

<p><b>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO</b> 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p><b>B.A. CLARK INVESTMENT JOSEPHINE STREET LLC,</b></p> <p>v.</p> <p>Respondent:</p> <p><b>DENVER COUNTY BOARD OF EQUALIZATION.</b></p>	<p><b>Docket No.: 51452</b></p>
<p><b>ORDER</b></p>	

**THIS MATTER** was heard by the Board of Assessment Appeals on January 21, 2009, Karen E. Hart and Sondra W. Mercier presiding. Petitioner was represented by Gary C. Moschetti, Esq. Respondent was represented by Eugene J. Kottenstette, Esq. Petitioner is protesting the 2008 actual value of the subject property.

**PROPERTY DESCRIPTION:**

Subject property is described as follows:

**1530 Josephine Street, Denver, Colorado  
(Denver County Schedule No. 02363-00-007-000)**

The subject property is a former grocery store of approximately 25,000 square feet that was built in the 1960s. The subject site is 111,408 square feet (2.56 acres) in size. The zoning on the subject was changed to MS-3 in April 2006 (Ordinance 261), two months prior to the end of the base period. The building is currently subject to a sublease agreement with Church in the City. Michael Walker, officer of Church in the City, filed the current petition to the Board. Documentation shows that Church in the City is occupying the subject under a lease extension through October 30, 2012 and has the right to protest taxes under the lease agreement.

Petitioner presented the following indicators of value:

Market: \$1,671,120.00  
Income: \$1,632,588.00

In the market approach, Petitioner valued the subject as vacant land and presented an indicated value of \$1,671,120.00. Petitioner presented five comparable land sales ranging in sales price from \$16.67 to \$56.71 per square foot and in size from 6,300 to 28,218 square feet. No adjustments were made to the comparable sales.

Petitioner placed the greatest reliance on the sale of 7440 East Colfax Avenue, at a price of \$25.00 per square foot. A 40% discount was made based on Respondent's data to reflect the lease encumbering the subject. Mr. Walker testified that he concluded to a value of \$15.00 per square foot for a total land value of \$1,671,120.00.

Petitioner presented an income approach to derive a value of \$1,632,588.00 for the subject property. Petitioner indicated that the actual annual rent for the subject was \$81,629.40. This amount was capitalized at 5% resulting in a value of \$1,632,588.00 using the income approach.

Petitioner is requesting a 2008 actual value of \$1,650,000.00 for the subject property.

Respondent presented the following indicators of value:

Market: \$3,350,000.00

In the market approach, Respondent also valued the subject as vacant land and presented an indicated value of \$3,350,000.00 for the subject property. Respondent presented six comparable sales ranging in sales price from \$42.44 to \$67.82 per square foot and in size from 20,191 to 103,202 square feet.

Adjustments were made for date of sale, location, zoning, size, and corner location. After adjustments were made, the sales ranged from \$41.06 to \$65.28 per square foot. Respondent made an additional adjustment of 40% to reflect the remaining leasehold interest in the subject. Respondent concluded to a value of \$3,350,000.00, \$30.00 per square foot for the land and \$10,000.00 for improvements.

Respondent assigned an actual value of \$3,538,100.00 to the subject property for tax year 2008. Respondent requested the Board place a lower value of \$3,350,000.00 on the subject for tax year 2008 based on the appraised value.

Sufficient probative evidence and testimony was presented to prove that the subject property was incorrectly valued for tax year 2008.

Petitioner contends that the Assessor is required to establish the "actual value" of the property and that "actual value . . . shall be that value determined by appropriate consideration of the cost approach, the market approach, and the income approach to appraisal." CRS § 39-1-103(5)(a).

Petitioner contends that no additional value can be assigned based on the change in zoning which occurred just prior to the end of the base period.

In *Board of Assessment Appeals v. Colorado Arlberg Club*, 762 P.2d 146, 153 (Colo. 1988) the court held:

[T]he reasonable future use of real property is an element of its fair market value under its technical definition as well as its common law interpretation in Colorado and elsewhere. Because there is no indication that the legislature intended to reject or distinguish those definitions here, we conclude that reasonable future use is relevant to a property's current market value for tax assessment purposes.

The Board is convinced that the building, a former grocery store completed in the 1960s, had passed its economic life and that the site, which had been recently rezoned, was no longer operating at its highest and best use. Redevelopment of the site is a reasonable future use based on the recent rezoning and comparable market data for redevelopment sites. It is important to note that under the market approach, Petitioner also valued the subject as land only, compared it with sales of other redevelopment sites, and concluded to a value for land only. There was no dispute that the rezoning had occurred prior to the base period. Based on comparable sales data, the Board is convinced that the new zoning would allow a higher density of use and would thereby cause the value of the subject to increase.

Petitioner further contends that Respondent gave inadequate adjustment to the comparable sales to reflect the influence on the subject of the parkway setback, landmark designation, limited Colfax access, and influence of East High School. The Board agrees; however, Petitioner provided no evidence as to the quantitative adjustment required for these issues.

Respondent made a 40% adjustment to the conclusion of value to reflect the remaining leasehold interest in the subject. Respondent relied on sales and contract information beyond the base period. The Board can give no consideration to the data used to determine the adjustment, which is found to be excessive. Leasehold interests are more typically calculated based on the discounted present value of the remaining lease payments. At a discount rate of 8%, the present value of the annual lease payment of \$81,629.40 through October 2012, or for approximately 4.75 years, results in a deduction of \$255,063.00 or \$2.29 on a per square foot basis. Based on a concluded market value of \$50.00 per square foot, this results in a percentage adjustment of just 5%.

Respondent contends that Petitioner relied on a sale that was located approximately 50 blocks east of the subject and not considered comparable for location or zoning. The Board was convinced that an upward adjustment was required to the sale at 7440 East Colfax Avenue for its significantly inferior location. This indicates a value above \$25.00 per square foot for the subject prior to adjustment for leasehold interest.

Petitioner provided no evidence to indicate that the actual rent for the subject was the market rent as of the date of value. Based on *Cherne v. Board of Equalization*, 885 P.2d 258 (Colo.App. 1994) the Assessor is not required to value the property based on the existing lease agreement if the lease distorts the actual value of the property:

In the *City & County of Denver v. Board of Assessment Appeals*, *supra*, as here, the property in question was an old discount store encumbered by an arms-length lease calling for a below-prevailing-market-rates rental amount until the year 2001. The low rental rate seriously affected the valuation of the improvements portion of the property because comparable properties had much higher rental rates for leases entered into after the lease on the subject property. Thus, the actual rental income, there and here, distorted the determination of the actual value of the property.

We agree with the BOE that the decision in *City & County of Denver v. Board of Assessment Appeals* does not stand for the proposition that, in the application of the income approach to assessed valuation, if the property is subject to a long term lease that at the time of appraisal is a below market lease, then the fact of such a lease is the sole determinant in the valuation of the property. There, the court merely held that in situations in which "consideration of actual rental income distorts the determination of the actual value of the property, the BOAA is free to place whatever weight it deems appropriate to [the actual rental income]." *City & County of Denver v. Board of Assessment Appeals*, *supra*, 848 P.2d at 361.

*Cherne, supra*, 885 P.2d at 260.

The Board is convinced that the actual value of the subject was not reflected in the remaining lease agreement, with less than five years remaining. Therefore, the Board gives no further weight to the actual lease agreement.

As previously indicated, Petitioner's sale at 7440 East Colfax Avenue, significantly inferior in location to the subject, indicates a value above \$25.00 per square foot for the subject. Respondent's sales indicate an adjusted range in value of \$41.06 to \$65.28 per square foot, with a mean of \$49.82 per square foot. Respondent concluded to a value of \$50.00 per square foot. The Board was convinced that adjustments for the remaining leasehold impact, the landmark designation, and parkway setback were required. The Board finds that a 40% adjustment is adequate to reflect these issues; although incorrectly applied to the leasehold interest and based on data beyond the base period. The Board concludes that the 2008 actual value of the subject property should be reduced to \$3,350,000.00 based on Respondent's recommended value. This results in a value of \$30.07 per square foot, which falls within the parameters established by both Petitioner's and Respondent's sales.

**ORDER:**

Respondent is ordered to reduce the 2008 actual value of the subject property to \$3,350,000.00.

The Denver County Assessor is directed to change his records accordingly.

**APPEAL:**

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 CRS § 24-4-106(11) (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five 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 CRS § 24-4-106(11) (commenced by the filing of a notice of appeal with the Court of Appeals within forty-five 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.

CRS § 39-8-108(2) (2008).

**DATED and MAILED** this 30<sup>th</sup> day of April 2009.

**BOARD OF ASSESSMENT APPEALS**

*Karen E Hart*

Karen E. Hart

*Sondra W Mercier*

Sondra W. Mercier

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

*Heather Flannery*  
Heather Flannery

