



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RRHC WILMINGTON, LLC, MIM V,  
LP, CHIPPEY STREET  
ASSOCIATES, and COMMERCE  
ASSOCIATES LP, Below Appellants,

Appellants,

v.

NEW CASTLE COUNTY OFFICE  
OF FINANCE AND NEW CASTLE  
COUNTY BOARD OF  
ASSESSMENT REVIEW, Below  
Appellees,

Appellees.

Case No. 303, 2014

Court Below: Superior Court  
of the State of Delaware in and  
for New Castle County

C.A. No. N13A-08-004 MJB

**APPELLANTS' OPENING BRIEF**

MONZACK MERSKY MCLAUGHLIN AND BROWDER, P.A.

Melvyn I. Monzack (#137)  
Michael C. Hochman (#4265)  
1201 North Orange Street, Suite 400  
Wilmington, DE 19801  
(302) 656-8162

Attorneys for Below Appellants/Appellants

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## NATURE OF PROCEEDINGS

It is well established under Delaware law that the power to tax must be strictly construed.<sup>1</sup> “In every case of doubt, therefore, such statutes are construed more strongly against the taxing power, and in favor of the citizen, because burdens are not to be imposed, or presumed to be imposed, beyond what the statutes expressly and clearly import.”<sup>2</sup> The case before this Court should be viewed in the context of New Castle County’s failure to conduct a County-wide property assessment for more than 30 years. Here, the New Castle County Board of Assessment Review’s (the “Board”) decision not to reduce Appellants’ 2013 property tax assessments is unconstitutional. The Board ignored Appellants’ competent evidence of substantial overvaluation, *i.e.*, current property values *trended-back* to the Board’s baseline year of 1983, and instead applied stale data from 1983, violating both the constitutional requirement of uniformity and the statutory standard for determining a property’s fair market value – its “true value in money.”<sup>3</sup> The Superior Court’s May 30, 2014 Opinion and Order (the “Opinion”)<sup>4</sup> endorsed this unconstitutional analysis, and its affirmance of the Board’s denial

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<sup>1</sup> See, e.g., *Town of Fenwick Island v. Sussex Sands, Inc.*, 1990 Del. Super. LEXIS 370, at \*6-7; *Consolidated Fisheries Co. v. Marshall*, 32 A.2d 426, 429 (Del. Super. 1943), *aff’d by*, 39 A.2d 413 (Del. 1944).

<sup>2</sup> *Consolidated Fisheries Co.*, 32 A.2d at 429 (*emphasis added*).

<sup>3</sup> 9 Del. C. §8306(a).

<sup>4</sup> Attached hereto as Exhibit A.

constitutes reversible error. Uniformity and true value in money standards cannot be met by relying on stale data more than 30 years old, particularly when current values factored-back to the baseline year of 1983 exist that take into consideration current market conditions.

Appellants are the owners of office condominium units in One Commerce Center, 1201 N. Orange Street, Wilmington, Delaware. In 2012, these owners submitted appeals of the commercial/industrial assessments for their units to the Board (collectively, the “Appeals”).<sup>5</sup> On appeal, the fundamental issue is whether the Superior Court incorrectly concluded that the Board met its burden of satisfying the constitutional requirement of uniformity and the statutory standard of true value in money because its members failed to consider competent evidence demonstrating over-assessment of Appellants’ properties. The Board’s members relied on a 30-year old assessment from 1983 – which creates an inequitable landscape for property owners. Instead of considering Appellants’ competent evidence of overvaluation – current market value *trended back* to the base year of 1983 – the Board acted contrary to law by applying only stale values from 1983, coincidentally, the same year in which Appellants’ condominium units were

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<sup>5</sup> Because the condominium units are all located in the same building, the Appeals reflected common information and detail.

constructed. More than thirty years later, there still has not been a County-wide reassessment which would reflect the depreciation, deterioration, and functional obsolescence that One Commerce Center has experienced (all factors which this Court has recognized as relevant in other assessment cases)<sup>6</sup>.

The Superior Court committed reversible error in concluding that the Board had considered Appellants' trended-back data – but found Appellees' 1983 values “more credible” than the trended-back data. A review of the record and the Opinion reflects that the Board ignored Appellants' evidence, under the mistaken belief that the 1983 data was the “best evidence,”<sup>7</sup> preempting any other dispositive data that Appellants presented. Although the Board *acknowledged* Appellants' trended-back analysis, it never actually *considered* the probative value of Appellants' evidence. The record also reflects the Board members' frustration and sentiment that the 30-year-old assessment data as applied to Appellants' properties was inequitable. However, several Board members understood –

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<sup>6</sup> See, e.g., *New Castle County v. New Castle Bd. of Assess. and Verizon Delaware, Inc.*, 970 A.2d 257 (Del. 2009); *Seaford Assocs. v. Bd. of Assess.*, 539 A.2d 1045, 1049-50 (Del. 1988); *Excelsior Assocs., L.P. v. New Castle County Dep't of Fin.*, Goldstein, J., 1995 Del. Super. LEXIS 43, at \*20, *aff'd by New Castle County Dep't of Fin. v. Teachers Ins. & Annuity Ass'n*, 669 A.2d 100 (Del. 1995).

<sup>7</sup> See Opinion at 20. See also Board's July 15, 2013 written decision (the “Decision”) at 4, attached hereto as Exhibit B. The record on appeal to the Superior Court (the “Record”), which includes a copy of the Board's written Decision, is included in the accompanying Appendix. Citation to the Record is referred to herein as “A#####/R#####” – referencing both the location in the Appendix and original Record).



erroneously – that in effect, “their hands were tied.” Because actual data from 1983 existed, they believed that they had no choice but to rely upon that data to the exclusion of Appellants’ competent evidence.<sup>8</sup>

In view of Appellants’ competent evidence of overvaluation, in contrast to the Board’s unconstitutional application of outdated 1983 data, the Superior Court should have overturned the Board’s denial and reduced the assessments to the requested levels. “When hearing a taxpayer’s appeal, the role of the Board of Assessment Review is to determine whether the County’s assessment is correct ‘in light of the facts produced at [the] hearing.’”<sup>9</sup> If a taxpayer presents competent evidence of substantial overvaluation, the Board must not ignore that evidence and should hear the entire appeal.<sup>10</sup> In contravention of the Supreme Court’s holding in *New Castle County Dep’t of Fin. v. Teachers Ins. & Annuity Ass’n*,<sup>11</sup> here the Board, in essence, declined to hear the entire appeal in that it refused to consider current fair market value trended-back to 1983 and relied exclusively on data from 1983, unadjusted for current market factors.

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<sup>8</sup> See March 20, 2013 Hearing Transcript (“Tr.”) at 40 (A62/R000050).

<sup>9</sup> *New Castle County v. New Castle Bd. of Assess. and Verizon Delaware, Inc.*, Babiarz, Jr., J., 2008 Del. Super. LEXIS 162, at \*3, *aff’d* by *New Castle County v. New Castle Bd. of Assess. and Verizon Delaware, Inc.*, 970 A.2d 257 (Del. 2009); *see also* 9 Del. C. §1318.

<sup>10</sup> *Verizon*, 970 A.2d at 257; *see also New Castle County Dep’t of Fin. v. Teachers Ins. & Annuity Ass’n*, 669 A.2d 100, 101 (Del. 1995).

<sup>11</sup> 669 A.2d at 102-04.

On appeal, the Superior Court concluded that “the Board considered the evidence presented by Appellants, found it lacked credibility in the face of the actual 1983 data, and denied Appellants’ request for reassessment.”<sup>12</sup> However, the Superior Court largely relied on the Board’s July 15, 2013 written Decision denying the appeals. A review of the transcript of the Hearing<sup>13</sup> reflects that, while the Board acknowledged the existence of Appellants’ trended-back analysis, it effectively ignored that data in favor of information with which it was already familiar, *i.e.*, actual data from 1983. The Board’s written Decision provided a refracted summary of the individual Board members’ analyses at the Hearing prior to voting on the appeals. The Board delivered its oral decision immediately at the conclusion of the Hearing on May 15, 2013. The written Decision – including an analysis that the Board did not utilize in its transcribed deliberations at the Hearing – was issued two months later – July 15, 2013.

In essence, the Board effectively failed to consider that 2012 values trended back to 1983 represent the *true* fair market value of the condominium units, *i.e.*, the “true value in money,” that were the subject of Appellants’ request for reduced assessments. “Uniformity merely requires that present market value be factored

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<sup>12</sup> Superior Court Opinion at 20.

<sup>13</sup> The Board heard the appeals on March 20, 2013 and May 15, 2013. The two dates are referred to collectively herein as the “Hearing.”

back to a base tax year. Market value, in turn, may be determined by using any of the three recognized methods, or any combination thereof. Thus, the preference for present market value and the need for uniformity are harmonized.”<sup>14</sup>

When compared against the transcript from the Hearing, it is clear that the members did not measure Appellants’ trended-back data against the stale 1983 figures that it applied. There was no actual analysis of the “credibility” of Appellants’ evidence as the Superior Court found. A line-by-line review of the Hearing transcript reveals that the Board did not once reference the credibility of Appellants’ evidence and in fact, complimented Appellants’ presentation.<sup>15</sup> In failing to substantively address Appellants’ data, the Board did not discharge its constitutional, statutory, and common law duties by failing to consider competent evidence of overvaluation presented to the Board.

The failure to consider the most accurate figures reflecting current market value, factored back to the base year of 1983, was arbitrary and capricious requiring reversal of the Superior Court’s decision affirming the Board at the administrative level. This is Appellants’ jointly-submitted Opening Brief challenging the Superior Court’s affirmation of the Board.

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<sup>14</sup> *Seaford Assocs.*, 539 A.2d at 1049-50.

<sup>15</sup> *See, e.g.*, May 15, 2013 Hearing Transcript (“Tr.”) at 30-33, 70 (A103-106, 143/R000091-94, 131).

## SUMMARY OF ARGUMENT

The Superior Court acted contrary to law in affirming the Board's denial of Appellants' property tax appeals. Neither the Superior Court on appeal, nor the Board of Appeals at the administrative level, gave actual consideration to Appellants' competent evidence of overvaluation. The Board refused to weigh Appellants' trended-back analysis to the benchmark year of 1983, which was credible and unrebutted. The recorded transcript is clear, although the Board's written Decision, issued two-months after the hearing and the Board's oral decision, includes a substantially and retroactively buttressed revision of the hearing transcript. Despite this divergence, the Superior Court relied on the written Decision and not the Hearing transcript, which is the only evidence of the Board's deliberations. The Board's written Decision, and the Superior Court's subsequent affirmation, were arbitrary and capricious. Accordingly, the refusal to reduce Appellants' property tax assessments must be reversed.

## STATEMENT OF FACTS

### THE CONDOMINIUM UNITS IN ONE COMMERCE CENTER

All of Appellants' condominium units are located in One Commerce Center.<sup>16</sup> One Commerce Center was constructed in 1983. Assessment of One Commerce Center is currently more than twice that of "peer" buildings.<sup>17</sup> The building consists only of commercial office space, there is no on-site parking or retail space. It is not a "green" or "high tech" building. The building has a substantially higher office vacancy than it did in 1983. In short, One Commerce Center has experienced "functional obsolescence," which requires a proportionately-reduced assessment from its 1983 assessment.<sup>18</sup>

### THE PARTIES

APPELLANTS: RRHC Wilmington, LLC, owns the third floor located within One Commerce Center. MIM V, LP owns the fourth floor. Chippey Street Associates owns the fifth and sixth floors. Commerce Associates LP owns the seventh, eighth, and ninth floors. Commerce Associates LP, successor-in-interest

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<sup>16</sup> One Commerce Center is an office building located at 1201 N. Orange Street in Wilmington, Delaware and is comprised of eleven floors. Each floor subject to appeal consists of 4,755 square feet. Each of Appellants' condominium units encompasses an entire floor of the building.

<sup>17</sup> May 15, 2013 Tr. at 11 (A84/R000072); March 20, 2013 Tr. at 18-19 (A40-41/R000028-29); *see also* Appeals Data Spreadsheet attached as Exhibit B to each of the Appeals (and attached hereto separately as Exhibit C).

<sup>18</sup> *See Seaford Assocs.*, 539 A.2d at 1049-50 (Supreme Court recognized factor of functional obsolescence in decision to reverse lower court because Board's refusal to consider competent evidence of overvaluation based on the need for uniformity was arbitrary and erroneous as a matter of law).

to 1000 Commerce Center, LP, owns the tenth floor.

**APPELLEES:** New Castle County Board of Assessment Review (the “Board”) is the statutory body responsible to hear appeals from any property owner alleging that the property owner’s property has been improperly assessed for purposes of property taxation. *See 9 Del. C. §8318(1)*. New Castle County Office of Finance (the “County”) is a part of New Castle County, a political subdivision of the State of Delaware. The County set the assessments at issue before the Board and now this Court.

**THE APPEAL TO THE BOARD**

On March 15, 2012, Appellants filed separate appeals with the Board for each condominium unit, challenging the property tax assessment of the individual properties as the County had previously imposed.<sup>19</sup> The County had assessed each of Appellants’ condominium units at \$432,900.00<sup>20</sup>. Appellants requested that each of the assessments be reduced to \$200,200.00, reflecting a fair and uniform assessment of \$42.31 PSF. The requested \$42.31 PSF is the current assessment for Unit 100B in One Commerce Center, which is currently used as a vending area.<sup>21</sup>

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<sup>19</sup> Appellants’ expert, Richard Stat, prepared a letter and attachments, which accompanied each of the Appeals. Copies of each of the Appeals with common materials are included with the Record at A147-251/R000134-238, A261-612/R000246-564.

<sup>20</sup> The equivalent of \$91.48 per square foot (“PSF”).

<sup>21</sup> Unit 100B was created in 1993 as a result of subdividing Unit 100 into Unit 100A and Unit 100B. Unit 100B’s assessment was not appealed.

Appellants presented a detailed analysis of the data supporting their position that the current assessments are disproportionately high. Their written submissions contained a comprehensive analysis of relevant market values, assessment comparisons with peer buildings and comparative valuation utilizing the income approach<sup>22</sup>, integrating the significant data points reflected in the Final Correlation of Value Breakdown.<sup>23</sup>

Here, consistent with controlling Delaware Supreme Court and Superior Court precedent, Appellants' expert demonstrated that current market value through (1) the income valuation method and (2) the comparable sales value method – both trended-back to 1983 – produces more accurate and equitable values for assessment purposes than the County's assessment based solely on historic 1983 values.<sup>24</sup> At the requested \$42.31 PSF, the assessed values would be fairly and uniformly positioned with respect to comparable professional office buildings in Wilmington, including larger high-rise buildings.<sup>25</sup> <sup>26</sup> In 1993, Unit 100B was

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<sup>22</sup> The three principal valuation approaches generally accepted and used in determining the fair market value of real estate are: comparable sales (or market), income capitalization, and reproduction cost. *Verizon*, 2008 Del. Super. LEXIS 162 at \*11, n. 20.

<sup>23</sup> See Section VI (Final Correlation of Value) of each Appeal, attached separately hereto as Exhibit D.

<sup>24</sup> See *Teachers Ins.*, 669 A.2d 100.

<sup>25</sup> For example, 300 Delaware Avenue (assessed at \$43.65 PSF), the Citibank (formerly DuPont) Brandywine Building (assessed at \$45.19 PSF), and the DuPont Building (assessed at \$44.42 PSF), as well as smaller office buildings with average assessments of \$47.64 PSF, e.g., 1700 Wawaset Street, (doctors' office assessed at \$32.19 PSF) and 1716 Wawaset Street (attorneys'

assessed by the County at \$42.31 PSF. The County's own valuation of Unit 100B confirms that the proposed recalibrated assessments for Appellants' units *in the same* building are fair and accurate.<sup>27</sup>

Appellants' expert applied a 10% capitalization rate to the income approach of valuation<sup>28</sup> yielding 2012 values ranging from \$218,655<sup>29</sup> to \$411,880<sup>30</sup>, with an average of \$315,268.<sup>31</sup> Discounting this average value back to 1983 for uniformity at a conservative discount rate of 2% per year yielded a 1983 value of \$177,531, or \$37.34 PSF based on 4,755 square feet per floor.<sup>32</sup> Appellants' expert also applied

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office assessed at \$52.27 PSF). *See* Appeals Data Spreadsheet – (Exhibit B to Appeals and attached hereto as Exhibit C). Unlike One Commerce Center, both Wawaset Street examples include on-site parking.

<sup>26</sup> At the requested value of \$42.31 PSF, the assessed value trended-back to 1983 for uniformity is 35% of the average of sales values within One Commerce Center from 1993 to 2005, as compared to 31% for four comparative sales of other properties presented from 2000 to 2006. *See* Appeals at Section VI (Final Correlation of Value) (Exhibit D hereto).

<sup>27</sup> Although as Appellants included in their written submissions and during the Hearing, Unit 100B is a small vending, systems, and electronics area, the build-out costs were as high or higher than those for other floors because of the complicated security and monitoring systems that were installed, which included amenities and features of the building that benefitted all unit owners and tenants. Moreover, the County did not offer *any* explanation as to how it calculated the assessment of Unit 100B, which seems at-odds with its opposition to Appellants' empirical analysis for reduction of units within the same building.

<sup>28</sup> As applied to units 500 and 1000.

<sup>29</sup> For tenth floor assuming 10% vacancy.

<sup>30</sup> For fifth floor assuming 0% vacancy.

<sup>31</sup> May 15, 2013 Tr. at 16-17 (A89-90/R000077-78).

<sup>32</sup> Appellants' expert explained at the Hearing that the Consumer Price Index ("CPI") for the Philadelphia-Wilmington area over the period from 1983 to 2012 averaged 3.06% per year. It should be noted that applying a lower discount rate of 2% per year results in a higher 1983 value than would be obtained if the CPI had been selected as the discount rate, as discount rate and 1983 value vary in opposite directions. *See* May 15, 2013 Tr. at 17-18 (A90-91/R000078-79).



a 9% capitalization rate in the same manner, which yielded a 1983 value of \$41.48 PSF.<sup>33</sup> The current assessment of \$91.48 PSF is disproportionate and excessive, particularly when compared with significantly larger, more modern, and more expensive buildings like the Bank of America complex in Wilmington<sup>34</sup> and the Hercules corporate headquarters complex in Wilmington<sup>35</sup>. Equity and uniformity require that the assessments for the units within One Commerce Center be reduced to the requested value.

#### **THE HEARING BEFORE THE BOARD**

At the Hearing, Appellants' expert, Richard Stat, provided oral testimony to explain the income approach method utilized in the written Appeals and, for purposes of calculating a fair and equitable assessment, explained how the values

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<sup>33</sup> May 15, 2013 Tr. at 16 (A89/R000077). The Table of Appraisals and Sales that accompanied the transmittal letter for the assessment appeal forms further supported Appellants' requests for reduction. *See* Exhibit A to the written Appeals (A240/R000227), attached separately hereto as Exhibit E. That spreadsheet reflected all known appraisal and sale data points generated within One Commerce Center since 1993, discounted by a 6% annual discount rate, to produce a factored-back to 1983 average value of \$42.11 per square foot – a figure nearly identical to the \$42.31 PSF requested by Appellants. At the March 20, 2013 hearing, Appellants' expert offered to explain the sales comparison approach used, including the fact that the discount rate used in this method was based on the implicit discount rate relating 1983 assessments to later sales of comparable buildings. This calculation was included in both the original and redacted version of the spreadsheet that the Board accepted at the Hearing (A250/R000237 and A251/R000238, respectively). When Appellants' expert offered to orally explain the comparable sales method used, which included the discount rate selection calculation, the Board declined.

<sup>34</sup> As of 2012, office portion assessed at approximately \$93.21 PSF. *See* March 20, 2013 Tr. at 16 (A38/R000026); *see also* Appeals Data Spreadsheet at Exhibit C; VI (Final Correlation of Value) at Exhibit D.

<sup>35</sup> \$102.06 PSF – later reduced on appeal by stipulation to approximately \$71.43, excluding parking. *Id.*

were trended back from 2012 to 1983 to satisfy the uniformity requirement under the Delaware Constitution. Mr. Stat's testimony paralleled the written submissions provided well in advance of the first hearing date.<sup>36</sup> However, the record reflects that the Board members were not familiar with Appellants' appeal materials.<sup>37</sup>

The Board incorrectly assumed that the sale numbers from circa 1983, and the County's income method using hypothetical 1983 income parameters, were the only data the Board could consider.<sup>38</sup> Simply stated, "the Board may not ignore competent evidence of over-valuation."<sup>39</sup> The record is replete with comments from the Board reflecting that its members were unwilling to consider Appellants' competent evidence of overvaluation – even in light of the Board's attorney's statement that the Board could consider trended-back data. For example:

[Board Member Victoria Bandy]: Okay. Article 6 of our rules, Section 6, subparagraph F, if the appellant has not presented any competent evidence of substantial overvaluation the Board shall either on the application of the County or sua sponte deny the appeal without receiving further testimony. *The entire basis for the appeal is 1983 market value. That's all we can consider.*<sup>40</sup>

[Board Member Steve Larrimore]: The only thing I'd say is that *in as much as the actual information having to do with what the income was in 1983 is quite*

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<sup>36</sup> See generally March 20, 2013 Tr. and May 15, 2013 Tr. (A23-145/R000011-133).

<sup>37</sup> March 20, 2013 Tr. at 13 (A35/R000023).

<sup>38</sup> Cf. *Teachers Ins.*, 669 A.2d 100.

<sup>39</sup> *Verizon*, 970 A.2d 257 (quoting Superior Court decision, 2008 Del. Super. LEXIS 162, at \*11).

<sup>40</sup> March 20, 2013 Tr. at 30 (A52/R000040) (*emphasis added*).

*available, there is no need to go through an analysis of what the current [value] or income [approach] is and then applying a discount rate to go back to 1983 values. But if you want to reopen it later you can but I still would have the same, my thought is that we are going through an analysis here that isn't necessary because the real numbers are available and why are we doing a discount rate back to 1983 values from today's values when the real values were available and weren't included in the appeal anyway. But that's just me.*<sup>41</sup>

[Board Member, Joseph Mannion]: I completely agree with Mr. Larrimore on this. They support the data at that time what it would sell for. And the actual income approach back then they wouldn't have paid that amount unless they could have made that income at that time, plus you are talking about a brand new building which always carries a premium too, and I don't know that this final correlation of value takes that into account at all.<sup>42</sup>

\* \* \*

[Attorney for Appellants before the Board, John Williams, Esq.]: Well I guess I don't see it in your rules where it says you have to use an actual sale in 1983. There's other evidence to the contrary.

[Board Chairman Anthony Felicia]: I would disagree with you. I think if you've read those rules you will see that.<sup>43</sup>

However, the Rules of the Board do not mandate the result advocated by the Board. And, even if it did, such interpretation ignores controlling law. The County's attorney also incorrectly reinforced this misstatement of Delaware law:

[County's Attorney, Julie Sebring, Esq.]: The reason why [Veronica Bonk, the County's witness] put together income data that would show 1983 income data is because this building existed in 1983 and the income data for 1983 is available. *There's really no reason to take today's [current fair market value].*

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<sup>41</sup> March 20, 2013 Tr. at 50 (A72/R000060) (*emphasis added*).

<sup>42</sup> March 20, 2013 Tr. at 50 (A72/R000060).

<sup>43</sup> March 20, 2013 Tr. at 44 (A66/R000054).

*Based on what the County is charged to do in terms of tax assessment for base year 1983, there would be no reason for it to look at today's value. And it would be absolutely, an impossible and impractical task to ask us to look at every single rental property all over New Castle County and get their today's rental values and income statements to be able to figure out the assessment.*<sup>44</sup>

The County has elected not to reassess for more than 30 years. Appellants' Appeals are the only available mechanism to challenge whether current assessments meet the constitutional standard of uniformity and the statutory requirement of determining a property's true value in money. Despite Ms. Sebring's admonition, there *is* a reason to use current value and to trend it back to 1983 for uniformity purpose – it is Delaware law. The correct assessment evaluation is to find the *present* fair market value and factor it back to 1983 to satisfy constitutional concerns for uniformity.<sup>45</sup> Moreover, the County has a constitutional, *i.e.*, due process, as well as equitable, obligation to ensure that tax assessments are fair, accurate and uniform – no matter the inconvenience.<sup>46</sup> The County attorney's contention that “it would be absolutely, an impossible and impractical task to ask us to look at every single rental property all over New Castle County” advocates abdication of that responsibility. It is the Board's statutory and equitable duty to correct inaccurate assessments that are brought to its attention by

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<sup>44</sup> May 15, 2013 Tr. at 49-50 (A122-123/R000110-111) (*emphasis added*).

<sup>45</sup> See *Teachers Ins.*, 669 A.2d at 102; *Seaford Assocs.*, 539 A.2d at 1049-50.

<sup>46</sup> See *Del. Const. Art. VIII, §1*.

taxpayers.<sup>47</sup> The Board did not discharge its responsibility with the requisite consideration necessary for a matter of constitutional proportion.

In the absence of a County-wide reassessment, the Board's function is, essentially, to consider all competent evidence and to apply established Delaware law. That did not happen at the Hearing. The County presented evidence based solely on a 1983 generic income method and 1983 data, which does not reflect factors such as depreciation, deterioration, and functional obsolescence recognized by the Delaware Courts as affecting fair market value and calculation of an accurate tax assessment.<sup>48</sup> "All elements directly affecting value must be considered by the Board in determining fair market value."<sup>49</sup>

[County's Attorney, Julie Sebring, Esq.]: Okay. At the risk of sounding a bit flip, in 1983 [One Commerce Center] wasn't an aged building. So in 1983 there would be no reason to take into account depreciation or for age or anything like that.<sup>50</sup>

This supposition ignores the law. This Court does not mandate that actual 1983 values be used to determine a current tax assessment for a building constructed in 1983. 1983 is a *base year* for uniformity purposes. Current values

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<sup>47</sup> See 9 Del. C. §1318(2).

<sup>48</sup> See, e.g., *Verizon*, 970 A.2d 257; *Seaford Assocs.*, 539 A.2d at 1049-50. By way of simplified example, when a building is demolished, the property assessment is reduced to reflect the absence of the structure, with only raw land remaining. Obsolescence and depreciation are more gradual forms of economic demolition.

<sup>49</sup> *Excelsior Assocs.*, 1995 Del. Super. LEXIS 43, at \*20.

<sup>50</sup> March 20, 2013 Tr. at 35 (A57/R000045).

must be factored-back to achieve a fair market value for assessment. In fact, at the Hearing, the Board's attorney acknowledged that the mission of the Board starts with consideration of the building "as it exists now" – to determine the *current* fair market value of the property and trend it back to 1983 for uniformity purposes:

[Board Attorney, Wilson Davis, Esq.]: I just want to reiterate that the Board has to -- in order to rebut, make its prima facie showing of substantial over valuation the appellant has to establish market value as of July 1, 1983. Now that means *we have to determine what this building as it exists now would have been valued as of 1983.*<sup>51</sup>

"Uniformity merely requires that present market value be factored back to a base tax year."<sup>52</sup> The County relied solely on 1983 sales and income data to support its inflated assessment and, contrary to the Superior Court's decision, presented no evidence to rebut Appellants' presentation of current fair market value, trended-back to 1983 for uniformity purposes. As noted *supra*, there is a fundamental difference between the actual sales value of Appellants' units when they were new in 1983 and their current value factored-back to 1983 for uniformity purposes. However, the Board refused to consider, or ignored, Appellants' competent evidence of overvaluation based upon the trended-back analysis. The Board's decision was not without reservation. As reflected in the Hearing transcript,

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<sup>51</sup> March 20, 2013 Tr. at 35 (A57/R000045) (*emphasis added*).

<sup>52</sup> *Seaford Assocs.*, 539 A.2d at 1049-50.

Board members were receptive to Appellants' requested adjusted assessments, but mistakenly believed that they could not depart from the 1983 data that the County relied upon in favor of accepting Appellants' 2012 data trended-back to 1983 for uniformity purposes:

[Board Member, Victoria Bandy]: I would certainly like to add this is an extremely difficult position that we are in. And I couldn't agree with you more that 1983 happened a long time ago. . . . But the reality is, is that's what we have to work with, you know, and everybody's interpretation is going to be different and *I think that certainly you might want to pursue this or you should pursue this beyond us.* And maybe, maybe get some case law established on this. But I don't believe that any of the case law we heard today says that by denying this appeal that we've done anything wrong. *I believe that we are acting within the capacity that we are supposed to and that we certainly have weighed all the evidence and that's just the way it is.*<sup>53</sup>

[Board Member, Joseph Mannion]: But if you do look at just sales, and you were around at that time you do realize at that time you paid a premium price because it was brand new right then and there and you were Class A. And like you pointed out, things have changed over the years so actually, you know, every 10 years you can be coming here asking for a new number. *So I think in this case, it doesn't seem to benefit you guys that you were built right at the time that the reassessment took place. But the ultimate standard here seems to be the sales numbers that do exist in '83. And I will tell you that I came from Delaware County and they had not reassessed for a long, long time. Somebody had a case maybe similar to this in the '90's, and they didn't like how it came out and they proceeded to the courts; and the courts then finally forced Delaware County to reassess and they went through that process. And, you know, maybe that's what you need to do.*<sup>54</sup>

[Board Chairman, Anthony Felicia]: *[W]hen I try to think of the elephant in*

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<sup>53</sup> May 15, 2013 Tr. at 70 (A143/R000131) (*emphasis added*).

<sup>54</sup> May 15, 2013 Tr. at 70-71 (A143-144/R000131-132) (*emphasis added*).

*the room also one of the difficulties I have is that if there had been other reassessments somewhere along the way other than 1983 then probably none of us would be sitting here today including this Board we wouldn't even have to be meeting. But the [fact that] there hasn't been that's why we get a lot of work with people coming in on appeal. So the fact that there hasn't been reassessments since 1983 people come in and say times have changed and because those times have changed we have to demonstrate, and we are taking the motivation and the initiative to show what has changed. And it would have been better if somebody else had done it and addressed all properties but it hasn't been done. And so you are taking the initiative and I think it's, it's good because that's the only other avenue there is to look at things in today's real world and we just have to make sure that it's being done in a way that's fair.*<sup>55</sup>

[Board Chairman, Anthony Felicia]: Okay. Well I've stated my logic earlier and unfortunately as Chairperson I don't even get a vote. We just made a change to that earlier today for the future, but I only get to vote if there is a tie. And to me it's still, I understand where Mr. Larrimore is coming from. I am still uncertain because *I don't really then see what the value of the appeal process is if you're not here to try to correct some of the inequities that have occurred. And basically then we are saying you have to live with the inequities for 30 years until the state or the county decides to do something else which just seems unfair as well. But somebody in the courts I guess is going to have to decide that, you know, instead of me. But I'm less comfortable, I'm less comfortable with this whole situation the more we get into it because I do think you can look at a lot of data and it doesn't seem to matter because it still always goes back to the way things were set in 1983. So while everybody can say that's the way it is, it's still also presenting hardships on people. So I'll leave it at that.*<sup>56</sup>

As the Supreme Court articulated in *Teachers Ins.*, the Board's presumption that it could not consider trended-back data to 1983 when data from 1983 exists, is

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<sup>55</sup> May 15, 2013 Tr. at 32-33 (A105-06/R000093-94) (*emphasis added*).

<sup>56</sup> May 15, 2013 Tr. at 71-72 (A144-145/R000132-133) (*emphasis added*).



inaccurate and, in fact, contrary to law.<sup>57</sup> Immediately following the conclusion of the hearing, the Board voted 4-0 (with one abstention) to deny each appeal.

**THE BOARD'S WRITTEN DECISION TWO MONTHS LATER INCLUDES CONTENT NOT ADDRESSED BY THE BOARD AT THE HEARING AND OTHER INACCURACIES**

The written Decision incorrectly stated that “Appellants did not correlate any of the sales to value as of 1983.”<sup>58</sup> This statement ignores the data specifically provided in the written submission, *e.g.*, Section VI (Final Correlation of Value) of the written Appeals.<sup>59</sup> In addition, the covering letter transmitted to the Board<sup>60</sup>, specifically states, “As illustrated in the table of appraisals and sales, applying a discount rate to all of the data points generated since 1993 produces an average 1983 value very close to the value requested in the appeals.”<sup>61</sup> Further, the written Decision’s criticism of the income capitalization approach,<sup>62</sup> *i.e.*, that it should only be used “as a last resort,” is inconsistent with Delaware law.<sup>63</sup> The written

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<sup>57</sup> See *Teachers Ins.*, 669 A.2d 100, which involved a parallel factual situation where a commercial property in New Castle County, which was built in 1983, successfully appealed its assessment years later, utilizing current fair market data trended-back to 1983.

<sup>58</sup> Written Decision at 8.

<sup>59</sup> See Exhibit D.

<sup>60</sup> See A147-148/R000134-135.

<sup>61</sup> *Id.*; see also A250-251/R000237-238 (redacted and unredacted versions).

<sup>62</sup> Written Decision at 6.

<sup>63</sup> *E.g.*, *Teachers Ins.*, 669 A.2d at 102 (“The capitalization of income method is the preferred method to value income-producing properties, but it is driven by numerous variables and, therefore, should be used in conjunction with another valuation method.” Consistent with this Court’s direction, Appellants utilized a comparable sales method in conjunction with the income

Decision also summarily concludes that “It is simply unnecessary to utilize the income capitalization approach where valid 1983 sales of the units exist.”<sup>64</sup> However, reliance on actual data from 1983 ignores precedent recognizing the preferred approach of utilizing the *current fair market value trended-back to 1983 for uniformity* in light of factors such as depreciation, deterioration, and functional obsolescence, an approach acknowledged as the correct methodology by the Board’s counsel.<sup>65</sup> The criticism of Appellants’ comparable sales approach was similarly conclusory: “Such evidence is overly attenuated in the face of an actual sale from 1983.”<sup>66</sup> Notably, the dissection of Appellants’ sales comparison and income capitalization approaches in the Board’s written Decision is not reflective of the record, nor does it reflect the Board members’ frustration with the inequities of Appellants’ current assessments and the County’s failure to conduct a County-wide reassessment for more than 30 years, as well as members’ sympathetic suggestions to pursue an appeal to the Delaware Courts. The Board’s written Decision also questions Appellants’ expert’s methodologies although such

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capitalization method. Also, the *Seaford* case on which the written Decision relies for this criticism is from 1988, several years before this Court’s *Teachers Ins.* decision.

<sup>64</sup> Written Decision at 7.

<sup>65</sup> See March 20, 2013 Tr. at 35 (A57/R000045) (“[T]he appellant has to establish market value as of July 1, 1983. Now that means *we have to determine what this building as it exists now would have been valued as of 1983.*” (*emphasis added*)).

<sup>66</sup> Written Decision at 8. The written Decision also significantly enhances the Board’s comments and ultimate decision at the May 15<sup>th</sup> hearing date.

criticism is not reflected in the transcribed record.<sup>67</sup> The overriding conclusion, based on the Hearing record, is that the Board members erroneously determined that they could not go beyond actual 1983 data even though several members were clearly uncomfortable with the result.<sup>68</sup>

### **THE SUPERIOR COURT AFFIRMS THE BOARD'S WRITTEN DECISION**

On May 30, 2014, the Superior Court issued its Opinion affirming the Board's refusal to lower Appellants' assessments.<sup>69</sup> The Opinion relies extensively on the written Decision, which is a refracted interpretation of the actual Board analysis. As discussed in detail below, the written Decision and the transcript diverge greatly, and the latter accurately reflects that the Board members did not consider Appellants' evidence, effectively ignoring it in favor of the familiar actual data from 1983.

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<sup>67</sup> Also troubling is the reference to the County's attorney's "incredulous" concern about Appellants' per square foot value based upon assessed value of unit 100B – a small space in One Commerce Center. Appellants clearly disclosed this was a vending area in the very first cell of the spreadsheet submitted with the Appeals. *See* Appeals Data Spreadsheet at Exhibit C (Property Description – "100B first floor vending area"). Appellants' expert witness also made this clear in his hearing testimony: "The vending area like every other part of the building benefits from the common areas, from the elevator systems, from the granite lobby, from everything else. If you were to assess, I mean the vending area, actually the construction cost of it was probably greater per square feet then [sic] any other then [sic] other parts of the building because the life safety system happens to be located there. It's part of an organic whole." March 20, 2013 Tr. at 36 (A58/R000046). *See also* May 15, 2013 Tr. at 41 (A114/R000102).

<sup>68</sup> *See, e.g.*, May 15, 2013 Tr. At 32-33 (A105-106/R000093-94), 70-71 (A143-144/R000131-132); March 20, 2013 Tr. at 44 (A66/R000054), 46 (A68/R000056).

<sup>69</sup> The Superior Court relied on the written submissions of the parties; there was no oral argument.

## ARGUMENT

### Question Presented

Did the Superior Court improperly affirm the Board's denial of Appellants' request for reduction of their property assessments, if the Board did not meet its burden of satisfying the constitutional requirement of uniformity and the statutory standard of true value in money by failing to consider competent evidence demonstrating over-assessment of the Appellants' properties and relying solely on a thirty-year-old assessment which employed only 30-year-old data with no allowance for current market values?<sup>70</sup>

### Scope of Review

On appeal to the Superior Court, and on further appeal to the Supreme Court, the Board's decision is deemed "prima facie correct" and will be disturbed only if the appellant can show that the Board acted "contrary to law, fraudulently, arbitrarily or capriciously."<sup>71</sup> This Court may reverse the trial court "if the Board's findings are clearly wrong and its conclusions not the product of an orderly and logical deductive process."<sup>72</sup>

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<sup>70</sup> See Appellants' Superior Court Opening Brief at A613-A650 and Appellants' Superior Court Reply Brief at A651-A674. There was no hearing or oral argument before the Superior Court on appeal from the Board. Accordingly, there is no trial court transcript.

<sup>71</sup> *Seaford Assocs*, 539 A.2d at 1047-48 (citing 9 Del. C. § 8312(c)).

<sup>72</sup> *Rodney Square Investors, L.P. v. Bd. of Assess.*, 1983 WL 482333 (Del. April 7, 1983), at \*1.

### Merits of Argument

#### **The Superior Court Misconstrued the Board's Obligation Under Delaware Law to Determine the Fair and Equitable Assessments for Appellants Based on the True Value in Money – Present Fair Market Value Trended-Back to 1983 for Uniformity Purposes.**

In contravention of this Court's holding in *Teachers Ins. & Annuity Ass'n*, the Board deliberately discriminated against Appellants by failing to hear the entire appeal in that it refused to consider current fair market value trended-back to 1983 and relied exclusively on actual data from 1983 – a tempting but erroneous conclusion. While the Hearing transcript clearly demonstrates the above analysis<sup>73</sup>, the Superior Court relied on the written Decision, which included curative language to overcome the deficiencies in the Board's on-the-record rationale.<sup>74</sup> Although the Board *acknowledged* Appellants' trended-back analysis, it never actually considered the probative value of Appellants' evidence.<sup>75</sup> In the instant case, the Superior Court affirmed the Board's erroneous conclusion instead of reversing it – despite the Board's enunciated refusal to consider Appellants' competent evidence, and its reliance solely on constitutionally- and statutorily-insufficient data. “[I]t is not necessary for [a] property owner to present proof

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<sup>73</sup> See Hearing transcript excerpts *supra*.

<sup>74</sup> The inclusion of perfunctory incantations in the record in an effort to “cure” the issue is insufficient to surmount the reality of the Board's deliberations.

<sup>75</sup> This established principle was reinforced in another recent tax assessment appeal to the Superior Court. See *Odessa Nat'l Golf Course LLC v. New Castle County*, Wallace, J., 2014 Del. Super. LEXIS 122, at \*15-16.

positive of a substantial overvaluation, only that it present competent evidence of such a claim in order to rebut the presumption of correctness of the County's assessment so that the County must present evidence on behalf of that assessment."<sup>76</sup> "The Board is required to accept competent evidence of overvaluation, even if the evidence is based [on] a different appraisal method than the County usually uses."<sup>77</sup> If a taxpayer "presents competent evidence of substantial overvaluation, the Board must not ignore that evidence."<sup>78</sup> Here, the Board did not follow that requirement.<sup>79</sup>

In that regard, the Superior Court also misconstrued Appellants' trended-back approach.<sup>80</sup> Unlike the appellants in *Board of Assess. Review v. Stewart*,<sup>81</sup> a 1977 Supreme Court decision on which the Superior Court heavily relied, Appellants have never argued that the base year system should be abandoned, only that the present

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<sup>76</sup> *Excelsior Assocs.*, 1995 Del. Super. LEXIS 43, at \*28.

<sup>77</sup> *Verizon*, 2008 Del. Super. LEXIS 162, at \*3.

<sup>78</sup> *Verizon*, 970 A.2d 257.

<sup>79</sup> Appellees ignored the principle that an "unadjusted base year system ignores market realities and fails to account for the impact of market forces on a property's value over time." See *Clifton v. Allegheny County*, 969 A.2d 1197, 1226, 1231 (Pa. 2009) (noting that 48 states require periodic reassessments of which 22 require annual reassessments).

<sup>80</sup> As reflected on page 10 of the Opinion: "The Board concluded that the Appellants' argument that the base year system should be 'abandon[ed] . . . in light of the present market value of their properties' – contending such 'abandonment will ensure that the Board comports with the uniformity and "fairness" requirements of the [sic] Article VIII, Section I of the Delaware Constitution' – 'reverses the hierarchy established by the Supreme Court, placing uniformity over present market value.'" This is not an accurate assessment of Appellants' position.

<sup>81</sup> 378 A.2d 113, 116 (Del. 1977).

value of One Commerce Center should be trended-back to the benchmark year of 1983 – for uniformity purposes and to ensure an accurate assessment reflecting its true value in money.

As this Court wrote in *Stewart*:

It is doubtful that real property values will remain constant in a dynamic economy and frequent economic change will strain any system of assessment which seeks to be uniform. One way to keep assessed values and market values closely aligned, of course, is to require short-term cyclical general reassessments. However, present Delaware law does not now require that there be periodic general reassessments, and it is not argued here that an unreasonable period of time has passed since the last general assessment was made in 1970.<sup>82</sup>

In *Stewart*, this Court articulated the exact principle at issue here – the fair market value of a building in modern times trended-back to 1983 is *not* the same as the fair market value of the same building in 1983 – even if coincidentally, the building was actually erected, and units sold, in 1983.<sup>83</sup> And, as this Court wrote in *Verizon*, “The inequities that arise from deterioration (depreciation) are normally addressed through periodic general assessments, but since no reassessment has been done since 1983, the Board is otherwise unable to correct the inequities.”<sup>84</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> The Board’s attorney echoed this conclusion (“Now that means we have to determine what this building *as it exists now* would have been valued *as of 1983*.” March 20, 2013 Tr. at 35 (A57/R000045) (*emphasis added*)).

<sup>84</sup> *Verizon*, 970 A.2d 257. Also, as the Supreme Court of Pennsylvania has noted, “the statutory base year system of taxation at issue, which approves the prolonged and potentially indefinite

The Board's refusal to consider a trended-back fair market value (and the Superior Court's ratification of the written Decision) ignores market realities and exemplifies why a reassessment after nearly 30 years is vital to recalibrate Appellants' excessive assessments. One Commerce Center was completed, and many of its floors sold, in 1983. Nearly 30 years later, its value has not "remain[ed] constant in a dynamic economy and frequent economic change[.]"<sup>85</sup> Nevertheless, there are still no systematic, short-term cyclical general reassessments "to keep assessed values and market values closely aligned" as the Delaware Supreme Court contemplated.

In fact, unlike the taxpayer in *Stewart*, here Appellants specifically argued that "an unreasonable period of time has passed since the last general assessment was made [for New Castle County in 1983]."<sup>86</sup> In addition, unlike the taxpayer in *Stewart*, here Appellants trended-back current data to the benchmark assessment year to show substantial overvaluation.<sup>87</sup> The taxpayer's evidence in *Stewart* was insufficient because the taxpayer failed to trend-back its 1975 valuation to 1970 and did not question the five year gap between its 1975 valuation and the 1970

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use of an outdated base year assessment to establish property tax liability, violates the *Uniformity Clause of the Pennsylvania Constitution*." *Clifton*, 969 A.2d at 1229 (*emphasis in original*).

<sup>85</sup> *Stewart*, 378 A.2d at 117.

<sup>86</sup> See May 15, 2013 Tr. at 31 (A104/R000092).

<sup>87</sup> In *Stewart*, the taxpayer utilized then-current 1975 sales data *without* a trended-back approach to satisfy the Uniformity Clause. 378 A.2d at 115-16.



assessment. It made the Court choose between current market value and the base year assessment without reconciling the two.

In the absence of a periodic reassessment, to ensure uniformity, back-trended data to the base year of 1983 is the most equitable, accurate, and constitutional measure of a property's true value in money. The County's insistence on using actual 1983 values to determine a current tax assessment for a building constructed in 1983 disregards Delaware Supreme Court precedent and ignores the constitutional mandate of uniformity and the statutory requirement of utilizing true value in money as the standard upon which to base assessments. "Uniformity merely requires that present market value be factored back to a base tax year."<sup>88</sup> In the written Decision, the Board relied on *Stewart* for the theory that "the Delaware Supreme Court has stated that, in a battle between present value and uniformity, present value is sacrificed."<sup>89</sup> This is an incomplete depiction of the *Stewart* decision. It is only when these two concepts cannot be reconciled under the facts of a specific case that the former must give way to the latter.<sup>90</sup> Here, the two concepts are in accord. And, despite Appellees' attempts to counter

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<sup>88</sup> *Seaford Assocs.*, 539 A.2d at 1049-50.

<sup>89</sup> Written Decision at 6..

<sup>90</sup> *Stewart*, 378 A.2d at 116.

Appellants' analysis under *Teachers Ins.*<sup>91</sup>; and *Seaford Assocs.*<sup>92</sup>, both cases support the conclusion that current fair market value trended-back to a benchmark year is the preferred and equitable approach to determining true value in money and preserving uniformity. The County relied on its own 1983 sales and income data to support its inflated assessment and presented no evidence to rebut Appellants' presentation of current fair market value, trended-back to 1983 for uniformity purposes. The Superior Court incorrectly endorsed this approach.

Further, the Superior Court mistakenly concluded that the Board presented persuasive evidence contrary to Appellants' trended-back data – incorrectly citing the hearing testimony of a County assessor who purportedly asserted “that the best evidence of value for the units was the actual sale prices in 1983.”<sup>93</sup> The County's assessor did assert that the value per square foot of a vending area in Appellants' building – for which the County had previously lowered the property tax assessment – was incongruent with the requested reductions for floor space within the same building. However, the appraiser did not explain the reasoning *why* this would be the case, nor did she explain why the County had previously reduced the assessments for the vending area. The County failed to rebut Appellants' credible

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<sup>91</sup> 669 A.2d 100.

<sup>92</sup> 539 A.2d 1045, 1049-50.

<sup>93</sup> Opinion at 20. However, a review of the Record does not reflect that the assessor made such a statement.

evidence of overvaluation; offering only 1983 data. As such, the Superior Court's rationale for the affirmation of the Board is inconsistent with the record. Respectfully, the Superior Court erred in endorsing the Board's written Decision.

This Court has clearly articulated that: "There is a strong preference in Delaware for using the present market value of real property as its value for assessment purposes."<sup>94</sup> The Board's reliance on actual data from 1983 ignores this precedent and the preferred approach of utilizing the current fair market value trended-back to 1983 for uniformity in light of factors such as depreciation, deterioration, and functional obsolescence.<sup>95</sup> This Court has also stated, "Optimally, every system of assessment will incorporate both the preference for present market value and the requirement of uniformity into its general scheme; but when these two concepts cannot be accommodated under the facts of a specific case, the former must give way to the latter as the true measure of assessment."<sup>96</sup> Here, Appellants' methodology satisfies both concerns. Appellants presented "competent evidence of substantial overvaluation" to the Board by utilizing *present*

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<sup>94</sup> *Stewart*, 378 A.2d at 115.

<sup>95</sup> At the Hearing, the Board's counsel acknowledged this as the correct methodology: "[T]he appellant has to establish market value *as of* July 1, 1983. Now that means *we have to determine what this building as it exists now would have been valued as of 1983.*" March 20, 2013 Tr. at 35 (A57/R000045) (*emphasis added*).

<sup>96</sup> *Stewart*, 378 A.2d at 115-16.

*market value* trended-back to satisfy *constitutional requirement of uniformity*. Under Appellants' presentation neither the present market value nor uniformity must yield to the other.

Appellants' expert demonstrated that current market value through the income capitalization method – trended-back to 1983 and also through the comparable sales value method – also trended-back to 1983<sup>97</sup> – produces more accurate and equitable values for assessment purposes than the County's assessment based solely on historic 1983 values.<sup>98</sup> It may not be as convenient as the actual data from 1983 that the Board insisted upon, but it is the most accurate, equitable, and constitutional assessment method available until the County conducts a comprehensive reassessment. The Superior Court did not weigh this important analysis, indicating that the Board had done so, although the record reflects to the contrary.

For example, on page 16 of the Opinion, in the section entitled "Record Demonstrates Board Considered Considerable Evidence Beyond 1983 Figures" the Superior Court wrote that "the Board's written decision and the hearing transcripts, plainly indicates that the Board considered valuation evidence beyond the 1983

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<sup>97</sup> Mr. Stat pointed out that the 2% back-trended rate utilized was significantly lower than the relevant CPI from 1983 to 2012. May 15, 2013 Tr. at 17-18 (A90-91/R000078-79).

<sup>98</sup> See *Teachers Ins.*, 669 A.2d at 102-04.

figures[.]” However, this section of the Opinion cites exclusively to the written Decision, *not* the Hearing transcripts, which as indicated in the above quotations from Board members, reflect otherwise.

Similarly, the Superior Court’s acceptance of the Board’s criticism of Appellants’ argument that their assessments should be adjusted down to that of Unit 100B in the same building was improper. Importantly, as the Board acknowledged in its written Decision, the County reassessed Unit 100B in 1993 – and lowered its assessment to a level that is consistent with the recalibrated assessments that Appellants have requested for the other units. This fact is further confirmation of the valuation conclusions reached by Appellant’s expert. When the County lowered the assessment for a unit within One Commerce Center in 1993 – whether a vending area or otherwise – it did not utilize the actual data from 1983. If it had, according to Appellees’ argument, there should have been *no* reduction because the 1983 assessment would remain the same. Clearly, this was not the case. If the Unit 100B assessment could be based on other than actual data from 1983, so should the other units in the building, *i.e.*, 2012 fair market value trended-back to 1983 to take into account market factors such as depreciation, deterioration and functional obsolescence – factors that the Delaware Courts acknowledge are essential for purposes of accurately calibrating fair market

value.<sup>99</sup> “All elements directly affecting value must be considered by the Board in determining fair market value.”<sup>100</sup> The Board members incorrectly assumed that they were locked into a determination of *actual* 1983 values.

The Superior Court also incorrectly relied on the written Decision in writing that Appellants argued for the “abandonment” of the base year system “in light of the present market value of their properties.”<sup>101</sup> That is not the case. Appellants’ competent evidence of overvaluation squarely contemplates a base-year assessment, but one that accurately trends-back 2012 values to the base year of 1983 to ensure fairness and equity.

Furthermore, the Superior Court relied on limited portions of Board members’ statements and some speculation to support the conclusion that the Board did weigh the evidence, but merely considered the Board and County’s evidence more credible.<sup>102</sup> As noted, however, the clear, comprehensive statements of Board members reflect that the Board ignored Appellants’ evidence in favor of the more convenient and familiar 1983 data.<sup>103</sup>

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<sup>99</sup> See, e.g., *Verizon*, 970 A.2d 257; *Seaford Assocs.*, 539 A.2d at 1048-50.

<sup>100</sup> *Excelsior Assocs.*, 1995 Del. Super. LEXIS 43, at \*20.

<sup>101</sup> Op. at 10.

<sup>102</sup> Op. at 12, 20.

<sup>103</sup> Op. at 16. The Superior Court also relied on the comments of the Board’s “independent counsel” (who does not vote) at the hearing to “clarify” the “somewhat ambiguous and equivocal” statements of the Board members. *Id.* However, it is unclear how an advocate for the

## CONCLUSION

The Board's denial of Appellants' real estate assessment Appeals was arbitrary, capricious, and contrary to law. The most accurate and equitable method of assessment is to consider current value at the time of an appeal, trended-back to the base year of 1983 to achieve uniformity in satisfaction of constitutional concerns. For purposes of preserving the base-year system, the true value in money of Appellants' property in 2012 trended-back to 1983 is not the same as its actual fair market value in 1983. The 1983 valuation data which the Board relied on is nearly 30 years out-of-date and reflective of a distinctively different real estate market and environment. It is unconstitutional and contrary to established case law to tax a property in 2012 based on its value nearly 30 years ago without regard to comparable values in the current real estate market.

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Board could be considered "independent." The Superior Court afforded great weight to the Board's attorney for noting on the record that it was "completely appropriate" for the Board to consider evidence beyond the actual 1983 data; but that does not show compliance by the Board members. In fact, the record belies this contention. Also, just as the Superior Court discounted the clear testimony of Commissioner Felicia because he did not vote, the testimony of the Board's attorney (who also did not vote) should not have been considered in the Opinion. Op. at 13.

WHEREFORE, Appellants respectfully request that this Honorable Court: 1) reverse the Superior Court's affirmation of the Board's written Decision and reverse the Board's written Decision; 2) reduce each of Appellants' property tax assessments to \$200,200.00 per floor; and 3) order such other relief, including the award of fees and costs to Appellants, as this Honorable Court deems just and equitable.

Respectfully submitted,

**MONZACK MERSKY MCLAUGHLIN  
AND BROWDER, P.A.**

*/s/ Melvyn I. Monzack*

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Melvyn I. Monzack (#137)  
Michael C. Hochman (#4265)  
1201 N. Orange Street, Suite 400  
Wilmington, DE 19801  
(302) 656-8162  
*Attorneys for Below Appellants,  
Current Appellants*

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