

DEBATING THE HOT TOPICS IN PROPERTY TAX LITIGATION

I. Retail/Big Box Issues

After more than a decade, the valuation of big-box retail stores is still contested in some jurisdictions. The so-called “dark store theory” really encompasses a number of issues including whether occupied/leased or vacant properties are comparable properties, debates over the definition of ‘fee simple’ and issues regarding highest and best use and the appropriate selection of approaches to value. Court cases are inconsistent across the country.

A. Dark Store Theory

1. *Lowe’s Home Centers, LLC v. City of Wauwatosa*, 964 N.W. 2d 547 (Ct. App. Wi. 2021)
2. *Lowe’s Home Centers, LLC v. City of Delavan*, 985 N.W. 2d 69 (Wi. 2023)

B. Fee Simple

1. *Rancho Cincinnati Rivers. LLC v. Warren Cnty. Bd. Of Rev.* 177 N.E. 2d 256 (Oh. 2021)
2. *Menard, Inc. v. City of Escanaba*, 891 N.W. 2d 1 (Mi. Ct. App. 2016)

C. Highest and Best Use

1. *Walgreens Eastern Co. v. Town of W. Hartford*
2. *The Appraisal of Real Estate, 15th Ed.*

D. Appropriate Approaches to Value

1. *Menard, Inc. v. City of Escanaba*, 891 N.W. 2d 1 (Mi. Ct. App. 2016)(Cost approach)

II. Office – Post COVID

Since COVID, work-at-home and return-to-office policies have made the valuation of office space challenging. With many long-term leases just now or not yet coming to an end, estimating vacancy becomes difficult. Will there be an across-the-board increase in vacancy or will there be more specific winners and losers in the multi-tenant office world? Add to that the debate over build-to-suit corporate office headquarters and assessing office buildings seems not so simple anymore.

A. Declining Vacancy – Temporary or the New Normal?

1. What evidence is sufficient?
 - a. *Bystrom v. Equitable Life Assur. Soc. of U.S.*, 416 So. 2d 1133 (Fla. 3d DCA 1982).

B. Winners and Losers

1. Across the board or select properties?
2. What evidence is sufficient?

C. Corporate Headquarters

- a. *Wellmark, Inc. v. Polk Cnty. Bd. of Rev.* 875 N.W. 2d 667 (Ia. 2016)

- b. *Freedom Fed. Saving & Loan Ass'n v. Dept. of Rev.* 801 P. 2d 809 (Or. 1990)

III. Build-to-Suit Leases

Should long term lease rates be used in an income approach? Are they reflective of market rent?

A. Features

1. Long term
2. Locked-in terms
3. Based on cost?

B. Reflective of market value?

1. *Lowe's Hiw, Inc. v Marion Cnty. Assessor,*

IV. Hotels

Litigating hospitality properties is becoming less hospitable. Arguments over the existence and influence of intangibles in real estate is a multi-faceted issue that the courts are still ferreting out.

A. Intangibles

1. Branding
 - i. *RRI Acquisition Co. v. Super. Of Assessments*
2. Franchise
 - i. *The Appraisal of Real Estate, 15th Ed.*
3. Management agreement
 - i. *Hotels and Motels – Valuations and Market Studies*
 - ii. *The Appraisal of Real Estate, 15th Ed.*
4. Workforce in place
 - i. *Boise Cascade Corp. v. Dept of Rev.*
5. Creditworthiness
 - i. *RC Springfield 2007 LLC v. Lane Cnty. Assessor, 2017 Ore. Tax LEXIS 85 (Or. Tax 2017)*
 - ii. *McGrath's Pub. Fish House v. Marion Cnty. Assessor, Or. Tax Ct. 2022 Ore. Tax LEXIS 21*

B. Restaurant Space

1. *Singh v. Walt Disney Parks and Resorts, U.S. 325 So. 3d 124 (Fla. 5th DCA 2020)*

C. Convention Space

1. *Aurora Convention Center Hotel, LLC v. Adams Cnty. Bd. Of Equal. 2022 Colo. App. 2022 LX 29502 (Ct. App. Co. Div 7 2022)*

V. Litigation Strategies

Litigating property tax cases comes with its own unique set of issues and requires a unique skill set to achieve the best results.

A. Discovery

- a. Requests for Production
 - i. Time frame of documents
 - ii. Relevance
 - b. Interrogatories
 - c. Requests to Admit
 - i. Expediting trial
 - d. Discovery Beyond the Rules of Civil Procedure?
- B. Depositions
- a. When and where?
- C. Pre-trial motions
- a. Motion in limine
 - i. Violation of law
 - ii. Violation of professional appraisal practices
 - 1. Rule 702/*Daubert*
 - 2. *Conduit for hearsay*
- D. Trial Tactics
- a. Expert Witness Selection
 - b. Direct Exam of Experts
 - i. Critique of opposing expert
 - 1. *Nowitzke v. State*, 572 So. 2d 1346 (Fla. 1990)
 - c. Cross Exam of Experts
 - i. Use of other appraisals
 - 1. *Ex parte Shepperd*, 513 S.W. 2d 813 (Sup. Ct. Tx. 1974)
 - d. USPAP
 - e. Use of authoritative texts
 - f. Post-valuation date evidence
 - i. *Bystrom v. Equitable Life Assur. Soc. of U.S.*, 416 So. 2d 1133 (Fla. 1982)
 - ii. *Lee Cnty. v. T&H Assoc. LTD*, 395 So. 2d 557 (Fla. 2d DCA 1981)
- E. Post-trial/Appeal issues