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IN THE SUPREME COURT OF THE STATE OF DELAWARE

RRHC WILMINGTON, LLC, MIM V, LP, CHIPPEY STREET ASSOCIATES, and COMMERCE ASSOCIATES LP,	)	No. 303, 2014
Appellants-Below/Appellants,	)	On appeal from the Superior Court of the State of Delaware in and for New Castle County
v.	)	C.A. No. N13A-08-004 MJB
NEW CASTLE COUNTY OFFICE OF FINANCE and NEW CASTLE COUNTY BOARD OF ASSESSMENT REVIEW,	)	
Appellees-Below/Appellees.	)	

APPELLEES' CORRECTED ANSWERING BRIEF

NEW CASTLE COUNTY OFFICE OF LAW
Wilson B. Davis (#5154)
For the Board of Assessment Review
Brian J. Merritt (#3982)
For the Office of Finance
Assistant County Attorneys II
87 Reads Way
New Castle, Delaware 19720
(302) 395-5130

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NATURE AND STAGE OF THE PROCEEDINGS

Appellants-below/Appellants, RRHC Wilmington, MIM V, LP, Chippey Street Associates, and Commerce Associates LP (collectively, the "Property Owners") appeal a Superior Court affirmance of a decision of the New Castle County Board of Assessment Review (the "Board"). The Board denied the Property Owners' appeals of property tax assessments set by the New Castle County Office of Finance (the "County") on their condominium units.

The Property Owners argued to the Superior Court that the Board had refused to consider their evidence, and had instead impermissibly considered only the valuation evidence presented by the County. The Property Owners claimed that the County's valuation evidence, based on 1983 "base year" data, violated the Uniformity Clause of the Delaware Constitution, and that the Uniformity Clause requires the Board and County instead to utilize contemporary data and back-trend to the 1983 base year.

The Superior Court opined that a thorough review of the record "plainly indicates" that the Board considered valuation evidence beyond the County's evidence, and, moreover, that this Court has approved the County's use of 1983 "base year" data as constitutional. This is the Answering Brief of Appellees-Below/Appellees, the Board and the County, respectfully requesting that this Honorable Court affirm the Superior Court's decision.

SUMMARY OF ARGUMENT

Denied. The Board did not refuse to consider the Property Owners' evidence, which consisted of comparing the assessments of their units to those of other properties, and of an income approach to valuation based on data from 2011 "back-trended" to the County's 1983 base year. Instead, the record demonstrates that the Board was highly critical of the Property Owners' evidence, and justifiably so given the Property Owners' incongruous conclusion that their 4,732-square-foot units should be assessed at the same rate as a 52-square-foot unit in their building – a unit 91 times smaller than the Property Owners' units and used as a vending machine area. The Board simply found the County's evidence, based on actual 1983 sales of the subject properties and actual 1983 income data, more credible. This Court has held that the Board is entitled to rely on the County's use of base year data to assess property, and is also entitled to evaluate competing methodologies in the assessment process. In doing so in the instant case, the Board did not act "contrary to law, fraudulently, arbitrarily or capriciously."

STATEMENT OF FACTS

A. Factual Background

The Property Owners severally own eight commercial condominium units in One Commerce Center, an eleven-story office building in downtown Wilmington.[1] The developer of One Commerce Center completed its construction in 1982 and established each floor as an individual condominium unit pursuant to a condominium declaration. (A31, A179). The Property Owners' units each occupy an entire floor of the building and are each 4,732 square feet in area. (*Id*.) The developer sold units in 1983 and in subsequent years. (A31). The sales prices of the units from 1983 to 1985, evident from the record, ranged from $436,603 to $507,708, or $92.27 to $107.29 per square foot. (A357, A385, A427). In 1993, the first floor unit was divided by condominium amendment into two units, Unit 100A and Unit 100B. (A181). Unit 100B consists of 52 square feet and houses vending machines and a security access panel.[2] (A49). It is 91 times smaller than the Property Owners' units.

The County assessed the Property Owners' units at $432,900, or $91.48 per square foot, and assessed Unit 100B at $2,200, or $42.31 per square foot. The

[1] The ownership is as follows: RRHC Wilmington, LLC – Unit 300; MIM V, LP – Unit 400; Chippey Street Associates – Units 500 and 600; Commerce Associates LP – Units 700, 800, and 900. (A13).

[2] Unit 100A consists of 3,465 square feet and is assessed at $319,000, or $92.06 per square foot. (A13). The owner of Unit 100A, the Delaware State Chamber of Commerce, appealed Unit 100A's assessment to the Board and was also unsuccessful, but did not join in the instant appeal. (*Id*.).

County's assessments reflect the units' fair market value as of July 1, 1983, the County's "base year" for tax assessment purposes.

B. The Property Owners' Appeal to the Board

On March 15, 2012, the Property Owners filed separate appeal forms for their respective units, challenging the County's assessments. The Property Owners requested a reassessment from $432,900 to $200,200. The Property Owners premised their request on applying Unit 100B's assessed value of $42.31 per square foot to the 4,732 square feet of their units. The Board heard the appeals over two days, on March 20, 2013 and May 15, 2013.

1. The Property Owners' Evidence

The Property Owners made a joint presentation before the Board, offering Richard Stat ("Stat") as their expert. (A78). Stat acknowledged that he was not an appraiser, had not performed an appraisal, and was not acting as an independent expert.[3] (A80). The Board accepted Stat as an expert in commercial real estate based on his experience in the field. (A81). At the outset, Stat acknowledged that the County's assessments, based primarily on 1983 sales of One Commerce Center units, was originally correct, but asserted that the assessments had grown incorrect over time.[4] (A43). Stat performed two analyses in support of the appeals.

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[3] Stat has ownership interest in units 700, 800, 900, and 1000. (A43, A48).

[4] Specifically, Stat stated: "[W]e are stuck with what was originally a correct valuation and I'll state that for the record." (A43).

In his first analysis, presented on March 20, 2013, Stat compared the current assessments of units in One Commerce Center to the current assessments of "selected" high-rise and low-rise buildings in downtown Wilmington.[5] (A38). Stat submitted a spreadsheet listing the buildings' assessments per square foot. (A38, OB at Ex. C). Stat did not testify to market adjustments typically presented to the Board, such as those for location, size, age, condition, or view. Instead, Stat focused on comparing "what [he] thought was their assessment per square foot." (A38). Stat argued that although One Commerce Center is eleven stories tall, it is more comparable to four of the low-rise buildings he cited because it is "a vertical aggregation of smaller properties into a single high-rise building." (A39). Stat argued that Unit 100B's assessed value of $42.31 per square foot would be appropriate, because it appeared to be more closely in line with the assessments of the four low-rise buildings, with an average assessed value of $47.64 per square foot. (*Id*., A269). However, Stat admitted he had "no clue" as to why Unit 100B was assessed at $42.31 per square foot. (A45). After Stat concluded his comparison of assessments, the Board moved to continue its hearing on the appeals to its next hearing date because the time it had allotted was exhausted. (A72). The Board specified that the continuance was necessary to "allow for the income approach to be reviewed." (A72).

[5] Stat did not provide a basis for his selections other than noting that four of his selected low-rise buildings house professional offices. (A36-A38).

The Board reconvened on May 15, 2013, and Stat presented the Property Owners' income approach to valuation. There are two income-producing units in One Commerce Center. (A269). Stat based his approach solely on 2011 income data. Stat provided the 2011 net operating income for both income-producing units, which were $21,866 and $41,188, respectively. (A87, A89). Stat applied a 10% capitalization rate to the net operating income for each unit, which he submitted was the top range for capitalization rates applied in Philadelphia in 2012, yielding values of $218,655 and $411,880. (A90, A269). Stat averaged the capitalized net operating income of both units, resulting in a value of $315,268. (*Id*.). Stat then back-trended the averaged capitalized income to 1983 using a discount rate of 2%. (*Id*.). Stat did not explain the precise basis for applying a 2% discount rate, though he argued it was "extremely conservative" compared to the Philadelphia-area Consumer Price Index rate of 3.06%. (A90). Stat's analysis yielded a per square foot value of $37.34. (A89). Stat observed that applying a 9% capitalization rate resulted in a value of $41.48 per square foot. (*Id*.).

2. The County's Evidence

The County presented evidence to rebut Stat's two analyses, as well as evidence in support of the existing assessments. County assessor Veronica Bonk observed that Unit 100B – Stat's proposed reference-point for reassessing the Property Owners' 4,732-square-foot units – is just 52 square feet in area, houses

vending machines and a security access panel, and is not outfitted for office use. (A49). Bonk submitted photographs of Unit 100B for the record. (A253-A254). Notably, until Bonk's revelatory testimony, Stat had made no mention at the hearing that Unit 100B is merely a vending area.[6] (*see* A24-A49). The County noted that the Property Owners' proposed value was premised on applying Unit 100B's assessment rate to their own units, and argued that Stat's income approach was merely an attempt to "back into" the assessment rate of Unit 100B.[7] (A111).

In support of the assessments, the County cited the 1983 sales of the units as indicative of their fair market value as of July 1, 1983, upon which the existing assessments of $432,900 are based. (A112). For example, Unit 400 sold in 1983 for $436,603. (A357). The County argued that the best evidence[8] available in terms of validity for establishing fair market value as of July 1, 1983 were the

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[6] The Property Owners assert that they "clearly disclosed" the nature of Unit 100B in their appeal materials, and cite a single cell in Stat's spreadsheet in support of their assertion. (OB at 22, fn 67.) However, Stat himself described the spreadsheet as a "mind-numbing collection of numbers" (A38), contained in the Property Owners' admittedly "voluminous" appeal materials (A85), effectively making the Property Owners' "disclosure" a needle in a haystack. In addition, the Property Owners quote statements by Stat regarding Unit 100B, but Stat made these statements *post hoc* in an attempt to mitigate the damage done by Bonk's testimony. (OB at 22, fn 67 (citing A58, A114)).

[7] The County's assertion is reasonable given Stat's equivocation as to which capitalization rate he applied, 9% versus 10% (A89), and his use of an "extremely conservative" 2% discount rate instead of the actual rate he cited, 3.06%. (A90). In any event, Stat's income approach did not yield a value of $42.31 per square foot, which was based purely on Unit 100B's assessed value.

[8] The County stated: "We have perfect sales value. Perfect in the sense of accurate true sales value for each and every one of these 11 floors. They were all sold around the time of 1983, maybe '84, maybe '85, but we have that data and they are in line with the amount that the properties have been assessed for tax purposes." (A112).

arms-length sales of units in 1983 (A112, A116), which Stat had previously acknowledged as establishing a "correct valuation" at one time. (A43).

In addition, at the request of the Board, Bonk presented the County's income approach to valuation. (A119-A120). Bonk based her approach on income data from 1983, utilizing a commercial office market survey of rents for office buildings in downtown Wilmington, performed by Stoltz Realty Company. (A123). Bonk submitted the office survey for the record, which included the rental rates of One Commerce Center. (A255). Bonk calculated the median rent per square foot of all office buildings in the market survey and applied it to the square footage of the units in One Commerce Center. (A259). Bonk accounted for operating expenses at 25% of total income, which was the average for office buildings in downtown Wilmington in 1983 based on studies performed at that time. (A126, A130). Bonk's calculations yielded a net operating income of $52,702. (A259). Bonk applied a capitalization rate of 12.1%, which was the actual capitalization rate applied in the downtown Wilmington area in 1983. (A120, A259). Bonk's income approach yielded a value of $435,550 for a unit as of July 1, 1983, which supported the County's assessment of $432,300. (A259).

In response to Bonk's evidence, Stat rationalized that use of Unit 100B as a reference point was appropriate because it is part of an "organic building" and "organic whole," sharing the benefits of common areas like the elevator system

and the lobby.[9] (A58). Further, Stat argued that Unit 100B "is the only space in the building that is publicly accessible for income-producing vending machines." (A60). Stat also suggested that the operating expenses used by Bonk were too low, and should be higher than 25%, but acknowledged that he did not have data available to support his claims. (A125).

3. The Board Denies the Appeals Based on the Evidence Presented

The Board members thoroughly discussed and considered the evidence presented by both the Property Owners and the County. The Board members were frankly skeptical of utilizing the assessment of Unit 100B as a reference-point for reassessing the other units in One Commerce Center. Board members Victoria Bandy and Anthony Felicia observed that Unit 100B is not much bigger than a bathroom. (A46). Felicia stated that the Property Owners' use of Unit 100B as a reference point "sticks out like a sore thumb," and remarked: "I can't really consider [Unit 100B] as comparable to anything." (A49-A50). Felicia later explained his comments, stating:

> [Unit 100B is] very small in terms of size compared to the other floors that we are talking about. … [I]t's hard to see [how] a small space with a vending machine and some security access panels … is representative of office space or living space. So it doesn't surprise me that [the assessment] is different.

[9] This description of an "organic building" is inharmonious with Stat's earlier characterization of One Commerce Center as merely the "vertical aggregation of smaller properties into a single high-rise building." (A39)

(A59). Bandy noted that "as an individual entity you would be hard pressed to put [Unit 100B] on the market and say how much are you going to pay me." (A59). Board member Stephen Larrimore agreed, noting that if the assessment of Unit 100B were at issue, the operative question would have been what someone would have paid for it in 1983. (A59). Alternatively, Larrimore suggested that the arms-length 1983 sales of the units were the best 'comparables' he had "ever heard of" for establishing the units' fair market value as of 1983. (A44). Bandy noted that the Board had previously used the 1983 sales of units in One Commerce Center as a reference point for reassessing other properties. (A99). Larrimore suggested that if Stat's comparison of assessments were correct, it had demonstrated that the assessments of the purportedly comparable buildings should be *raised* in relation to the properly-assessed units in One Commerce Center.[10] (A44). Stat responded:

> I would personally be delighted if you would double the DuPont Company's assessment on their building. Bring it up to One Commerce Center. That's what it should have been and all the other high-rise buildings and all the low-rise buildings. Because you're right we are a poster child for the County getting an accurate value in 1983.

(A44).

[10] The alternative explanation for the abnormal results produced by Stat's assessment comparison is that it is grossly flawed, failing to account for appropriate market adjustments, and relying purely on unadjusted assessments per square foot. Effectively, Stat compared apples to oranges – high-rise corporate headquarters (A40) to low-rise professional offices. (A37).

The Board was also skeptical of the Property Owners' income approach. Board member Joseph Mannion noted that the 1983 sales already reflected income, given that the price a buyer pays for an income-producing property is based on its income potential. (A72). Bandy was of the same mind, stating: "I can't understand that business savvy people would pay that kind of money for something in 1983 if they weren't generating an income to support it." (A99). The Board was fully aware that it is permissible to factor back contemporary income to 1983 when performing an income approach,[11] and went so far as to continue its March 20, 2012 hearing to consider Stat's back-trended income approach. (A72). However, Larrimore and Mannion were of the opinion that the 1983 sales were so probative that it was largely superfluous to take contemporary income and factor it back to 1983. (A72). Bandy took a dim view of factoring back in light of the actual 1983 sales, considering the length of time that has elapsed since 1983. (A99). Similarly, Larrimore stated that he was "very skeptical" of factoring back present value to 1983 in the face of actual 1983 sales data given the "many variables" that play into factoring back present value to 1983. (A137). When Bandy asked whether the Property Owners were prepared to submit an actual appraisal that had utilized the income approach, the Property Owners' attorney responded bluntly:

[11] The Board's attorney specifically stated that it is "completely appropriate" to use contemporary income in an income approach and factor back to 1983. (A105).

> Well you tell me the name of an appraiser who is willing to go on record and say that the property is worth half of what it actually sold for in 1983 based on his or her, you know, expert appraisal knowledge. … [Appraisers] won't discount things that are built in '83 because they are going to put their license in jeopardy.

(A68).

After hearing the parties' evidence, and after a thorough discussion of the evidence by the Board members, Bandy moved to deny the appeals, stating pointedly: "we certainly have weighed all the evidence." (A143). The Board unanimously voted to deny the appeal, upholding the assessment by a vote of 4-0. (A145) The Board issued its written decision on July 15, 2013. (A12-A21).[12]

[12] For clarification, it is noted here that the Board discusses Stat's comparison of assessments under the heading "The Sales Comparison Approach" in its decision, and references a "sales comparison approach," but goes on to explain that the Property Owners had improperly utilized comparable assessments in their approach versus comparable sales. (A18-A19). The Property Owners acknowledge that their approach was based on "assessment comparisons with peer buildings." (OB at 10).

ARGUMENT

I. THE BOARD DID NOT REFUSE TO CONSIDER THE PROPERTY OWNERS' EVIDENCE

A. Question Presented

Have the Property Owners demonstrated that the Board act contrary to law, fraudulently, arbitrarily or capriciously in refusing to consider the Property Owners' evidence, despite the record's plain indication that the Board not only considered the Property Owners' evidence, but was highly critical of it?

B. Standard of Review

A decision of the Board is *prima facie* correct, and will be disturbed only if the appellant demonstrates that the Board "acted contrary to law, fraudulently, arbitrarily or capriciously." 9 *Del. C.* § 8312(c).

C. Merits of the Argument

1. A Property Owner Must Present Competent Evidence of Substantial Overvaluation, and it is the Board's Prerogative to Weigh Competing Evidence

The County assesses real property in terms of its fair market value as of July 1, 1983, the County's "base year" for assessment purposes.[13] *New Castle County*

[13] Delaware law requires the County to assess a property based on its "true value in money." 9 *Del.C.* § 8306(a). True value in money is synonymous with "fair market value." *Seaford Associates, L.P. v. Board of Assessment Review*, 539 A.2d 1045, 1048 (Del. 1988) (citations omitted). Fair market value is "the price which would be agreed upon by a willing seller and a willing buyer, under ordinary circumstances, neither party being under any compulsion to buy or sell." *Seaford Associates, L.P. v. Board of Assessment Review*, 539 A.2d 1045, 1048 (Del. 1988) (citations omitted).

Dept. of Finance v. Teachers Ins. & Annuity Ass'n, 669 A.2d at 102, fn 2. A property owner seeking a reduction in his assessment "is faced with a substantial evidential burden" before the Board, given that a "*prima facie* case of accuracy is made by the assessment record." *Tatten Partners, L.P. v. New Castle County Board of Assessment Review*, 642 A.2d 1251, 1256 (Del. Super. 1993) (quoting *Fitzsimmons v. McCorkle*, 214 A.2d 334, 337 (Del. 1965)). A property owner must present competent evidence of substantial overvaluation to rebut the presumption of accuracy, and his evidence must consist of "techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court." *Teachers Ins.*, 669 A.2d at 103.

There are three generally accepted methods of valuation: (1) the comparable sales or market approach; (2) the income approach; and (3) the cost approach. *Seaford Associates, L.P. v. Board of Assessment Review*, 539 A.2d 1045, 1049 (Del. 1988). Each method has its strengths and weaknesses. *See id*. at 1048-1049. While the income approach is an accepted method of valuation, this Court "has repeatedly noted that the comparable sales or market method is generally the preferred test to determine fair market value." *General Motors Corp. v. New Castle County*, 2000 WL 33113802 (Del. Super. Dec. 16, 2000) (citing *Seaford Assocs*., 539 A.2d at 1048; *Fitzsimmons*, 214 A.2d at 338). When the comparable sales approach is inappropriate, for example, where there are no comparable sales

or where the property is unique, then a property owner may "resort to one of the remaining methods."[14] *Seaford Assocs*., 539 A.2d at 1048 (citing *Fitzsimmons v. McCorkle*, 214 A.2d at 338). The income approach is generally the most frequently applied and preferred method of evaluating income producing properties. *Seaford Assocs*., 539 A.2d at 1049. However, because

> the income method may result in reassessment requests as income varies … [t]he income method of valuation, even where appropriate, should not be accepted as the sole method for fixing market value. If relied upon as the principal technique its validity must be tested against one of the two remaining standards.

Id. at 1050; *cf. Klair v. New Castle County Board of Assessment Review*, 687 A.2d 196 (Del. 1995) (TABLE) (holding the income approach, standing alone, constituted competent evidence, noting testimony supporting that no other method was available). Furthermore, the income approach "may not be based on aberrational operating results or temporary phenomena." *Seaford Assocs*., 539 A.2d at 1049.

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[14] The Property Owners misquote the Board's decision as stating the income approach should only be used "as a last resort," and argue that this straw man statement is inconsistent with Delaware law. (OB at 20.) The Board's decision never states the words "as a last resort." The Board's "Discussion" section states: "An appellant may 'resort to' the income capitalization approach where comparable sales are lacking." (A19) (quoting *Seaford Associates*, 539 A.2d at 1048). The Board's decision also makes note of the County attorney's argument that the income approach should "be used only as a 'resort,' applied as a primary means of valuation only where sales data is insufficient to support a sales comparison approach." (A17). Both of these statements are consistent with this Court's holding in *Seaford Associates*. The Property Owners also falsely imply that the Board determined in its written decision that it "is simply unnecessary to utilize the income capitalization approach where valid 1983 sales of the units exist." (OB at 21 (citing (A18)). In actuality, this quotation, appearing in the Board's recitation of facts, was the Board's paraphrase of an argument presented by the County's attorney. (A18).

If an appellant rebuts the presumption of accuracy, "the Board should hear the entire appeal"; in other words, the Board should hear the County's evidence in support of the assessment. *Teachers Ins.*, 668 A.2d at 103. This Court explained in *Teachers Insurance*:

> The County is free to use different valuation methodologies and to present evidence and argument in support of its position that the taxpayer's valuation is unreliable or otherwise inaccurate. The Board then will be able to use its expertise to evaluate the competing methodologies; make an informed judgment as to which is more persuasive; and state the reasons for its decision.

Teachers Ins., 668 A.2d at 103.

2. The Board Considered All of the Evidence, and Found the County's Evidence More Persuasive

The Superior Court below held that the process identified by this Court in *Teachers Insurance* "is exactly what happened in the case *sub judice*." *RRHC Wilm., LLC, et al. v. New Castle Cty. Off. of Fin. and New Castle Cty. Bd. of Assessment Review*, C.A. No. N13A-08-004, at 20 (Del. Super. May 30, 2014) (hereinafter "Opinion"). The Superior Court observed that the record "plainly indicates" the Board "considered the evidence presented" by the Property Owners, and "found it lacked credibility in the face of the actual 1983 data." (Opinion at 16-17, 20). In so holding, the Superior Court explained accurately, and in detail, how each of the statements the Property Owners cited to the court failed to support their argument that the Board members believed only 1983 data could be

considered. (Opinion at 13-16). Indeed, the Superior Court held the Property Owners' claims were "entirely without merit." (Opinion at 12). The County and Board wholly adopt the Superior Court's explications without further reciting them here, but also stress that the Board members not only considered the Property Owners' evidence, but were highly critical of it, and for sound reasons.

The Board found Stat's comparison of assessments wholly unpersuasive, having no bearing on establishing the accurate fair market value of the units as of July 1, 1983.[15] (A19, A52). No Delaware Court has recognized a comparison of assessments as a method of valuation generally accepted in the financial community, and the Superior Court has explicitly rejected it upon examination. In *Jones v. New Castle County Board of Assessment Review*, 1987 WL 12442 (Del. Super. June 5, 1987), the Superior Court reasoned that a discussion of allegedly comparable assessments "is essentially irrelevant to the issue of whether … property is assessed at its 'true value in money,'" because "[i]solated errors in the assessments of allegedly comparable properties cannot be used to justify the

[15] Specifically, as to Stat's comparison of assessments, Bandy remarked: "The entire basis for the appeal is 1983 market value. That's all we can consider. And unfortunately you don't have a dispute with 1983 market value." (A52). Bandy's statement is correct. This Court has held that an expert's evidence must address value as of the County's base year. *See Board of Assessment Review v. Stewart*, 378 A.2d 113, 116 (Del. 1977) (holding that an expert's testimony was not entitled to weight because he did not found his calculations on the County's base year). The Property Owners take Bandy's statement out of context, implying that it demonstrates her refusal to consider Stat's back-trended income approach. (OB at 13). In point of fact, the Property Owners had not presented their income approach at the time Bandy made her statement, and Bandy later moved to continue the Board's hearing in order to hear Stat's back-trended income approach. (A71).

reduction of other assessments that may accurately reflect market value." *Jones*, 1987 WL 12442, at *2 (citing *City of Roanoke v. Gibson*, 170 S.E. 723 (Va. 1933)). An assessment is an attenuated figure; it is determined by reference to actual data – primarily to sales, income, and cost. A system based on a comparison of assessments would create ever-shifting sands where, when one assessment is changed, other assessments that have been valued in relation to it must also be changed, and so on, *ad infinitum*. The Board's reliance on an actual sale versus an attenuated assessment is perfectly reasonable.

In the instant case, Stat admitted that the 1983 arms-length sales of units in One Commerce Center accurately reflect 1983 market value, and further admitted that the assessments he had cited in his assessment comparison were erroneous and should be raised. (A44) (quoted *supra* at 10). Despite his admissions, Stat argued that One Commerce Center units should be lowered in order to be in-line with the erroneous assessments, to ensure that their "current assessments are … uniform [and] equitable as compared to other comparable properties." (A39). Thus, Stat advocated to the Board precisely what the *Jones* court prohibited – justifying the reduction of a properly-assessed property by comparing it to erroneously-assessed properties. (*Id*.) The Board's Rules of Procedure reflect the *Jones* court's holding: "An appellant may cite only comparable sales, *not* allegedly comparable assessments." Board Rule of Procedure VII.3 (emph. in orig.). Felicia cited this

rule at the Board's hearing, informing the Property Owners that an appellant must use an "actual sale" for comparison purposes.[16] (A72).

Nonetheless, the Board allowed Stat to present his comparison of assessments, and the Board discussed his comparison in its deliberations. Although the Board considered such evidence, it was thoroughly unconvinced by Stat's conclusion that the assessment of Unit 100B should be used as a comparison for assessing the Property Owners' 4,732-square-foot units, observing that bathroom-sized Unit 100B was not "comparable to anything." (A50). The Property Owners incorrectly aver that Bonk failed to state why Unit 100B is assessed at a lower rate. (OB at 29). Both Bonk and Felicia explained that Unit 100B is validly assessed differently because of its small size and use as a vending area. (A49-A50). The Property Owners' professed ignorance on this point is frankly surprising, as the rationale has been explained to them several times. (OB at 29). Even so, Property Owners' erroneously argue that applying Unit 100B's assessment rate is fair and accurate, pointing to the fact that it is "*in the same building*" as the Property Owners' units. (OB at 11) (emph. in orig.) The Property Owners' argument is entirely specious. It makes perfect sense that a unit the size of a bathroom and used as a vending area should be valued differently than

[16] The Property Owners incorrectly cite Felicia's reference the Board's rules as purported evidence that the Board refused to consider or ignored its back-trended evidence. (OB at 14).

a unit 91 times larger, used as a professional office, and occupying an entire floor of a high-rise building.

The Board was similarly unconvinced by the Property Owners' income approach to valuation. Stat utilized only a single year of data from 2011 in his income approach,[17] and did not test his approach against one of the other remaining standards.[18] Notwithstanding these deficiencies, the Board considered Stat's income approach, and accepted as more persuasive the arms-length 1983 sales of the units as demonstrative of their 1983 fair market value. (*see* Opinion at 19-21). Board members Mannion, Larrimore, and Bandy agreed that the arms-length sale of an income-producing property is indicative of its income potential. (A72, A99)

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[17] Stat's 2011 income data is just a few years removed from the "Great Recession." *See* (A269, ¶ 3) (Property Owners note 2006 is "pre-recession"); (A136) (R. Douglas Sensabaugh, the General Manager of the Office of Property Assessment, observes that 2006 "is when it all went sour for everyone"). Thus, the 2011 income data may well be the product of temporary or aberrational phenomena. *See Seaford Assocs*., 539 A.2d at 1049.

[18] The Property Owners attempt to characterize Stat's assessment comparison as a valid "comparable sales" approach, in a belated attempt to cure this defect in their evidence. (OB at 10, 31). This Court has described the comparable sales approach as follows: "[S]ales of similar properties are examined and compared to the subject property. Market oriented adjustments are made for any differences between the comparable sales and the subject." *Seaford Assocs*., 539 A.2d at 1046, fn 1. In this case, Stat's analysis was not based on "recent sales" of "similar properties," but rather of "assessments" of varied "high-rise and low-rise buildings in the Wilmington area." (A38). Stat did not identify typical market adjustments to the assessments he cited, such as location, size, age, condition, or view. *See Fitzsimmons* 214 A.2d at 338-339 (observing relevant factors in the comparability of a sale include: size, location, and recency of the transaction) (citations omitted). To the extent Stat cited sales of allegedly comparable properties, none were "recent"; instead, they ranged from the years 2000 to 2006. (A269, ¶ 3). If there remains any doubt, the Property Owners' cover letter the Board specifically states: "The appeals rest on assessment comparisons with peer buildings and on valuation by the income approach." (A147). The Property Owners make no mention of a comparable sales approach in their cover letter. (*see Id*.).

(*see supra* at 11). When Bandy asked the Property Owners' attorney if he was prepared to submit an appraisal based on the income approach, he responded that no appraiser was willing to contradict sales from 1983, and that an appraiser would put his "license in jeopardy" by applying a back-trend method to a property built and sold in 1983 to arrive at an assessment of 50% of what it actually sold for.[19] (A68) (quoted *supra* at 12). This admission lends further support to the weight the Board assigned to the 1983 sales of the units versus Stat's back-trended income approach.

The Board members were well-aware that it is proper for a property owner to submit for their consideration a back-trended income approach, having been so advised by the Board's attorney. (A105) (*see supra* at 11, fn 10). However, Bandy and Larrimore, while considering the approach offered by the Property Owners, were "very skeptical" of back-trending in the face of actual sales from 1983. (A99, A137) (*see supra* at 11). In this instance, the Board found that the 1983 sales were the "gold standard," "ultimate standard," and the best 'comparables' it "had ever heard of" for obtaining an accurate valuation of the Property Owners' units as of 1983. (A44, A144).

As the Superior Court held, a plain reading of the record demonstrates that the Board considered the Property Owners' evidence and found it "lacked

[19] The Property Owners request a 54% reduction in their assessments, from $432,900 to $200,200.

credibility"[20] in the face of the County's evidence. (Opinion at 20). The Property Owners claim that the Board's written decision is not fairly reflective of the Board's deliberations, and that the Superior Court improperly relied upon it, but the Property Owners do not identify the alleged discrepancies with adequate specificity to allow the County or the Board to address them.[21] Moreover, the Property Owners fail to cite any case law in support of their claim. The Board's written decision was a "fair statement of the conclusions of the Board," as well as of the "facts material to show the grounds for those conclusions." *Conway & Conway v. Zoning Board of Adjustment & Jankowski*, 1998 WL 283393, at *2 (Del. Super. Feb. 20, 1998) (quoting *Searles v. Darling*, 83 A.2d 96, 98 (Del. 1951)) (holding, on review via writ of certiorari, that it was not "illegal" for the Board's written decision to contain a legal standard not articulated in the Board's oral deliberations). In fact, the Property Owners extensively rely on the written decision in arguing the Board's decision should be reversed, which undermines the

[20] The Property Owners are critical of the Superior Court's conclusion, averring that they conducted a "line-by-line" review of the record and were unable to find reference to the "credibility" of their evidence. (OB at 6). While the precise word "credibility" may not appear directly in the record, certainly the Board's stark criticisms of Stat's use of Unit 100B's assessment rate, the basis for his proposed reassessed value for the Property Owners' units, lend support to the Superior Court's conclusion that the Board found Stat's analysis lacked credibility.

[21] The Property Owners vaguely allege that the written decision is a "refracted summary" of the Board members' comments at the hearing, is a "retroactively buttressed" version of the Board members' statements, and contains "curative language." (OB 5, 7, 24).

Property Owners' claim that the written decision is unrepresentative of the Board's actual deliberations. (*E.g.*, OB at 3, 20, 21, 32).

In any event, a "thorough review" of the record, including "the hearing transcripts," "plainly indicated" to the Superior Court that the Board did not act arbitrarily or capriciously in weighing the evidence, but rather acted reasonably, giving due consideration of the facts presented and explaining its justification for denying the appeals. (*see* Opinion at 12, 16). The Superior Court's evaluation of the record was correct, and should be affirmed.

II. THE BOARD ACTED PROPERLY IN RELYING ON THE COUNTY'S METHODS OF VALUATION, BASED ON ACTUAL DATA FROM 1983

A. Question Presented

Have the Property Owners demonstrated that the Board act contrary to law, fraudulently, arbitrarily or capriciously in determining that the County's evidence in support of the assessments, based on actual 1983 data, was more persuasive than the Property Owners' evidence, consisting of a comparison of assessments and an income approach to valuation utilizing 2011 data back-trended to 1983, despite this Court's previous holdings that it is the Board's responsibility to evaluate competing methodologies?

B. Standard of Review

A decision of the Board is *prima facie* correct, and will be disturbed only if the appellant demonstrates that the Board "acted contrary to law, fraudulently, arbitrarily or capriciously." 9 *Del. C.* § 8312(c).

C. Merits of the Argument

1. This Court has Authorized the Board's Reliance on Methodologies Utilizing Base Year Data

In essence, the Property Owners ask the Court to hold, as a matter of law, that Stat's methods of valuation were superior to the County's methods of valuation. However, the Court has never viewed its role as the arbiter of competing methodologies in the assessment process – it has expressly held that it is

the Board's duty to weigh the evidence. The Board is to use its "expertise to evaluate the competing methodologies [and] make an informed judgment as to which is more persuasive." *Teachers Ins.*, 668 A.2d at 103. "[The Court's] task upon appeal is not to choose which of various appraisal techniques is more suitable but simply to determine whether the resulting assessment is supported by the record and not contrary to the law, fraudulent, arbitrary or capricious." *Rodney Square Investors, L.P. v. Board of Assessment Review of New Castle County*, 1983 WL 482333 (Del. April 7, 1983) (citing 9 *Del. C* . § 8312(c); *Board of Assessment Review v. Stewart*, 378 A.2d 113 (Del. 1977)).

Moreover, the Supreme Court has expressly held that it is appropriate for the County to use base year data to determine an assessment, and for the Board to rely on the County's base-year approach in the face of a "present market value" or back-trended approach to valuation.

In *Board of Assessment Review for New Castle County v. Stewart*, 378 A.2d 113, 115 (Del. 1977), this Court determined that the County's use of base year data to assess real property did not violate the Uniformity Clause of the Delaware Constitution. 9 *Del. C.* § 8306(a). This was so in *Stewart* even when the current value of the property was known, and less than its assessed value. *Id*. at 116. While the Property Owners nonetheless believe that *Stewart* supports their argument that a

back-trended approach must be accepted as a matter of law over an approach based on actual data, subsequent case law dispels the Property Owners' mistaken belief.

In *Rodney Square Investors, L.P. v. Board of Assessment Review of New Castle County*, 1983 WL 482333 (Del., April 7, 1983), a case decided six years after *Stewart*, a property owner challenged the Board's acceptance of the County's use of comparable sales from the County's base year, at that time 1970, rather than the property owner's method of using a contemporary sale of the subject property, back-trended to 1970. This Court opined that the County assessor had "reasonably elected" to use base-year sales in his approach to valuation, and "was not required to give any explicit weight to the property's 1980 sales price or to 'factor back' the 1980 sales price to arrive at a 1970 value." *Id*. at *2. Further, the Board was entitled to rely upon the County assessor's methodology; the Board, simply, "is required to choose the evidence it finds most reliable." *Id*. at *2. In the instant case, that is precisely what occurred, a fact that is well-supported by the record. The Board considered all of the evidence submitted by both the Property Owner and the County and found the County's evidence more reliable.

2. *Seaford Associates* and *Teachers Insurance* are in Harmony with the Board's Decision

The Property Owners wrongly rely on *Seaford Associates* for the proposition that a method of valuation using contemporary data back-trended to 1983 is superior to a method using actual data from 1983. (OB at 29). In *Seaford*

Associates, the Sussex County Board of Assessment Review rejected a property owner's income approach to valuation because Sussex County assessed all property solely on the cost approach to valuation. *Seaford Assocs*., 539 A.2d at 1047. The Sussex County Board decided that non-uniformity would result if it were to permit the use of a valuation method other than the cost approach. *Seaford Assocs*., 539 A.2d at 1047. The *Seaford Associates* Court presented the issue as "the narrow legal question of whether an administrative body charged with the duty of determining claims of overassessment may preclude one of the three accepted standards for real property valuation." *Seaford Assocs*., 539 A.2d at 1048.

The *Seaford Associates* Court went on to hold that the Sussex County Board could not adopt one method of valuation to the exclusion of others, opining that the Sussex County Board had exaggerated the reach of the Uniformity Clause: uniformity, applied in the context of choosing between the three accepted methods of valuation, merely required Sussex County to apply the same methods it had used in factoring back its cost approach to the other two accepted methods of valuation. *Seaford Assocs*., 539 A.2d at 1047. It is in this context that the *Seaford Associates* Court made the statement: "Uniformity merely requires that present market value be factored back to a base tax year." The Property Owners cite this statement out of context, claiming it supports their argument that a method using data back-

trended to 1983 is superior to one using actual data from 1983. (OB 29). However, the *Seaford Associates* Court did not hold that back-trended data is superior to actual data, and such a holding would have fallen outside of the "narrow legal question" the *Seaford Associates* Court actually addressed. Rather, the *Seaford Associates* Court held that the Sussex County Board's refusal to consider the income approach or give it any weight was arbitrary. *Seaford Assocs*., 539 A.2d at 1049.

In the instant case, the Board did not "preclude one of the three accepted standards for real property valuation." *Seaford Assocs*., 539 A.2d at 1048. In fact, the Board heard evidence from both the County and the Property Owners with respect to the income approach to valuation. The Superior Court correctly determined that *Seaford Associates* is inapposite here, and further supportive of the Board's decision – the Board never denied the Property Owners "an opportunity to present all the evidence they had in support of the revaluation," "even reconvening the hearing another day to allow for a more complete presentation." (Opinion at 20).

The Property Owners also incorrectly cite this Court's decision in *Teachers Insurance*, 669 A.2d 100, as establishing their claim that back-trended data is superior to actual data in terms of uniformity and equity. (OB 29). The Superior Court below held that the Property Owners' reliance on *Teachers Insurance* was

mistaken as well. (Opinion at 19-20). In *Teachers Insurance*, a property owner presented a "leased fee" approach to valuation to the Board, as well as the three principle methods of valuation. *Teachers Ins.*, 669 A.2d at 102. Notably, the Court observed, without criticism or comment, that the property owner had based its valuation on both back-trended contemporary data *and* 1983 data[22]:

> To determine the leased fee value of the property, [the appraiser] used the three traditional valuation methods—cost, sales comparison, and income capitalization. With each valuation method, [the appraiser] used two different approaches to determine the value as of July 1, 1983. First, it considered data and economic conditions in 1983 to arrive at a 1983 value. Second, it valued the property as of January, 1994, and then trended back to a 1983 value.

Teachers Ins., 668 A.2d at 102. The *Teachers Insurance* Court went on to hold that the Board had improperly rejected the leased fee approach out of hand, and had ignored the property owner's presentation of the other three methods of valuation entirely. *Id*. at 102-103. The *Teachers Insurance* Court held the Board had erroneously refused to perform its duties of evaluating the evidence by ignoring the property owners' evidence. *Id*. at 103. The *Teachers Insurance* Court did not opine that data back-trended to 1983 is superior to actual data from 1983; rather, it held that it is the Board's duty to use its "expertise to evaluate the competing methodologies." *Id*. The Superior Court properly determined that the Board

[22] At least two subsequent Superior Court decisions discuss methods of valuation utilizing data from 1983 without scrutiny as to their constitutionality: *Brandywine Innkeepers, L.L.C. v. Board of Assessment Review of New Castle County*, 2005 WL 1952879 (Del. Super. June 03, 2005) and *First Union Bank of Delaware v. New Castle County Dept. of Land Use*, 1999 WL 1236569 (Del. Super. Oct. 25, 1999).

weighed the evidence in accordance with this Court's holding in *Teachers Insurance*. (Opinion at 19-20).

In this case, the Property Owners argue that the County's methods of valuation utilizing base year data do not adequately account for the preference in Delaware for assessing property based on its present market value, and that Stat's methods of valuation were superior in this respect. (OB at 30). However, the Board heard and considered these same arguments at its hearing, evaluated Stat's evidence against the County's, and found the County's evidence more persuasive. Again, the Board's decision is squarely in line with this Court's holding in *Teachers Insurance*, and the arguments the Property Owners' make concerning present market value go to the weight of the evidence, which is the Board's area of expertise. *See JMB Income Properties v. New Castle County Bd. of Assessment Review*, 1994 WL 45336, at *6 (Del. Super. Feb. 3, 1994) (holding that it was within the Board's discretion to weigh a property owner's contention that the County's method of valuation had not adequately accounted for the effect the presence of asbestos had on the present market value of a property).

The Board's decision was well within the legal parameters this Court has established. This is simply a case of a 'battle of the experts,' where the Board properly denied the Property Owners' appeals based on due consideration of all the

evidence. As the Superior Court correctly held, the Board's decision should not be reversed.

CONCLUSION

For the reasons stated, the County and the Board respectfully request this Honorable Court affirm the judgment below.

NEW CASTLE COUNTY OFFICE OF LAW

/s/ Wilson B. Davis
Wilson B. Davis (#5154)
For the Board of Assessment Review
Brian J. Merritt (#3982)
For the Office of Finance
Assistant County Attorneys II
87 Reads Way
New Castle, Delaware 19720
(302) 395-5130

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