

BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203	Docket No.: 78104
Petitioner: COMMERCIAL NET LEASE C/O BEST BUY STORES, L.P., v. Respondent: DENVER COUNTY BOARD OF EQUALIZATION.	
FINAL AGENCY ORDER	

THIS MATTER was heard by the Board of Assessment Appeals (“Board”) on April 7, 2021, Samuel M Forsyth and Diane M. DeVries presiding. Petitioner was represented by Sarah M. Kellner, Esq. and Christopher A. Raftery, Esq. Respondent was represented by Charles T. Solomon, Esq., Assistant City Attorney with the City and County of Denver. Petitioner protests the actual value of the subject property for tax year 2019.

EXHIBITS AND EXPERT WITNESSES

The Board admitted into evidence Petitioner’s Exhibits 1-11 and 13-16. The Board admitted Respondent’s Exhibit C.

DESCRIPTION OF THE SUBJECT PROPERTY

Schedule Number 06193-00-181-000 1730 South Colorado Boulevard

The subject is a free standing, single-story retail building constructed in 1991. The building underwent refitting, including raising the wall height 4 feet and replacing the roof structure, in 1998. The gross building area totals 45,991 square feet with an average story height of 26 feet. The subject improvements have a total of four overhead doors, two truck docks and two grade level doors. The condition and construction are average. The site size is 153,332 square feet, yielding a land to building ratio of 3.33:1. The zoning is B-3, Shopping Center District. The current use is legal and conforms with zoning. There is 99-year reciprocal easement and operating agreement that restricts the use of the subject improvements and provides non-exclusive perpetual access with the neighboring shopping center parcels. The reciprocal easement and operating agreement contain restrictions that define any redevelopment of the subject parcel in the future.

The parties agreed that the highest and best use of the improvements as improved is for continued use of the existing improvements as a freestanding retail building.

Appealed CBOE Value:	\$15,460,200
Petitioner's Requested Value	\$10,300,000
Respondent's Requested Value:	\$15,460,200
BAA Concluded Value:	\$14,355,800

BURDEN OF PROOF AND STANDARD OF REVIEW

In a proceeding before this Board, the taxpayer has the burden of proof to establish, by a preponderance of the evidence, that the assessor's valuation is incorrect. *Bd. of Assessment Appeals v. Sampson*, 105 P.3d 198 (Colo. 2005). Proof by a preponderance of the evidence means that the evidence of a circumstance or occurrence preponderates over, or outweighs, the evidence to the contrary. *Mile High Cab, Inc. v. Colorado Public Utilities Commission*, 302 P.3d 241, 246 (Colo. 2013). The evaluation of the credibility of the witnesses and the weight, probative value, and sufficiency of all of the evidence are matters solely within the fact-finding province of the BAA, whose decisions in such matters may not be displaced on appeal by a reviewing court. *Gyurman v. Weld Cty. Bd. of Equalization*, 851 P.2d 307, 310 (Colo. App. 1993).

The Board reviews every case de novo. *See Bd. of Assessment Appeals v. Valley Country Club*, 792 P.2d 299, 301 (Colo. 1990). In general, a de novo proceeding before the Board "is commonly understood as a new trial of an entire controversy." *Sampson*, 105 P.3d at 203. Thus, any evidence that was presented or could have been presented in the board of equalization proceeding may be presented to the Board for a new and separate determination. *Id.*

APPLICABLE LAW

The market approach relies on comparable sales, as required under section 39-1-103(8)(a)(I), C.R.S., which states:

Use of the market approach shall require a representative body of sales, including sales by a lender or government, sufficient to set a pattern, and appraisals shall reflect due consideration of the degree of comparability of sales, including the extent of similarities and dissimilarities among properties that are compared for assessment purposes.

The cost approach involves estimating the cost of replacing the improvements to the property, less accrued depreciation. *Bd. of Assessment Appeals v. E.E. Sonnenberg & Sons, Inc.*, 797 P.2d 27 (Colo. 1990). Colorado law mandates that depreciation in the valuation of a taxpayer's personal business property be allowed annually from the base year to the date of assessment. *BQP Industries v. State Bd. of Equalization*, 694 P.2d 337 (Colo. App. 1984).

The income approach is a common method for calculating the value of commercial properties, especially apartment buildings, office buildings and shopping centers. *Sonnenberg*, 797 P.2d at 31. It generally involves calculating the income stream (rent) the property is capable of

generating, capitalized to value at a rate typical within the relevant market. *Id.*

ARGUMENT

Petitioner called as its first witness Kiernan (“K.C.”) Conway, MAI, CRE, CCIM, principal and co-founder of Red-Shoe Economics. Mr. Conway authored Exhibit 1, a two-part report. Mr. Conway stated that, “Although this assignment does not involve an appraisal opponent, I do have a temporary Colorado appraisal permit in January of 2021 which expires in July 2021.” (Exhibit 1, p. 5; Bates p. 5 of 46.)

The first part of Mr. Conway’s report detailed appraisal methodology for retail properties in fee simple, and the second part was a report on the state of the retail industry with focus on “Big Box” retail properties.

Mr. Conway opined that the only sure way to determine the value of fee simple interest in a property is to use sales that are fee simple, that are not encumbered by leases at time of sale and that are available for lease. Choosing other than vacant sales, he contended, comprises the credibility of an appraisal.

Mr. Conway stated appraisers often erroneously conclude that their appraisals of Big Box properties represent the fee simple interest. The common error, he opined, results when appraisers select leased-fee sales with leases in place, resulting in a value that represents the leased fee interest rather than the fee simple interest. Mr. Conway asserted that when employing leased-fee sales that are encumbered with leases, appraisers often do not conduct a thorough review of the entirety of the terms of the existing leases to determine the extent to which real property interests are leased, which requires determining the extent that there are non-realty aspects of a lease.

Mr. Conway testified that the only sure way to know the terms of a lease, in order to ensure that only aspects of the real estate are included in the lease terms, is to have the entirety of the lease available for review, including addenda, revisions and extensions. Mr. Conway also suggested that the terms of a lease are often impossible to determine due to reluctance of parties to release full leases. He stated that if the terms of a lease are available, appraisers should verify that the market rent and terms at the time of value (for ad valorem purposes, the appraisal date) are market rents. He testified that rents below or above stabilized market rent and rent structures than include non-realty items must be identified and the adjustments applied.

Mr. Conway stated that any sale with an existing lease in place must have adjustments to reflect what part of the consideration of the sale price is attributable to non-realty components of the lease. In order to properly account for these components, he contended an appraiser must have the entirety of the lease and be able to analyze all of the components of the lease. Non-realty items and lease aspects which must be identified and understood, he argued, include amortization of tenant improvements within the lease, original date of lease, escalations in leases, term of the lease, tenant improvements (e.g. signage), equipment included in the lease terms, initial store opening inventory, above market standard utility usage/expense, and above standard life- expectancy such as wear and tear on physical property elements like parking and loading docks.

In the second part of his report, Mr. Conway referenced the challenged state of the Big Box segment of the market. He offered that Big-Box retail stores are becoming functionally obsolete, having more floor space than needed, and economically obsolete because of online shopping associated with eCommerce technology, OMNI Channel, and e-tailers such as Amazon and Shopify that are reducing the need for physical stores. Mr. Conway's report was heavily weighted on national statistics showing the impact of eCommerce on retail overall, and the closing of stores with footprint floor area sizes like Big Box stores, including the resulting softening of rental rates. Regarding the regional market, he also commented about the state of the Big-Box market in Denver:

Colorado and its major metros, like Denver, have seen the same trend in store closings and shift to e-Commerce and online retail sales versus in-store shopping as the rest of the Country. The same national brand store names such as the former Dick's Sporting Goods, ToysR Us, Bed Bath & Beyond, Kmart, Sears, etc. have closed stores in Colorado. And the NNN-Lease structures in which contract rents were negotiated materially above market rent years in order to finance story expansions or amortize unique store construction features are present in Colorado Big-Box retail just as they are nationally.

(Exhibit 1, p. 33; Bates page 33 of 36.)

The evolution of use from National Brand Big Box stores when they become vacant is for owners to repurpose to alternate uses. Mr. Conway concludes, in order to more accurately reflect this transition, that the better choice of sales are sales that are vacant and available to lease because there are no leases in place. He defines these as "Fee Simple" sales. He states:

This market transition is evident in unencumbered lease-free sales. These sales more typically represent actual market value of the land and improvements absent the intangible value of the lease's terms.

(Exhibit 1, p. 19; Bates p. 19 of 46.)

Under cross-examination, Mr. Conway stated that he would first look at vacant and available for lease "Fee Simple sales" because he would not have to make property rights adjustments to these sales. Mr. Conway opined that a vacant sale is not necessarily a distressed sale. It was his belief that the most important selection criteria for a sale when appraising on a fee simple basis is property rights, an attribute more important than any other attribute, including location. Mr. Conway opined that if a leased fee sale (a sale in which a lease was in place at the time of sale) is used as a comparable, the appraiser must be aware of all of the terms and all the iterations of the lease or leases. Mr. Conway testified that there is no way to determine these factors unless an appraiser has access to the entirety of a lease. He stated that without access to the entire leases from the initial lease date and through the iterations during the term, an appraiser could not be certain whether the underlying leases have non real estate lease consideration, or that the rent at time of sale is market rent. While strongly recommending that only Fee Simple sales be used, he stated that he did not advocate a complete prohibition on using leased-fee sales.

Mr. Conway also authored Exhibit 7, titled “Expert Appraisal Review Report for Best Buy Denver County Property Tax Appeal.” This report was a USPAP Standard 3 professional appraisal review of the appraisal report produced by Respondent’s expert appraiser Richard Phinney. Mr. Conway made the overall determination that the value concluded by Mr. Phinney did not accurately conclude to a value of the fee simple interest on the subject property as required by Colorado Revised Statutes, and that Mr. Phinney’s value did not accurately account for the downturn in the retail market for Big Box stores. Mr. Conway’s primary criticism was that the selection of leased fee comparable sales, that is sales leased at time of sale, was a fundamental flaw. Mr. Conway stated that the leased fee sales comparables selected by Mr. Phinney indicate that Mr. Phinney lacked the background, training or industry knowledge about the Big-Box retail property to reliably make adjustments necessary to arrive at a value of the interest of the subject. Mr. Conway testified that Mr. Phinney made inadequate adjustments to the leased-fee sales and did not account for non-realty based elements such as assumed financing, and substantial personal property leased at time of sale that do not reflect real property aspects of value. He also called into question whether the lease rates of the leases in place at time of Mr. Phinney’s selected sales were reflective of the market. Mr. Conway further found fault in Mr. Phinney’s appraisal, stating that there is no discussion about any of the leases’ material terms like duration, inclusion of fixtures and equipment amortized in the rent, or rent escalations. He saw similar fault in Mr. Phinney’s analysis of the rental comparables, specifically lack of supporting information, and the use of market derived capitalization rates from leased fee sales that transacted outside of the 18-month data collection period.

Mr. Conway concluded that the lack of adjustments or discussion of lease terms demonstrated a lack of analysis necessary to arrive at a reliable conclusion of value of the fee simple interest of the subject. Mr. Conway further found fault with Mr. Phinney’s lack of consideration of the restrictive easement of the subject that restricts redevelopment in the future, stating that Mr. Phinney inaccurately characterized easements such as this as “typical.”

Petitioner called Kevin Kernan, MAI, as its second witness. Mr. Kernan is managing director in the Real Estate practice within the valuation Advisory Group of STOUT. He holds a Certified General Appraisal license with the state of Colorado. Mr. Kernan authored an Appraisal Report representing his opinion of the retrospective market value of the fee simple interest of the subject property.

Mr. Kernan considered the three traditional approaches to value: the replacement cost, the market (sales comparison), and income capitalization approaches. He concluded to the following values for each approach.

Income Approach	\$10,700,000
Cost Approach	\$11,800,000
Market Approach	\$10,100,000

For the income capitalization approach, Mr. Kernan stated that this method appropriately reflected the value of a stabilized property. His analysis developed an estimate of the market rental rate, an estimation of the market vacancy, projected operating expenses, and a capitalization rate that was taken against the net operating income to derive an estimate of market value.

For the market rent, Mr. Kernen identified six leases for similar use properties. Mr. Kernen stated he expanded the time search of the rent comparables from the 18-month data collection period (ending July 1, 2015) to June 30, 2018, or 30 months. The size of the leased comparables ranged from 15,000 sq. ft. to 57,019 square feet. The average size of the six rent comparables was 37,366. The range of distance of the rental comparables to the subject was .3 miles to 21.7 miles, averaging 14 miles. All of the comparable leases were NNN. The rent rate ranged from \$9.50 to \$26.00 per square foot, averaging \$14.00 per square foot before adjustments. Mr. Kernen adjusted for market conditions, location, tenant size, condition, and other lease terms (e.g. lease terms, tenant improvements, free rent). The largest adjustments were for location, an adjustment that was 20% and applied to all sales but rental comparable 1. The rent rates after adjustment ranged from \$13.15 to \$22.37 per square foot, averaging \$15.51 per square foot. Mr. Kernen reconciled to \$20.00 per square foot, NNN. The stabilized vacancy rate was projected to be 5% and the credit loss was projected to be 1%. Expense reimbursement income was projected to be \$105,165. Mr. Kernen observed that market rent is based on NNN reimbursement basis, where the tenant reimburses the landlord for their pro rata share of operating expenses. Mr. Kernen estimated the operating expenses to be 12.7% of the effective gross income. The resulting net operating income was \$846,421. Mr. Kernen developed a conclusion of overall capitalization rates from three methods. First, he reported market derived overall capitalization rates from leased-fee sales “obtained from and confirmed by CoStar.” Twelve sales were identified. The sale date of the market derived capitalization comps ranged from June 30, 2016 to March 9, 2018 with the median date being October 2017. The market derived capitalization rate of the sales obtained from and confirmed by CoStar ranged from 5.50% to 8.68, averaging 7.14% OAR. Second, he then provided investor surveys that “indicated a range of overall capitalization rates between 4.83% and 14.62% with an average overall capitalization rate range of 6.60% to 10.55%.” Last, he concluded with an analysis based on the Band of Investment to which he concluded to a range of a low capitalization rate of 7.41% to a high rate of 9.74%.

Mr. Kernen placed some emphasis on the market-derived rates obtained from and confirmed by CoStar. He added this caveat:

It is important to note; however, that those represent leased-fee transactions and the capitalization rates from those transactions are heavily dependent on the specific lease terms in place and the credit quality of the tenant for each specific property. The reliance on the lease in place and the credit worthiness of the tenant adds value that is inherently included in leased-fee transactions that is generally not tied to the real property improvements.

(Exhibit 2, p. 69; Bates. p 173.)

Mr. Kernen concluded to an OAR of 7.75% to which he “loaded” a discounted effective tax rate to account for property taxes of .13%, resulting in tax loaded OAR of 7.88%. Mr. Kernen applied the OAR to a net operating income of \$846,421, which yielded a value based on the income capitalization approach of \$10,700,000 (rounded).

Mr. Kernen developed a conclusion of value based on the market (sales comparison) approach. In developing a value based on this approach, Mr. Kernen stated:

The sales comparison approach is based on the principle of substitution, which states that when a property is replaceable in the market the value tends to be set at the cost of acquiring an equally desirable substitute property, assuming costly delays are not encountered in making the substitution.

In the case of properties similar to the subject, market participants analyze comparable properties based on price per square foot of net rentable area.

(Exhibit 2, p. 53; Bates p. 157.)

Mr. Kernan identified four sales for analysis. He stated that all of the sales selected were vacant a short time before being sold because all were either occupied by owner-users or available for lease. He elaborated on the comparable sale selection criteria in the Real Property Rights Conveyed in the Description of Adjustments part of the appraisal:

The first adjustment applied to the transaction price accounts for differences in the real property rights conveyed in the transaction. Some transactions convey more rights to the use of the property than other transactions. Fee simple transactions offer the highest form of ownership and transfer the full bundle of rights. Comparatively, properties encumbered by lease contracts are sold in leased fee transactions, whereby the acquirer does not acquire the full bundle of rights to use the property.

When trying to determine the value of the real estate, care must be taken when considering leased-fee sales as the indicator. Generally, properties encumbered by a lease are acquired by investors for the sole purpose to acquire the rental stream associated with the lease. For example, big box stores that are developed for a tenant, generally are leased at a rate that is tied directly to the actual construction costs over a long-term lease. This is due to the fact that their motivations are for business profit and not real estate investment. Therefore, most sales of leased big box stores are such that the rental payment is often justified by the business revenue potential and not the interest in the real estate alone. Accordingly, leased fee transactions are generally not appropriate when determining the underlying value of the real estate.

All of the comparable sales utilized in this analysis are fee simple transactions. Accordingly, no adjustments for differences in property rights conveyed are made to any of the improved sales.

(Exhibit 2, p. 55; Bates p. 159.)

The size of the improvements of the comparable sales ranged from 25,162 square feet to 79,965 square feet, averaging 47,455 square feet. The sale prices ranged from \$3,300,000 to \$9,500,000 averaging \$6,434,250. The sale price per square foot of the sales ranged, before adjustment, from \$90.04 to \$213.67, averaging \$144.37 per square foot. The dates of sale ranged from May 2017 to May 2018. The distance from the subject of the sales ranged from 7.3 miles to

13 miles, averaging 9.95 miles. Mr. Kernan made adjustments for market conditions, conditions of sale, location (ranging from +10% to +25%, averaging 16.25%, all locations deemed inferior), building size, condition and land to building ratio. After adjustments, the indicated values per square foot of the comparables were adjusted to \$171.64, \$152.03, \$124.38 and \$243.03, respectively averaging \$172.77. Mr. Kernan reconciled to a value on the sales comparison approach of \$220 per square foot or \$10,100,000.

Mr. Kernan also authored Exhibit 8, which he described as findings regarding the comparable properties utilized by Mr. Richard Phinney. Mr. Kernan repeated Mr. Conway's critique of Mr. Phinney's use of leased fee comparables sales (sales with leases in place), the lack of detail about the leases, and the lack of adjustments to the sale to account for the effect on the value of the fee simple interest of the leases in place.

Petitioner requested the Board reduce the value of the subject to \$10,300,000.

Respondent presented as its expert witness Richard Phinney. Mr. Phinney is employed by the Denver City Finance Department, Assessment Division. He is a licensed Certified General Appraiser in the state of Colorado. Mr. Phinney authored Exhibit A, Appraisal Report of The Real Property. He stated that: "The purpose of this analysis is to estimate the fee simple market value of the subject property for ad valorem purposes." (Exhibit A, p. 3.)

Mr. Phinney considered the three traditional approaches to value: the replacement cost, the market (sales comparison), and income capitalization approaches. He concluded to the following values for each approach.

Cost Approach	\$16,027,940
Income Approach	\$18,552,000
Market Approach	\$20,696,000

Regarding the income capitalization approach, Mr. Phinney stated: "The projection of a typical operating year's net operating income is the goal of income analysis and the most useable point of comparison between properties in the income approach." (Exhibit 2, p. 26.)

Mr. Phinney identified the following steps in arriving at net operating income: 1) project potential gross income; 2) deduct an allowance for vacancy and collection loss to determine effective gross income; and 3) deduct operating expenses to arrive at net operating income.

In the process of determining potential gross income, Mr. Phinney referenced the statutory requirement of determining the value of the fee simple interest in a property. He stated that market rent must be considered. He stated that market rent is the rental income that a property would most probably command in the open market. Mr. Phinney stated that rent that is other than market rent would result in the valuation of the leased fee interest only and not the fee simple interest. To that extent, Mr. Phinney stated it is necessary to report leasing levels of rent of similar properties leased within the eighteen months prior to the appraisal date.

Mr. Phinney identified four leases of comparable properties to determine the rent rate for

the subject. The size of the leased comparables ranged from 17,400 sq. ft. to 58,900 square feet. The average size of the four rent comparables was 35,992 square feet. Rental rates quoted were \$30.01, \$34.82, \$30.05 and \$24.94 per square foot, averaging \$29.96 per square foot. Vacancy rates ranged from 0% to 4% averaging 1%. Expense rates ranged from 2% to 19%, averaging 8.5%. Mr. Phinney stated that specific location and lease dates could not be provided due to statutory confidentiality requirements. In his appraisal report Mr. Phinney stated, "Rent rates are arrived at considering only leases negotiated in that eighteen-month period." (Exhibit A, p. 29.) During direct testimony, Mr. Phinney stated that the four lease comparables were within less than 2 to 4 miles from the subject. Mr. Phinney made adjustments to rent comparable one for effective age (5%) and for size (-5%), and to rental comparable two for size (-5%). He made no adjustment to rent comparable three, and a -3% adjustment to rent comparable three. The average rental rate of the four comparables after adjustments was \$29.33. Mr. Phinney reconciled to a rental rate of \$30.00 per square foot, a vacancy collection loss rate of 5%, and a non-reimbursed expense rate of 8%.

In developing a capitalization rate, Mr. Phinney stated that an overall rate derived from comparable base year sales was preferred. He preferred to reference derived capitalization rates from sales similar to the subject, rather than published rates of data derived from a broad set of data of sales that included sales not similar to the subject. Mr. Phinney also considered capitalization rates reported from published survey of investors. Mr. Phinney referenced capitalization rates from two sales in his sales comparison approach, of 6.0% and 6.2%. Mr. Phinney reconciled to an overall capitalization rate of 6.5%. Applying a 6.5% capitalization rate to a net operating income of \$1,205,880 yielded a value based on the direct capitalization income approach of \$18,552,000.

For the sales comparison approach, Mr. Phinney selected four sales. All four were leased at time of sale. The selection criteria emphasized in the comparable sale selection were size, proximity and timeliness of sales. The size of the comparable sales ranged from 23,118 sq. ft. to 58,884 sq. ft., averaging 33,081 square feet. The sale prices ranged from \$8,750,000 to \$19,650,000. The average sale price was \$13,287,500. The sale price per square foot ranged from \$333.71 to \$490.96 averaging \$421.17 per square foot. The distance from the subject property of the comparable sales was .3 miles, .1 miles, .1 miles and 3.1 miles, averaging .9 miles. Comparable one is adjusted 5% to account for its multi-tenancy layout yielding an adjusted sale price per square foot value of \$350.40. Comparable two is adjusted 24.4% to account for a below market rate lease negotiated in 2001 and -5% for size yielding an adjusted sale price per square foot of \$451.49 per square foot. Comparable three is adjusted -4% to account for an above market rent at time of sale and -5% for size yielding a sale price per square foot of \$446.77 per square foot. According to testimony in during direct examination, comparable sale 4 is adjusted -3% for size and -3% to account for personal property (e.g. racks and freezers) for an adjusted sale price per square foot value of \$452.97. The Board notes that the adjustment grid only indicates and calculates an adjustment for size, and incorrectly notes a sale price per square foot value of \$467.42. The adjusted sales price per square foot of the comparables are \$350.40, \$451.49, \$446.77 and \$452.97 (corrected) averaging \$425.41 (corrected). Mr. Phinney places most weight on comparable 2 (\$451.49 per square foot) and comparable 3 (\$446.77 per square foot). Mr. Phinney reconciled to a value of \$20,696,000 based on the sales comparison approach, or \$450.00 per square foot.

Mr. Phinney placed no weight on the value developed by the cost approach. The developed value for the sales comparison approach was \$20,696,000 and for the direct capitalization income approach \$18,552,000. Based on the quality and quantity of data, and the observation that the income approach best simulates the actions of the market, Mr. Phinney placed most weight on the value developed by income approach.

The Respondent requested that the Board sustain the value of \$15,460,200 set by the Denver County Board of Equalization.

FINDINGS AND CONCLUSIONS

Colorado case law requires that “[Petitioner] must prove that the assessor’s valuation is incorrect by a preponderance of the evidence in a de novo BAA proceeding.” *Bd. of Assessment Appeals v. Sampson*, 105 P.3d 198, 204 (Colo. 2005). Petitioner produced sufficient probative evidence to convince the Board that Respondent’s valuation of the subject for tax year 2019 is incorrect.

The Board finds the Mr. Phinney incorrectly analyzed the comparable rent data and overvalued the subject property. The Board’s finds Mr. Phinney’s conclusion of rent at \$30 per square foot excessive. The building size of Mr. Phinney’s comparables one and two were significantly less than the subject. Mr. Phinney was unable to provide the lease date of the leases from which he derived his comparable rental rates. These factors undermined Mr. Phinney’s rental rate conclusion. Considering all of the evidence presented, the Board determines that the subject’s rental rate is more appropriately calculated to be \$25.00 per square foot. The Board determines that the capitalization rate is more appropriately concluded to 7%. Accepting all other aspects of Mr. Phinney’s income approach, these changes yield a value of the fee simple interest value for the subject of \$14,355,800. The Board finds this is the correct value of the subject for tax year 2019.

Petitioner contended Respondent’s value did not appropriately address the downturn in the market for Big Box properties. The Board disagrees. The Board finds Respondent appropriately valued the subject using data proximate to the location of the subject, and finds that Petitioner failed to show that a downturn in the wider Big Box market (even assuming, without deciding, that it occurred) impacted the subject’s value.

Petitioner failed to convince the Board that the overall market for Big-Box retail uses – nationwide and regionally – is suffering a downturn in market appeal. The Board finds that the information and opinions regarding the Big-Box retail market analysis of the Petitioner lacked credibility in two aspects: 1) Petitioner provided neither an industry-established nor self-proposed definition of the physical elements that describe a “Big-Box” property, and; 2) Petitioner provided no analysis as to how the impact of the perceived market downturn of this class of properties effected properties in the local submarket where the subject exists. The data presented by Petitioner reflected the lease rates and vacancy rates of the subject neighborhood, demonstrating the strength of this submarket and also obviating the argument made by the Petitioner regarding the downturn of the retail market nationally and regionally.

Petitioner also argued, and the Board agrees, that assessors are obliged by statute to appraise the fee simple interest in properties for ad valorem property tax purposes. Petitioner contended that Respondent did not appraise the fee simple interest of the subject, but that Respondent appraised the leased-fee interest in the subject property. The Board disagrees.

Petitioner provided a detailed definition of fee simple vs. leased fee interest valuation. Petitioner referenced statute, Appraisal Institute guidelines, and expert analysis in asserting that the Respondent, by virtue of its comparable leased-sales selection, and lack of appropriate adjustments to the sales comparables, failed to account for the non-realty aspects and non-market based lease rates of the leases in place. On this basis, Petitioner criticized the sales used by Mr. Phinney in his sales comparison approach, and the comparable leases and the market extracted capitalization rates from leased fee sales in his income approach. However, Petitioner provided no compelling evidence to back up its concerns that there were lease factors for which the Respondent did not account in reaching its fee simple value for the subject. The Board finds that Petitioner neither specifically identified these allegedly unaccounted for lease aspects, nor identified needed and lacking adjustments to prove the Respondent's valuation approaches or value conclusion were flawed.

Mr. Kernan, the Petitioner's expert appraiser, and Mr. Conway, the Petitioner's market expert, opined that to calculate the value of a fee simple interest it is highly preferable to use vacant improved sales available for lease, and to overlook leased fee sales. The Board finds this approach, applied in this case, understated the value of the fee simple interest of the subject property, and is likely to do so applied to any property. The Board, having reviewed Petitioner's rental comparables, finds that the rental rate conclusion of \$20 per square foot understated the subject's value. Among the factors calling the reliability of this conclusion into question is the great distance of several of the comparables from the subject. Petitioner strayed far away from the subject neighborhood to access its sales. In doing so, the Petitioner ignored available leased fee sales that were proximate to the subject and shared the dynamic and viable nature of the subject property and the subject neighborhood. In choosing disparately located vacant and available for leased fee simple sales, in lieu of these more proximate lease encumbered leased fee sales, Mr. Kernan could not specifically enumerate reasons why these leased fee sales were not indicative of fee simple value. He merely suggested that determining any non-realty or non-market aspect components of these sales would be too "challenging."

However, while expressing great concern with the difficulty of confirming the terms of leases in leased fee sales, in the income approach Mr. Kernan did identify and rely on comparable leases for establishing the rent rate and gave consideration to the concluded capitalization rate by referencing CoStar reported capitalization rates for 12 leased fee sales.

The Board dismisses Petitioner argument that leased fee sales are so challenging or difficult to confirm or adjust that only vacant sales available for lease should be chosen as comparables. The Board finds that the Respondent's appraisal acknowledged the need to determine the fee simple value, referenced the need to identify factors in leased fee sales that need to be considered to derive fee simple interest value, and made adjustments to take these factors into account. The Board agrees that known factors that affect the fee simple value of a sale must be adjusted for when necessary, but disagrees with Petitioner's assertion that these factors can only be known if

the entirety of a lease is available for inspection and analysis. The Board finds that due diligence, that is the undertaking of appropriate and peer consistent confirmation processes, based on publications of market acknowledged sources such as CoStar and CompStak, and the proper analysis of factors discovered in due diligence, conforms to the standard of deriving the value of fee simple interest for ad valorem property tax purposes. The Board determines that the Respondent's conclusion of value, and manner in which the conclusion was reached, is a valuation of the fee simple interest of the subject property.

Finally, the Board addresses the Petitioner's challenge that Respondent's value did not take into account the impact of the redevelopment, cross easement restrictions that encumber the subject property. The Board finds Petitioner failed to show this factor impacts the subject's value. Mr. Kernen testified that the only valuation approach which might show an impact on value due to this factor was the cost approach. Mr. Kernen stated that his value conclusion within the cost approach had no impact on his final conclusion of value. Mr. Kernen also stated that this factor did not "depress" the value conclusion of the subject. The Board agrees with Mr. Kernen.

The Board undertakes no analysis of the value conclusions of the cost approach developed by either party. Both parties' appraisers concluded that their concluded values under the cost approach had no bearing on their ultimate determination of value.

ORDER

The petition is **GRANTED**. The Board finds that Petitioner has met its burden of proving that the County's 2019 valuation of the fee simple interest of the subject property was incorrect, and further finds that the value should be \$14,355,800. The Denver County Assessor is directed to change his/her records accordingly.

APPEAL RIGHTS

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation of the respondent county, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

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

If the Board does not recommend its decision to be a matter of statewide concern or to have

resulted in a significant decrease in the total valuation of the respondent county, Respondent may petition the Court of Appeals for judicial review of such questions within thirty days of such decision.

See § 39-8-108(2), C.R.S. (rights to appeal a tax protest petition); *see also* § 39-10-114.5(2), C.R.S. (rights to appeal on an abatement petition).

DATED and MAILED this 25th day of August, 2021.

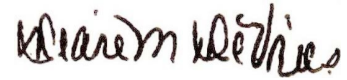
BOARD OF ASSESSMENT APPEALS:

Drafting Board Member:



Samuel M. Forsyth

Concurring Board Member:



Diane M. DeVries

*Concurring without modification
pursuant to § 39-2-127(2), C.R.S.*

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



Stephanie Hinojos