannah's appraisal report. Counsel also argues that Ms. Ebert's comparables used in

⁸ See discussion at fn. 3 regarding auditor's ability to challenge a decision of the BOR.

her sales comparison and income approaches are superior to those in Mr. Hannah's appraisal, as most of them are located within the county where the subject is located, while most of Mr. Hannah's are not. Counsel further argues that Mr. Hannah should not have used vacant or abandoned properties as comparables in his value approaches. Finally, counsel notes the use of "2nd tier" and "3rd tier" properties by Mr. Hannah in his appraisal, as opposed to the use of "1st tier" properties, which the county appellees and the BOE consider the subject to be.⁹

In its briefs, Kmart's counsel generally argues that the values asserted by Ms. Ebert, and the conclusions reached in her appraisal report, are not supported by sufficient information and data. Counsel argues that Ms. Ebert's testimony reflects a lack of knowledge of the comparables used in her report, in addition to an absence of adjustments to account for differences in the subject property and her comparables. Counsel further criticizes each comparable utilized by Ms. Ebert, and also questions the methodology used in preparing the sales comparison and income approaches to value.

After a thorough review of the record, we believe that Mr. Hannah's appraisal report provides an accurate value of the subject property. See *Target Corporation v. Greene Cty. Bd. of Revision* (May 27, 2008), BTA No. 2006-V-751, unreported, appeal pending, Sup. Ct. No. 08-1231; *Lowes Home Centers, Inc. v. Fairfield Cty. Bd. of Revision* (May 27, 2008), BTA No. 2006-R-801, unreported; *Tuller Square Northpointe, LLC v. Delaware Cty. Bd. of Revision* (Aug. 18, 2006), BTA No. 2003-H-1549, unreported; *Meijer Stores L.P. v. Defiance Cty. Bd. of*

⁹ See discussion above related to build-to-suit properties.

Revision (Mar. 3, 2006), BTA No. 2003-T-2035, unreported, dismissed on appeal, 110 Ohio St.3d 1475, 2006-Ohio-1475 and 2006-Ohio-4645; *Agree Limited Partnership v. Wood Cty. Bd. of Revision* (Sept. 23, 2005), BTA No. 2003-T-1205, unreported; *Wal-Mart Real Estate Business Trust v. Fulton Cty. Bd. of Revision* (July 15, 2005), BTA No. 2003-T-913, unreported; *Meijer Stores L.P. v. Wood Cty. Bd. of Revision* (July 15, 2005), BTA No. 2003-A-1204, unreported (all rejecting identical arguments that criticize Integra Realty Resources' "big-box" appraisal approach that is similar to the present appraisal issues).

In reviewing Mr. Hannah's appraisal, we first consider his sales comparison approach, on which he placed the greatest weight in valuing the subject property. We note that the use of comparable five, a property available for sale, will be disregarded, as an offering of a property is not sufficient to establish market prices, since the sale was not consummated. *Gupta v. Cuyahoga Cty. Bd. of Revision* (1997), 79 Ohio St.3d 397 and *Meijer*, supra. While the county appellees and the BOE argue that the use of abandoned or vacant properties should not be considered in valuing an operating enterprise such as the subject, we disagree, and find that each of Mr. Hannah's comparables are "big-box" properties similar to the subject. Mr. Hannah's report contains adjustments for each comparable that account for location, size, age and condition, and build-out, and we find these adjustments to be reasonable and supported by his testimony. H.R., Ex. E at 58, H.R. 1 at 232-241. The final value opined by Mr. Hannah is within the value range of the comparable sales listed in the report, and we find this value to be a reliable indicator of the subject's value as of its January 1, 2005 tax lien date. In addition to Mr. Hannah's testimony before this

board, we find this value to be further supported by the evidence and testimony presented by Mr. Lorms before the BOR.

We agree with Mr. Hannah that the cost approach is of little utility in valuing the subject property, as it is ten years old as of tax lien date, and significant obsolescence can be attributed to the subject. With regard to the income approach, we give minimal weight to the final value estimate, but do believe this approach to be supportive of the value opined in the sales comparison approach. We thereby conclude that, through the competent and probative evidence submitted and reviewed, Kmart's burden of persuasion has been met. *Columbus*, supra.

When this board determines that an appellant has met its burden with regard to the presentation of competent and probative evidence, appellees then have a corresponding burden to present evidence for this board's review to determine whether such evidence is competent and probative in rebutting appellant's evidence. *Westhaven, Inc. v. Wood Cty. Bd. of Revision* (1998), 81 Ohio St.3d 67, 70; *Springfield and Mentor Exempted*, supra.

Here, the county appellees and the BOE have presented the evidence and testimony of Ms. Ebert. Upon review, and for the reasons set forth below, we do not find this evidence and testimony sufficiently competent and probative when weighed against Kmart's evidence of value.

A review of Ms. Ebert's appraisal report and testimony, and of the evidence set forth before the BOR, reveals that Ms. Ebert has not, in her land valuation calculations, her sales comparison approach, or her income approach to value, adjusted for any differences between her comparable properties and the subject. As such, we

are left to speculate on possibly important differences between these comparables and the subject. While we are aware that Ms. Ebert's comparables are generally in the vicinity of the subject, this does not de facto provide this board with a sufficient basis upon which to compare the properties. Furthermore, we not find the grids/graphs included in Ms. Ebert's report to be persuasive evidence of a per square foot value for the subject.

With regard to her sales comparison approach, Ms. Ebert submitted eight "comparable" sales of big-box properties, all occurring between 2004 and 2006, and apparently consisting of build-to-suit properties.¹⁰ Additionally, it appears that Ms. Ebert used build-to-suit properties in her income approach. Pursuant to *Cummins*, *Rhodes*, and *AEI*, supra, this board will consider, inter alia, the sales of comparable build-to-suit properties when valuing real property. However, in reviewing the comparables as a whole, we emphasize that Ms. Ebert did not provide any adjustments that relate to land size, location, age or condition. These properties may appear, at face value, to be similar to the subject. Without the necessary adjustments, however, we are unable to find these properties to be competent and probative evidence of the subject's value. Therefore, we have not been presented with the existence of comparable first-generation sales and leases that successfully refute the assertion that the subject is marketable only to second-generation users.

¹⁰ Ms. Ebert's testimony before this board reflects that she was unsure whether the comparables used in her sales comparison approach were build-to-suit properties. H.R. 1 at 115, 126, 137, 141, 160. The record is also unclear as to whether the subject property itself was a build-to-suit property. Conflicting testimony was presented by Mr. Lorms at the hearing before the BOR, and by Mr. Hannah before this board. S.T., BOR Hearing Record at 3, 11, 12, H.R. 2 at 72-73.

With regard to Ms. Ebert's income approach, a review of this section of the appraisal report, and Ms. Ebert's testimony before both the BOR and this board, reveals a general lack of information to support an accurate value based upon this approach. While the respective capitalization rates used by Mr. Hannah and Ms. Ebert are similar, the vacancy and credit loss rates differ significantly, with Ms. Ebert using a rate of 4%, and Mr. Hannah using a rate of 10%. As with Ms. Ebert's sales comparison approach, we are left to speculate on how her comparable rentals compare to the subject, as there are again no adjustments contained in her report, whereas Mr. Hannah completes an adjustment analysis and comparability analysis for his comparable rentals. H.R., Ex. E at 64, 65. Additionally, Ms. Ebert's report does not contain any expense comparables, while Mr. Hannah's report uses 12 Kmart stores located in Ohio for additional support of his expense estimates. Id. at 66.

Based upon all of the above, we find that Kmart has shown, through competent and probative evidence, that the true value of the subject property should be \$5,200,000 for tax year 2005. We further find that the county appellees and the BOE have failed to set forth the competent and probative evidence needed to establish a different value than that opined by Kmart's appraiser. *Springfield* and *Mentor Exempted*, supra. Accordingly, it is the decision of the Board of Tax Appeals that the true and taxable value of the subject property, as of January 1, 2005, is as follows:¹¹

¹¹ As we find Mr. Hannah's estimate of the land value of the subject property to be an accurate indicator of value, the land and building values of the subject are allocated as such. See *Polaris Amphitheater Concerts, Inc. v. Delaware Cty. Bd. of Revision*, 118 Ohio St.3d 330, 2008-Ohio-2454.

Parcel No. 591-0027-0065-00	TRUE VALUE	TAXABLE VALUE
LAND	\$3,400,000	\$1,190,000
BUILDINGS	<u>\$1,800,000</u>	<u>\$ 630,000</u>
TOTAL	\$5,200,000	\$1,820,000

We order the Auditor of Hamilton County to list and assess the subject property in conformity with this decision and order and to carry forward the determined values in accordance with law.

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