

<p>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p>NASSER CHAMANBAHAR & JANETH F. SCOVILLE,</p> <p>v.</p> <p>Respondent:</p> <p>DENVER COUNTY BOARD OF EQUALIZATION.</p>	<p>Docket No.: 68119</p>
<p>ORDER</p>	

THIS MATTER was heard by the Board of Assessment Appeals on October 17, 2016, Debra A. Baumbach and Louesa Maricle presiding. Petitioners were represented by Richard G. Olona, Esq. Respondent was represented by Noah Cecil, Esq. Petitioners are protesting the 2015 actual value of the subject property.

The parties stipulated to the admission of Petitioners' Exhibits 1 and 2, and Respondent's Exhibits A and B, subject to cross examination and motions to strike. The parties also stipulated to the admission of their respective expert witnesses for the purpose of this hearing.

Subject property is described as follows:

**726 Lincoln Street, Denver, Colorado
Denver County Schedule No. 0503903054000**

The subject property includes a 3,895 square foot commercial building constructed in 1947 on a 13,515 square foot lot (per the Denver Assessor's records). The property is located on the east side of Lincoln Street, in the Golden Triangle neighborhood, south of the Denver central business district. The lot is zoned D-GT (Downtown Golden Triangle). The building has two tenant spaces including a finished restaurant space, and a warehouse area that has a low degree of interior finish that is occupied by a motorcycle shop. Both spaces were leased as of the effective date of value.

Petitioners are requesting an actual value of \$750,000 for the subject property for tax year 2015. Respondent assigned a value of \$1,487,700 for the subject property.

The parties agreed that the primary disputed issue in this case is the premise under which the subject property is valued. Petitioners claim it must be valued under its current use as a small two-tenant, income producing commercial building. Respondent contends the value of the subject site is higher than the value of subject as currently improved. Therefore, the property should be valued based on land value.

Petitioners presented the following indicators of value:

Market:	\$467,400
Cost:	Not presented
Income:	\$753,825

Petitioners contend the county has improperly valued the subject property as vacant land based on a speculative future highest and best use of the site, rather than as currently improved. Petitioners cited *Board of Assessment Appeals v. Colorado Arlberg Club*, 762 P.2d 146 (Colo. 1988) and claim that highest and best use cannot be speculative, and that Respondent has misapplied the decision because its holding did not address improved properties such as the subject. Petitioners cited Justice Erickson's concurring opinion in *Arlberg*, which states in part:

Consideration of future use should be restricted by tying the determination of actual value of real estate to concrete factual circumstances. . . .By definition, even a "reasonable" future use is to a large degree speculative because it allows for the taxing of non-existent improvements of an assumed type and quality.

Arlberg, 762 P.2d at 158 (Erickson, J., concurring).

Further, Petitioners contend that *Arlberg* presented evidence of a specific future use, not a speculative future use as has been applied by Respondent. Because a specific change in use for the subject site has not been identified, any consideration of future use is speculative and is prohibited. Petitioners contend the subject property is improved with a commercial building that is occupied, so that is the highest and best use. Respondent cannot know the future use of the site and valuing it as vacant land is speculative. Petitioners also cited the Assessors' Reference Library (ARL) Volume 3, page 2.3, which also refers to *Arlberg*, stating that speculative future uses cannot be considered in determining present market value. Petitioners also claim that the 83% increase in the 2015 assigned value for the subject property over the assigned value from the previous period shows that Respondent's speculative future use analysis of value is unreasonable.

Petitioner's witness, Mr. Todd Stevens, President of Stevens & Associates Cost Reduction Specialists, Inc., disclosed he prepared a contingent-fee consulting assignment to value the subject property. Mr. Stevens testified there was an 83.2% increase in the assessment for the subject property in 2015 over the previous assessment period despite there being no significant change in the property. The witness stated in his report: "For ad valorem tax purposes in Colorado the highest and best use of the subject is its current use." He considered all three approaches to value but determined

that market sales do not support the cost of new construction. Therefore, the cost approach to value was not applied. The witness presented a market approach with three retail building sales that occurred in 2013, within the base period. The sales ranged in building size from 2,189 to 10,678 square feet. One was a free-standing building and the other two were attached to separately owned buildings on both sides. The witness adjusted each sale for location, age, physical quality/appeal, excess land, and size and concluded to a value of \$120.00 per square foot of the improvements, which indicated a total value for the property of \$467,400. Mr. Stevens presented an income approach, using the base period leases of the two tenant spaces in the subject property plus two additional leases of restaurant space to determine the market rent for the property. After deducting an estimate for vacancy and expenses, the witness capitalized the estimate of net operating income to produce an indicated value by this approach of \$753,825. He gave most weight to the income approach and concluded to a final value for the property of \$750,000.

Respondent presented the following indicators of value:

Market:	\$1,636,300
Cost:	Not presented
Income:	Not presented

Respondent presented Mr. Greg A. Feese, a state Certified General Appraiser employed by the Denver Assessor's Office as witness. Mr. Feese testified the subject property's D-GT zoning is a high-density zone district along the high visibility Lincoln Street commercial arterial. He considered all three approaches to value and concluded that the value of the subject site is greater than the value of the property as improved. Therefore, the witness concluded that the property as improved is not the highest and best use. The improvements are an interim use, with a view to a reasonable future redevelopment use or assemblage for redevelopment with a higher density use, consistent with the current zoning. The witness determined that the cost approach to value is not relevant to the market value of the property and the income approach results in a lower value for the property than the land value alone, so it was not presented. The witness testified that his conclusion is not based on a speculative future use because there has been recent active redevelopment close to the subject. The witness testified that the classification of the property did not change because of his determination of highest and best use of the property.

Respondent presented three comparable sales that are located within approximately three blocks of the subject property and all occurred within the base period. Sale 1 has frontage on both the Broadway and Lincoln commercial corridors and was purchased for redevelopment with a higher density mixed use commercial/residential property. Sale 2 is on the east side of the same block as the subject and was subsequently redeveloped with a high-rise apartment property. Sale 3 is a portion of the site that was assembled for redevelopment with a Trader Joe's market. The sale prices ranged from \$109.40 to \$127.85 per square foot and in size from 10,950 to 45,704 square feet. Adjustments were made to the sales for date of sale and for a variety of physical features. The witness also made a downward adjustment to Sale 3 for atypical buyer motivation to acquire the last piece of the assembled site for Trader Joe's. After adjustments, the indicated values ranged from \$120.34 to \$123.89 per square foot. The witness gave most weight to Sale 1 because it has the same zoning as the subject and because of its Broadway and Lincoln Street frontage, and concluded to a value for the

subject land of \$121.00 per square foot. The total conclusion of value for the subject property was \$1,636,300, rounded, which included \$1,635,315 for the land plus \$1,000 for “token improvement value”.

Regarding the large increase in value of the property over the previous assessment period, Mr. Feese testified there were few Lincoln/Broadway corridor sales during the previous base period, but there were multiple sales of properties purchased for redevelopment during the 2015 base period supporting higher land values. The witness testified that no informed seller would sell the subject property for the \$750,000 value submitted by Petitioners’ witness that is based on income from the existing improvements when other properties in the vicinity have been selling for significantly higher prices.

Respondent also presented Mr. Curt Settle, Deputy Director of the Department of Property Taxation (DPT) as witness. Mr. Settle testified about the difference between current use and highest and best use as those concepts apply to ad valorem assessment. Current use is appropriate for determining classification, but classification is not to be confused with determining value. Relying primarily on the *Arlberg* decision, it is the DPT’s opinion that absent statutory directive otherwise, valuation for property tax purposes in Colorado should be based on the concept of highest and best use.

Respondent contends that a concurring opinion in the *Arlberg* case is not controlling; the *Arlberg* decision itself is controlling. The reasonable use of land as a vacant site has value to a developer and, in this case, the value of the subject land is higher than the value contributed by the improvements.

Respondent assigned an actual value of \$1,487,700 to the subject property for tax year 2015.

In rebuttal, Petitioners’ witness, Mr. Stevens, testified that based on the aerial photo presented in his report, there was not an abundance of redevelopment in this area, so Respondent’s conclusion that the highest and best use is for redevelopment is speculative. The witness testified that the assemblage sales used by Respondent were not arm’s-length transactions, so should not be considered. In his opinion, assemblage sales involve atypical buyer motivation, and do not represent market values. Respondent’s Sale 3 to Trader Joe’s supports that opinion because the buyer needed that last piece of land to complete its assemblage. Further, it was his opinion that unless a property is marketed by a broker, it is not a market value sale.

Petitioner presented insufficient probative evidence and testimony to prove that the subject property was incorrectly valued for tax year 2015.

The *ARL: Land Valuation Manual*, Volume 3, page 2.3, states the following regarding classification and use determination:

Classification for ad valorem property taxation is based on the current use of the property as of the assessment date. However, determining classification based on current use should not be confused with determining value.

...Unless otherwise directed by law, valuation for ad valorem property taxation should be based on a property's highest and best use.

“The requirement of valuing property at its highest and best use was affirmed by the Colorado Supreme Court in *Board of Assessment Appeals, et al, v. Colorado Arlberg Club*, 762 P.2d 146 (Colo. 1988). In that case the court concluded that “reasonable future use is relevant to a property’s current market value for tax assessment purposes.” The court further noted “our statute does not preclude consideration of future uses” and it quoted the American Institute of Real Estate Appraisers, referencing *The Appraisal of Real Estate* 33, 1983, 8th Edition, “In the market, the current value of a property is...based on what market participants perceive to be the future benefits of acquisition.” Reasonable future use is based on the actions and expectations of the market and is consistent with the highest and best use concept that requires the future use to be physically possible, legally permissible, financially feasible, and maximally productive.

The Appraisal Institute defines highest and best use as follows

The reasonably probable and legal use of vacant land or an improved property that is physically possible, appropriately supported, financially feasible, and that results in the highest value. The four criteria that the highest and best use must meet are legal permissibility, physical possibility, financial feasibility, and maximum productivity. *Appraisal Institute, The Dictionary of Real Estate Appraisal, Fifth Edition, 2010, Page 93.*

The Board finds no language in *Arlberg* to indicate that the findings in that case apply only to vacant land properties. In fact, the language used refers to “real property”. The Board also finds no language in *Arlberg* to support Petitioners’ claim that because a specific change in use for the subject site has not been identified, any consideration of future use is speculative and is prohibited. Therefore, the Board concludes that Petitioners’ claim that *Arlberg* has been misapplied by Respondent is not supported.

The Board is persuaded by testimony given by both parties that development of the full cost approach to value analysis is not relevant because the cost to construct a replacement structure on this site is not supported by the market. In analyzing the highest and best use of an improved property, one of the important questions to be answered is should the existing improvements be demolished to create a vacant site for a different use that will produce a higher return to the land? The Board finds this is a critical part of the valuation analysis for the subject property, which is improved with a small, low density commercial building more than 65 years old, on a major arterial in an area adjacent to the central business district that has had a significant amount of recent redevelopment. To answer that question, the land value of the property must be estimated. The Board finds that on cross examination, Petitioners’ witness testified that he did not know the value of the subject land. Because the witness concluded that the current use was the highest and best use, he did not consider the land value to be relevant. The Board disagrees.

While the existing small commercial building on the site continues to produce rental income, the Board is persuaded by Respondent's argument that the highest and best use of the property is for redevelopment with any one of the mix of higher density uses permitted by the current zoning and with other recent redeveloped properties in the vicinity. After comparing the value conclusion presented by Petitioners for the property under its current use with the estimated value of the land alone presented by Respondent, the Board finds that the highest return to the property is the value of the land. It follows that the most likely buyer of the subject property is a developer planning to redevelop the site on its own or to assemble it with adjacent lots for a larger redevelopment. Based on the land sale evidence presented by Respondent and common public knowledge that there is and has been a significant amount of redevelopment close to the subject property, the Board rejects the statement made by Petitioners' witness that there has not been an abundance of redevelopment in this area, so redevelopment of the subject property is speculative.

The Board finds that Respondent's approach to valuing the property did not result in a change in classification or a speculative value. The Board has considered the evidence of multiple recently redeveloped properties close to the subject and concludes that Respondent's highest and best use opinion as a redevelopment site is a supportable reasonable future use. Redevelopment activity was occurring close to the subject property during the base period. Therefore, the Board concludes that redevelopment of the subject property is not a distant future speculative use. The Board finds that Respondent did not rely on sales of land purchased for a single specific redevelopment use, such as apartment, office, or retail development sites. The sales used were simply nearby sites purchased for redevelopment. The Board concludes that Respondent's use of redevelopment site sales was appropriate. Highest and best use is a fundamental tenet of market value and the Board is persuaded that Respondent considered the income and sales approaches to value as well as the land value and found that the property has a higher value as a redevelopment site than as currently improved.

ORDER:

The petition is denied.

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 Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation of the respondent county, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S.

(commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

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

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

Section 39-8-108(2), C.R.S.

DATED and MAILED this 17th day of November, 2016.

BOARD OF ASSESSMENT APPEALS

Debra A. Baumbach

Debra A. Baumbach

Louesa Maricle

Louesa Maricle

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

Milla Lishchuk
Milla Lishchuk

