



**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

COMMERCE ASSOCIATES, LP, :  
and 1000 COMMERCE CENTER, LP: :  
: :  
Appellants, : No. 218,2016  
v. : :  
: : On appeal from  
NEW CASTLE COUNTY OFFICE : C.A. No. N15A-07-007 DCS  
OF ASSESSMENT and NEW : the Superior Court of the State  
CASTLE COUNTY BOARD OF : of Delaware  
ASSESSMENT REVIEW, : :  
: :  
Appellees. : :

**APPELLEES' ANSWERING BRIEF**

**NEW CASTLE COUNTY OFFICE OF LAW**

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DATE: July 15, 2016

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## NATURE AND STAGE OF THE PROCEEDINGS

On March 16, 2015, Appellants-below/Appellants Commerce Associates, LP (hereinafter “Commerce Associates”) and 1000 Commerce Center, LP (hereinafter “1000 Commerce”) (hereinafter collectively “Commerce”) filed four separate appeals with the Board of Assessment Review (hereinafter the “Board”) requesting the assessment for Parcel Numbers 2602840256C0700, 2602840253C0800, 260284253C0900, and 2602840253C1000 (hereinafter the “Subject Properties”) be reduced from \$432,900 to \$249,900 each. After a full and fair hearing the Board upheld the New Castle County Office of Assessment’s (hereinafter the “County”) assessment.

Commerce appealed the Board’s decision to the Superior Court of the State of Delaware (hereinafter the “Court below”) on July 24, 2015. Consistent with the holding in *RRHC v. New Castle County of Finance*,<sup>1</sup> the Court below properly found that the Board considered all the evidence presented and the use of 1983 base-year data was permissible and issued its decision on April 1, 2016.<sup>2</sup>

Commerce appealed the Court below’s affirmance of the Board’s decision on May 2, 2016. Commerce argues that the Board failed to consider their

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<sup>1</sup> *RRHC v. New Castle County of Finance*, 2014 WL 2538886, at \* 6 (Del. Super. 2014), *aff’d* 108 A.3d 1226 (Del. 2015) (Table) (hereafter, “*Commerce I*”). (The Supreme Court of Delaware in *RRHC*, a proceeding involving the assessment of the *very same properties, owned by Commerce, and at issue in this appeal*, upheld a Board decision finding the 1983 sales price is the best indicator of the Subject Properties’ value in 1983.)

<sup>2</sup> *Commerce Associates LP v. New Castle Office of Assessment*, 2016 WL 3457820, at \*6 (April 1, 2016) (hereafter, “*Commerce II*”).

depreciation evidence, and therefore, erroneously denied their request for a reduction in the assessed value of their respective properties. Commerce filed their Opening Brief (the “OB”) in support of their appeal on June 16, 2016. This is the Answering Brief of Appellees, the New Castle County Board of Assessment Review and the New Castle County Office of Assessment (collectively, “Appellees”).

## **SUMMARY OF ARGUMENT**

1. Denied. The Court below properly found that the Board did not ignore, or refuse to consider the property owner's depreciation evidence but simply preferred the County's evidence.

## STATEMENT OF FACTS

The Subject Properties, four condominium units in One Commerce Center (hereinafter the “One Commerce”), an eleven story office building located at 1201 North Orange Street, Wilmington, Delaware, were constructed in 1983.<sup>3</sup> Many of the units in One Commerce were conveyed in arms-length transactions in and around the 1983 base year. In the same year the Subject Properties were constructed, New Castle County conducted a County-wide assessment of real property.<sup>4</sup> The County’s 1983 "base year" for property tax assessment has remained the County's benchmark for 30 years.<sup>5</sup> All real property in New Castle County is assessed in terms of its fair market value as of July 1, 1983.<sup>6</sup> The County’s base year system has been held to be Constitutional by this Honorable Court and conforms to the constitutional mandate of tax uniformity.<sup>7</sup>

The Subject Properties are each assessed in the amount of \$432,900. The assessments for the Subject Properties are substantially similar to the prices at which they sold, and represent an accurate measure of the fair market value as of

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<sup>3</sup> A033.

<sup>4</sup> *Bailey v. Board of Assessment Review Department of Land Use*, 2004 WL 1965867, at \*1 (Del. Super. Aug. 19, 2004) (hereafter, “*Bailey*”).

<sup>5</sup> *Id.* at \*1.

<sup>6</sup> *Board of Assessment Review v. Stewart*, 378 A.2d 113, 116 (Del. 1977) (hereafter, “*Stewart*”).

<sup>7</sup> *Stewart*, 378 A.2d at 114-116.



July 1, 1983.<sup>8</sup> The difference between the assessed values of the Subject Properties and the actual construction costs for each of the units is also negligible.<sup>9</sup>

On or about March 16, 2015, Commerce filed appeals with the Board challenging the assessed values of the Subject Properties.<sup>10</sup> Commerce requested that the Board reduce their property assessment to \$249,900.<sup>11</sup> Commerce submitted ten exhibits including: the condominium declaration and 1993 amendment, tax parcel information of the units taken from a County website, deeds for the units in One Commerce, deeds and photographs of purportedly comparable properties, and various spreadsheets comprising their sales, income, and cost approaches to value.<sup>12</sup>

On May 28, 2015, a duly noticed hearing was held. Richard Stat (hereinafter “Stat”), the president of Commerce Building, Inc., the general partner of Appellant Commerce Associates, and owner of four units, appeared on behalf of Commerce. Stat acknowledged that he was not an appraiser, had not

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<sup>8</sup> 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) (hereafter, “*Seaford*”). 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.” *Id.* at 1048 (citation omitted). *Also see New Castle County Dept. of Finance v. Teachers Ins. & Annuity Ass’n*, 669 A.2d 100, 102 n.2 (Del. 1995) (hereafter, “*Teachers*”).

<sup>9</sup> A199.

<sup>10</sup> A party in the hearing before the Board, MIV, LP, did not appeal the Board’s decision.

<sup>11</sup> A017.

<sup>12</sup> B000001-000271.

performed an appraisal, and was not acting as an independent expert during the hearing, but as an expert in commercial real estate.<sup>13</sup>

Commerce offered evidence of comparable sales, income and cost data. Stat's sales approach included two analyses in which he compared the sales of units in One Commerce to the sales of purportedly comparable properties.<sup>14</sup> In Commerce's first analysis, Stat relied on six allegedly comparable properties to make his comparison.<sup>15</sup> Specifically, Stat submitted sales data for buildings that were nearly 33 years old in 1983 and which were sold between 1979 and 1986. Stat did not provide 1983 values, but utilized the Consumer Price Index (hereinafter "CPI") to trend back his sale data to arrive at the 1983 values.<sup>16</sup> Three of the comparables were buildings similar in size to the entirety of One Commerce. The other three were similar in size to one individual unit.<sup>17</sup> None of Stat's comparables were condominium type ownership.<sup>18</sup> The second sale comparison analysis presented by Commerce was based upon asking prices for seven properties actively listed for sale on March 16, 2015, with a hypothetical sales date of July 1, 2015.

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<sup>13</sup> A018-019.

<sup>14</sup> A023.

<sup>15</sup> A023.

<sup>16</sup> A025; B000086.

<sup>17</sup> A031.

<sup>18</sup> B000086.

Here again, Stat utilized the CPI to reach 1983 values.<sup>19</sup>

Stat also presented two income approach analyses in which he offered income data from Class “B” buildings and buildings that were 32 years old in 1983. Stat presented 2015 income data from the ninth floor in One Commerce, applied a 10.59% capitalization rate, and back-trended using the CPI to arrive at value as of July 1, 1983.<sup>20</sup> Lastly, with respect to the cost approach, Commerce provided evidence to the Board which showed the average cost of construction for each of the seventh, eighth, and ninth floors was \$429,093. Although Commerce did not have the actual construction cost for the 10<sup>th</sup> floor, they maintained that it was likely similar to the cost of other units. Commerce adjusted the average cost of construction by 75% to reflect alleged obsolescence and depreciation.<sup>21</sup> Remarkably, during the hearing Commerce’s counsel acknowledged that the building was built and sold in 1983. In fact, Commerce’s counsel said “we know what the value was in 1983. We know what the fair market value was. There's no dispute about what the fair market value was in 1983.”<sup>22</sup>

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<sup>19</sup> A025-026.

<sup>20</sup> B000143; B000164.

<sup>21</sup> A007.

<sup>22</sup> A013-014.

At the conclusion of Commerce’s case, the County moved to dismiss the appeal. The Board denied the County’s motion and found Commerce had provided credible valuation evidence.<sup>23</sup> The County then presented comparable sales, income and cost evidence in support of its assessment through Doug Sensabaugh (hereinafter “Sensabaugh”), the manager of Assessment, and Georgiana Trietley (hereinafter “Trietley”), an Assessor II employed by the County. Trietley provided the actual sales price of units in the One Commerce Center which sold in 1985, and evidence of comparable sales of other condominium units.<sup>24</sup> Trietley offered testimony that on July 1, 1985 Unit 1000, then three years old, sold for \$594,375 a cost of \$125.60 per square foot and on March 1, 1985 Unit 500 was purchased for \$459,202 or \$97.04 per square foot.<sup>25</sup> The County argued that the best evidence of value in 1983 is the arm’s length sale prices of the units, which supported its assessments of the units.<sup>26</sup> Trietley further presented two income approach analyses utilizing real estate market surveys<sup>27</sup> provided by Commerce as Exhibit F to establish rental rates for the Subject Properties. The first analysis used an average rental rate

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<sup>23</sup> A097.

<sup>24</sup> A124-127.

<sup>25</sup> A125.

<sup>26</sup> A125.

<sup>27</sup> The Stoltz Realty Company survey and the Black’s Guide are market surveys of office buildings in the Wilmington, Delaware area. They were provided by Appellants as Exhibit F. B000145-000161.

from 1983 of \$16.50 per square foot. The second analysis used the rent of \$18.20 per square foot, the amount reported in the market surveys as having been *actually* received by One Commerce. Trietley used a stabilized vacancy and expense rate and applied a 12.1% capitalization rate in each analysis.<sup>28</sup> Based on these rates, Trietley obtained a valuation that was somewhat higher than the current assessment.<sup>29</sup> Trietley also testified that she used cost data from Marshall & Swift, a nationally recognized cost manual for real estate appraisers.<sup>30</sup> Trietley customized the data for the Subject Properties using modifiers for height and the sprinkler system to arrive at a cost. Trietley determined the value of the land based on comparable sales from 1983. Using these values she obtained a valuation that deviated less than 0.2% from the assessment.<sup>31</sup>

As evidenced by the transcript, the Board “weighed the competing evidence”<sup>32</sup> and determined that the County’s evidence was more persuasive. The Board issued its written decision on June 25, 2015.<sup>33</sup> The Board unanimously

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<sup>28</sup> A138-140.

<sup>29</sup> A135.

<sup>30</sup> *Tatten Partners, L.P. v. New Castle County Bd. of Assessment Review*, 642 A.2d 1251, 1257 (Del. Super. 1993), *aff’d*, 647 A.2d 382 (Del. 1994)(Table) (hereafter “*Tatten*”)( Marshall Valuation Service is a nationally recognized cost and appraisal service whose expertise was acknowledged and relied *upon by appraisers.*).

<sup>31</sup> A116-117.

<sup>32</sup> A199.

<sup>33</sup> A195-204.

voted to deny the appeal and uphold the assessment.<sup>34</sup> The Board found the 1985 sale of units in One Commerce represented the fair market value of units within One Commerce.<sup>35</sup> The Board was also persuaded by the market surveys provided by Commerce which contained the actual rental rates received by One Commerce in 1983.<sup>36</sup> Lastly, the Board found it to be significant that Stat admitted the actual cost of constructing a unit in One Commerce in 1983 was nearly the exact amount of the assessed value.

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<sup>34</sup> A199.

<sup>35</sup> A199.

<sup>36</sup> A199; B000149; B000161.

## ARGUMENT

### **I. THE BOARD DID NOT IGNORE, OR REFUSE TO CONSIDER THE PROPERTY OWNERS' DEPRECIATION EVIDENCE**

#### **A. Question Presented**

Has Commerce demonstrated that the Board refused to consider its depreciation evidence and acted contrary to law, fraudulently, arbitrarily or capriciously, despite the record indisputably showing that the Board considered the use of depreciation in connection with valuation of the Subject Properties?<sup>37</sup>

#### **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.”<sup>38</sup> The reviewing Court “does not weigh the evidence, determine questions of credibility, or make its own factual findings.”<sup>39</sup>

It is the Board’s charge to make factual determinations with respect to all of the evidence presented by the parties.<sup>40</sup> This Court has specifically recognized depreciation as a factual matter which is the province of the Board and, as such, is not subject to *de novo* review by the Court.<sup>41</sup>

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<sup>37</sup> B000285-000286.

<sup>38</sup> 9 Del. C. § 8312(c).

<sup>39</sup> *Brandywine Innkeepers, L.L.C. v. Board of Assessment Review of New Castle County*, 2005 WL 1952879, at \*3 (Del. Super. June 3, 2005) (hereafter, “Innkeepers”) (citing *E.I. duPont De Nemours & Co v. Faupel*, 859 A.2d 1042, 1046 (Del. Super. 2004)).

<sup>40</sup> *Innkeepers*, at \*3-4(citing *E.I. duPont De Nemours & Co. v. Faupel*, 859 A.2d 1042, 1046 (Del. Super. 2004)).

### C. Merits of the Argument

1. Commerce 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."<sup>42</sup> 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."<sup>43</sup> 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."<sup>44</sup> There are three generally accepted methods of valuation: (1) the comparable sales or market approach; (2) the income approach; and (3) the cost approach.<sup>45</sup> The Court below correctly recognized these three methods.<sup>46</sup>

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<sup>41</sup> *New Castle Cty. v. New Castle Cty. Bd. of Assessment Review and Verizon Delaware, Inc.*, 2008 WL 1904266 (Del. Super. April 20, 2008) *aff'd* 970 A.2d 257 (Del. March 26, 2009)(Table)( hereafter *Verizon*).

<sup>42</sup> 9 *Del.C.* § 8306(a); *Seaford*, 539 A.2d, at 1048 (citations omitted); *Teachers*, 669 A.2d at 102 n.2.

<sup>43</sup> *Tatten*, 642 A.2d at 1256 (quoting in part *Fitzsimmons v. McCorkle*, 214 A.2d 334, 337 (Del. 1965)).

<sup>44</sup> *Teachers*, 669 A.2d at 103.

<sup>45</sup> *Seaford*, 539 A.2d at 1048-49.

<sup>46</sup> *Commerce II*, 2016 WL 3457820, at \*1-2, \*7.



With respect to the three valuation methods, each method has its strengths and weaknesses.<sup>47</sup> While the income approach is an accepted method of valuation, this Honorable Court “has repeatedly noted that the comparable sales or market method is generally the preferred test to determine fair market value.”<sup>48</sup> 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.”<sup>49</sup> The income approach is generally the most frequently applied and preferred method of evaluating income producing properties.<sup>50</sup> 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.<sup>51</sup>

The income approach, however, “may not be based on aberrational operating results or temporary phenomena.”<sup>52</sup>

If an appellant rebuts the presumption of accuracy, “the Board should hear

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<sup>47</sup> *Seaford*, 539 A.2d at 1048-1049.

<sup>48</sup> *General Motors Corp. v. New Castle County*, 2000 WL 33113802, at \*5 (Del. Super. Dec. 16, 2000) (citing *Seaford*, 539 A.2d at 1048; *Fitzsimmons*, 214 A.2d at 338).

<sup>49</sup> *Seaford*, 539 A.2d at 1048 (citing *Fitzsimmons*, 214 A.2d at 338).

<sup>50</sup> *Seaford*, 539 A.2d at 1048-49.

<sup>51</sup> *Id.* at 1050; *cf. New Castle County Bd. of Assessment Review v. Klair*, 687 A.2d 196 (Del. 1996) (Table) (income approach, standing alone, constituted competent evidence, where no other valuation method was available).

<sup>52</sup> *Id.* at 1050.

the entire appeal.”<sup>53</sup> In other words, the Board should then, and only then, hear the County’s evidence in support of the assessment. This Court explained in *Teachers*:

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.<sup>54</sup>

The *Commerce II* Court below correctly applied this framework.<sup>55</sup>

2. The Board heard the County’s evidence and determined that Commerce presented competent evidence. The Board simply preferred the County’s evidence.

The Board considered Commerce’s valuations, including its use of depreciation. Commerce used all three accepted methods to arrive at a 1983 valuation. In connection with its income and comparable sales methodologies, Commerce incorporated the age and condition of the Subject Properties in 2015, and used a trending back approach to arrive at a 1983 value.

The Board considered the sales approach.

Commerce’s presentation to the Board included two ostensible market approaches, both of which were markedly different from the sales comparison

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<sup>53</sup> *Teachers*, 669 A.2d at 103.

<sup>54</sup> *Id.* at 103.

<sup>55</sup> *Commerce II*, 2016 WL 3457820 at \*6.

approach described by this Honorable Court in *Seaford*.<sup>56</sup> Commerce's first market approach did not include properties similar to the Subject Properties. Instead, that approach consisted of 1983 sales figures of buildings that were more than 30 years old in 1983.<sup>57</sup> Commerce's submissions with respect to this methodology ignored the critical fact that the Subject Properties were *new* in 1983 when they were assessed. Commerce's second market approach was also inconsistent as it lacked actual sales<sup>58</sup> and was instead predicated upon an analysis of 2015 "listing prices" with a "hypothetical sale" date of July 1, 2015 back-trended using the CPI to 1983.<sup>59</sup>

By contrast, the County presented actual sales data of two units within the property and sales data of other similar condominiums in the area.<sup>60</sup> The County presented the sales from the Subject Properties and similar properties because, as Sensabaugh testified, the sale "indicates the market value in 1983. There's nothing better than sale price. Apparently the buyer thought it was worth that much or he wouldn't have paid that much."<sup>61</sup> Commerce's own brief acknowledges that property is to be assessed at the "true value in Money" which means "fair market

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<sup>56</sup> *Seaford*, 539 A.2d 1046, n.1. (Sales approach requires an examination of sales of similar properties with adjustments made for difference between the comparable property and the subject).

<sup>57</sup> A025.

<sup>58</sup> *Seaford*, 539 A.2d at 1047.

<sup>59</sup> A025-026; A029.

<sup>60</sup> A124-127.

<sup>61</sup> A128.

value” – “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.”<sup>62</sup> It is undisputed that the Subject Properties were built and sold in 1983, the same year that the last assessment took place.<sup>63</sup>

It was significant to the Board that the Commerce’s use of the CPI to back-trend contemporary data was not an accurate and reliable method of determining fair market value in 1983.<sup>64</sup> Interestingly, Commerce has not challenged this finding below or in this Court. The Court below specifically found that the Board acted properly when it credited testimony of the County’s witness concerning the unreliability of the CPI to back trend the hypothetical sales data.<sup>65</sup>

The Board properly concluded that the County’s comparable sales were more persuasive due to the County’s reliance on the sale of condominium units as comparable sales, as well as the actual 1983 sales figures of two units in One Commerce.<sup>66</sup> The Board observed that these actual sales are the ultimate standard for determining the fair and accurate assessment.<sup>67</sup>

The Board considered the income approach.

Commerce presented two income approach methods to the Board.

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<sup>62</sup> OB at 11.

<sup>63</sup> A013.

<sup>64</sup> A199.

<sup>65</sup> *Commerce II*, 2016 WL 3457820, at \*8.

<sup>66</sup> A199.

<sup>67</sup> A199.

Commerce's first income approach relied upon 1983 income and expense data for "Class B" buildings that were 32 years old as of 1983.<sup>68</sup> Commerce's second approach used 2015 income and expenses for one floor in the subject building. Commerce employed the CPI - which does not consider real estate - to trend the 2015 numbers back to 1983.<sup>69</sup>

Commerce relatedly argued before the Board that the Subject Properties are now "Class B" due to their current age and condition.<sup>70</sup> The County, however, introduced evidence that the Subject Properties were "Class A" in 1983 and continued to be in 2015. Commerce's own exhibits include a 2015 advertisement marketing the 3<sup>rd</sup> floor in the One Commerce as "Class A" office space.<sup>71</sup> Trietley testified that she considered 1000 Commerce to be a "Class A" property in part because the property was advertised as such in 2015.<sup>72</sup> Furthermore, Commerce admitted that the Subject Properties were "Class A" in 1983 and commanded "Class A" rents.<sup>73</sup>

The County offered evidence of actual 1983 incomes received by the Subject Properties and other "Class A" properties. The County adjusted for vacancy and

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<sup>68</sup> A026-027.

<sup>69</sup> A027; A067.

<sup>70</sup> *Cf.* OB, at 6-7.

<sup>71</sup> B000172.

<sup>72</sup> A114-122.

<sup>73</sup> A072.

expenses and applied the capitalization rate as required by the income method.<sup>74</sup> The County used Commerce's market surveys which provided the actual income received by the Subject Properties in 1983 and 1985.<sup>75</sup>

The Board rejected Commerce's use of the CPI for trending back current data.<sup>76</sup> Furthermore, the Board preferred the County's reliance on actual rental rates received by One Commerce in 1983.<sup>77</sup>

The Board considered the cost approach.

In presenting Commerce's cost analysis, Stat admitted that "...we use as a 1983 cost the assessed value of \$432,900. I checked that against our accounting records, and it's almost right on, almost dead on on what it actually cost us to produce one of these floors."<sup>78</sup> The County presented cost data which was substantially the same as the actual construction cost for the Subject Properties. The Court in *Tatten* held that when actual cost data is available, the use of economic comparables is undesirable.<sup>79</sup> Commerce's application lists the average cost of construction for the seventh, eighth and ninth floors to be \$429,093 and states that construction cost of the tenth floor is likely similar.<sup>80</sup>

The Board accepted the County's assessment "particularly given that Mr.

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<sup>74</sup> A135-139.

<sup>75</sup> B000145- 000161.

<sup>76</sup> A199.

<sup>77</sup> A199.

<sup>78</sup> A080.

<sup>79</sup> *Tatten*, 642 A.2d at 1257-58.

<sup>80</sup> A007.

Stat admitted that the 1983 cost of construction was nearly the same amount as the assessment.”<sup>81</sup> Here too the Board found the use by Commerce of the CPI to back-trend contemporary data was not an accurate and reliable method of determining fair market value in 1983.<sup>82</sup>

The Board considered depreciation.

Commerce jumps to the unsupported conclusion that the Board committed legal error because “the Board refused to consider depreciation” in valuing the Subject Properties.<sup>83</sup> This assertion is incorrect. Commerce confuses two concepts: (1) The Board’s consideration of a valuation technique; and (2) the Board’s acceptance of that valuation technique over other more persuasive valuation approaches given the facts relating to the Subject Properties and the testimony.<sup>84</sup>

Indeed, with respect to the same properties, Commerce previously raised the argument that the Board mistakenly thought they were bound by 1983 values and could not consider other evidence of valuation.<sup>85</sup> The Superior Court in *Commerce*

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<sup>81</sup> A199.

<sup>82</sup> A199.

<sup>83</sup> OB, at 12; 15-19.

<sup>84</sup> Relatedly, Commerce interchanges the Board’s decision, which is before this Honorable Court and the County’s choice of valuation methodologies for this particular Property. E.g., OB at 1, 2, 3, 11, 12, 14, 15.

<sup>85</sup> *Commerce I*, 2014 WL 2538886, at \*6.

I found this argument to be “entirely without merit.”<sup>86</sup> The Superior Court in *Commerce I* further ruled that the record in that litigation demonstrated that the Board considered significant evidence beyond 1983 figures.<sup>87</sup>

In accord with this Honorable Court’s ruling in *Commerce I*, in the case *sub judice*, the Board in fact carefully considered the use of depreciation, and did not “refuse” to consider depreciation. This consideration by the Board is evidenced both by the hearing transcript and its written decision.<sup>88</sup>

The Board discussed depreciation with Stat,<sup>89</sup> and with Sensabaugh.<sup>90</sup> Sensabaugh testified that the County did not attribute any depreciation to the subject building because the building was constructed in 1983 and had not experienced depreciation at that time.<sup>91</sup> Sensabaugh elaborated “[i]f a building were built in 1925 during the last reappraisal reassessment, that building would indeed show depreciation. It would be assessed as such. A building built in 1983, we can't show depreciation now because it would not reflect the '83 value. It was a new building then.”<sup>92</sup> Other colloquy between the Board and the parties indicates the Board’s evaluation of the use of depreciation with respect to the Subject Properties. One Board member observed “...the ultimate question is should every

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<sup>86</sup> *Commerce I*, 2014 WL 2538886, at \*6.

<sup>87</sup> *Commerce I*, 2014 WL 2538886, at \*8.

<sup>88</sup> A009-204.

<sup>89</sup> A044.

<sup>90</sup> A107-109.

<sup>91</sup> A108-109.

<sup>92</sup> A109.



Class A building from around that time period receive a reduction to Class B status.”<sup>93</sup> Indeed, consistent with *Commerce I*,<sup>94</sup> counsel to the Board instructed the Board in the case *sub judice*: “So to the extent that you want to consider depreciation, it doesn't matter that the county doesn't do it.”<sup>95</sup>

The most telling point of the hearing which demonstrates that the Board did consider Commerce’s valuations, which included depreciation, occurred at the close of Commerce’s presentation. The County moved to dismiss on the grounds that Commerce had failed to show competent evidence of substantial overvaluation.<sup>96</sup> This motion was denied.<sup>97</sup> Evaluating the County’s dismissal motion, one Board member observed: “I'm on the page that I believe they have provided credible evidence and we should proceed, and we will then have to decide on what they presented versus what the County presents that says this is totally wrong.”<sup>98</sup>

The Board’s written decision is also replete with references of its consideration of depreciation and the aging of the building. The decision discussed Stat’s cost approach and that he “used 75% of the cost of construction and depreciated it over 60 years.”<sup>99</sup> The decision recognized Stat’s “depreciated cost

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<sup>93</sup> A097. See generally, A110-112; A178-179(discussing use of depreciation).

<sup>94</sup> *Commerce I*, 2014 WL 2538886 at \*7.

<sup>95</sup> A110.

<sup>96</sup> A093-094.

<sup>97</sup> *Commerce II*, 2016 WL 3457820 at \*4.

<sup>98</sup> A097.

<sup>99</sup> A197.

approach”,<sup>100</sup> and referred to the “current age of One Commerce.”<sup>101</sup> It is apparent from the record that the premise of Commerce’s argument, that the Board committed legal error by failing to consider depreciation,<sup>102</sup> is faulty.

The Board weighed all the evidence and did not find Commerce’s valuations persuasive.

The Board considered and evaluated each of Commerce’s three valuation methodologies.<sup>103</sup> The Board “weighed the competing evidence.”<sup>104</sup> The County’s evidence of actual 1983 sales, actual 1983 income, and actual 1983 cost was more persuasive.<sup>105</sup> The Board ultimately ruled that Commerce failed to show that the Subject Properties were assessed higher than they should be based on the competing evidence.<sup>106</sup>

3. The Board’s decision was not arbitrary or capricious, or contrary to law.

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<sup>100</sup> A197.

<sup>101</sup> A197 (discussing Stat’s six comparable sales, and his view that the 1983 sales data as no longer valid as applied to One Commerce today, because One Commerce is now an aged building).

<sup>102</sup> See generally OB, at 15-19.

<sup>103</sup> *Commerce II*, 2016 WL 3457820, at \*10.

<sup>104</sup> A199.

<sup>105</sup> A199.

<sup>106</sup> A199.

Commerce must show that "the Board's findings are clearly wrong and its conclusions not the product of an orderly and logical deductive process."<sup>107</sup> In applying this standard, a reviewing Court should affirm unless there is no substantial evidence in support of the factual findings of the Board.<sup>108</sup>

The Board was not clearly wrong in finding the County's comparable sales to be more persuasive.

With respect to comparable sales, the Board found the County's evidence to be more persuasive.<sup>109</sup> This finding was not "clearly wrong." The County presented actual sales in or near 1983. Specifically, in arm's length transactions in 1985, Unit 1000 sold for \$594,375 and unit 500 sold for \$459,202. In *Commerce I*, this Court affirmed a Board decision finding the 1983 sales price is the best indicator of the values of these Subject Properties in 1983.<sup>110</sup>

The County's \$432,900. assessment correctly reflects the 1983 "fair market value."<sup>111</sup> The Board's finding with respect to the comparable sales was thus not "clearly wrong." The Court below reviewed the Board's orderly and deductive

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<sup>107</sup> *Tatten*, 642 A.2d at 1256 (quoting *Rodney Square Investors, L.P. v. Bd. of Assessment Review of New Castle County*, 1983 WL 482333, at \* 1 (Del. April 7, 1983)) (internal quotations omitted).

<sup>108</sup> *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965); *Mellow v. Board of Adjustment of New Castle County*, 565 A.2d 947 (Del. Super. 1988).

<sup>109</sup> A199.

<sup>110</sup> *Commerce I*, 108 A.3d 1226.

<sup>111</sup> A125. If anything, the County's assessment was conservative.

process,<sup>112</sup> and properly found that the Board considered the comparable sale evidence.<sup>113</sup>

The Board's finding that the County's income method of valuation was more persuasive was not clearly wrong.

With respect to the income method, the Board found the County's evidence to be more persuasive.<sup>114</sup> This finding was not "clearly wrong." In cases where a building was in existence during the base tax year, the preferred method for establishing an income valuation is to use actual data on the specific property.<sup>115</sup> Commerce's income approach ignored the actual rents received by One Commerce in 1983 even though the market surveys they presented detailed the actual income received in 1983 and 1985.<sup>116</sup> The Board's acceptance of the actual income received by the Subject Properties was appropriate.

The Court below reviewed the Board's orderly and deductive process and properly held that the Board considered the income evidence.<sup>117</sup>

The Board was not clearly wrong in finding the County's cost data to be more persuasive.

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<sup>112</sup> *Commerce II*, 2016 WL 3457820 at \*8-9.

<sup>113</sup> *Id.* at \*10.

<sup>114</sup> A199.

<sup>115</sup> *Tatten*, 642 A.2d at 1258.

<sup>116</sup> B000145-000161.

<sup>117</sup> *Commerce II*, 2016 WL 3457820 at \*9-10.

With respect to the cost approach, the Board found the County’s evidence to be more probative in light of Commerce’s admission as to cost.<sup>118</sup> This finding was not “clearly wrong.” Commerce did not challenge this finding below or in this Court. The Court below reviewed the Board’s orderly and deductive process and held that the Board properly considered the cost evidence.<sup>119</sup>

4. The case law does not support Commerce’s position.

Commerce’s characterization of the law is incorrect. The base assessment year is 1983. The Subject Properties were new in 1983. Using base year data does not violate the Supreme Court holding in *Seaford*.<sup>120</sup> In *Seaford*, the Board entirely refused to permit the application of the income method or give it any consideration.<sup>121</sup> This Court properly ruled that to do so was legal error. In the case *sub judice*, the Board permitted and considered the income method—indeed the Board considered all three methods of valuation that Commerce presented.<sup>122</sup>

Commerce has incorrectly characterized the *Seaford* case. In *Commerce I*, the property owners argued that the *Seaford* case does not allow the Board to accept the use of base year data as oppose to a trended-back approach.<sup>123</sup> The

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<sup>118</sup> A199.502.

<sup>119</sup> *Commerce II*, 2016 WL 3457820 at \*9-10.

<sup>120</sup> *Seaford*, 539 A.2d 1045.

<sup>121</sup> *Id.* at 1048.

<sup>122</sup> *See generally Commerce II*, 2016 WL 3457820, at \*8-10.

<sup>123</sup> *Commerce I*, 2014 WL 2538886, at \*6 & n.52.

Superior Court in *Commerce I* rejected this argument and this Honorable Court affirmed that decision.<sup>124</sup>

In *Verizon*, the issue was not whether a depreciation factor could be considered, but which analysis was more accurate.<sup>125</sup> In *Verizon*, the Board chose Verizon's analysis over the County's analysis, and that choice was affirmed upon appeal. *Verizon* does not require the Board to apply the back-trend method as the *sole method* of valuation to the exclusion of the other techniques including the use of actual data.<sup>126</sup> Similarly, in the instant case, the Board found the County's approach to each of the three valuation methodologies to be more persuasive and accurate than those of Commerce.

The facts of *Excelsior Associates, L.P v. New Castle County Department of Finance*,<sup>127</sup> are readily distinguishable from the facts of the case *sub judice*. In *Excelsior*, the property owner hired an independent appraiser.<sup>128</sup> That appraiser prepared an appraisal that applied each of the three traditional approaches to determining the assessment value of property - the income capitalization, sales

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<sup>124</sup> *Commerce I*, 2014 WL 2538886, at \*10 (“Appellants’ reliance on *Seaford* is also misplaced.”).

<sup>125</sup> The *Verizon* matter came before the Superior Court pursuant to a writ of certiorari, not a direct appeal. Thus, the Superior Court’s review of the Board’s decision was limited to the face of the record and whether the Board committed legal error, exceeded its jurisdiction, or proceeded irregularly. 970 A.2d 257(Table).

<sup>126</sup> *Verizon*, 2008 WL 1904266 \*3.

<sup>127</sup> *Excelsior Associates, L.P v. New Castle County Department of Finance*, 1995 WL 347380 (Del. Super. December 31, 1995) (hereafter “*Excelsior*”).

<sup>128</sup> *Id.* at \*1.

comparison, and cost approach.<sup>129</sup> Within each approach, the appraiser utilized two methodologies to determine value in 1983 terms. First, the appraiser used a 1983 analysis. Second, the appraiser determined a 1994 value (the appraisal took place in 1994) and trended the value back to 1983. The appraiser then reconciled the two approaches to determine value in 1983 values.<sup>130</sup> The appraiser came up with a final number of \$11,300,000.

In the absence of any evidence offered by the County to controvert the appraiser's 1983 value, the Superior Court ordered the County adopt the *Excelsior*'s number.<sup>131</sup> *Excelsior* does not support the position of Commerce as the County in the instant matter presented values utilizing all three acceptable methodologies.

*Tatten*<sup>132</sup> is similar to the circumstances of *Excelsior*. The taxpayer presented competent evidence of substantial overvaluation to the Board utilizing each of the accepted three methods of valuation.<sup>133</sup> The taxpayer used actual construction costs,<sup>134</sup> and actual comparable rental rates.<sup>135</sup> In response, the County put forth no evidence to rebut these facts.<sup>136</sup> The County presented a cost

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<sup>129</sup> *Id.* at \*2.

<sup>130</sup> *Id.* at \*2.

<sup>131</sup> *Id.* at \*10-11.

<sup>132</sup> *Tatten*, 642 A.2d at 1256.

<sup>133</sup> *Id.* at 1260.

<sup>134</sup> *Id.* at 1257.

<sup>135</sup> *Id.* at 1259.

<sup>136</sup> *Id.* at 1259.

valuation not based upon actual construction costs, and with an unclear basis,<sup>137</sup> and an income approach based upon general economic figures to estimate income rather than using actual data from similar buildings in 1983.<sup>138</sup> Thus, the *Tatten* Court found that the Board’s rejection of the taxpayer’s proposed assessed value was arbitrary and capricious. If anything, the *Tatten* decision’s preference for utilizing actual numbers at or near the base year of 1983, supports the Board’s finding.

Commerce’s reliance on *Ren Centre LLC v. New Castle County Office of Finance*,<sup>139</sup> is also unavailing. In *Ren Centre*, the “parties agree[d] that the Board intended to assess the building at a value that accounted for depreciation.”<sup>140</sup> Through human error, the Board failed to do so. The Superior Court merely remanded the case back to the Board so that the Board could implement the full arithmetic calculations that it had intended to do at the hearing.<sup>141</sup>

Perhaps not surprisingly, one case Commerce fails to mention in the OB is *Commerce I*, which serves as controlling law with respect to the legal issues Commerce raises in this appeal.<sup>142</sup> In *Commerce I*, this same property owner

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<sup>137</sup> *id.* at 1257.

<sup>138</sup> *Id.* at 1259.

<sup>139</sup> *Ren Centre LLC v. New Castle County Office of Finance* (hereafter “*Ren Centre*”), 2016 WL 399328 (Butler, J.) (Del Super. January 29, 2016).

<sup>140</sup> *Id.* at \*1.

<sup>141</sup> *Id.* at \*2.

<sup>142</sup> *E.g., Account v Hilton Hotels Corp.*, 780 A.2d 245, 248 (2001) (discussing application of the doctrine of *stare decisis*).



appealed the County's assessment of \$432,900. per condominium unit<sup>143</sup> to the Board. In *Commerce I*, Commerce sought to have the assessment reduced to \$200,200.<sup>144</sup> In a two day hearing<sup>145</sup> before the Board, Commerce and the other property owners presented the testimony of Stat. Stat presented two valuation methodologies: (1) An analysis of assessed values of properties that he contended were comparable to the subject units; and (2) An income approach.<sup>146</sup> After Stat's presentation, the County presented a competing income valuation approach utilizing actual 1983 numbers.<sup>147</sup>

The Board denied the appeal. Commerce and the other property owners appealed to the Superior Court. The appellants argued in their opening brief that the Board's analysis failed to take into account such factors as functional obsolescence and deterioration of a building (which at the time of the appeal was approximately 30 years old), and changed market conditions. The appellants in that brief further challenged the County's evidence because that evidence did not account for depreciation. Relatedly, the appellants argued that the Board's analysis was contrary to law. The Court ruled that the Board did not act contrary to law, or

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<sup>143</sup> The same assessed value being appealed in the case *sub judice*.

<sup>144</sup> *Commerce I*, 2014 WL 2538886, at \*2.

<sup>145</sup> The Board hearing was held on March 20, 2013 and May 15, 2013.

<sup>146</sup> *Id.* at \*2.

<sup>147</sup> *Id.* at \*2.

fraudulently, or in an arbitrary or capricious manner. The Superior Court affirmed the Board's decision.<sup>148</sup>

Commerce and the other property owners appealed the *Commerce I* Order to this Honorable Court. Commerce argued that the Board did not consider all competent evidence and that the County's 1983 data did not reflect depreciation, deterioration, or functional obsolescence. Commerce also argued that equity and uniformity required that the assessments be reduced. Similarly, Commerce cited in support of their position the decisional cases of *Verizon*, *Seaford*, and *Excelsior*. After oral argument, this Honorable Court affirmed the Superior Court decision.<sup>149</sup>

The Board's decision was well within the legal parameters this Honorable Court has established. This is simply a case of a 'battle of the experts' where the Board properly denied Commerce's appeal based on due consideration of all the evidence. As the Court below correctly held, the Board's decision should not be reversed.

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<sup>148</sup> *Id.* at \*11.

<sup>149</sup> *Commerce I*, 108 A.3d 1226.

**CONCLUSION**

The Appellees thus urges this Honorable Court to view Commerce’s “legal error” argument as without merit on its face. For the reasons stated, the Appellees respectfully request this Honorable Court affirm the judgment below.

Respectfully submitted,

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