101 Va. Cir. 512

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Circuit Court of Virginia.

Re: HERSHEY CHOCOLATE OF VIRGINIA, INC.
v.
COUNTY OF AUGUSTA, Virginia

Case No.: CL14002172-00
|
October 24, 2018

Attorneys and Law Firms

FACSIMILE: 757-629-0660 (Hard copy to follow.), Shane L. Smith, Esquire, Williams Mullen, 999 Waterside Drive, Suite 1700, Norfolk, Virginia 23510

FACSIMILE: 703-680-5549 (Hard copy to follow.), Sharon E. Pandak, Esquire, GREEHAN, TAVES, PANDAK & STONER, PLLC, 4004 Genesee Place, Suite 2012, Woodbridge, Virginia 22192

FACSIMILE: 703-378-5771 (Hard copy to follow.), Randall T. Greehan, Esquire, GREEHAN, TAVES, PANDAK & STONER, PLLC, 3923 Old Lee Highway, Suite 63B, Fairfax, Virginia 22030

FACSIMILE: 540-245-5096 (Hard copy to follow.), James R. Benkahla, Esquire, County Attorney, County Government Center. P. O. Box 590, Verona, Virginia 24482

Opinion

Victor V. Ludwig, Judge

***1** Dear Ms. Pandak and Gentlemen:
Pursuant to Va. Code Ann. § 58.1-3984(A), on December 12, 2014, the plaintiff, Hershey Chocolate of Virginia, Inc. (Hershey), filed an Application for Relief from Erroneous Assessment of Real Property Taxes (the Complaint), asking that the Court correct the assessment for the year 2014. The Court subsequently entered an Order granting Hershey's motion for leave to file an amended application to include a claim for the 2015 tax year, which Hershey then filed on September 14, 2015.

The defendant, County of Augusta, Virginia (the County), sought dismissal of the Complaint and filed an answer and a demurrer. The Court overruled the County's demurrer for the reasons articulated in its letter opinion of August 21, 2015.

The parties presented evidence over four days between February 27 and March 1, 2018, and on April 17, 2018. The parties filed post-trial briefs on June 4, 2018. In addition, the parties stipulated that:

1. The improved parcel of real estate at issue in this action is located at 120 Harold Cook Drive, Stuarts Draft, Virginia, and its Tax Map and Parcel Number is 084-40 (the Property). [1]

2. The Property was owned by Hershey during the 2014 and 2015 tax years.

3. The County's tax rate for the tax year 2014 was $0.56 per $100 of assessed value, and for the tax year 2015 was $0.58 per $100 of assessed value.

4. The County's assessment of the Property for the 2014 tax year was $31,697,200, resulting in a tax bill of $177,504.32 for the 2014 tax year.

5. The County's assessment of the Property for the 2015 tax year was $31,697,200, resulting in a tax bill of $183,843.76 for the 2015 tax year.

Having considered these facts and the evidence and arguments presented at trial, as well as the parties' post-trial briefs, the Court is now in a position to rule on Hershey's Complaint. To save the readers the agony of slogging through the following text (which is easily as turgid, dense, and seemingly without end as Herman Melville's *Moby Dick*), [2] the Court's conclusions are that the County enjoys the statutory presumption of correctness, that Hershey has rebutted the presumption, that Hershey has proved a fair market value for the Property, that Hershey has proved that the assessed value exceeds the fair market value, and that Hershey proved that the assessment was not arrived at in accordance with generally accepted appraisal practices. Finally, the Court's determination of the fair market value of the Property was $14,700,000 for 2014 and $15,500,000 for 2015. That is the value assigned by Hershey's primary appraiser, that is the value that the Court finds most persuasive, and I am not inclined to tinker with it given the limited experience I have with appraising real estate.

A. Applicable law:

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

> ***2** In circuit court proceedings to seek relief from real property taxes, there shall be a presumption that the valuation determined by the assessor or as adjusted by the board of equalization is correct. The burden of proof shall be on the taxpayer to rebut such presumption and show by a preponderance of the evidence that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application, and that it was not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations such as the International Association of Assessing Officers (IAAO) and applicable Virginia law relating to valuation of property.[3] Mistakes of fact, including computation, that affect the assessment shall be deemed not to be in accordance with generally accepted appraisal practice.

Va. Code Ann. § 58.1-3984(B).

Without describing the evolution of Code § 58.1-3984, suffice it to say that, in 2011, the General Assembly amended the statute by adding subsections (B) and (C). Prior to the amendment, there was no statutory presumption that the assessment was correct, and there was no articulation of the standard of proof allocated to the taxpayer in subsection (A).[4] The jurisprudence involving the presumption (originally given the dignity of a "clear presumption"[5]) and the standard of proof (a "clear preponderance"[6]) was developed by caselaw, and it governed challenges to tax assessments of all property (including real property). The amendment to the statute, by the addition of subsections (B) and (C), changed all of that. Solely with respect to challenges to real estate assessments, the General Assembly (a) established, for the first time, by statute, a presumption that the value determined by the assessor[7] is correct, (b) prescribed a new (and lower) standard of proof to be borne by a taxpayer attacking the assessment (a preponderance of the evidence), and (c) established clearly (well, pretty clearly) what the taxpayer must prove.

***3** The addition of subsection (B), and a plain reading of it, results in a significant departure from the earlier statute, the language of which is still preserved in subsection (A), but now specifically excludes real estate from its scope. When the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended. *Sosa v. Alvarez-Machain,* 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004); *Pollok v. Commonwealth*, 217 Va. 411, 229 S.E.2d 858 (1976) (where different terms were employed in different provisions of the same Act, "[u]nquestionably, the General Assembly intended the two terms to have different meanings and designed them to serve varying purposes"). Moreover, the addition of subsection (C)[8] further confirms that the Legislature was intentional in the broad scope of its amendments to "the presumptions, burdens, and standards" now applicable to appeals of real property assessments. For example, the case-law-created presumption of correctness was not unconditional (see Section C.1. below), but it cannot be clearer that the presumption under the statute is now absolute (but rebuttable). The rules regarding the burden of proof on the taxpayer challenging assessments of property other than real estate will still be governed by caselaw; the burden on the taxpayer challenging the assessment of real estate has been more specifically prescribed by the statute. And the standard of proof was (and as to all but real property remains) a case-law-created "clear preponderance," but subsection (B) refers simply to a "preponderance."[9]

There is a long history and significant body of jurisprudence developed by the Supreme Court of Virginia addressing tax assessments prior to the amendment, culminating in *West Creek Assocs., LLC v. County of Goochland,* 276 Va. 393, 403, 665 S.E.2d 834 (2008). By the amendment, the Legislature significantly altered the landscape of the law applicable specifically to challenges to real estate assessments. Depending on what the ultimate authoritative interpretation of the statute is, some of the Court's holdings still apply, but some of that caselaw is no longer either necessary or particularly helpful in deciding real estate assessment cases.[10] However, I am not aware of any case that has been appealed to the Supreme Court regarding the interpretation of subsection (B) of Code § 58.1-3984, so there

has been no guidance from the Supreme Court of Virginia and no binding precedent on the issue. [11]

Whatever the old law was, now, the presumption of correctness is absolute, without exception or condition, but it remains rebuttable. The standard of proof is not a clear preponderance, but the lower standard of a preponderance of the evidence. And, although the additional provision (requiring that the taxpayer prove that the appraisal was not in accordance with generally accepted practices) may also serve as proof of "manifest error" (about which, more later), under any circumstances, it is now required in every case.

Before addressing how to rebut the presumption, it may be helpful (it is certainly helpful to me in keeping my thoughts organized while writing this opinion) (a) to address what the ultimate issue is that the taxpayer must prove and (b) to distinguish that from what it is that the taxpayer must prove in order to rebut the presumption of correctness. Clearly, the ultimate goal of the taxpayer is to obtain relief from an assessment that exceeds the fair market value of its property. [12] To obtain that relief, the taxpayer must prove "by a preponderance of the evidence that the property in question is valued at more than its fair market value." Code § 58.2-3984(B). How does the taxpayer prove that?

***4** First, he must overcome the presumption of correctness, and then, having done so, the taxpayer must prove that the assessment is erroneous and what the fair market value is. See *County of Albemarle v. Keswick Club,* L.P., 280 Va. 381, 699 S.E.2d 491 (2010). Second, what must the taxpayer prove to overcome the presumption of correctness? It is here that existing caselaw may be helpful because the statute does not prescribe what evidence is required to rebut the presumption. That void can be filled by resort to the principle of statutory construction that the General Assembly is presumed to be aware of the law existing at the time it adopts a statute, including previous judicial interpretations of the statute or of terms used in it. *See e.g. Visikides v. Derr,* 3 Va. App. 69, 72, 348 S.E.2d 40 (1986); *see also Cape Henry v. Natl. Gypsum,* 229 Va. 596, 600, 331 S.E.2d 476 (1985).

The problem is that there is some confusion caused by the language of the caselaw existing at the time of the amendment to the statute. That confusion is caused by conflating the taxpayer's burden to prove the ultimate issue (that the assessment exceeds the fair market value of the property) with the taxpayer's predicate obligation to rebut the presumption (using the tools that the Supreme Court has provided through its decisions). A taxpayer cannot prevail without rebutting the presumption of correctness, but (a) it is not necessary for the taxpayer to prove the ultimate issue in order to rebut the presumption and (b) rebutting the presumption, alone, is not sufficient for the taxpayer to prevail. Having rebutted the presumption, the taxpayer must then present evidence sufficient to persuade the Court that its appraisal should be adopted over the (non-presumptively correct) appraisal of the taxing authority and that the property is over-assessed.

To illustrate the confusion, with respect to the issue of fair market value, in *West Creek*, the Court observed that:

> ... [a] taxing authority's assessment is presumed to be correct, and a taxpayer has the burden to rebut that presumption *by establishing that the real property in question is assessed at more than fair market value* .... * * * We have held that a taxpayer must show by a clear preponderance of the evidence that the taxing authority committed manifest error or totally disregarded controlling evidence in making the assessment.

Id. at 409, 665 S.E.2d 834 (emphasis added). More than an implication, the first sentence was a clear statement that the taxpayer must prove that the property is over-assessed in order to rebut the presumption. The Court added to that requirement, however, that "a taxpayer must show by a clear preponderance of the evidence that the taxing authority either committed manifest error or totally disregarded controlling evidence in making the assessment." *Id.* That latter (disjunctive) requirement and the requirement regarding proof that the assessment is in excess of fair market value do not appear to be in apposition, and it does not appear that the Court was saying that proof of either of the disjunctive components serves to rebut the presumption of correctness. The Court appeared to say that, to rebut the presumption, the taxpayer would have to prove that the property was assessed at more than fair market value. In addition, unrelated to rebutting the presumption, the taxpayer would have to prove that the assessor committed manifest error or disregarded controlling evidence.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

The problem with the language in *West Creek* is that it conflates proving the ultimate issue with rebutting the presumption. The language requires that the taxpayer prove the ultimate issue *in order* to rebut the presumption rather than requiring that the taxpayer rebut the presumption as a necessary step (but not the only step) to proving the ultimate issue. To prevail, the taxpayer must prove that the property is assessed in excess of its fair market value, but first it must prove that the assessment is not entitled to the presumption of correctness. Only then can the taxpayer approach the litigation on a level playing field.

***5** Two of the three cases which *West Creek* cites [13] do not support its statement that the presumption must be rebutted by "establishing that the real property in question is assessed at more than fair market value." The language in *Shoosmith Bros., Inc. v. County of Chesterfield,* 268 Va. 241, 601 S.E.2d 641 (2004) is closest.

> The parties do not dispute the principles which we apply when reviewing a challenge to a tax assessment. We presume that a county's tax assessment is correct, and the burden is on the taxpayer to rebut the presumption by showing by a clear preponderance of the evidence that its property is assessed at more than fair market value. Shoosmith agrees that the taxpayer must show that the County committed manifest error or totally disregarded controlling evidence in its determination of fair market value.

Id. at 245, 601 S.E.2d 641. However, in *Arlington County Board v. Ginsberg*, 228 Va. 633, 640, 325 S.E.2d 348 (1985), the Court held that "[t]here is a clear presumption that an assessment is valid; the presumption can be rebutted only upon a showing of manifest error or total disregard of controlling evidence." And the most recent case cited by *West Creek* makes a distinction between what the taxpayer must prove ultimately to obtain relief and the proof necessary to rebut the presumption:

> A taxpayer seeking relief from an allegedly erroneous assessment has the burden to show that the assessment exceeds fair market value. [14] [Citations omitted.] Generally, a taxing authority's assessment of a property's fair market value is presumed valid [15] and a circuit court will reject and correct a taxing authority's assessment only if the taxpayer demonstrates that the taxing authority committed manifest error or disregarded controlling evidence in making the assessment. [16] [Citations omitted.]

Keswick Club, L.P. v. County of Albemarle, 273 Va. 128, 136-37, 639 S.E.2d 243 (2007). In *County of Albemarle v. Keswick Club, L.P.,* 280 Va. 381, 699 S.E.2d 491 (2010), the Court confirmed each of those three principles and added that "if the taxpayer establishes that the taxing authority has committed manifest error, the assessment is not entitled to a presumption of correctness and the taxpayer is required only to show that the assessment was erroneous." *Id.* at 387, 699 S.E.2d 491 (citation omitted). [17]

***6** Notwithstanding the confusing language, it seems clear that proof that the assessment exceeds the fair market value is not necessary to rebut the presumption (although it is necessary for the taxpayer to prevail). What is necessary to rebut the presumption is a showing that the assessor committed manifest error or disregarded controlling evidence.

To establish manifest error in the assessment, the taxpayer must prove "that the taxing authority employed an improper methodology in arriving at a property's assessed value or [establish] 'a significant disparity between fair market value and assessed value ... so long as the assessment [does not come] within the range of a reasonable difference of opinion, ... when considered in light of the presumption in its favor.' " *Id.* at 19, 726 S.E.2d 279.

There is caselaw addressing improper methodology, but it is less clear what is necessary to establish that the assessor

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

"disregarded controlling evidence." The contours of that issue have never been clearly defined, and no standards have been specifically articulated because its application has always been contextual, depending on the particular facts of the case and what a Court found to be "controlling evidence."

The only remaining issue is the standard of proof to overcome the presumption. Historically, to overcome the judicially-created "clear presumption," there was no prescribed standard; when the clear presumption was demoted to a presumption, the standard was a "clear preponderance." The statute, trumping the judicially created constructs, does not afford the assessment a "clear presumption;" only a presumption. And the statute does not expressly prescribe the standard of proof on that issue because the preponderance standard is on the far side of the conjunction. ("The burden of proof shall be on the taxpayer to rebut such presumption *and* show by a preponderance of the evidence that ...") One might argue that the lower standard applies only to those elements of proof that follow the term and that rebutting the presumption still requires the higher standard.

There are three reasons that I conclude that the "clear preponderance," together with the judicially abandoned "clear presumption," were swept away with the amendment. First, one fact that the taxpayer must prove is that the assessment was not arrived at in accordance with generally accepted appraisal practices; the statute requires that the taxpayer prove that only by a preponderance of the evidence. However, that evidence would also prove that the appraiser employed an improper methodology. Unless the lower standard applies to rebutting the presumption, the taxpayer could satisfy the obligation to prove that statutorily required fact by a preponderance but fail to rebut the presumption unless he also proved it by a clear preponderance; that makes little sense.

Second, the procedural provisions in the second paragraph of subsection (B), regarding some residential property, are instructive. The first sentence of subsection (B) is unconditional; in ail challenges to an assessment of real property, the taxing authority enjoys the presumption of correctness. As to challenges governed entirely by the first paragraph of the subsection (regarding real property other than the category of residential real property described in the second paragraph), the existence of the presumption and the allocation of the burden of proof effectively allocate the burden of production in the proceeding to the taxpayer. (The taxing authority's assessment is presumed to be correct, and the taxpayer takes the laboring oar to produce evidence to rebut the presumption.) Under the second paragraph, in the residential context, if the taxpayer makes the appropriate requests, it is the taxing authority which has the burden of production; the taxing authority must present its evidence first, and the evidence it must produce is the evidence on which the presumption is based. "Upon the conclusion of the presentation of the evidence of the assessing officer," the burden of production shifts to the taxpayer to bear his "burden of proof by a preponderance of the evidence to rebut" the assessor's evidence "as otherwise provided in" subsection (B). At that point, the residential taxpayer looks to the first paragraph and finds himself in the same posture as the non-residential taxpayer, with the same obligations of proof. His evidentiary standard in all regards, including rebutting the presumption, is a preponderance of the evidence. If he is to meet his obligations "as otherwise provided in this section," then it is not only practical, but logical, to conclude that the standard of proof to rebut the presumption as required in the first paragraph is a preponderance.

***7** Add into the calculus the provisions of subsection (C), which is the Legislature's clear statement of intent to distinguish the "burdens, standards, and presumptions" peculiar to real estate from those which apply to other forms of property. The General Assembly appears to be recognizing (a) that the presumption as to correctness for real estate is just a presumption, not the judicially created "clear presumption" that applies to other taxable property, (b) that, as to real estate, the issues as to which the taxpayer bears the burden of proof are now statutorily created and specific; and (c) that the standard of proof is a preponderance of the evidence, not a "clear preponderance."

Although the statute may not be entirely clear, in "interpreting a statute, we endeavor 'to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.' " *Colbert v. Commonwealth,* 47 Va. App. 390, 394, 624 S.E.2d 108 (2006) (quoting *Jones v. Rhea,* 130 Va. 345, 372, 107 S.E. 814 [1921]).

Applying the amended statute, concluding that it is a new statement of the process through which a taxpayer challenges a real estate assessment, and stripping it (as I believe the General Assembly intended to do) of much of the judicial interpretation of its predecessors that evolved over decades, the Court will analyze Hershey's claims under the following

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

spare but statutorily mandated rubric, in the same order as set forth in the statute. [18]

1. Is there is a presumption that the assessment is correct?

and

2. Did Hershey rebut the presumption by proving either:

a. that the assessor committed manifest error either

1. by proving that the taxing authority employed an improper methodology in arriving at a property's assessed value or

2. by establishing a significant disparity between fair market value and assessed value, so long as the assessment does not come within the range of a reasonable difference of opinion, when considered in light of the presumption in its favor

or

b. that the assessor disregarded controlling evidence?

and

3. Has Hershey established the Property's fair market value? [19]

and

4. Did Hershey prove either:

a. that the Property is assessed at more than fair market value, or

b. that the assessment is not uniform?

5. Has Hershey proved that the assessment was not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations such as the International Association of Assessing Officers (IAAO) and applicable Virginia law relating to valuation of property?

Question 5 appears to be redundant to question 2.a.1, but Hershey can only succeed on its claim if it meets each of those burdens.

***8** Finally, I know that fair market value is an elusive and multi-faceted concept. The Supreme Court of Virginia has generally defined the term "fair market value" as a "sale price when offered for sale 'by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it.' " *Keswick Club, L.P. v. County of Albemarle,* 273 Va. 128, 136, 639 S.E.2d 243 (2007) (quoting *Tuckahoe Woman's Club v. City of Richmond,* 199 Va. 734, 737, 101 S.E.2d 571 ([1958]). Having acknowledged that, I also defer to Judge Lannetti's scholarly and insightful analysis in *PHF II Norfolk, LLC v. City of Norfolk,* 94 Va. Cir. 454, 462 (2016), with respect to the fluidity of the term and the scope of what might be accepted as a fair market value. Noting the difficulty with applying the term in practice, Judge Lannetti characterized it as a "somewhat chimerical concept." *Id.* at 462. He was more charitable than Justice Holt in *Washington County Nat'l Bank v. Washington County,* 176 Va. 216, 10 S.E.2d 515 (1940) when he observed: "The Constitution of Virginia, ... declares that assessments of real estate shall be at their fair market value. But this mandate has been so honored in the breach that no assessors feel called upon to apply it in practice. If this bank building be assessed at its fair market value, it would probably be the only building in Abingdon so assessed." *Id.* at 218, 10 S.E.2d 515. *See also Lehigh Portland Cement Co. v. Commonwealth,* 146 Va. 146, 135 S.E. 669 (1926), *Richmond v. Commonwealth,* 188 Va. 600, 50 S.E.2d 654 (1948), and *Southern R. Co. v. Commonwealth,* 211 Va. 210, 176 S.E.2d 578 (1970).

Over the years since 1940, it appears that there has been a greater effort more faithfully to adhere to the mandate of the Constitution, but the fact of the matter is that there is no single, absolute fair market value. In this case, the parties' appraisals vary wildly, and the real issue, after the determination of whether the presumption has been rebutted, is which appraisal is best supported and most persuasive, taking into account the standards by which the Court must assess them.

B. Initial observations:

First, although there is a presumption that the value determined by the assessor is correct, that does not oblige the Court to accept the County's evidence uncritically. For example, the "highest and best use" of property is a component of its value, but the Court is not bound, in the face of conflicting evidence, simply to accept the assessor's decision of that factor; the presumption does not reach that far. Nor does the presumption strip from the Court its obligation to assess the credibility of the witnesses (both those whose conclusions the presumption shields and those who are challenging those conclusions). *In County of Albemarle v. Keswick Club, L.P.,* 280 Va. 381, 388, 699 S.E.2d 491

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

(2010), the Court stated: "The parties' expert valuations differed greatly. In cases where the circuit court is presented with such conflicting testimony, we 'will defer to the circuit court's judgment of the weight and credibility to be given [the witness'] testimony.' *H.C.A. Health Servs.,* 260 Va. [317,] at 332, 535 S.E.2d 163 [2000]." Were it otherwise, no taxpayer could ever overcome the presumption of correctness in the teeth of naked, untested, and presumptively correct but conclusory assertions by an assessor (a) as to every element that is the basis of the valuation, (b) that the assessor did consider all three approaches and properly rejected some, (c) that he used a proper methodology, and (d) that he did not disregard controlling evidence. To maintain the presumption, those assertions must be credible.

Second, the County's request for proposal (the RFP) specifically provided that" [a]ll estimated and stated values shall be developed using accepted mass appraisal methodology" (PEx1, tab 14), and that is the methodology that was implemented. The accepted standard for mass appraisal (and one to which the parties referred in this case) is the Standard on Mass Appraisal of Real Property (the MAStandard), promulgated by the International Association of Assessing Officers (the IAAO). The MAStandard provides that "[m]ass appraisal is the process of valuing a group of properties as of a given date and using common data, standardized methods, and statistical testing." PEx1, tab 8, § 2. Perhaps beyond the scope of judicial review, I nevertheless note that a perusal of the MAStandard implies that a mass appraisal contemplates that there be a mass of properties to study and value (without quantifying how great the mass is). I base that observation on a review of the MAStandard, including the nature of the information to be collected and compared, the valuation schedules and models described, and other aspects of developing the data to implement the methodology, arrive at a value, and verify it. Indeed, the person who was specifically tasked with appraising the Property testified that the methodology "allows you to value a number of properties as of a good and specific time. To test the results, you often do statistical analysis to see how the product of the model performs. So, it's a method of valuing mass numbers of properties." TrII at 232. Outside of the scientific and religious contexts, a mass is generally defined as a large quantity, amount, or number. In this case, the "mass numbers of properties" was two, the Property and another local food-processing facility (McKee).

***9** Third, the Virginia Constitution requires that real estate assessments "shall be at their fair market value, to be ascertained as prescribed by law." Va. Const. Art. X § 2. The Supreme Court of Virginia has defined fair market value as the "sale price when offered for sale 'by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it.' " *Keswick Club, L.P.,* 273 Va. at 136, 639 S.E.2d 243 (2007) (quoting *Tuckahoe Woman's Club v. City of Richmond,* 199 Va. 734, 737, 101 S.E.2d 571 ([1958]). In determining fair market value, Courts (and presumably appraisers) must consider "all the capabilities of the property and all the uses to which it may be applied." *Tuckahoe,* 199 Va. at 738, 101 S.E.2d 571 and *Fruit Growers Express Co. v. City of Alexandria,* 216 Va. 602, 609, 221 S.E.2d 157 (1976). The County was critical of the fact that Hershey's expert appraisers did not use the mass appraisal system to arrive at their conclusions of the fair market value of the Property. [20] However, nowhere in the Constitution or in the Code is there a reference to any particular system of appraising real estate, *e.g.,* a mass appraisal or single-property appraisal; nowhere in the law of the Commonwealth is there a provision that states that the use of any system justifies the assessment of a property at a value different than fair market value; and nowhere in the law of the Commonwealth is there an implication that a taxpayer who challenges an assessment is limited to the assessing appraiser's system (by choice or contract) in proving fair market value. The "apples" that are at issue in this case are the competing experts' conclusions of the fair market value of the Property, not the system by which they arrive at that value, so long as they arrive at those conclusions by proper methodologies, those being the sales comparison, income (or income capitalization), and cost (or depreciated cost) approaches.

Fourth, the parties agreed to the Court's accepting each of four appraisers as experts. Yet, if I reflect on the experts' testimony as to the quality of each other's work product, each offered an opinion of the others' that was even less restrained than the oft-recited observation of Carl McFarland, my Legislative/ Administrative Law professor at the University: "If you believe that, you'll never own your own home." One expert opined that another had violated the rules of the Virginia Real Estate Board and the USPAP guidelines, had relied on inappropriate data to assess value, and misunderstood a basic concept in determining the interest to be valued. One expert opined that another's work was misleading and that his opinions were inappropriate, unreasonable, and not credible. Another expert opined that yet another's work violated USPAP standards, *inter alia,* by not employing the correct methodology to produce a credible appraisal and that he was misleading in how he presented his report. And those

merely skim the surface of the experts' criticisms of each other. I understand that there will be differences of opinions among experts; I see it in every case in which they testify. I must say, however, that I understand it all the more in cases like this because, when one reads the standards which govern the conduct of the appraisers (MAStandard, USPAP, IAAO, etc.), one concludes that they can be charitably described as remarkably (one might suggest unnecessarily) complex, difficult to understand, and, in the end, setting goals which are beyond aspirational and more likely chimerical. The consequence of all of this is that, having to rely on the opinions of dueling experts, the Court is left (more personally, I am left) virtually unarmed and without cover, in the middle of the OK Corral.

Finally, what follows is an incomplete summary of the evidence that was presented over the four days of hearings, in more than 1,200 pages of transcripts, and in the thousands of pages of exhibits. There may well be evidence and criticisms of experts' conclusions that each of the parties feels would have been more significant than the evidence on which I have focused. I would not quarrel with that possibility, and I acknowledge that some of what I have omitted is persuasive for one side or the other, but it was a target-rich environment, and I have only so many harpoons. Had I but world enough and time, this summary could have been more complete, but, "at my back I always hear Time's winged chariot hurrying near,"[21] so I believe the following must suffice for the purpose.

C. Statutory considerations:

1. Is there is a presumption that the assessment is correct?

***10** In the past, when the presumption was created by judicial interpretation, the Supreme Court of Virginia had imposed at least one limitation: "When a taxing authority uses a depreciated reproduction cost approach as the sole method of assessing fair market value, after the taxing authority has considered but properly rejected the use of other valuation methods, the assessment is entitled to a presumption of correctness." *Bd. of Supervisors v. HCA Health Servs. of Va., Inc.,* 260 Va. 317, 330, 535 S.E.2d 163 (2000). A negative implication is that, if the assessor used only the cost approach and did not "properly" reject other valuation methods, the presumption would not attach. The limitation is a creature of caselaw and was made at a time when the presumption of correctness was, too, a creature of caselaw. *See Rixey's Ex'rs v. Commonwealth,* 125 Va. 337, 348, 99 S.E. 573, 576 (1919) (citing secondary sources and non-Virginia cases for the proposition that the "presumption is in favor of the validity of the assessments");[22] *Union Tanning Co. v. Commonwealth,* 123 Va. 610, 633, 96 S.E. 780, 786 (1918) ("The taxing power rests secure upon the presumption aforesaid that the assessment is correct in all other particulars, until the contrary is shown in evidence.").[23]

This is not the past, however, and what might have been is now only an abstraction because a judicially imposed restriction on a judicially created presumption cannot survive the unequivocal (but not impenetrable) cloak afforded by the General Assembly. Although the County's assessment is grounded on the conclusions of an appraiser who used the cost approach as the sole method of appraising the Property's fair market value, and Hershey maintains that he improperly rejected the use of other valuation methods (*see infra* Section C.2.), the presumption of correctness (in real estate cases) is now directly conferred by Code § 58.1-3984(B), and it is unambiguously absolute. Thus, by the plain language of the statute, the County is entitled to a presumption that its assessment of the Property was correct, regardless of whether it "considered but properly rejected the use of other valuation methods." That consideration, once a predicate to the creation of the presumption, is now only a means to attack it.

Accordingly, the simple answer to this question is yes.

2. Did Hershey rebut the presumption?

The short answer is yes. At a minimum, Hershey proved manifest error by proving that the assessment was based on the County's appraisal which did not properly reject one of the three accepted methods of appraising property. Further, Hershey proved the fair market value of the Property and that there is a significant disparity between that value and the assessed value. Finally (if somewhat redundantly), Hershey proved that the County's appraiser did not arrive at his fair market value in accordance with generally accepted appraisal practices. (In this case, the latter suffices both to rebut the presumption and to satisfy the final requirement of the statute.)

Given that subtlety is not my strong suit and not wanting the reader to be in suspense, I observe that, Donald Kirk Thomas (Thomas), the person directly (and, ultimately, solely) charged with appraising the Property, was not a persuasive witness either in terms of his credibility or his skill as an appraiser (or, at least, in presenting his conclusions). The

former criticism may be something of a product of the latter, and is grounded, in part, on Thomas' failure to document the data for his analyses (making an examination into the bases for his conclusions difficult, with the result that the Court was left largely to rely on his representations that he did the work, with little corroborating evidence that he did). [24] The basis for the latter criticism will appear throughout the balance of this section.

***11** Thomas was a principal of Wingate and Associates, Ltd. (Wingate), the firm which was awarded the contract by the County to conduct the assessment which is at issue in this case. Miles Willett (Willett) was an employee of Wingate and a subordinate of Thomas. Thomas held a certification as a residential real estate appraiser; [25] Willett was certified as a general real estate appraiser. [26] By letter of May 20, 2013, Thomas wrote to the County to assure it that, pursuant to Va. Code Ann. § 58.1-3275, Wingate was recommending Willett "to serve as your Professional Appraiser." Consistent with that representation, he enclosed Willett's qualifications and a sample letter by which the County could request approval of Willett from the Department of Taxation. PEx1, tab 17.

The evidence showed that no single person could have performed the work for all 40,000 properties that were to be appraised and that Willett, Thomas' subordinate in Wingate but who held a certification higher than Thomas, did substantial work in the completion of the overall assessment for the County. Nevertheless, neither he nor anyone with a general real estate appraiser certification did anything with respect to the appraisal work that resulted in the assessment of the Property. Both Thomas and Willett candidly acknowledged at trial that Willett did not participate in the appraisal, did not supervise Thomas' work in conducting the appraisal, did not know what data or methodologies Thomas used, and did not review, in any substantive way, the result of Thomas' work. In short, although the evidence does demonstrate that Willett did serve, generally, in the role described in Thomas' letter to the County, he did not serve in any capacity (direct involvement, oversight, or review) in Thomas' appraisal of the Property.

The County minimizes the issue by noting, correctly, that Hershey cannot avail itself of any breach of contract argument, that Hershey did not "establish a prerequisite requiring a specific appraisal license to perform the assessment" on the Property, [27] and that Thomas testified that he had been engaged by other jurisdictions as an assessor. Accepting all of that, it does not alter the fact that, with respect to the Property, Thomas was charged with performing appraisal work at a level higher than his certification as contemplated by the Virginia administrative regulations.

a. Overview of the County's methodology, including Thomas' categorization of the Property as a special-purpose property, his determination of the highest and best use of the Property, and the effect of those decisions:

***12** At trial, Thomas testified that the first thing one does in "assessing a market value" is to "[d]etermine the highest and best use of the property." TrII at 237. In fact, however, his next statement implied that the determination of a property's highest and best use is the second step, following a determination of the classification of the property, at least if the classification is special-purpose: "[U]nless we have evidence to suggest otherwise ... the highest and best use is generally the current use ... with special-purpose properties." TrII at 237. Thomas confirmed the order of analysis moments later: "The classification of the property was prior to determining highest and best." TrII at 240.

Thomas categorized the Property as "special-purpose" property. [28] Attributes of the Property which led him to classify it in that way included that it "is a super-sized site[, w]hich, if it was a general commercial property ... wouldn't be necessary." TrI at 212. That allows "for an environmental buffer" which permits the owner to "upkeep that buffer in such a fashion where vermin is not susceptible to reaching the perimeter of the building." TrI at 212-213. The wall construction of the main building on the Property is durable, not susceptible to rust, and one can treat the walls with "anti-microbial agents and urethane finishes that allows easy clean up and also allows for sanitation purposes." TrI at 213. The floor system is "saturated with drains;" (there was something peculiar about the floor joints); the light diffusers are shatter-proof; the "rooms tend to be smaller." TrI at 213-214. [29] Thomas did not explain how the particular features that he mentioned limited the use of the Property or how they disqualified it from being put to other uses. Indeed, having listed those details, he agreed that he "classified and appraised the [Property] as a special-purpose property solely because it was originally designed and constructed to be used as a confectionary plant...." TrI at 107.

Thomas agreed that the a special-purpose property is a property "adapted to a single use," such as an "oil refinery ...

or a sports stadium." TrI at 106. He agreed that the "definition of a special-purpose property is a property adapted for a single use" and that a special-purpose property is not "adapted to multiple, other uses." TrI at p. 111. He acknowledged that "a rectangular-shaped manufacturing building can be used for a variety of other manufacturing uses;" he agreed that the building on the Property "is a rectangular-shaped manufacturing building;" and he grudgingly agreed that it could "conceivably" be "used for manufacturing purposes other than manufacturing confections." TrI at 111. Later, Thomas conceded that another local business (manufacturing copper valves and fittings) could work from the Property, TrII at 301, [30] and that one could build a go-cart track inside the building, TrII at 303, and that the Property could be used as a self-storage facility, TrII at 303.

Nevertheless, having concluded that the Property was special-purpose, Thomas then described the justification for his use of the cost method. Although Thomas did not know if they were "requisite," he testified at the trial that the "IAAO standards are recommended [for the mass appraisal techniques]," and he agreed that the appraisal of the Property "was performed in accordance with" those standards. TrI at 68. As guidance in his selection of the appropriate appraisal method, Thomas looked specifically to § 4.6.7, which provides that "[t]he cost approach tends to be most appropriate in the appraisal of special-purpose properties, because of the distinctive nature of such properties and the general absence of adequate sales or income data." Accompanying that Section is Table 1, which indicates that the sales comparison approach and the income approach rank second and third in usefulness of the three approaches (with no preference of one over the other).

***13** One cannot infer from the language of § 4.6.7 that, because the MAStandard recognizes one method as most appropriate, it is mandating that only the cost approach be used or that it is *carte blanche* for an appraiser to ignore either of the two approaches. That section does not assume that adequate sales or income data are unavailable; it merely acknowledges the probability. It is not an authorization to fail to look for what might be there or fail to see what is. Indeed, the MAStandard "addresses mass appraisal procedures by which the fee simple interest in property can be appraised at market value, *using mass appraisal application of the three traditional approaches to value (cost, sales comparison, and income)"* PEx1, tab 8, § 1 (emphasis added.)

As to the effect of Thomas' categorization of the Property as special-purpose, he testified more than once that he considered all three approaches, but the classification of the Property as special-purpose made it impossible to find comparables for the sales approach and, because special-purpose property is generally owner-occupied, there was no data with which to pursue the income approach. Indeed, Thomas conceded that he relied solely on the depreciated cost approach in appraising the Property, agreeing that he was limited to that because of his categorization of the Property as a "special-use property." TrI at 113. In response to the observation, "[i]n other words, classifying the [Property] as a special-purpose property effectively pigeonholed you into the cost approach," Thomas replied: "That is correct." Addressing his rejection of the sales comparison approach and specifically responding to the question whether his "classification of the [Property] as a special-use property dictated the types of industrial properties that you looked [at] to consider use of a sales-comparison approach," Thomas said, "That is correct." TrI at 113.

It is clear that Thomas' appraisal rested entirely on the foundation of his initial categorization of the Property; its nature as special-purpose drove him to the cost approach as the only method and so limited his horizon of comparables that he could not properly consider (hence, could not properly reject) either of the other approaches. But Thomas stood alone among the experts in categorizing the Property as special-purpose, [31] and the bedrock of his conclusions eroded, not only during his own testimony, but as the other appraisers offered their expert opinions. Even the County's second expert appraiser rejected the conclusion that the Property was properly categorized as special-purpose. Although the other experts generally agreed that the income approach was not helpful, each of them asserted that the sales approach was the preferred method (or the method to be given the greatest weight).

In determining the highest and best use of the Property, Thomas testified that he "did not document [his evaluation of alternate uses], but [he] evaluated alternate uses and concluded that the present use as-constructed was the highest and best use." TrI at 100. However, at an earlier deposition, responding to his consideration and analysis of the highest and best use, Thomas' answer indicated that he did not consider alternatives. He said, "it was a fairly obvious analysis at the time." Because the industry of which Hershey was a part was not waning, "it was an obvious conclusion based on [the Property's] current occupancy and reasonable presumption that its occupancy continues profitably." PEx2 at 82-83. Thomas did not identify any alternate uses of

the Property that he considered and rejected, stating only: "Again, more of an obvious nature. The research and analysis included just obviously that it was a purpose-built property for its current occupancy." PEx2 at 83. After discussing his deposition testimony, at trial, Thomas then acknowledged that he did not analyze (or at least did not document) any alternate uses for the Property. TrI at 103.

***14** Finally, as a general observation not applicable to any of the three methods, I note that Thomas identified two sources on which he relied in making the appraisal, neither of which existed at the time he completed it. In one instance (Hershey's annual report, not completed by the time the appraisal was), it may simply have been a typographical error, referring to the wrong year. Even so, Thomas acknowledged that the report (even one of the correct vintage) gave no information specific to the Property, although he extrapolated from the report of the multi-national corporation that the industry was healthy, and that fact, he asserted, was relevant to the appraisal. TrI at 166. To be specific, Thomas opined that the fair market value of the Property would be higher or lower depending on the multi-national corporation's profitability because "that would be a signal that other participants might not be willing to enter into the possibility of buying or renting or leasing the property back to another company." TrI at 168. [32]

As to the other publication, Thomas said he relied on a specific article on mergers and acquisitions that simply did not exist (because it had not been published) at the time he completed his appraisal. His explanation was that, although the article had not been published at the time, some of the data in it was available when he was appraising the Property. TrI at 164 and TrII at 247. He did not explain clearly why he did not simply refer to the data on which he relied rather than to a publication that did not exist.

b. Cost approach:

Setting aside whether Thomas' characterization of the Property as special-purpose was appropriate, as I have noted, Thomas relied on § 4.6.7 of the MAStandard to guide him in his selection of the appropriate appraisal method. That Section provides that "[t]he cost approach tends to be most appropriate in the appraisal of special-purpose properties, because of the distinctive nature of such properties and the general absence of adequate sales or income data." Of more general application, "[t]he cost approach is more reliable for newer structures of standard materials, design, and workmanship." MAStandard, § 4.2. (I note that the structure on the Property is not a "newer structure.")

Use of the cost approach involves determining a replacement cost for the improvements, then applying various depreciation factors to the improvements, and then adding the value of the land (which of course, does not depreciate). [33] Addressing that last factor, when asked to review a document in the appraisal report submitted to the County (PEx1, tab 9, p.0029), styled "Commercial/Industrial Cost and Price Support" and with his attention drawn to items 2 and 3, Thomas acknowledged that neither of the listed properties was a good comparable for the non-depreciable land of the Property. TrI at 119-120. Thomas said, "we relied more on general knowledge of industrial-site sales." [34] TrI at 120. Yet, in an earlier deposition, Thomas had testified, specifying one of the sales listed on the document, that it "was used in support" as a "comparable land sale[ ] and reconciled to a conclusion for the land value estimate." PEx2, tab 7, p.8. Explaining that earlier comment, Thomas asserted at trial that the two sales were the only documented price support for the valuation of the land but added that "[w]e're aware of general sales of industrial properties throughout the region, and those tend to follow within certain parameters. When we look at some of the sales [in the general area], we're able to also know that better sites which we've been aware of have sold." TrI at 124. [35] Thomas did not document those better sites of which he was aware; rather, he documented only the two which he agreed were not good comparables for establishing the land value.

***15** Turning his attention to the improvements, on the spreadsheet reflecting his calculations for the main manufacturing building on the Property (PEx1, tab 9, p.0022), Thomas concluded that the total square footage of the actual structure was 697,589, covering a footprint of 574,200 square feet. (The building has more than one level, with some levels being used for different purposes.) The figures for both areas were estimated only and were not the result of a physical measurement. Thomas used the square footage of the footprint as the factor for calculating the reproduction cost of the building, opining that the smaller building would be of equal utility as the larger (based on actual square footage) were it built "using current designs and layouts." TrI at 132. [36]

The MAStandard Glossary's definition of "reproduction cost" is the "cost of constructing a new property, reasonably

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

identical (having the same characteristics) with the given property except for the absence of physical depreciation ....” To meet the goal of the cost approach to reproduce a building that is of equal utility as the actual building under consideration, Thomas asserted that his analysis was based on his “knowledge of newer, modem manufacturing facilities generally,” but he agreed that he had no way of knowing and did no research to ascertain that the smaller building would be of equal utility as the larger building. TrI at 132.

The definition also provides that constructing the new property should contemplate “using the same materials, construction standards, design and quality of workmanship, computed on the basis of prevailing prices and on the assumption of normal competency and normal conditions.” To that end, § 4.2 of the MAStandard provides: “Reliable cost data are imperative in any successful application of the cost approach. The data must be complete, typical, and current. Current construction costs should be based on the cost of replacing a structure with one of equal utility, using current materials, design, and building standards.”

Thomas admitted that he “did not do any research or analysis of the nature, layout, or design of the state-of-the-art processing lines in the food-processing industry.” Although he testified that he knew the “standards that are at play in food-processing construction generally,” TrI at 144, he did not document any analysis of improvements in construction materials in the food-processing industry. In response to a question implying that he had no information regarding material prices normally used in the industrial construction industry in Augusta County, Thomas declined to “agree to that entirely. Our Marshall & Swift Valuation Service assists us in estimating materials costs and construction costs, as localized by the multipliers we use.” TrI at 174. (The Marshall & Swift Valuation Service [the MVS] is an industry-accepted publication which provides construction cost adjustment figures depending on the specific geographic area.) Although Thomas testified that the MSV which he used “would have been [geared to] either Charlottesville or Harrisonburg, because there's none specific just for Augusta County,” TrI at 222, he had not documented the time frame for the version of the MSV that he had used.

Thomas then had to consider depreciation, specifically physical, functional, and economic (sometimes referred to as locational) obsolescence. Thomas concluded that there was no locational obsolescence (the Property is located in an advantageous area), and he made observations about physical obsolescence using a matrix that rates characteristics from “very poor” to “excellent” (without a definition of any category). With that as a guide, he concluded that the overall physical condition of the Property was “good to average.” DExA, tab G.

***16** Thomas testified that no one at the Hershey plant informed him of any functional obsolescence. TrII at 251. However, it was in considering the issue of functional obsolescence that Thomas justified his using only the footprint (rather than the actual square footage) as the basis for his calculations in reproducing the building. He did not identify any functional obsolescence, TrI at 144, but he used the smaller area to calculate the reproduction cost because he “felt that was one of the ways [he] could be most fair to Hershey” to address the issue. His decision to use just the footprint, thereby eliminating certain portions of the building (*e.g.* a mezzanine or a small office), was predicated on the following: “These types of areas, I feel like and it's my opinion that, based on what I know about modem techniques in construction, that that's not being recognized in the market.” TrII at 227. However, he had no market evidence to support the proposition that the reduction in area would accurately quantify functional obsolescence. TrI at 148. [37]

Thomas acknowledged that he did “no statistical testing to determine the reliability of the cost approach valuation method or the overall accuracy of [his] estimates of value for the Hershey or McKee property.” TrI at 78-79. He agreed that “[t]o determine a parcel's value using mass appraisal techniques, the appraiser must rely upon valuation equations, tables, and schedules developed through mathematical analysis of market data,” [38] but Thomas also agreed that he did no mathematical analysis of market data for the Property, asserting that “we had no statistical data to analyze ... and we had no market data to analyze of a comparable property.” TrI at 79. He also agreed that he had no documentation of the development of the mass appraisal model he used in appraising the Property (TrI at 85-86) and that the “only thing that we have that would illustrate the uniformity approach is the spreadsheets.” TrI at 86.

Responding to a question whether he did a market analysis specifically applicable to the Property, Thomas ultimately responded “no,” prefaced by: “Well, only to the extent that when we developed our land estimate, our value of land to use in the cost approach, we may have used findings that we learned through the studies of other, similar commercial properties, particularly land sales, if we had those.” TrI at

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

92-93. He agreed, however, that there was no documentation of a market analysis of the Property. TrI at 93. He did not document, for the appraisal file, any research or analysis of the available supply of any competing properties, and the only research he conducted into the construction of potentially competitive properties was limited to consideration of a processing plant "unknown as to how comparable it would be because it was not constructed at the time of the assessment." TrI at 95.

Thomas began with a building, the dimensions and size of which he did not measure but only estimated; he then theoretically reproduced a new one of entirely different dimensions and size to create a building of equal utility. He did that based on general knowledge, without researching or analyzing the nature, layout, or design of a building used in the industry, without documenting the costs of constructing the replacement, and admitting that he had no way of knowing (and had not conducted research to determine) that the reproduced building would be of equal utility to the existing structure. In essence, rather like Sir Phillip's Sidney's castle in the air, Thomas built a structure without foundation, supported only by columns of numbers on paper and without much research into hard costs-a special-purpose building (that was not there) to replace a building (that was). He represented, without much analysis, that the building, that was not, would be of equal utility to the one that was. It gets more complicated. Having conceived a different building, in order to calculate the fair market value of the building that is, Thomas then had to apply the various depreciation factors to arrive at a fair market value for an imaginary building that never was and equate that to the building that is. Finally, he added in the value of the undepreciated land based on entirely inadequate data. [39]

***17** The foregoing gives an incomplete summary of some of the problems with Thomas' appraisal of the Property using the cost approach, but it is not exhaustive of the deficiencies that were raised and inadequately explained. It is sufficient, however, for the Court to conclude that Thomas did not properly apply the methodology he selected and that, using this approach, he did not act in accordance with generally accepted appraisal practices.

Regardless of the specific issues with Thomas' use of the cost approach, as noted hereafter, as a more general matter, one expert testified that this approach was almost never used (except by assessors) and another weighted it at 30%. In fairness, another expert observed that, because of limitations on available data, assessors are "forced to use a cost approach," TrIV at 2, but, to the extent that the observation is correct, it does not justify using the approach improperly.

c. Income approach;

Thomas agreed that he rejected the income approach because the Property was "owner-occupied and because [he believed] rents for leases of food-processing plants were not available." TrI at 112 and TrII at 257. As a result, because neither of the two buildings subject to the mass appraisal was leased, he did not explore the income approach, and he did not "conduct a search for rental data for food-processing plants ... [or] for general-use manufacturing plants." TrI at 112 and TrII at 258.

As to this approach (if for slightly different reasons), the other experts agreed. One of Hershey's experts agreed that he could find no comparable data to justify the use of the income approach; the County's second expert did use it, but he weighted it at only 20%, and the data that he used for the approach was questionable.

Based on the other experts' opinions, I find that Thomas properly rejected the income approach.

d. Sales approach:

As I noted above, Thomas acknowledged that he rejected the sales approach because his classification of the Property as a special-purpose property dictated the types of industrial properties he could consider in applying this approach. Thomas did not search for any sales of general-use or limited-use manufacturing plants. Using a data base program (LoopNet) and key words for the search criteria, Thomas searched only for comparable sales of food-processing plants and limited that to the eastern region of the United States. TrI at 113 and TrII at 256 and 260. However, even within those restrictions, he did not recall the precise areas in which he searched, and he kept no record of any sales that he identified, [40] but he rejected the use of the sales approach because he could not locate sales of comparable food-processing plants in the eastern United States. TrI at 114.

Assessing that potential market for a sale of the Property, Thomas considered only (a) companies that would be interested in merging with Hershey or acquiring all of its assets or (b) pension funds or REITs, with Hershey remaining

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

as a tenant. TrI at 93. However, he did not contact any such entities or, for that matter, identity any. TrI 93-94. Finally, although he limited his consideration of the potential market to entities which he did not identify or contact, Thomas acknowledged that the basis of his assumption of that limited market was "the common knowledge of [perhaps that] mergers and acquisitions do occur within the industry," but he did not document any research or analysis of the market demand for the Property. TrI at 94-95.

***18** Each of the other experts generally agreed that the sales approach was the preferred method to be used in the appraisal of the Property (or the method to be given the greatest weight); each of them used the sales approach as the primary method for his appraisal of the Property; and each of them identified comparable properties for the application of that approach (although they disagreed on what constituted a comparable property). But because Thomas's classification of the Property as special-purpose was wrong, and because his limited analysis of likely purchasers for the Property, his failure to pursue this approach was an improper rejection of it.

e. Reconciliation:

Because Thomas arrived at a fair market value for the Property by using only one method, there is no reconciliation among the approaches. His conclusion as to the fair market value for the Property resulted in an assessed value of $31,697,200 for each of the years 2014 and 2015.

f. Conclusion:

First, as I have noted, only Thomas concluded that the Property was a special-purpose property, and his own statements support the conclusion that he was wrong in that classification. Whether or not Thomas' classification of the Property as special-purpose excluded from his consideration either of the other two methods, he had the obligation to apply his chosen methodology properly, and the Court concludes that he did not.

Despite unanimity among the other experts that the sales approach was either the best method or the method to be given the most weight, Thomas concluded that he could not employ it. The Court finds that he did not properly reject that approach. I note that his failure properly to reject the sales approach, standing alone, likely would rebut the presumption. I recognize that this deficiency no longer subjects the judicially-created presumption to the judicially-created exception; the Code says that the assessment enjoys the presumption of correctness, and it necessarily does. Nevertheless, in the past, the Supreme Court of Virginia found that this precise deficiency (the failure to consider and "properly reject" other methodologies) was sufficient to prevent even the attachment of the presumption, so one must conclude that the deficiency would now suffice to demonstrate manifest error and so to rebut the presumption. Moreover, the deficiency is additional evidence that Thomas did not comply with generally accepted appraisal practices.

As will become clear later in the opinion, Hershey also has proved that there is a significant disparity between fair market value and assessed value and that the assessment does not come within the range of a reasonable difference of opinion, when considered in light of the presumption in its favor.

Finally (not particularly related to any of the approaches), in response to interrogatories, the County represented that "generally accepted mass-appraisal techniques were used during the assessment of [the Property], in accordance with Standard 6 of USPAP, [the MAStandard], and the county's request for proposals, along with applicable sections of the Code of Virginia." DEx1, tab 7, p.33. Standards Rule 6-8 of the USPAP Standard contains a detailed list of what the written report of a mass appraisal must include, and it is clear that Wingate did not comply with that Rule. Despite the County's representation that the appraisal was in accordance with the USPAP Standard, Thomas attempted to explain why it was not. "There's a portion of the preamble that states that you need to be USPAP-compliant unless the law-if required by law, or if required by the client, or the intended user. In other words, the appraiser may wish to comply with USPAP." TrI at 193.[41] He testified that Va. Code Ann. § 58.1-3300 does not mandate compliance with USPAP and that "there's some things in this statute and USPAP that are clearly are overwritten." TrI at 192. With respect to the detail of the material published by USPAP, I could not agree more, but I did not find an exception that permitted one to disregard it because it is too complex.

***19** As I noted at the beginning of this section, the Court finds that Hershey has rebutted the presumption of correctness.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

3. Has Hershey established the Property's fair market value?

This question must be considered in light of all of the evidence concerning the Property's fair market, and that evidence was presented though four experts. Thomas and William Charles Harvey, II (Harvey), testified for the County, and Stuart Darren Holtzman (Holtzman) and John Baker Lifflander (Lifflander) testified for Hershey.

Although a Court may find that the taxpayer has rebutted the presumption of correctness of an assessment based on an appraiser's appraisal, that is not necessarily the equivalent of finding that the appraisal is of no consequence in answering this question. Certainly, if the assessment does not take to the scales the weight of a presumption, neither can the appraisal on which it is based, but that does not disqualify it as evidence in a case in which the Court is charged, working on a level playing field, to determine whether a taxpayer has established its property's fair market value. It would be possible, even though the bubble of the presumption is burst, that Thomas' appraisal would be more persuasive than Hershey's. I do not find that to be the case; on the contrary, I find, for all the reasons I have already recited, that the evidence not only rebutted the presumption but torpedoed Thomas' appraisal so that is not of sufficient value to be considered.

However, both Hershey and the County presented other expert testimony as to the fair market value of the Property, and the Court must consider all of that evidence to answer this question.

Hershey's evidence as to fair market value as developed by its experts:

Holtzman testified as an expert real estate appraiser on behalf of Hershey, and he prepared an appraisal of the Property. PEx1, tab 27. Using the definition prescribed by the Virginia Supreme Court in *Keswick Club,* Holtzman determined the fair market values of the Property to be $15,000,000 for the year beginning January 1, 2014, and $15,600,000 for the year beginning January 1, 2015. He was particular to state that he was valuing the "fee-simple estate ... the absolute bundle of rights ... subject only limitations by government powers, such as taxation and eminent domain issues." TrII at 80.

a. Overview of Holtzman's methodology, including his categorization of the Property, his determination of the highest and best use of the Property, and the effect of those decisions:

Holtzman began his work with a market analysis which looked "first from a regional, and then from a market, being the industrial market, and then a more refined submarket analysis[,] ... the point of [which] is to determine whether the supply and demand characteristics that are going into, ultimately the highest and best use analysis, which then guides the different value approaches." TrII at 83 and 87. [42]

***20** Holtzman testified that "[t]he most important element of highest and best use is as-if vacant and improved." TrII at 123. His conclusion was that "the highest and best [of the Property] is to continue it [in its present use] ... as an owner-user property, not a rental property." TrII at 125. That did not, however, limit the scope of comparables that he considered in applying the sales approach; rather, he concluded that "the types of buildings that would be appropriate [for that analysis] would be any manufacturing property or property purchased for the purpose of manufacturing." TrII at 182. [43]

Holtzman described the different types of uses for "industrial" buildings, including manufacturing buildings (in which raw materials are used to produce goods), warehouses (where things stored and shipped), distribution buildings (which are "highly-specialized buildings"), and flex-warehouse or office warehouse buildings (e.g., for research and development with offices). He categorized the main building on the Property as a "bulk-manufacturing facilit[y]-that's 250,000 square feet, 300,000 square feet and above." TrII at 87. He classified the Property as "strictly a manufacturing building ... used to fabricate and transform raw materials into finished goods." TrII at 89. He further opined that it was not a special-use property but is best compared to other manufacturing facilities. TrII at 89.

> [I]f you take out the [furniture, fixtures and equipment], which is personal property, what you have .. is a very well built, steel frame ... thick concrete floors, 100% (almost) HV (except for 18%), HVAC, sprinkler ... a well-built building that ... can be reused for general-purpose manufacturing. It certainly can't be used as a distribution or warehouse building. It doesn't have nearly enough doors and they're on

> the wrong side of the building. * * * But the main point ... is ... that it is interchangeable with other general-purpose manufacturing buildings.

TrII at 90.

b. Cost approach:

Although Holtzman opined that "[i]n this case, a cost approach is almost never done," he nevertheless considered the cost approach using "standard appraisal methodology" because "assessors use the cost approach almost exclusively." TrII at 126.

Like Thomas, Holtzman testified that, to apply the cost approach, "the idea is to estimate what the building would cost using current methods to replace the building today." [44] TrII at 135. The first step with that approach is to value of the land. TrII at 127. Holtzman "searched the market thoroughly for properties that were purchased for general industrial use," *i.e.,* the as-vacant highest and best use. TrII at 128. Then, Holtzman considered replacement costs and site improvements and adjusted for depreciation of those improvements.

***21** Like Thomas had done, Holtzman recognized the MVS as "the national standard for replacement costs." TrII at 136. Holtzman testified that the "subject is approximately 665,000 square feet of manufacturing on a little over 300 acres of land, a hundred of acres of which was the main site." TrII at 79. Like Thomas and Harvey, Holtzman discounted (more accurately, did not count) the square footage of parts of the building on the Property in determining what the replacement building of equal utility would be because they opined that those areas would not be recognized (or useful) in the market. However, unlike Thomas and Harvey (who categorized the Property as light manufacturing), Holtzman opined the use of the Property put it "into the category of average quality, heavy manufacturing ... as defined by MVS." PEx1, tab 27, p85; TrII at 136. Further, it he opined that the building would be a Class C building. PEx1, tab 27, p85-86 (and see TrII at 136). [45]

On those bases, Holtzman concluded that it would cost roughly $67,000,000 to build the main building on the Property, today, TrII at 135-138, and then reduced that cost by the accrued depreciation and other adjustments, arriving at a value of $11,840,000 for the building. TrII at 146. Finally, by adding the value of the land to this figure, Holtzman arrived at $15,500,000 as of January 1, 2014, and $15,700,000 as of January 1, 2015. TrII at 146-147.

Without detailing all of Harvey's criticisms of Holtzman's application of the cost method (including his observations about Holtzman's depreciation calculations), suffice it to say that Holtzman's description of his data and the bases for his conclusions were no more arcane than were those of any of the other experts. Still, even had there been no criticism of Holtzman's calculations, the Court did not place much weight on the analysis for the reasons noted in footnote 39.

c. Income approach:

Holtzman testified that he attempted to see if this approach could be utilized, but he "could not find a reliable rental market." TrII at 126. Explaining why there was a lack of such data, Holtzman testified:

> Over and over again, both buyers and sellers, and the people who represent the buyers and sellers were telling me that when you have a building of this size in that type of semirural location, the only way you will find a user is to have an owner-user because they will be able to do what they want with the property.... This is why owner-users buy these big buildings in semirural locations.

TrII at 127.

Harvey criticized Holtzman for failing to use this approach; the basis of Harvey's criticism was that he (Harvey) had found data which he opined would support a consideration of the income approach and that Holtzman had improperly failed to consider it. [46] TrIII at 128. Holtzman responded that he had "looked very thoroughly for rents that would be comparable to an older manufacturing building in a rural area," TrIV at 14, but he did not find "any credible leases of large buildings." TrIV at 15. His inquiry of "market participants"

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

yielded the response that "you will never find a single-tenant user for a manufacturing building, new or old, that is in a semi-rural location. The reason is that a 600,000 square foot building, there's just too much risk for a single tenant." TrIV at 16. There are leases for warehouse buildings, but that is "a completely different class of property ... not used for manufacturing ... highly specialized" and they fall "into the category of a triple-net lease investment..." TrIV at 16-17.

d. Sales approach:

Holtzman described the sales comparison approach as "the only reliable approach in this case." TrII at 126.

***22** As a general observation (and it seemed to me to fit best into his sales approach analysis), Holtzman opined that the "demand for manufacturing has been on the decline for decades." TrII at 87. "[A]s jobs were moved overseas, as robotics came in, we moved from a manufacturing to a distribution-oriented society." TrII at 97. As a consequence, there is little demand for such property, so it is "difficult to get market information that's consistent." TrII at 87.

Certainly to be considered a plus, Holtzman observed that the Property is near the intersection of two major interstate highways, "which is known nationwide as being one-trucker's-day drive from two thirds of the U.S. population." TrII at 84. In addition, "this area provides low-cost land and relatively low-cost labor, yet it is relatively convenient to an educated workforce." TrII at 84. Nevertheless, the Property is isolated from other industrial or commercial facilities, and it is not entirely convenient for the workforce employed there because Stuarts Draft is not very commercialized, both of which have an impact on the value, particularly land value. TrII at 85-86.

Addressing land value first, Holtzman testified that he searched the market for properties that had been purchased for general industrial use (the highest and best use of the land). [47] In evaluating the comparables, he adjusted for size, shape, the fact that some of the land which is a part of the Property can only be used for agricultural purposes (because part of it is in a flood plain), TrII at 128, for location and "access" to the interstate, and for "time and market conditions." TrII at 129. With that analysis, Holtzman arrived at a value for the various parcels (including the excess land) of $3,640,000 for 2014 and $3,810,000 for 2015.

Looking then to the value of the improvements, Holtzman testified that the Property has on it a "very large building, 665,000 square feet. It just doesn't sell all that often, so I have a very limited number of sales to look at." TrII at 103. He testified that buildings such as that on the Property "are the last manufacturing buildings of this size. Matter of fact, there hasn't been a new manufacturing building that has sold in all of Virginia of over 350,000 square feet since 2000. * * * So that means these big buildings are becoming less and less useful." TrII at 113. Holtzman added that his market participant analysis revealed that "many market participants look at anything over 300,000 square feet as something they would just as soon demolish. * * * So, there's very little value, and that's something we have to reflect later in the valuation." TrII at 114. He observed that there were sales of "warehouse distribution facilities ... that were oftentimes bigger, but built since 2000, and ... for a completely different reason, different style building, Class A, investment property," so they could not be used as comparables. TrII at 103.

Holtzman testified that he found "food-processing plants that were bought and then sold to be food-processing, properties that were other manufacturing uses that became food-processing, general purpose that became food-processing, general purpose that became general purpose manufacturing." TrII at 149. He described (and documented) the sales he considered and testified as to the bases for their being included in the mix, looking not just at properties in the Commonwealth but at properties throughout the country that had similar "locational characteristics," for instance, "one food-processing plant, that was in Texas, but it was also in a small town ... [and] close to a major metropolitan area and it was right on major interstates." TrII at 150. All told, in addition to the property in Texas, which was 350,000 square-feet, Holtzman looked at a 319,434 square-foot food-processing facility in Kentucky (near Cincinnati, Ohio); a 640,832 square-foot distribution center in Roanoke; a 397,859 square-foot facility "purchased to convert to a manufacturing use" in North Carolina; a 322,192 square-foot cold-storage facility in Lyndhurst, Virginia; and a 772,000 square-foot cold storage facility in Clinton, Tennessee, that was converted to manufacture oil and gasoline products and, like the Property, has easy access to Interstate 81. TrII at 152-154.

***23** Harvey criticized Holtzman for using as comparables properties which were not in the Commonwealth, but in today's expansive economy, we are not so provincial as to think, that interstate business entities (or, for that matter,

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

international corporations doing business in the United States) are necessarily bound to one county, or one state, or even to one region. As Holtzman testified, "locational characteristics" are key. For instance, a parcel similar to the Property in rural Texas close to the interstate would likely be a better comparable to the Property than a smaller sized manufacturing warehouse in, for example, Fairfax; although the latter would be in Virginia, its locational characteristic and function would be a poor match for the Property.

Harvey criticized Holtzman for failing to consider sales that he (Harvey) used in his sales approach, but Holtzman responded that he had not failed to consider them; on the contrary, he had considered but rejected them "because they were not manufacturing buildings, they were warehouse buildings, but also were triple-net lease investments with corporate guarantees." TrIV at 12-13.

With the comparable sales that he used, Holtzman made adjustments for time, square footage, and other factors and determined that the fair market value of the Property, using the sales approach, was $14,700,000 for 2014 and $15,500,000 for 2015. TrII at 161-162; PEx1, tab 29, p105.

e. Reconciliation:

After considering the values at which he arrived for each of the two approaches which yielded a fair market value and "reconciling those figures with " 'a little bit of weight' " given to the cost approach, Holtzman opined that the fair market value of the Property for 2014 was $15,000,000 and $15,600,000 for 2015. TrII at 162; PEx1, tag 29, p106. [48]

Holtzman concluded (TrII at 123), and Harvey agreed (TrIII at 160), that the disparity between Holtzman's values and the assessed value of the property are not within a range of a reasonable difference of opinion. The Court adopts those opinions on that issue.

The County's evidence as to the fair market of the Property as developed by its expert:

Harvey testified as a real estate expert on behalf of the County, and he prepared an appraisal of the Property. Like the other experts, using the definition prescribed by the Virginia Supreme Court in *Keswick Club*, Harvey determined that the fair market value of the Property to be $28,000,000 both for the years beginning January 1, 2014, and January 1, 2015. DEx1, tabs J-00 (excluding K and L). Like Holtzman, Harvey testified that he valued the fee-simple interest of the Property, TrIII at 26, which he defined as "absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by government powers of taxation, eminent domain, police power, and escheat." TrIII at 27.

a. Overview of Harvey's methodology, including his categorization of the Property, his determination of the highest and best use of the Property, and the effect of those decisions:

Harvey said that a "market analysis has to look at the critical factor of supply and demand [and] [t]he whole purpose of that analysis is to render a conclusion of highest and best use." TrIII at 24. Harvey "did certain investigations of market data ... both general in nature, things germane to the Commonwealth of Virginia and its industries, as well as locally to Augusta County." TrIII at 24. In Harvey's opinion the highest and best use was "the existing improvements," TrIII at 25, or the "existing improvements as renovated." TrIII at 110. However, he recognized that there were alternative uses, i.e., "uses [that] would be found in the relative market, as indicated by the comparables" that he used, "where the subject property had a warehouse component, a processing component, and a manufacturing component. [49] One could make those functionable. You could change those internally within the structure, if the user decided to do so." TrIII at 110-111.

***24** Harvey categorized the improvements on the Property as a "limited-market, general purpose industrial light manufacturing building ...," DEx1, tab J, p1; TrIII at 223, and he agreed that that was also its highest and best use. DEx1, tab J, p2; TrIII at 224. He agreed that, as of the effective date of his appraisal, it was not functioning as a distribution warehouse, TrIII at 223, and that he never described it as a distribution warehouse. TrIII at 224. Even so, he agreed that he valued the Property as a "substitute use ... distribution warehouse or processing/distribution building." TrIII at 225.

With respect to uses of an improvement, Harvey suggested that one may use the same building for warehousing, processing, or distribution; "the square footage is all that those uses are derived from." TrIII at 91. Even so, he acknowledged that, if one uses the building for a warehouse, one "give[s] up internal flow. In other words, the more roll-up doors you have, the more space you're impairing for processes." TrIII at

91.[50] Although he opined that the number of loading docks necessary for a distribution facility to function effectively depends on "the distribution, the product, and the user," he did not know the typical ratio of loading docks to gross building area for distribution warehouses, nor did he know the ratio of loading docks to the gross building area of the Property. Harvey had not estimated the cost to install additional loading docks to permit the Property to function as a distribution warehouse (and disagreed that it would be necessary), and he disagreed that it would be necessary to remove interior walls to permit the Property to be efficiently used as a distribution warehouse; indeed, it was Harvey's opinion that the only adaptation to the Property which would be necessary to make it a distribution warehouse would be the removal of its machinery and tools. TrIII 226-229.

As rebuttal evidence, Holtzman testified that warehouse and manufacturing buildings are designed differently. In his report (PEx1, tab 28, p4), Holtzman described in detail the differences in function and design of the two types of buildings and added that his market interviewees informed him that it would cost "millions of dollars" to reformat the Property and add the necessary doors to convert the Property to a warehouse. Further he noted that the warehouse/distribution market is rising because of increasing demand, while manufacturing is on the decline.

Harvey concluded that the "relevant submarket from which data [for supply and demand conditions] should be derived" was an area "along 1-81. It's 20 miles to the north of Stuarts Draft, and its 20 miles to the south of Stuarts Draft."[51] TrIII at 36; DEx1, tab X. In that area, he identified 1500 properties "that were within the contours of what appears on the submarket map [to] constitute an adequate sample frame of data." TrIII at 37. Focusing on that submarket, Harvey charted the 1500 properties in terms of the year during which they were built and the percentages of vacancy for the 4th quarter of each year from 2010 through 2014. That analysis showed that, regardless of the age of the building, 10% was the approximate vacancy rate, except for "super-adequate [or] jumbo" buildings, for which there was a zero-percentage vacancy. DEx1, tab Y. From that data, Harvey concluded that, in the category of properties in which the Property fell ("light industrial facilities"), TrIII at 40, there was "one-hundred percent occupancy." TrIII at 40.

***25** Considering Harvey's categorization of the Property, the bases on which he grounded his appraisal are questionable. Harvey described the Property as a manufacturing facility, and he agreed that it was not functioning as a distribution warehouse, but he equated it to a distribution warehouse. Although not a precise parallel, just as Thomas based his appraisal on the questionable conclusion that the Property was a special-purpose property, so Harvey based his appraisal on the questionable conclusion that the Property was a warehouse or distribution property. Even if it was not a warehouse or distribution property, Harvey asserted that the Property was a facility that could be converted to a distribution warehouse. He acknowledged that the types of facilities are not interchangeable without modification, but he had not considered the modifications necessary for the building on the Property to meet the standards of, *e.g.,* a distribution facility, nor did he calculate any costs to make those modifications. Hence, Harvey did not determine the fair market value of the Property as it is, but rather as it might be. In doing so, he violated the principle that "fair market value 'is the present actual value of the land with all its adaptations to general and special uses, and not its prospective, speculative or possible value, based on future expenditures and improvements.' " *Fruit Growers Express Co. v. City of Alexandria,* 216 Va. 602, 609, 221 S.E.2d 157 (1976).

Like Thomas, Harvey limited the submarket area to a narrow corridor along Interstate 81, spanning a distance of approximately 300 miles north and south of the Property's location, as "the relevant submarket from which data should be derived and by which market participants who would be looking for similar facilities would find the greatest degree of offerings, competition, and metrics that they would rely on to guide their rental sale and other decision-making with regard to competing properties." TrIII at 36. That tunnel vision imposed a limited scope (a) on the identification of market participants who might be interested in the Property and (b) from which to draw comparables to the Property.

The Court finds that Holtzman's search based on function, utility, and locational characteristics is more persuasive than Harvey's focus on geography.

b. Cost approach:

Harvey testified that the cost approach is "particularly applicable to limited-market special-purpose properties." TrIII at 60. He agreed that there was not much dispute among the experts as to land value, and his "land value opinion was $4.4."[52] Given the reference to "special-purpose," I

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

acknowledge that Harvey never testified specifically that the Property was not a special-purpose property; however, I further note that he was not asked the question, that he consistently testified that the Property was categorized as a general purpose industrial light manufacturing building, he suggested that there were alternative uses for the Property, all of which imply that he did not find it to be special-use. Moreover, none of the facilities which he identified as comparables were special-purpose buildings. A reasonable inference is that he did not support Thomas' classification of the Property as special-purpose.

Like Thomas and Holtzman, Harvey reduced the size of the building on the Property to adjust for his opinion that portions of it are not recognized in the market. Harvey testified that the main building on the Property, excluding the mezzanines, is 661,427 square feet, the footprint is 575,000, TrIII at 33, and he used the former for the purpose of his valuation. TrIII at 34. Harvey testified that it was important to note that, although the building on the Property is an older facility, Hershey had spent $12,000,000 between 2010 and 2015 (*e.g.*, for a new roof). TrIII at 35.

Using the MVS, Harvey testified that "they used the light-manufacturing building, Class B, which is good to average, and came up with a replacement ... of $54,000,000." Adding in indirect costs, the figure went to $53,433,402. TrIII at 63; DEx1, tab CC, p1. To determine depreciation, Harvey testified that he considered the age/life method (which encompasses all forms of depreciation) and market extraction (which considers sales of similar facilities), and he concluded that the total depreciation (physical and functional) was $36,170,295. DEx1, tab CC. That yielded an estimated fee simple value of the Property of $25,400,000 for 2014 and (with modest adjustments) $24,500,000 for 2015, using the cost approach. DEx1, tab CC, pp1-2.

***26** As I noted in the corresponding section addressing Holzman's evidence, without detailing all of the criticisms of Harvey's application of the cost method by Hershey's experts, suffice it to say that his description of his data and the bases for it were no more enlightening or persuasive than the evidence offered by others in their use of the cost approach. And, again, even had no other experts criticized Harvey's application of the cost approach, the Court did not place much weight on the analysis for the reasons noted in footnote 39.

c. Income approach:

Harvey testified that the first step in this approach was to "analyze rental value, comparable value," and, to do that, he looked "in the general vicinity of the subject property, I-81, I-64, I-95." TrIII at 66. The search revealed four properties described as "warehouse/distribution" and two as "processing/distribution." DEx1, tab GG. Harvey created a chart for each of years 2014 and 2015, using the rental rates for those properties to generate a rental rate for the Property (using four for the first year and all six for the second). Specifically, he used facilities rented to:

1. Home Depot in Winchester, described as "warehouse/distribution"

2. Elizabeth Arden, Inc., in Roanoke, described as "processing/distribution"[53]

3. AmCor Pet Packing, in Wytheville, described as "processing/distribution"[54]

4. Ply Gem Holdings, in Harrisonburg, described as "warehouse/distribution"

5. Kraft Foods in Winchester, described as "warehouse/distribution"

6. Amazon in Petersburg, described as "warehouse/distribution"

Based on the various properties' square footages and rents, Harvey calculated a "rent per square foot" and then "qualitatively" (and I am pretty sure that means subjectively, however much flavored by experience) made adjustments for the differences between the comparables and the Property to arrive at a rental rate per square foot for the Property. DEx1, tab II. With that figure and using the direct capitalization method and a base-capitalization rate of 8%,[55] and adding to that an estimated tax rate of .56%,[56] he arrived at a value for the Property (including surplus land, not included in the rental calculation) of $27,400,000 for 2014 and $27,900,000 for 2015. DEx1, tab KK.

Harvey agreed that he did not know "anything about the credit ratings of the tenants of any of the properties [he] used as comparables" because the information he confirmed did not include data regarding that issue. TrIII at 193. However, he agreed that capitalization rates "are influenced by the

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

degree of perceived risk of investment," TrIII at 193, and that cap rates have an inverse relationship to a tenant's credit quality, *e.g.,* higher cap rates are associated with lower-credit tenants and lower cap rates with higher-credit tenants. TrIII at 190. Having said that, Harvey nevertheless testified that he did not think his analysis of the risks associated with the leases he used as comparables required anything more than a knowledge that the rents were at market rate. TrIII at 196. Further, he testified that he did not believe that "understanding the risks associated with the parties to the lease requires an analysis of more than just whether the rents called for in the lease are at market rate." TrIII at 196.

***27** Harvey also acknowledged that the cap rates were derived from the annual rents and sales of the properties listed above and from statistical data shown on DEx1, tab JJ (also appearing in tab J, pA73). All of the facilities listed in the statistical data were distribution/warehousing buildings, and he agreed that "none of his capitalization rates [were] derived from sales of manufacturing buildings or from survey data regarding sales of manufacturing buildings." TrIII at 204.

With respect to the properties under consideration, four were described as "warehouse/distribution" facilities and two as "processing/distribution" facilities, and none were described as industrial or manufacturing. Harvey had described the Property as a general purpose industrial light manufacturing building, and he acknowledged that none of his comparables were manufacturing buildings, but he said that they are "terms of art [presumably he was referring to the terms manufacturing, distribution and processing] ... [s]o people can differ on their description." TrIII at 249. He alluded to conversations which he or other employees of his company had with the parties to the transactions, and he said that "they describe[d] it definitely," TrIII at 249, but he did not testify as to what they described, or how those descriptions would, for example, harmonize "processing" with "manufacturing" or distinguish "manufacturing" from "distribution."

The Court describes below its additional observations concerning Harvey's selection of the category of comparables on which to base his analysis using the income approach and his assessment of the impact of the tenants which were parties to the leases.

d. Sales comparison (or sales) approach:

Harvey summarized the sales approach as the "lemmings approach. If somebody does this, do I feel justified in doing the same thing?" TrIII at 87. The appraiser identifies properties that are comparable, but, because no two properties are identical, the appraiser then applies adjustments. This is the approach which is "followed most by the marketplace ...." TrIII at 88. That is not quite the ringing endorsement that Holtzman gave the methodology, which he described as "the only reliable approach in this case," but it is another harpoon in Thomas' decision not to employ it.

The following is a list of the comparables on which Harvey relied, reflecting the purchaser and the interest which was the subject of exchange at the time of sale; each of them was a property subject to a lease.

1. Cole ID Winchester: lease-fee interest (presumably with Home Depot, the tenant);

2. Nash Finch Company: the tenant bought a fee simple in the property it was leasing, subject to a *de minimus* third party tenancy;

3. Cole ID in Roanoke: lease-fee interest with Elizabeth Arden as the tenant;

4. Terraza 3: lease-fee interest, but it was sold in December 2007, so Harvey used the rent as of December 2007 and "escalated it 8% to bring it to current market." TrIII at 93;

5. Stag Industrial Management: leased-fee interest;

6. Cole ID: leased-fee interest;

7. Cabot IV: leased-fee interest (This is one of the properties that was not considered in the income approach. It was sold after January 1, 2014, and it was described as "warehouse/distribution.");

8. US Rio: leased-fee interest with Amazon as the tenant (This is second of the properties that was not also considered in the income approach, it was sold after January 1, 2014, and it was described as "warehouse/distribution").

***28** Harvey then calculated the square footage sales price for each of six of the properties and made adjustments to bring the comparables into line with the Property. Using this approach, Harvey fixed a fan-market value for the Property at $29,700,000 for 2014 and $30,2000,000 for 2015. DEx1, tab NN.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

As a predicate to his testimony, relevant to the ownership interest which he was appraising, Harvey opined that "fee simple and leased-fee are synonymous ... [if] at the time of sale, the lease was at market." TrIII at 90. On cross examination, Harvey recited, again, the definition of a fee simple interest [57] and defined a leased-fee as "the possessory interest derived through a lease between a landlord and a tenant". TrIII at 169. Harvey did not explain where, in the definition of "fee simple" (which contemplates no encumbrance by any other estate), there is an exception for a lease interest, even one that is at market rate. Nevertheless, although Harvey did not cite the Court to any learned treatises in support of his position that the two ownership interests (fee simple and leased-fee) can be equivalent, the Court acknowledges (from a perusal of the learned treatises) that the proposition has currency in the appraisal industry. However, there are leases at market rate and then there are leases at market rate; the tenant and the term may make a difference in the value of the leased-fee interest.

Harvey agreed that a "credit-tenant lease is a lease with very little risk of default by the tenant," TrIII at 176, and that the Appraisal of Real Estate (14th Edition) (a learned treatise) referred to a credit-tenant lease as a lease to a tenant with an investment-grade credit rating. TrIII at 174. Initially, Harvey acknowledged that "the leased-fee sales that [he] used in [his] sales comparison approach have investment-grade tenants, including Home Depot, McKeesson, [58] and Elizabeth Arden," TrIII at 172, and that leases to such tenants would be credit leases or credit-tenant leases. TrIII at 173. However, despite his initial acknowledgement that his comparables involved leases with investment-grade tenants, Harvey then distinguished between leases "with companies with multiple-levels of structure" and perhaps no corporate guarantees, and he could not say whether the leases that were the subject of the comparables were supported by corporate guarantees. TrIII at 175. [59] (Perhaps in a short-lived effort to make the Property more comparable to his selected comparables. Harvey testified that he did not know whether the Property was owner-occupied or leased because he did not know "how Hershey's internal mechanism deals with real property and the corporate structure." TrIII at 186. [60])

***29** As to the quality of the tenants occupying Harvey's comparable properties, Holtzman had more information. Called to the stand to rebut Harvey's testimony, Holtzman testified that he had considered all eight properties which Harvey used, and he reexamined them in the course of his review of Harvey's appraisal. He said that the brochures of the brokers "hardly mention the building. They mention the tenant. They mention the lease. They mention the corporate guarantee. They have an entire page on the company, how many billions of dollars they're making a year." TrIV at 18. Similarly, Lifflander testified that Harvey's comparables "were not just leased-fee properties; they were leased-fee properties that had major, very high-credit tenants, like Amazon, Kraft, McKeesson, and [Elizabeth] Arden." TrIII at 310.

Cross-examined about whether the market value of a leased-fee interest could be higher than the market value of the fee simple interest in the underlying property, Harvey responded that "[i]t could be higher. It could be lower. It could be the same." TrIII at 189. In response to the suggestion that "the sale price of a property that is leased to an investment grade tenant under a long-term lease may be greater than the price at which the same property would sell without that lease," Harvey again responded that it could be higher or lower. TrIII at 189.

Holtzman observed that purchasers of leased-fee interests with credit-tenants were "buying the lease. They're buying the guarantee of the lease, the regular payments." TrIV at 18. Lifflander testified that, although there is an encumbrance to the fee simple interest, "[i]n this case, the encumbrance is a benefit because the buyer gets a property that has long-term income coming in. * * * So there is nothing to do but collect a check. * * * So, the value of the property, the underlying value is not what you're paying for as much as you're paying for that long-term lease." TrIV at 311.

Responding to the following statement, "[t]he market position of a fully-leased property is different from the market position of a property that has no lease in place," Harvey said, "no, I disagree." TrIII at 218-219. He did agree, however, that "the market position of a fully-leased property is different from the market position of a property that has no leases in place." TrIII at 220. [61] Having listened to (but not having been asked if he agreed with) a passage from the Appraisal of Real Estate (14th Edition) that posited "[i]deally, comparables selected for analysis include the same type of property rights as the subject property's so that adjustments are not needed," Harvey acknowledged that "none of the sales [he] used as comparables included the same type of property rights as are present in the [Property]." TrIII at 221.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

Harvey's appraisal on the sales approach was based on the transfer of leased-fee interests leased to credit-tenants who used them for warehousing or distribution purposes; none of his comparables involved the transfer of unencumbered fee simple interests used for manufacturing purposes. He testified that all of the leases were at market rates, and, although he was ambivalent as to the credit-worthiness of the tenants, both Holtzman and Lifflander testified unequivocally that the tenants were credit-tenants. Harvey insisted that the transfer of a leased-fee leased at market rates is the equivalent of a transfer of the fee simple, but one must question whether that proposition is absolute. In a transaction involving a credit-tenant, the leasehold itself could add value to the fee simple because the purchaser would be buying a secure market-rate return for a fixed term plus the reversionary interest in the fee. In another transaction, with a lease to an undercapitalized tenant operating a start-up business, the purchaser may hope for a market-rate return but clearly bears a risk of an early termination of the income stream.

e. Reconciliation:

***30** After considering the values at which he arrived for each of the three approaches and applying relative weights of 50% on the sales approach, 30% on the cost approach, and 20% on the income approach, Harvey concluded that the fair market value of the Property for both years 2014 and 2015 was $28,000,000.

f. Conclusion:

Taking into account all of the evidence and carefully considering the irreconcilable differing opinions of the experts, the Court finds that Holtzman's sales comparison approach is the most persuasive. Accordingly, the Court finds that Hershey has established a fair market value for the purposes of fulfilling its obligation pursuant to the statute.

4. Did Hershey prove that the Property is assessed at more than fair market value?

The assessment is substantially more than the fair market value of the Property, so the answer is yes.

5. Has Hershey proved that the assessment was not arrived at in accordance with generally accepted appraisal practices, procedures, rules, and standards as prescribed by nationally recognized professional appraisal organizations such as the International Association of Assessing Officers (IAAO) and applicable Virginia law relating to valuation of property?

For the reasons I have already cited with respect to Thomas' appraisal (and the resulting assessment which was based on it), the answer is yes.

D. Conclusion:

A summary of the Court's findings would only lengthen an over-long opinion. I ask that Mr. Smith prepare an order consistent with and incorporating this letter opinion. I am assuming that the parties can, better than I can do, (a) calculate the amount of the refund, (b) calculate the amount of interest pursuant to Va. Code Ann. § 58.1-3916 and its application to § 22-3 of the Augusta County Code, [62] (d) set a date through which interest is to be calculated and a per diem thereafter until paid. In addition, I assume that the parties can agree to a date on which the refund will be paid, but, if not, if the parties will provide a blank in the order for the purpose, I will address that on the date I enter the order.

Very truly yours,

/s/

Victor V. Ludwig

Judge

All Citations

Not Reported in S.E. Rptr., 101 Va. Cir. 512, 2018 WL 9515223

Footnotes

1 From time to time in this opinion, I may refer to the improvements on the Property as the Property, and at other times, more precisely as the “building on the Property.” I will try to edit out the less precise references, but, should I fail, the context should make it clear what I mean.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

2 That may be a particularly apt allusion in that this is my final voyage into the sea of substantive opinions, and, to the last, I will grapple with the issues the case presents. It is not difficult to imagine what the white whale symbolizes, and chasing it down may be the death of me.

3 Throughout this opinion, when I refer to this latter requirement, I will refer to "generally accepted appraisal practices" as an abbreviated reference for the entire statutory phrase beginning with "not arrived at."

4 The earlier version provided only that: "[T]he burden of proof shall be upon the taxpayer to show that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application, or that the assessment is otherwise invalid or illegal, but it shall not be necessary for the taxpayer to show that intentional, systematic and willful discrimination has been made." Va. Code Ann. § 58.1-3984(A).

5 The phrase "clear presumption" first appears in *Norfolk v. Snyder*, 161 Va. 288, 291, 170 S.E. 721 (1933): "In Virginia it is settled law that there is a clear presumption in favor of the assessment...." The "settled" nature of the clear presumption is premised on four prior cases, none of which endorses more than a presumption (and not all do that). The final appearance of a "clear presumption" in this context is in *County of Mecklenburg v. Carter,* 248 Va. 522, 449 S.E.2d 810 (1994). See the following footnote. Notwithstanding the fact that the Court abandoned that language years ago, the County persists in characterizing the presumption as a "clear presumption." (County's Brief, p.7)

6 In 1998, the Supreme Court recognized only a simple presumption, but fortified it by requiring that the taxpayer rebut it by a "clear preponderance" of the evidence. *Tidewater Psychiatric Inst. v. City of Virginia Beach*, 256 Va. 136, 141, 501 S.E.2d 761 (1998). As support for a "clear preponderance" standard, the Court cited two cases, one of which does not refer to any standard, and the other of which is a 1947 case which does. There is no case addressing this issue after 1947 until *Tidewater* that imposes the "clear preponderance" standard, but, since *Tidewater,* the "clear preponderance" standard has been the law.

7 It is the assessor who generates the assessment. That is based on the work of an appraiser, hired for the purpose of gathering data for the assessment. Although it is somewhat inaccurate, because of the language of the statutes and the caselaw, I will sometimes refer to the County's appraiser as the assessor, rather than the appraiser on whose appraisal the assessment is based.

8 "The presumptions, burdens, and standards set out in subsection B shall not be construed to change or have any effect upon the presumptions, burdens, and standards applicable to applications for the correction of erroneous assessments of any local tax other than real property taxes." Code § 58.1-3984(C).

9 "I ... conclude that [the General Assembly's] eschewing the phrase 'clear preponderance' was not accidental." *Staunton Mall Realty Mgmt., LLC v. Bd. of Supervisors,* 92 Va. Cir. 96, 118, 2015 WL 13567440 (fn.30).

10 For example, in *West Creek,* our Supreme Court considered what would be required to prove manifest error and reversed the trial court's conclusion that "a taxpayer must prove what information the taxing authority considered and how it arrived at the assessment in question." *Id.* at 397, 665 S.E.2d 834. Hence, the Court explicitly rejected, as proof of "manifest error," what is now very close to the evidence required by statute in that the taxpayer must now prove that the taxing authority did not arrive at its assessment in accordance with generally accepted appraisal practices.

11 Hence, like the narrator of Robert Frost's *The Road Not Taken,* the Court must necessarily take a road less traveled, and perhaps that will make all the difference. To be sure, there are a few other Circuit Court opinions, but it is still a lonely road.

12 Uniformity is also a consideration, but it is far less frequently the issue in the cases.

13 West Creek cites the following for that proposition: *Keswick Club, L.P. v. County of Albemarle,* 273 Va. 128, 136, 639 S.E.2d 243 (2007); *Shoosmith Bros., Inc. v. County of Chesterfield,* 268 Va. 241, 245, 601 S.E.2d 641 (2004); *Arlington County Board v. Ginsberg,* 228 Va. 633, 640, 325 S.E.2d 348 (1985).

14 That is the taxpayer's goal; it is the ultimate issue.

15 That is the first hurdle the taxpayer must overcome.

16 That is the mechanism by which the taxpayer overcomes the presumption.

17 Finally, the most recent decision regarding a challenge to an assessment of real property under the statute in its pre-2011 form is helpful. In *City of Richmond v. Jackson Ward Partners, L.P., 284 Va. 8, 18*, 726 S.E.2d 279 (*2012*)., the Court confirmed, after acknowledging the presumption, that a "taxpayer challenging an assessment must show, 'by a clear preponderance of the evidence,' that the taxing authority 'totally disregarded controlling evidence in making the assessment' or 'committed manifest error.' " However, the precise issues decided by the Court in that case did not require that the Court determine whether the taxpayer had rebutted the presumption; that was unnecessary because the taxpayer did not establish a fair market value.

18 There is an alternative interpretation to the statute, and I think it a good one. However, I only want to recognize it here, but I will not attempt to reconcile the more practical analysis to my more cumbersome one. In *Army Navy Country*

Club v. City of Fairfax, 2018 Va. Cir. LEXIS 102, Judge Ortiz construed the statute as follows: "In order to rebut the presumption of a correct valuation, a taxpayer must 'show by a preponderance of the evidence that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application.' Va. Code Ann. § 58.1-3984(B)." Rather than reading the first "and" in the second sentence of subsection (B) strictly as a conjunction joining equal requirements, he construed the "and" to mean "by means of," yielding a sentence stating: "The burden of proof shall be on the taxpayer to rebut such presumption" *by showing* "by a preponderance of the evidence that the property in question is valued at more than its fair market value or that the assessment is not uniform in its application." That may be a reasonable construction of the statute, but it is not strictly grammatically correct. That is not to say that it is without common-sense support, because it is not infrequent that "and" would be used in that way. It would make perfect sense for a field commander to issue an order for his firing batteries to shell the enemy and further to order that the gunners either use point-detonating fuses for ground explosions or use variable-time fuses for air bursts 20 meters up. In the statute, the taxpayer's objective is to rebut the presumption; in the field, the commander's mission is to shell the enemy. Those are the goals. And, in both instances, what follows on the far side of the conjunction are not additional missions; they are only alternate methods to accomplish the primary goal of rebutting the presumption or shelling the enemy. A problem with this construction is that it substantially dilutes the effect of the presumption, which I suspect the General Assembly did not intend.

19 The statute does not specifically state this requirement, but "[i]n order to satisfy the statutory requirement of showing that real property is assessed at more than its fair market value ... a taxpayer must necessarily establish the property's fair market value." *West Creek* at 417, 665 S.E.2d 834. That is the one bit of caselaw that clearly survives the amendment. To be sure, it is addressing a phrase in the statute prior to its amendment in 2011, but the language appears in an identical form in subsection (B), post-amendment. However, the Court's comment is more in the nature of a logical conclusion or factual observation than a judicial interpretation—one could not demonstrate that the known value A exceeds B without also having a value for B.

20 Of the County's two expert appraisers, only one used the mass appraisal method.

21 Andrew Marvell, *To His Coy Mistress.*

22 As I have noted, Code § 58.1-3984, pre-amendment, did provide that it was the taxpayer's burden to prove that the assessment was incorrect but said nothing with respect to a presumption of correctness.

23 *Rixey's Ex'rs* and *Union Tanning* appear to be among the first reported cases in the Commonwealth acknowledging the presumption of correctness attached to the taxing authority's assessment, though the rule itself may very well predate those cases.

24 The Court's skepticism of some of Thomas' testimony is reflected in the transcript, sometimes expressly, sometimes by inference but without requiring the reader to be acutely perspicacious.

25 " 'Certified residential real estate appraiser' means an individual who meets the requirements for licensure for the appraisal of or the review appraisal of any residential real estate or real property of one to four residential units regardless of transaction value or complexity. Certified residential real estate appraisers may also appraise or provide a review appraisal of nonresidential properties with a transaction value or market value as defined by the Uniform Standards of Professional Appraisal Practice up to $250,000, whichever is the lesser." 18 VAC 130-20-10. Definitions.

26 " 'Certified general real estate appraiser' means an individual who meets the requirements for licensure that relate to the appraisal of all types of real estate and real property and is licensed as a certified general real estate appraiser." *Id.*

27 Code § 58.1-3275 provides, in part that "[e]very general reassessment of real estate in a city or county shall be made by (i) a professional assessor appointed by the governing body, who is either an employee qualified by the Department or an independent contractor holding valid certification issued by the Department...." I have found nothing in the Code or the regulations which prescribes what a "valid certification" is. To be sure, Va. Code Ann. § 58.1-3258.1 (to which Code § 58.1-3276[C] refers) directs the Department to "establish requirements for the certification of all ... appraisers and personnel appointed by a locality to perform the assessment," and, the IAAO State Roll Call outlines, by state, the requirements for assessor licensing and certification and indicates that such regulations have been promulgated by Virginia (https://www.iaao.org/library/library_files/Roll_Call_Book_V03.pdfpp.87-88). Moreover, the expert engaged by the County referred to the Code's "authoriz[ing] the Virginia Real Estate Board to promulgate regulations ... [which] are set forth in the Virginia Administrative Code ... [and which] require compliance with certain provisions of the Uniform Standards of Professional Practice." TrIII at 18. Notwithstanding all of that, other than the definitions in footnotes 25 and 26, I was unable to locate any regulation by the Department specifically addressing that obligation in the context of a certification to participate in an assessment, and no expert testified as to where the Court might find those regulations.

To the extent that those definitions apply to assessments, Thomas was not authorized to conduct the appraisal of the Property.

28 "Special-Purpose Property-A property adapted for a single use." MAStandard Glossary. The parties used this term and the term "special-use" interchangeably.

29 Thomas amplified the specific attributes of the Property at TrII at 244-246.

30 On redirect, Thomas said he considered it "highly unlikely" that the copper plant had any intention to move to the Property, but he was not asked, again, whether its operations could be conducted on the Property. TrI at 317.

31 Thomas agreed (and it is a fact) that none of the other experts who testified for either party agreed that the Property was a special-purpose property.

32 Given that Thomas did not use the sales or income method to value the Property, I am unclear on why he would be concerned about an issue that clearly has nothing to do with the replacement value that is the heart of the cost approach.

33 As Scarlett O'Hara's father taught us, speaking of Tara: "[L]and is ... the only thing that lasts." Over the long haul, it does not depreciate.

34 He did not identify the basis for the "general knowledge" except in general terms, and he did not identify any of the industrial-site sales.

35 Thomas later referred to "a couple of sales nearby, one in Waynesboro and one in Rockingham County, that led us to the conclusion of what the developed site might be worth." TrII at 262.

36 In fairness to Thomas, Holtzman and Harvey also discounted some square footage of the main building on the property (*e.g.*, the mezzanine) on the theory that it would be of no utility to a purchaser.

37 As I noted, each of the other appraisers who discussed the cost approach in detail also used a square footage less than the actual square footage of the building on the Property, and I do not believe that their conclusions stood on any firmer ground than did Thomas'.

38 That language is from MAStandard, § 2.

39 These observations are directed specifically at Thomas' work, but they generally apply to all of the experts' calculations using this approach. The cost approach itself invites skepticism; it is the most obscure of the three methodologies because it relies least on objective factual data. Thomas is not alone in the dusky environment of smoke and mirrors into which the cost approach takes him (although he is the only one who relied on it exclusively). Each of the other appraisers in this case who used it, *inter alia,* (a) made the same qualitative conclusions (generally meaning subjective assumptions, regardless of the *curricula vitae* of the persons making them) of what building would provide the same utility as the existing building on the Property (and none of them articulated how they made that assessment), (b) relied on the same compilation of statistics of murky validity regarding the costs to construct that imaginary building, and (c) used the same near-mystical assumptions and equations for depreciation. All of those components of the approach can be manipulated by skillful (or unskillful) appraisers to arrive at a desired number. Although the method is accepted in the industry, to an objective observer who has no financial interest in the outcome, it frequently yields what appears to be a result-oriented calculation, not unlike pulling a rabbit from a hat. My skepticism notwithstanding, I accept that it is a method generally accepted by appraisers, so I am obliged to honor the expertise of the industry. Even given the validity of the approach, however, the Court has concluded that Thomas did not follow generally accepted practices in his use of it.

40 Thomas did discuss four properties that he documented, all in Augusta County. Of those, only two were sales (the other two were construction projects), none were food-processing plants, and he did not use the data from the properties for the purposes of the sales comparison approach. Rather, he used the two sales in his cost approach to determine the value of the land. TrII at 262.

41 The specific language to which Thomas referred is: "Compliance with USPAP is required when either the service or the appraiser is obligated to comply by law or regulation, or by agreement with the client or intended users. When not obligated, individuals may still choose to comply."

42 As is the case when viewing a production of a Shakespeare play interpreted by professional actors, as opposed to reading the text alone, that comment made more sense as Holtzman was verbalizing it than it does on paper. It may be, too, that it lost something in transcription. My notes make more sense; they show the phrase to be: "what supply and demand characteristics there are, going into, ultimately, the highest and best use analysis, which then guides the different value approaches."

43 Holtzman did suggest that the Property and its improvements could "technically" be used in some way other than manufacturing, but that the building would have to be divided, and such a process would not only be very expensive, but unlikely because "there just isn't any demand for the smaller spaces in semirural locations." TrII at 124-125.

 © 2020 Thomson Reuters. No claim to original U.S. Government Works.

44 All the experts agreed that the starting point for the cost approach was the replacement cost, rather than the reproduction cost. The definitions in the MAStandard help; reduced to the simplest terms (and therefore not accurate in detail), replacement cost is the cost incurred in constructing an improvement having the same utility to its owner, while reproduction cost is the cost incurred in constructing a new property reasonably identical to the property reproduced.

45 Thomas, also using MS V, rated the building as a Class B light industrial building of good quality. Harvey rated it as a Class B light-manufacturing, good to average. The Court does not have MSV and could not interpret it if it were available.

46 A summary (and the Court's observations) of Harvey's conclusions regarding the income approach appears below.

47 For the sales approach, Holtzman said that the Property's land was “not manufacturing land; it's general industrial land.” TrII at 128. Recall that Holtzman previously described the main building on the Property as “strictly a manufacturing building ... used to fabricate and transform raw materials into finished goods.” TrII at 89.

48 Lifflander appraised the Property at $14,428,000 as of January 1, 2014, and $15,089,000 as of January 1, 2015. However, because he was engaged by Hershey primarily to critique the appraisals of Thomas and Harvey (and because it does not appear that Lifflander fully developed his appraisal with all three methods), I rely on Holtzman's appraisal.

49 There was no evidence that any of Harvey's comparables were used for manufacturing.

50 Presumably, an existing manufacturing use would create issues or require modifications for use of the building as a warehouse or a distribution facility.

51 Both the court reporter and I heard the same statement, but Harvey mis-spoke as to the distances. The map depicts the area running from Martinsburg, West Virginia (approximately 125 miles north of Stuarts Draft) to Marion, Virginia (approximately 175 miles south of Stuarts Draft).

52 First, that is a bad transcription. Harvey's land values were $4,030,000 for 2014 and $4,110,000 for 2015. DEx1, tab J, p40. Second, I do not believe it to be an accurate statement.

53 The Comps Detail Sheet, PEx1, tab 37, reflects the property as a “400,000 SF Class B Distribution Building.”

54 The Comps Detail Sheet, PEx1, tab 37, reflects the property as a “709,078 SF Class A Distribution Building.”

55 Without going further into the woods on this issue than I have already gone, Harvey's mathematical method of deriving the cap rate was standard, using the rental income from the “comparable” property at the time of sale and the sale price, and then using the standard equation to yield an estimated return on the purchase price, given a continuation of the rent. The troubling issue, of course, is whether the properties he used were comparable to the Property.

56 The County's tax rate for real estate was $.56 per $100.00 of value for one of the two years in question.

57 “[A]bsolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by government powers of taxation, eminent domain, police power, and escheat.” TrIII at 27.

58 I thought at first that this is a transcription error, and that the witness was referring to Amazon, but “McKeesson” appears in several places in the record over three of the four days. Nevertheless, I cannot find McKeesson as a tenant listed in any exhibit, but at least one of the appraisals does refer to that entity, whatever it is.

59 The evidence regarding the credit-worthiness of the tenant was elicited during the cross examination regarding the sales comparison approach, but the issue of the financial muscle of the tenant ripples over to the income approach as well. When, at TrIII at 207, the Court inquired how his lack of knowledge regarding the strength of the tenant impacted his valuation of property, Harvey said “that's why I put 20% on the indicated value.” (See the section below entitled Reconciliation.) He then agreed that he was applying 20% to something he could not “really ... assess.” TrIII at 208. The problem with that is that the same consideration (credit-worthiness of the tenant) applies to the sales-comparison approach, to which Harvey applied a weight of 50%, and his explanation of that (see TrIII at 210) was unpersuasive.

60 That answer might be characterized as coy. Later, when asked if he had “compared leased properties to a property that was not leased” (*i.e.*, the Property), Harvey responded that he “was not aware of a lease, so I'll say yes.” TrIII at 218. And later still, he unequivocally stated that “the subject property is not under lease.” TrIII at 282. The effort of the attorney for the County to neaten up that apparent inconsistency did not help. The fact of the matter is that Harvey was not lying in the first instance; as pleasant as he was in general, at that point in his testimony, he was just being difficult because the attorney for Hershey was taking him down a path he did not want to go.

61 Yes, the two statements are identical. Assuming the record is rigorously accurate in transcription, the only distinction is the use of the singular “lease” in one statement and the plural “leases” in the other.

62 Section 22-3 of the Augusta County Code does not specify an interest rate applicable to a refund, but the final sentence of Code § 58.1-3916 appears to cure that oversight.

© 2020 Thomson Reuters. No claim to original U.S. Government Works.