



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' REPLY 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

Dated: September 4, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT..... 1

ARGUMENT 5

The Board’s Decision Affirmed by the Superior Court
Was Unconstitutional. 5

Appellees’ Reliance on *Conway v. Zoning Bd. of Adjustment*
Is Misplaced. 14

Appellees’ Focus on Unit 100B in Their Answering Brief Is an
Intended Distraction from the Merits of the Appeal. 16

CONCLUSION. 20

TABLE OF AUTHORITIES

STATUTES AND ORDINANCES:

Del. Const. Art. VIII §1 5

9 Del. C. §1318 6

9 Del. C. §8306(a) 3

CASES:

Barley Mill, LLC v. Save Our Country, Inc.,
89 A.3d 51 (Del. 2014) 8

Bd. of Assess. Rev. v. Stewart,
378 A.2d 113 (Del. 1977) 10, 11, 12

Clifton v. Allegheny County,
969 A.2d 1197 (Pa. 2009) 11

Consolidated Fisheries Co. v. Marshall,
32 A.2d 426 (Del. Super. 1943), *aff'd* by 39 A.2d 413 (Del., 1944) 15

Conway v. Zoning Bd. of Adjustment,
1998 Del. Super. LEXIS 113 (Del. Super. Feb. 20, 1998) 14, 15

Excelsior Assocs., L.P. v. New Castle County Dep't of Fin., Goldstein, J.,
1995 Del. Super. LEXIS 43, *aff'd* by *New Castle County Dep't of Fin. v. Teachers Ins. & Annuity Ass'n*,
669 A.2d 100 (Del. 1995) 4

New Castle County v. 16.89 Acres of Land,
Del. Super., 404 A.2d 135 (1979) 17

New Castle County v. New Castle Bd. of Assess. Rev. and Verizon Delaware, Inc.,
Babiarz, Jr., J., 2008 Del. Super. LEXIS 162, *aff'd* by *New Castle County v. New Castle Bd. of Assess. Rev. and Verizon Delaware, Inc.*,
970 A.2d 257 (Del. 2009) 6

New Castle County v. New Castle Bd. of Assess. Rev. and Verizon Delaware, Inc.,
970 A.2d 257 (Del. 2009) 4, 6, 11, 19

New Castle County Dep't of Fin. v. Teachers Ins. & Annuity Ass'n,
669 A.2d 100 (Del. 1995) 4, 6, 17

Odessa Nat'l Golf Course LLC v. New Castle County,
Wallace, J., 2014 Del. Super. LEXIS 122. 3

Rodney Square Investors, L.P. v. Bd. of Assess. Rev.,
Del., 1983 WL 482333 (Del. April 7, 1983) 17, 19

Seaford Assocs. v Bd. of Assess. Rev.,
539 A.2d 1045 (Del. 1988). 3, 4, 6, 13, 19

Town of Fenwick Island v. Sussex Sands, Inc.,
1990 Del. Super. LEXIS 370. 15

OTHER AUTHORITIES:

Appellees' Corrected Answering Brief. 10, 14, 17, 18

May 13, 2013 Written Decision of the Board of Assessment Review. 12, 18

PRELIMINARY STATEMENT

The fundamental issue before this Honorable Court is one of Constitutional proportion – the constitutional mandate of uniformity in taxation. The decision of the New Castle County Board of Assessment Review (“Board”) denying Appellants’ property tax appeals (“Appeals”), which the Superior Court subsequently affirmed, does not meet the necessary constitutional standard because the Board’s members failed to consider Appellants’ competent evidence demonstrating over-assessment of Appellants’ properties. The Board conflated the application of a 1983 base-year *system* with a 1983 base-year *value*.

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.

The Board Hearing transcripts reflect that the members were frustrated with the perceived (but inaccurate) requirement of applying 30-year-old assessment data, instead of applying current data trended-back to the base year of 1983, to calculate the proper fair and uniform assessment for Appellants’ units. Because

actual data from 1983 existed, the members mistakenly believed that they were obligated to rely only upon that data to the exclusion of Appellants' competent evidence.¹ In their Answering Brief, Appellees attempt to distance themselves from the actual basis of the Board members' conclusions as reflected in the verbatim Hearing transcript. The distilled rationale that appears in the Board's July 15, 2013 written decision denying the Appeals ("Decision") is not supported by the transcript. The County did not rebut Appellants' back-trended valuation analysis. There were no Board deliberations post-Hearing. The Board concluded the Hearing, immediately voted without any caucus, and issued its oral decision denying the Appeals. Three of the four voting Board members made statements prior to the vote, which provide the real rationale for their decision.

The Board's written Decision – including an analysis that the Board did not utilize in its transcribed deliberations at the Hearing – was issued two months later. Appellees attempt to diminish the inconsistencies between the Hearing transcript and the written Decision, but the record is self-evident. The inclusion in the written Decision of *pro forma* incantations and curative language in an effort to overcome the constitutional and other legal deficiencies in the Board's on-the-record rationale are insufficient.

¹ See March 20, 2013 Hearing Transcript ("Tr.") at 40 (A62/R000050).

Similarly, quoting from the Superior Court’s May 30, 2014 Opinion and Order (“Opinion”) that the record “plainly indicates” that the Board “considered the evidence presented” by Appellants is inconsistent with the Hearing transcripts, as is the reference to one Board member stating “we certainly have weighed all the evidence.”² Although the Board *acknowledged* Appellants’ trended-back analysis, it never actually considered the probative value of Appellants’ evidence because the stale 1983 data existed in the County’s database.³ Convenience cannot preempt constitutionality. 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.

In order to determine the accurate assessments for Appellants’ units in One Commerce Center, the statutory standard of “true value in money” should have been applied by trending-back current property values to the baseline year of 1983. Instead, the Board applied outdated 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.”⁴

² Board Member Victoria Bandy at May 15, 2013 Tr. at 70 (A143/R000131).

³ See *Odessa Nat’l Golf Course LLC v. New Castle County*, Wallace, J., 2014 Del. Super. LEXIS 122, at *15-16.

⁴ 9 Del. C. §8306(a); see also *Seaford Assocs. v. Bd. of Assess. Rev.*, 539 A.2d 1045, 1048 (Del. 1988) (*citations omitted*) (Fair market value is “the price which would be agreed upon by a

The 30-year-old assessment on which the County levies taxes against Appellants' units is not the accurate measure in light of real-world factors including depreciation, deterioration, and functional obsolescence – all of which One Commerce Center has experienced – and all economic factors that this Court has recognized as relevant criteria impacting the accurate determination of a property's value in other assessment cases.⁵ Appellees' attempt in their Answering Brief to: (1) inaccurately recast the Board members' comments concerning Appellants' trended-back evidence of overvaluation, (2) bypass Appellants' documented sales and income analysis (including pre-recession sales and sales of other floors in the same building), (3) wrongly discredit Appellants' assessment comparisons as being "isolated," and (4) try to refocus the evaluation of the appeal analysis on Unit 100B in One Commerce Center – a unit that is not the subject of the Appeals and was a minor part of Appellants' reduction analysis.

On appeal, the Superior Court upheld the Board's unconstitutional analysis, and accordingly, its Opinion constitutes reversible error. Respectfully, the Board's denial of the Appeals and the Superior Court's Opinion affirming the denial should be reversed.

willing seller and a willing buyer, under ordinary circumstances, neither party being under any compulsion to buy or sell.”).

⁵ See, e.g., *New Castle County v. New Castle Bd. of Assess. Rev. and Verizon Delaware, Inc.*, 970 A.2d 257 (Del. 2009); *Seaford Assocs.*, 539 A.2d at 1049-50; *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).

ARGUMENT

The Board's Decision Affirmed by the Superior Court Was Unconstitutional.

Uniformity and true value in money are standards that 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. Under Delaware law, the principle of uniformity is embodied in Article VIII, §1 of the Constitution which provides, in relevant part:

All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, except as otherwise permitted herein, and shall be levied and collected under general laws passed by the General Assembly.

The Board members' reliance on an assessment based solely on actual 1983 data creates an inequitable landscape for property owners, which is not uniform. 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 relying only upon data *from* 1983, the year in which Appellants' condominium units were constructed and effectively ignoring Appellants' comprehensive analysis.

“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.”⁶ If a taxpayer presents competent evidence of substantial overvaluation, the Board must not ignore that evidence and should hear the entire appeal.⁷ Here, in contravention of this Court’s holding in *New Castle County Dep’t of Fin. v. Teachers Ins. & Annuity Ass’n*,⁸ 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 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.”⁹ The failure to consider the most accurate data 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.

In their brief, Appellees have attempted to diminish this deficiency – importantly, one which the Board members repeatedly acknowledged – by

⁶ *New Castle County v. New Castle Bd. of Assess. Rev. 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. Rev. and Verizon Delaware, Inc.*, 970 A.2d 257 (Del. 2009); *see also* 9 Del. C. §1318.

⁷ *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).

⁸ 669 A.2d at 102-04.

⁹ *Seaford Assocs.*, 539 A.2d at 1049-50.

belatedly attempting to challenge the “credibility” of evidence. Here, the Hearing transcripts are the only accurate reflection of the Board’s concerns with the staleness of the 1983 data the County applied, as well as their frustration with the system as a whole. These are substantive facts that Appellees do not acknowledge in their brief. For example:

[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 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.¹⁰

[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.¹¹

* * *

[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.¹²

¹⁰ March 20, 2013 Tr. at 50 (A72/R000060) (*emphasis added*).

¹¹ March 20, 2013 Tr. at 50 (A72/R000060).

¹² March 20, 2013 Tr. at 44 (A66/R000054).

The Board Rules do not mandate the result advocated by the Board. Even assuming *arguendo*, they did, such interpretation ignores controlling law. In that regard, Appellees' suggestion that Board members were "'very skeptical' of back-trending in the face of actual sales from 1983" ignores Delaware law, particularly since their "skepticism" was based on an erroneous understanding of the relevant legal standard. Analogous to the situation in *Barley Mill, LLC v. Save Our County, Inc.*, "a mistake of law undermined the [Board's] deliberative process and therefore rendered its vote arbitrary and capricious."¹³

As the record reflects, the Board members were in fact, skeptical about being restricted to consideration of only the 1983 sales data-driven assessments and encouraged an appeal of the inequities of the assessments as-applied:

[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.*¹⁴

[Board Member, Joseph Mannion]: Yeah there seems to be a lot of different ways to look at this and you made very good points and a very

¹³ 89 A.3d 51, 61 (Del. 2014) (New Castle County Council decision not following the law was arbitrary and capricious).

¹⁴ May 15, 2013 Tr. at 70 (A143/R000131) (*emphasis added*).

good presentation. I was impressed by it. 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.*¹⁵

[Board Chairman, Anthony Felicia]: *[W]hen I try to think of the elephant in 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.*¹⁶

[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*

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

¹⁶ May 15, 2013 Tr. at 32-33 (A105-06/R000093-94) (*emphasis added*).

*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.*¹⁷

Similarly, Appellees' reliance on perfunctory statements by Board members such as "gold standard"¹⁸ and "ultimate standard"¹⁹ in referencing 1983 sales data does not cure the fact that members effectively ignored the controlling law requiring the back-trending of current data to ensure uniformity and assessments reflecting a property's true value in money to satisfy constitutional concerns. In fact, these statements indicate the Board members' unjustified reliance on the 1983 data.

1983 is a *base year* for uniformity purposes. Trending-back present value of the units in One Commerce Center to the benchmark year of 1983 ensures accurate assessments reflecting their true value in money. As this Court wrote in *Bd. of Assess. Rev. v. 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

¹⁷ May 15, 2013 Tr. at 71-72 (A144-145/R000132-133) (*emphasis added*).

¹⁸ Answering Brief at 21.

¹⁹ *Id.*

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 1970.²⁰

In *Stewart*, this Court articulated the precise economic 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 1983.²¹ And, as this Court noted 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.”²²

The Board’s refusal to consider a trended-back fair market value (and the Superior Court’s ratification of the decision) ignore market realities and exemplify why a reassessment after nearly 30 years is vital to recalibrate Appellants’ excessive assessments. There have been no systematic, short-term cyclical general reassessments “to keep assessed values and market values closely aligned” as the Delaware Supreme Court contemplated.

²⁰ 378 A.2d 113, 116 (Del. 1977).

²¹ 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*).

²² *Verizon*, 970 A.2d 257 (*quoting* Superior Court’s decision). 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 use of an outdated base year assessment to establish property tax liability, violates the *Uniformity Clause of the Pennsylvania Constitution*.” *Clifton v. Allegheny County*, 969 A.2d 1197, 1226, 1229 (Pa. 2009) (*emphasis in original*).

Here, unlike the taxpayer in *Stewart*, Appellants specifically argued that “an unreasonable period of time has passed since the last general assessment was made [for New Castle County in 1983].”²³ Also, unlike the taxpayer in *Stewart*, here Appellants trended-back current data to 1983 to show substantial overvaluation.²⁴

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. 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.”²⁵ This is an incomplete characterization 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.²⁶ Here, the two concepts are in accord. Current values must be factored-back to achieve a fair market value for assessment. The Board’s attorney acknowledged that the Board should begin its analysis by considering the building “as it exists now” – to determine the *current* fair market value of the property and trend it back to 1983

²³ See May 15, 2013 Tr. at 31 (A104/R000092).

²⁴ 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. 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 assessment. It made the Court choose between current market value and the base year assessment without reconciling the two.

²⁵ Written Decision at 6.

²⁶ *Stewart*, 378 A.2d at 116.

for uniformity purposes:

[Board Attorney, Wilson B. 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.*²⁷

However, this accurate reflection of Delaware law did not resonate with the Board members, as they did not apply the applicable legal principle to the facts before the Board. The quotations cited *supra* illustrate that the Board members ignored the prevailing legal standard and rejected the constitutionally-compliant, trended-back approach presented by Appellants. Their rationale was arbitrary and capricious. “Uniformity merely requires that present market value be factored back to a base tax year.”²⁸ 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. However, the Board refused to consider, or ignored, Appellants’ competent evidence of overvaluation based upon the trended-back analysis.

²⁷ March 20, 2013 Tr. at 35 (A57/R000045) (*emphasis added*).

²⁸ *Seaford Assocs.*, 539 A.2d at 1049-50.

Appellees' Reliance on *Conway v. Zoning Bd. of Adjustment* Is Misplaced.

In their Answering Brief, Appellees also cite to *Conway v. Zoning Bd. of Adjustment*,²⁹ in an effort to ameliorate the substantial deviation between the Board's oral decision announced immediately following the Hearing and the written Decision issued two-months later.³⁰ Such reliance is misplaced. In *Conway*, the oral deliberations of the Zoning Board of the City of Wilmington did not include the legal standard that appeared in that board's subsequent written decision approving a property owner's request for a zoning variance.³¹ The Superior Court concluded that the failure to enunciate that legal standard during the oral deliberations was excusable because the record on appeal included a "fair statement of the conclusions of the Board," as well as "the facts material to show the grounds for those conclusions."³² By analogy, Appellees submit that the 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.'"³³ However, that is not the case.

As reflected in the extensive quotations from Board members at the Hearing *supra*, the Board made clear that it felt that "its hands were tied" and that it was precluded from considering Appellants' trended-back analysis in light of the

²⁹ 1998 Del. Super. LEXIS 113, at *1 (Del. Super. Feb. 20, 1998).

³⁰ Answering Brief at 22.

³¹ 1998 Del. Super. LEXIS 113, at *2.

³² *Id.* at *6.

³³ *Id.*

existence of actual 1983 data. Here, the written Decision diverges so significantly from the actual statements and real-time “deliberations” of the Board members, that it is not “a fair statement of the conclusions of” the Board. Unlike in *Conway*, the disparity between the written Decision and the hearing transcripts is substantive and legally significant, extending well beyond the mere inclusion of a legal standard not articulated in the Board of Adjustment’s oral deliberations.³⁴

Further, *Conway* involved a zoning challenge, not a constitutional challenge to property taxation. It is well established under Delaware law that the power to tax must be strictly construed.³⁵ “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.”³⁶ Here, the Board did not abide by this binding legal principle. Accordingly, the Board’s written Decision, and the Superior Court’s subsequent affirmation, should be reversed.

³⁴ *Id.*

³⁵ 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).

³⁶ *Consolidated Fisheries Co.*, 32 A.2d at 429 (*emphasis added*).

Appellees' Focus on Unit 100B in Their Answering Brief Is an Intended Distraction from the Merits of the Appeal.

The Answering Brief is replete with references to Unit 100B – a unit in the same building as Appellants' condominiums, which was created through subdivision of an existing unit in 1993 and assessed at a substantially lower per-square-foot rate than the other units in One Commerce Center.³⁷ Contrary to Appellees' presentation, Unit 100B was not the focus of Appellants' expert, Richard Stat, in his analyses for purposes of reassessment.

As Mr. Stat pointed out, Appellants are requesting recalibrated assessments that are *consistent* with that of Unit 100B, but his analysis is based on factors separate-and-apart from the existence of a lower-assessed unit within One Commerce Center, *i.e.*, the income method utilized as reflected in the written Appeals and, for purposes of calculating a fair and equitable assessment, his expert explanation at the Hearing as to how market values were trended back from 2012 to 1983 to satisfy the uniformity requirement under the Delaware Constitution. Appellants' expert demonstrated that current market value through the income

³⁷ Although as Appellants included in their written submissions and during their presentations before the Board, 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.

capitalization method – trended-back to 1983³⁸ – and through the comparable sales value method – also trended-back to 1983 – produce more accurate and equitable values for assessment purposes than the County’s assessment based solely on historic 1983 values.³⁹

Also, Appellees’ criticism of the incorporation of “comparable assessments” in Appellants’ written submissions and expert testimony is unfounded. Contrary to Appellees’ statement that “No Delaware Court has recognized a comparison of assessments as a method of valuation generally accepted in the financial community,” in *Rodney Square Investors, L.P. v. Bd. of Assess. Rev.*, a case on which Appellees’ rely in their Answering Brief, this Court explicitly recognized the comparison of assessments as a method of valuation, which was, in fact, a method *utilized by the County’s assessor*.⁴⁰ *Rodney Square Investors* stands for two principles: (1) comparable assessments are valuable evidence, and (2) when presented with a “traditional” theory and a “concededly novel” theory of valuation, the Board is free to choose the method “it finds most reliable in order to fulfill its

³⁸ 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).

³⁹ See *Teachers Ins. & Annuity Ass’n*, 669 A.2d at 102-04.

⁴⁰ “The assessor also properly considered the assessed values of other properties as assessed values are related to actual market value and are admissible as evidence indicating value.” 1983 WL 482333 (Del. April 7, 1983), at *2 (citing *New Castle County v. 16.89 Acres of Land*, Del. Supr., 404 A.2d 135 (1979)). Appellees’ citation to *Rodney Square Investors* ignores the fact that the assessor utilized comparable assessments. Answering Brief at 25.

constitutional duty to equally and uniformly levy property taxes.”⁴¹

Here, the Board did not weigh the County’s 1983 actual values over Appellants’ trended-back approach; it refused to consider the latter in light of the familiarity and convenience of the 1983 data favored by the County. As the Hearing transcripts reveal, there was no comparison between the fixed 1983 data and Appellants’ trended-back approach regarding which method best reflects *current value in terms of* 1983. Appellees’ submission to the contrary is not supported by the record.⁴²

Appellees’ contentions in their Answering Brief that Unit 100B is significantly smaller than the condominiums at issue, and is used to host vending machines and essential building safety equipment, does not address any sales or income data.⁴³ If the Unit 100B assessment is based on factors *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

⁴¹ 1983 WL 482333, at *2.

⁴² Moreover, Appellees’ gratuitous comments regarding Appellants and Appellants’ expert’s testimony are unsupportable. For example, while Appellees may disagree with Stat’s assessment comparison, to characterize it as “grossly flawed” is unfounded. Answering Brief at 10, n. 10. Similarly, Appellees’ comment at page 15, n. 14 questioning Appellants’ *direct quotation* from the written Decision that it “is simply unnecessary to utilize the income capitalization approach where valid 1983 sales of the units exist” is unjustified.

⁴³ Nor does it reveal in any detail the County’s substantive analysis for reducing this unit’s assessment.

Courts acknowledge are essential for purposes of accurately calibrating fair market value.⁴⁴

The Board's refusal to do so was wrong, and its conclusions were not the product of an orderly and logical deductive process.⁴⁵ The Superior Court's affirmation of the Decision constitutes reversible error. In view of Appellants' competent evidence of overvaluation, in contrast to the Board's unconstitutional application of outdated 1983 data, the Trial Court should have overturned the Board's denial and reduced the assessments to the requested levels.

⁴⁴ See, e.g., *Verizon*, 970 A.2d 257; *Seaford Assocs.*, 539 A.2d at 1048-50.

⁴⁵ *Rodney Square*, 1983 WL 482333, at *1.

CONCLUSION

The Board's consideration of current value of a property at the time of an appeal, trended-back to the base year of 1983 to achieve uniformity in satisfaction of constitutional concerns is the most accurate and equitable method of assessment. The County offered no valuation evidence other than the actual 1983 data. The written Decision does not incorporate the appropriate standard enunciated by its counsel at the Hearing, and does not accurately reflect the Board's oral deliberations. It is arbitrary, capricious, and contrary to law. The Board's Decision conflates 1983 base year comparisons with 1983 actual value. To tax a property in 2012 based on its value nearly 30 years ago, ignoring market factors and comparable values in a vastly different real estate market and failing to follow applicable legal standards, is unconstitutional.

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; and 2) reduce each of Appellants' property tax assessments to \$200,200.00 per floor.

MONZACK MERSKY MCLAUGHLIN AND BROWDER, P.A.

/s/ Melvyn I. Monzack

Melvyn I. Monzack (#137)

Michael C. Hochman (#4265)

1201 N. Orange Street, Suite 400

Wilmington, DE 19801

Attorneys for Below Appellants, Current Appellants

Dated: September 4, 2014