

OHIO BOARD OF TAX APPEALS

Retail Trust IV, and H. Lee Scott as)	CASE NOS. 2006-T-1130
Managing Trustee of the Wal-Mart)	2006-T-1134
Real Estate Business Trust,)	
)	(REAL PROPERTY TAX)
Appellants,)	
)	DECISION AND ORDER
vs.)	
)	
Wood County Board of Revision and)	
Wood County Auditor,)	
)	
Appellees.)	

APPEARANCES:

For the Appellants -	Siegel, Siegel, Johnson & Jennings Co., L.P.A. Nicholas M. J. Ray 3001 Bethel Road, Suite 208 Columbus, Ohio 43220
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For the County Appellees -	Rich, Crites & Dittmer, L.L.C. James R. Gorry 300 East Broad Street, Suite 300 Columbus, Ohio 43215-3704
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Entered January 13, 2009

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

The Board of Tax Appeals considers this matter pursuant to two notices of appeal filed by Retail Trust IV, and H. Lee Scott as Managing Trustee of the Wal-Mart Real Estate Business Trust (collectively, "Retail"). Retail appeals from two decisions of the Wood County Board of Revision, in which the BOR found the

combined true value of permanent parcel numbers B08-510-360201019100 and B08-510-360201019001 to be \$9,070,600 for tax year 2005.¹ Retail claims that the correct true value should be \$5,500,000.

The subject consists of approximately 33.150 acres of land. The land was improved in 1993 with a one-story building of concrete block construction. As of tax lien date, the 125,158-square foot building was used as a retail discount storeroom.² The subject is also improved with paved parking for 926 vehicles.

All parties were represented by counsel at this board's evidentiary hearing. Retail offered the testimony of an appraiser and his appraisal report into evidence. The county offered no additional evidence of value.

In support of its contention of value, Retail relies upon the testimony and written appraisal report of Mr. Robin L. Lorms, an Ohio-certified general appraiser and a member of the Appraisal Institute. Mr. Lorms utilized two of the three traditional approaches to value: (1) the market data approach (also known as the sales comparison approach), and (2) the income approach. See, generally, Ohio Adm. Code 5703-25-07. Mr. Lorms did not utilize the cost approach to value because the age of the improvements made the accurate calculation of depreciation unreliable. Appellants' Ex. A at 62.

¹ There are different owners for each parcel. Retail Trust IV owns parcel B08-510-360201019100, which is the building located on the subject property. The county lists an improvement value only for this parcel. Scott H. Lee, Managing Trustee of the Wal-Mart Real Estate Business Trust, owns parcel B08-510-360201019001, which is the land portion of the subject property.

² The improvements were subsequently demolished in May 2007, after completion of a new retail storeroom on another piece of the subject property.

In applying his approaches, Mr. Lorms began with a market analysis of what is commonly known as a “big-box” retail store, the type of store that the subject represented. Retailers that utilize the big-box concept construct single-use properties that have a large footprint. These retailers construct buildings of their own design so that they may use them to merchandise their products according to their unique business plan. H.R. at 14. Mr. Lorms testified that the supply of big-box retail space is growing; however, the market demand for such properties is limited. H.R. at 14; Appellants’ Ex. A at 17.

According to Mr. Lorms, the demand for this type of space in the market, in contrast to the growth in available big-box space, is limited. Appellants’ Ex. A at 18. Mr. Lorms indicated that other competing retailers capable of operating on such a large scale are typically not interested in another entity’s property because of differences in merchandizing plans. H.R. at 15. “These retailers thrive on efficiency, knowing that their stores are of specific dimensions for purposes of store design, product and display placement and restocking. Costs to retrofit existing big boxes to accommodate the needs of ‘first generation’ retailers are too high for financial feasibility.” Appellants’ Ex. A at 18.

The result, Mr. Lorms continued, is that big-box properties tend to have an extended marketing period before they sell or rent and, because demand for such space is limited, they tend to sell for less or rent at a lower rate than would be supported by the cost of developing a similar property. In summary, Mr. Lorms determined that “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 box stores are worth less than their cost to develop.” Appellants’ Ex. A at 23.

Mr. Lorms describes the subject as being in what he calls a “3rd-tier market,” i.e., one that is considered a rural area with a limited number of retailers and a limited population draw. Appellants’ Ex. A at 24; H.R. at 20.

In valuing the subject property, Mr. Lorms concluded that the size of the land was more than adequate to accommodate the subject’s operation as a big-box retail property. He therefore determined that 13.50 acres should be valued as “excess land.”³ To determine the value of this unimproved portion of the subject property, Mr. Lorms looked at the sales of five parcels of land that were subsequently improved with a big-box storeroom. Appellants’ Ex. A at 43. He concluded that a value of \$175,000 per acre, or a total value of \$2,360,000, was appropriate for the excess 13.50 acres of land. Appellants’ Ex. A at 44.

Mr. Lorms then proceeded to value the remainder of the subject under the sales comparison and income approaches to value. In applying his approaches to value, Mr. Lorms essentially valued the improvements and the 19.65 acres of land that supported those improvements. After reaching a value for the main portion of the land, he added the value of the excess 13.50 acres. We note, however, that Mr. Lorms did

³ “Excess Land” is defined as follows: “In regard to an improved site, the land not needed to serve or support the existing improvement. *** Such land may be separated from the larger site and have its own highest and best use, or it may allow for future expansion of the existing or anticipated improvement.” The Dictionary of Real Estate Appraisal (4th Ed. 2002), at 103.

not opine a separate land value for the remaining 19.65 acres. He did indicate that the \$175,000 per acre value assigned to the 13.50 acres applied to the excess land only. The remaining 19.65 acres, as land that supports the building, would therefore have a different per-acre value.

The sales comparison approach, often referred to as the market data approach, derives an estimate of value by comparing the subject property to the sale prices of similar properties, identifying appropriate units of comparison and making adjustments to the sale prices (or unit prices) based upon relevant, market-derived elements. The sale prices of properties considered most comparable generally establish a range in which the value of the subject will fall. The Appraisal of Real Estate (13th Ed. 2008), at 297; Ohio Adm. Code 5703-25-05(G). Mr. Lorms analyzed sales of six retail properties that he found to be similar to the subject. He also reviewed one other property that was currently listed for sale in the market. The sales occurred between January 2000 and June 2007 and ranged in price from a low of \$14.81 per square foot to a high of \$40.78 per square foot. The property listed for sale was offered at a price of \$15.63 per square foot. Noting what he determined to be “the superiority and inferiority of the other sales and their sale prices,” Mr. Lorms opined a value for the retail space of \$25.00 per square foot, or a total of \$3,128,950. Appellants’ Ex. A at 48. This value included the improvements and the 19.65 acres of supporting land only. To this, he therefore added the \$2,360,000 value of the excess land. This yielded a total value under the market data approach of \$5,500,000.

In employing the income approach, Mr. Lorms found value under the direct capitalization method. Direct capitalization converts a single year's income expectancy into a value in one step by estimating a net income for the property and dividing it by a market-derived income factor, known as an "overall capitalization rate." *The Appraisal of Real Estate*, at 499.

To arrive at income expectancy, an appraiser reviews the subject property's historical income and expenses. These are then combined with an analysis of typical income and expense levels found for comparable properties. *The Appraisal of Real Estate*, at 465. The subject property is owner occupied and thus does not generate rental income. To determine an income, Mr. Lorms estimated what would be considered a market rent for the subject by surveying rental rates obtained at six properties, which he considered to be comparable to the subject. The leases yielded adjusted lease rates between \$0.00 and \$2.75 per square foot. Mr. Lorms also looked at an asking lease rate at one unoccupied property. The asking rate was \$3.50 per square foot, a rate which Mr. Lorms opined would be higher than the actual lease rate, once negotiated. After consideration for size, location, and condition, Mr. Lorms determined that a market rental rate for the subject would be \$2.75 per square foot. To this figure, he added expense reimbursement income of \$1.43 per square foot to arrive at a potential gross income for the subject of \$533,807. A ten percent vacancy and credit loss was deducted to arrive at an effective gross income of \$480,427. From this amount, expenses of \$235,325 were deducted to arrive at a net operating income for the subject of \$245,101. Income was capitalized at 9.5 percent. The capitalization rate

was derived from investor surveys and the band-of-investment method. Appellants' Ex. A at 60. When applied to the net operating income, this equated to a value under the income approach for the improvements and supporting acreage of \$2,580,016. Mr. Lorms then added the \$2,360,000 value of the 13.50 acres of excess land to derive a total value under the income approach of \$4,900,000.

In reconciling his approaches to value, Mr. Lorms placed greatest weight upon the sales comparison approach. He determined that several of the sales were "highly comparable to the subject property and require few adjustments." Appellants' Ex. A at 62. Mr. Lorms placed minimal weight upon the income approach, as he concluded that the approach was "less supportable." Appellants' Ex. A at 62. Accordingly, Mr. Lorms opined a final true value for the subject property of \$5,500,000 for tax year 2005.

We now begin our review of this matter by noting that a party who asserts a right to an increase or a decrease in the value of real property has the burden to prove its right to the value asserted. *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564; *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336; *Crow v. Cuyahoga Cty. Bd. of Revision* (1990), 50 Ohio St.3d 55; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318. Consequently, it is incumbent upon an appellant challenging the decision of a board of revision to come forward and offer evidence that demonstrates its right to the value sought. *Cleveland Bd. of Edn.*, supra;

Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision (1994), 68 Ohio St.3d 493.

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. In short, there is a burden of persuasion that rests with the appellant, whether it be the property owner or a board of education, to convince this board that the appellant is entitled to the value which it seeks. *Cincinnati School Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325. Accordingly, this board must proceed to examine the available record and to determine value based upon the evidence before it. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120; *Clark v. Glander* (1949), 151 Ohio St. 229. In so doing, we will determine the weight and credibility to be accorded to the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

The county argues that we should reject Mr. Lorms' opinion of value because the appraiser has demonstrated clear bias by artificially limiting his choice of comparable properties. "Lorms acknowledges that there is a well-established market for first generation stores, and that there are leases of these stores which do establish market rents for the property. *** However, Lorms rejects this market as being

applicable to the subject property because he claims that prices paid for, and rents paid for, leased fee first-generation stores do not reflect the market value of these stores.” Appellees’ Brief at 7.

The issue raised by the county concerns Mr. Lorms’ opinion that leased build-to-suit properties should not be relied upon when appraising real property: “[B]uild-to-suit arrangements result in above market rent and leased fee interests which are greater than the market value of the fee simple interest. Thus, leases from build-to-suit arrangements should not be used as an indication of market rent *** and sales of properties subject to build-to-suit arrangements should not be used in the sales comparison approach ***. Sales of properties subject to build-to-suit leases do not reflect the obsolescence of the real estate created by the tenant’s design requirements.” Appellants’ Ex. A at 41.

Mr. Lorms further opined that the subsequent sale of a build-to-suit property that is subject to a lease should not be considered an arm’s-length transaction. See Appellants’ Ex. A at 40. He testified that the purchaser of such a property has an interest in the income stream created by the lease, which adds value beyond that of the real estate itself. “Most of the investors that buy net lease build-to-suit properties look solely at the lease. They look solely at the creditworthiness of the tenant. What’s secondary is consideration given to the real estate itself.” H.R. at 17. In support of his conclusions, Mr. Lorms referred to the sale of a Lowe’s store located in Columbus. It sold in April 2005 for \$10,636,470, or \$84.85 per square foot. He compared the Lowe’s sale to the sale of a K-Mart, also located in Columbus, which sold in August

2005 for \$5,800,000, or \$47.59 per square foot. Each property was similar in size, of identical age, and had about the same amount of land. However, the Lowe's was subject to a lease while the K-Mart, abandoned at the time, had been owner occupied. Mr. Lorms concluded that the difference in sale prices must be due to the value of the lease. Appellants' Ex. A at 42.

In previous decisions, we have rejected the position advanced by the county where a party has failed to offer into evidence any sale or lease between first generation users. For example, in *Wal-Mart Real Estate Business Trust v. Fulton Cty. Bd. of Revision* (July 15, 2005), BTA No. 2003-T-913, unreported, we held:

“Next, the county argues that, by eliminating other first generation users such as Target, Meijer, and Lowe's from the pool of potential buyers of a property like the subject, Mr. Lorms has been able to lower both the subject's potential gross income and its potential sale price. The county asserts that this is nothing more than unsupported opinion used to artificially lower the value of the subject. We disagree.

“Mr. Lorms testified that his research did not disclose any sales between first generation users. In addition, he testified that discussions with several first generation users suggested that such a user would not be interested in an existing big-box property. Finally, Mr. Lorms gave specific examples of this phenomenon, including the case where one retailer had a recently completed big-box storeroom razed because the building, developed by a competitor, did not meet its marketing strategy. We find Mr. Lorms' evidence to be competent and well corroborated.

“The county may speculate as to the reasons why there are no sales between first generation users. However, these conjectures are without substance. Ultimately, we cannot ignore the fact that the county has not offered into evidence any sale or lease between first generation users

that would either impeach Mr. Lorms' testimony or rebut the evidence presented by Wal-Mart." (Footnote omitted.)
Id. at 12.

See, also, *Meijer Stores L.P. v. Wood Cty. Bd. of Revision* (July 15, 2005), BTA No. 2003-A-1204, unreported.

In other cases, we have nonetheless rejected Mr. Lorms' position 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.

In *Meijer*, the appellee board of education presented appraisal evidence, including sales of leased built-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.

In the instant matter, Mr. Lorms admits that there are sales of build-to-suit properties that he nevertheless rejected from consideration. See Appellants' Ex. A at 40, 45. The county essentially asks us to revisit our previous holdings. The county's argument against Mr. Lorms' position rests upon the Ohio Supreme Court's decision in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979. There, the 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.

Here, the county asserts that the sale of a big-box property encumbered by a lease, which is made at arm's length, should nevertheless be within that scope of properties considered for use in the sales comparison and income approaches to value. At hearing, upon cross examination, Mr. Lorms admitted that, based upon recent case law, the sale of a certain build-to-suit property, noted at page 42 of his written report, could be a sale that reflects the true value of that property. H.R. at 50. Mr. Lorms, however, said that he did not agree with the court's conclusion that the sale of such a property would be reflective of true value notwithstanding the encumbrance of a long-term lease. H.R. at 50-51.

Subsequent to the hearing in this appeal, the Ohio Supreme Court issued a series of decisions dealing with the sale of encumbered real property. In *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-

Ohio-1473, the appellant board of education argued that we erred in accepting, as determinative of value, the sale price of the property at issue in the appeal. The BOE argued that, because the deed contained a particular use restriction, the sale price was not indicative of the full value of the property. Referencing *Berea*, supra, the court concluded that the sale price was controlling. The court determined that a deed restriction could be imposed as part of an arm's-length sale in that "encumbering property typically represents an owner's attempt to realize the full value of the property." *Cummins*, supra, at ¶27. The court noted that, because interests in real property are so often subject to some type of encumbrance, "one could as a practical matter rarely utilize the sale price to determine value if the fee interest had to be valued as though the encumbrances did not exist." *Id.* at ¶24.

Then, in *Rhodes v. Hamilton Cty. Bd. of Revision*, 117 Ohio St.3d 532, 2008-Ohio-1595, the court had an opportunity to apply *Cummins* and *Berea* to the sale of a build-to-suit property that was under a long-term lease. The property owner in *Rhodes* argued that it had purchased the property subject to an "above market" lease. Much as he has done in this appeal, Mr. Lorms, appearing as an appraisal witness, had testified in *Rhodes* that the sale should be disregarded. He opined that the sale price reflected the high rent and creditworthiness of the tenant, which, in his opinion, were sources of value that should not constitute part of the value of the fee simple. *Id.* at ¶5. 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 stressed 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.

On October 9, 2008, the Ohio Supreme Court issued its most recent decision concerning the application of the sale price to the true value of a parcel of real property. Among the positions advanced in *AEI Net Lease Income & Growth Fund v. Erie Cty. Bd. of Revision*, 119 Ohio St.3d 563, 2008-Ohio-5203, was the owner’s argument that the existence of a long-term lease elevated the sale price of the fee interest beyond the value of the real property itself.⁴ In rejecting the argument, the court summarized its previous rulings:

“Our decision in *Rhodes* was issued during the pendency of the present appeal and rejects several of the arguments that have been advanced in the briefs in this case as well. Specifically, the fact that the property is encumbered by a long-term lease does not by itself establish that the sale price must be adjusted to arrive at true value. In *Rhodes*, we relied on *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, in which we noted that the encumbrance of real property typically reflects an owner’s attempt to realize its value. *Id.* at ¶ 27. To the extent that an existing long-term lease generates revenue above or below market, the existence of the lease will tend to increase or decrease the value of the fee interest in the property. *Rhodes* exemplifies this principle when the long-term lease is an above-market lease, while the exemplary case for a below-market long-term lease is *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, 834 N.E.2d 782. See *Cummins*, ¶ 16, 27.” *AEI*, supra, at ¶13.

⁴ *AEI* also rejected the argument that the sale should not be considered reflective of value because the long-term lease constituted part of a sale-leaseback transaction. The court held that, in the absence of collusion, a sale-leaseback is a valid, arm’s-length sale. See *AEI*, supra, at ¶20.

Although the instant appeal does not involve the sale of the subject property, we find that the principles enumerated by the court regarding the validity and applicability of a sale price are equally applicable to properties employed in the appraisal of real property.⁵ This is especially so under the sales comparison approach, where market value is “predicated upon prices paid in actual market transactions.” Ohio Adm. Code 5703-25-05(G). See, also, *The Appraisal of Real Estate*, at 298 (“The principle of substitution holds that the value of property tends to be set by the price that would be paid to acquire a substitute property of similar utility and desirability within a reasonable amount of time.”). Under the income approach, the leases of build-to-suit properties may also be considered where those leases are reflective of the market in which the property at issue competes. The determination of market is important in these cases, as a user-occupied big-box storeroom, such as the subject property, may well compete with leased first-generation properties rather than with second-generation users. Such a determination must be made on a case-by-case basis.

⁵ We acknowledge that *The Appraisal of Real Estate* (13th Ed. 2008) takes a different view from that expressed by the court in *Cummins, Rhodes, and AEI*, supra. *The Appraisal of Real Estate*, at 447, opines that an appraiser should not necessarily conclude that all interests in real property are “additive and always equal to fee simple value.” *The Appraisal of Real Estate* further states, “A lease never increases the market value of real property rights to the fee simple estate. Any potential value increment in excess of a fee simple estate is attributable to the particular lease contract, and even though rights may legally ‘run with the land,’ they constitute contract rather than real estate rights.” *Id.* at 447. However, while this treatise recognizes general principles of real property valuation, an appraiser, as well as this board, must value property in conformity with the specific pronouncements of Ohio’s judiciary. Thus, for Ohio taxation purposes, the existence of an above-market lease does not, in and of itself, mandate rejection of the sale price. *Cummins, Rhodes, and AEI*, supra.

In addition to the foregoing, we do not find Mr. Lorms' reliance on the Columbus Lowe's and Kmart sales to be compelling support for his opinion that a long-term lease adds value beyond that of the property's market value. While there is a difference between the sale price of the leased property and the abandoned property, this difference is consistent with the court's decisions, in that the right to collect rents under the long-term lease is a part of the value of the fee simple interest. *Rhodes*, supra, at ¶6. We also find that the appraiser is operating under the assumption that the sole reason for the price differential is that the build-to-suit property subject to the long-term lease is marketed differently from a property not subject to such a lease. However, no evidence was introduced to support a finding that the leased property was not exposed to the market that ordinarily exists for properties generally offered for lease. We note, too, "Special care must be taken when relying on pairs of adjusted values because the difference measured may not represent the actual difference in value attributable to the characteristic being studied. The difference may include other aspects of the property, not just the one characteristic being studied." *The Appraisal of Real Estate*, at 317.

Simply put, if the price paid for a build-to-suit property subject to a long-term lease is the true value of the property, see *Cummins*, *Rhodes*, and *AEI*, supra, then an appraiser should review such sales. If the sales are otherwise comparable in terms of market, size, condition, etc., they should be considered as part of the appraisal process. Such sales are particularly apropos where, as here, the issue is the valuation of a first-generation user-occupied property. See *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. As to the income approach, the decision to remove from consideration build-to-suit properties that are subject to a long-term lease may also artificially remove from consideration rentals of competitive income-producing properties of the same type in the same market. Ultimately, an appraiser's decision to reject from consideration such build-to-suit properties not only creates the risk that the appraiser may eliminate a necessary component right that constitutes a part of the value of the property's fee simple interest, thereby resulting in a value less than market value for taxation purposes, but also is contrary to Ohio law. *Berea, Cummins, Rhodes*, and *AEI*, supra. See, also, *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 118 Ohio St.3d 45, 2008-Ohio-1588.

Turning specifically to Retail's appraisal evidence, we note that the market data approach was the one most heavily relied upon by Mr. Lorms in reaching his final opinion of value. The county argues that Mr. Lorms intentionally focused on the "worst" of the abandoned properties and further limited the scope of his review by eliminating the sales of leased build-to-suit properties. As we have discussed in detail above, we concur with the county that there is nothing in the sale of build-to-suit properties, in and of itself, that would warrant the summary rejection of such sales. Given that the subject is a build-to-suit user occupied property, such sales, if otherwise comparable, are appropriate for consideration. However, there is no evidence before us to indicate that there are any such comparable sales available for consideration. Mr. Lorms has presented sales that he concludes are comparable to the subject. While it

may seem counter-intuitive that we reject Mr. Lorms' purposeful omission of build-to-suit sales while still reviewing the sales he does offer, we must weigh the actual evidence before us, taking into account how the evidence relates to the specific property at issue. Here, we have been presented with uncontroverted evidence that the sales used are indeed appropriate for consideration. The county may, of course, assert that there are better properties available; however, we cannot reject otherwise comparable sales simply based upon the county's speculation of what may, or may not, exist in the market. If there are other build-to-suit properties that are comparable to the subject, then the county had the opportunity to provide that information to impeach Mr. Lorms' testimony. In the absence of such evidence, the county runs the risk that this board may find the sales information contained in the record sufficiently comparable for valuation purposes. In short, the county's argument that Mr. Lorms focused on the most problematic of properties remains mere conjecture.

We do concur with the county that one of the comparables relied upon by Mr. Lorms is not an actual sale. It is a property that is currently listed for sale. We do not find this listing to be persuasive evidence of value. *Wal-Mart, supra*. Cf. *Gupta v. Cuyahoga Cty. Bd. of Revision* (1997), 79 Ohio St.3d 397, at 400. Mr. Lorms also subtracted from the sale price of comparable sale number 1 amounts for seller-paid closing costs and for the seller's agreement to pay some utility costs. There is no evidence before us to indicate that such dollar-for-dollar adjustments are appropriate in this matter. See, e.g., *Ruben v. Franklin Cty. Bd. of Revision* (Nov. 8, 1996), BTA No. 1995-P-273, unreported, at 6 ("We fail to understand the justification for reducing a

sales price by subtracting real estate taxes, real estate commissions and the like if ‘market value’ or ‘true value’ is our required objective. *** This value, however, appears to equate more with ‘investment value’ not ‘true value.’”). As such, we decline to rely upon the sale. Sale number four is a significantly older property located in what appears to be a very different market. Upon review, we agree with the county that this sale is not comparable to the subject.

Nevertheless, even after removing the listing and minimizing the weight placed on sales one and four, we find the remaining sales to be sufficiently comparable to the subject for valuation purposes. The sales utilized were all located in markets similar to the subject’s and appear to be sufficiently comparable. Mr. Lorms’ consideration of these sales’ similarities to and differences from the subject appears to be reasonable and is supported by his testimony and the remainder of the record. While the county has criticized all of the sales utilized by Mr. Lorms, it has offered no specific evidence to rebut the reliability of the data. See *Parmalat Bakery Group v. Ashland Cty. Bd. of Revision* (Aug. 12, 2005), BTA No. 2004-M-792, unreported, at 9 (holding that “it is common practice for an appraiser who is struggling to find comparable sales to widen his search to adjoining neighborhoods, cities, counties, and at time, states, to assist in arriving at an opinion of value.”).

Our review of the remaining four properties, however, indicates a different value range than the range determined by Mr. Lorms when using all seven properties. The value range of the four sales is between \$14.81 per square foot and \$40.78 per square foot, with three of the four sale prices occurring at over \$30.00 per

square foot. Weighing the four sales, and taking into consideration the condition, age and location of the comparable sales, we find that the record supports a value for the subject of \$35.50 per square foot. This equates to a value for the subject, excluding the excess land, of \$4,443,100. In determining this value, we remind the parties that we may accept all, part, or none of the offered opinions of value. *Witt Co. v. Hamilton Cty. Bd. of Revision* (1991), 61 Ohio St.3d 155, at paragraph three of the syllabus; *Fawn Lake Apts. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 609. When the value of the excess land is added, we find that the evidence under the sales comparison approach indicates a total value for the subject property of \$6,803,100.

We agree with Mr. Lorms that the income approach is of limited evidentiary value. We have further concerns about the adjustments made to the rent comparables used by Mr. Lorms. He employed an effective rent analysis in his approach. Effective rent is an analytical tool used to compare leases with different provisions in order to develop an estimate of market rent. *The Appraisal of Real Estate*, at 454. Effective rent is defined as the “total of base rent over the rent term minus rent concession, such as free rent, excessive tenant improvements, moving allowance, or lease buyouts.” *Id.* at 454. See, also, *The Dictionary of Real Estate Appraisal*, at 93. The timing of rent concessions may impact the analysis of effective rent. *The Appraisal of Real Estate*, at 454. In the matter before us, we have insufficient information about the nature and timing of the concessions for which Mr. Lorms has made an adjustment. In some instances, we also are unable to determine

whether allowances for tenant improvements are excessive, and therefore subject to adjustment, or nominal.

Next, we question whether all of the rent comparables are truly comparable to the subject property. For example, lease comparable numbers 2, 4, 5, and 6, unlike the subject, all appear to be anchor stores located at regional malls. Finally, we note that one of the lease comparables used in the income approach was actually an asking rate rather than an actual lease. While we agree that the income approach seeks to consider the anticipated future benefits generated by a property and to estimate their present value, see *The Appraisal of Real Estate*, at 446, the use of asking rents is more speculative than probative. See *Wal-Mart*, supra. Accordingly, we place no weight upon Mr. Lorms' income approach to value.

Lastly, we do not find Mr. Lorms' valuation of 13.50 acres of the subject as excess land to be unreasonable. The acreage qualifies as excess land, as it was not needed to support the improvements as they existed on tax lien date. See *The Appraisal of Real Estate*, at 214. The fact that this portion of the parcel was later developed may affect its value for subsequent tax years; however, we find nothing in the record upon which to reject Mr. Lorms' treatment of this acreage as excess land. While the county argues that Mr. Lorms' analysis skews the allocation of land and improvement value, we reiterate that the county has come forward with no evidence sufficiently competent to refute the data submitted by the appellants.

Upon review of all of Retail's appraisal evidence, we find that the most reliable evidence is presented by Mr. Lorms' market data approach, as adjusted by our

review. Thus, we conclude that Retail has satisfied its burden of persuasion and has come forward with competent and probative evidence that the value for the subject property was \$6,803,100 for tax year 2005. *Cincinnati*, supra.

Where we determine that an appellant has come forward with competent and probative evidence of value, the appellees have a corresponding burden to present evidence that this board must review to determine whether it is competent and probative in rebutting the appellant's evidence. *Westhaven, Inc. v. Wood Cty. Bd. of Revision* (1998), 81 Ohio St.3d 67, 70; *Springfield and Mentor Exempted*, supra. Failure of an appellee to present rebuttal evidence may, upon our finding that the appellant has presented credible and probative evidence, result in our adoption of the appellant's evidence as the subject property's true value. *Mentor Exempted*, supra. See, also, *Fairlawn Assoc., Ltd. v. Summit Cty. Bd. of Revision*, Summit Cty. App. No. 22238, 2005-Ohio-1951 ("By not presenting any evidence, the BOR and county auditor do risk that the court will find the appellant's evidence competent and probative, and therefore, determinative of value."). Here, the county appellees have elected to not provide us with any additional evidence of value. Moreover, our review of the transcript certified to this board by the county auditor discloses no other evidence upon which we may base an opinion of value.

In conclusion, we find that Retail has demonstrated through competent and probative evidence that the true value of the subject property should be \$6,803,100 for tax year 2005. We further find that the county appellees have failed to put forward evidence sufficiently competent to prove value and to rebut that presented by Retail.

Cincinnati, Springfield and Mentor Exempted, supra. The Board of Tax Appeals therefore finds the true and taxable values of the subject property to be as follows for tax year 2005:⁶

	TRUE VALUE	TAXABLE VALUE
Parcel B08-510-360201019100		
LAND	\$ -0-	\$ -0-
BUILDINGS	<u>\$2,736,950</u>	<u>\$957,930</u>
TOTAL	\$2,736,950	\$957,930

	TRUE VALUE	TAXABLE VALUE
Parcel B08-510-360201019001		
LAND	\$4,066,150	\$1,423,150
BUILDINGS	<u>\$ -0-</u>	<u>\$ -0-</u>
TOTAL	\$4,066,150	\$1,423,150

	TRUE VALUE	TAXABLE VALUE
Total, All Parcels		
LAND	\$4,066,150	\$1,423,150
BUILDINGS	<u>\$2,736,950</u>	<u>\$ 957,930</u>
TOTAL	\$6,803,100	\$2,381,080

The Auditor of Wood County is hereby ordered to list and assess the subject property in conformity with this board’s decision and order and to carry forward the determined values in accordance with law.

⁶ We are mindful of the Ohio Supreme’s Court’s recent decision in *Polaris Amphitheater Concerts, Inc. v. Delaware Cty. Bd. of Revision*, 118 Ohio St.3d. 330, 2008-Ohio-2454, in which the court found that this board failed to support its finding regarding land value, as distinct from improvement value. The court specified, “The allocation of value between land and improvements does not constitute an arbitrary exercise; it relates to the basic method by which county auditors determine value.” Id. at ¶17. In the matter before us, we note that no party has expressly challenged the auditor’s assigned allocation of value, which places 61.6 percent of the total value on the improvements and 38.4 percent on the land. We have therefore retained the auditor’s allocation, with one adjustment. We have allocated the value based upon our determination of value excluding the excess land, i.e., the \$4,443,100 value. See page 11, supra. The value of the excess land has then been added to the value assigned to parcel B08-510-360201019001. In other words, the \$4,066,150 land value is actually comprised of two parts. First, based upon the auditor’s allocation, the value for the 19.65 acres of land that support the improvements is \$1,706,150. The remaining \$2,360,000 represents the value of the 13.50 acres of excess land.

Mr. Eberhart dissents.

I respectfully dissent from the majority's value determination. I do agree wholeheartedly with the majority's conclusion that there is nothing in a build-to-suit property, in and of itself, that would warrant the summary rejection of such a property in an appraisal, and I join the majority in putting all parties before this board on notice of this holding.

However, it is clear from the record that Mr. Lorms' value conclusion purposefully excludes build-to-suit properties from his analysis. See Appellants' Ex.A at 45. Given that the subject is a build-to-suit user-occupied property, I would find that his opinion of value is not probative of the subject property's value. Rather, it creates an ambiguity that leaves it to this board to speculate as to whether a component of value has been artificially omitted. See, also, my dissenting opinion in *Wal-Mart Real Estate Business Trust v. Darke Cty. Bd. of Revision*, BTA No. 2006-V-773, announced this date.

Accordingly, I would affirm the Board of Revision's value of \$9,070,600.

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