

KeyCite Yellow Flag - Negative Treatment
Judgment Amended by Walt Disney Parks and Resorts US, Inc. v. Singh, Fla.Cir.Ct., August 10, 2018
2018 WL 4468707 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Ninth Judicial Circuit
Civil Division
Orange County

WALT DISNEY PARKS AND RESORTS US, INC., a Florida Corporation, Plaintiff,

v.

Rick SINGH, as Property Appraiser, et al., Defendants.

No. 2016-CA-005297-O.

July 3, 2018.

Final Judgment for Plaintiff

Thomas W. Turner, Judge.

*1 Division: 33-2

THIS CAUSE was tried before the Court, sitting as the finder of fact, from April 30 to May 8, 2018. The Court heard the testimony of the witnesses, including consideration of their veracity and demeanor, and considered the evidence. The Court makes the following Findings of Fact and Conclusions of Law.

STATEMENT OF THE CASE

The Plaintiff is Walt Disney Parks and Resorts, US, Inc., a wholly-owned subsidiary of The Walt Disney Company, ("Disney.") The Defendant is Rick Singh, as Property Appraiser [Orange County, Florida], et. al. ("The Property Appraiser").

Disney has filed this action challenging the validity of the Property Appraiser's 2015 real property tax assessment of Disney's Yacht and Beach Club Hotel (Yacht and Beach Club"). In 2014, the Property Appraiser assessed the just value of the real property of the Yacht and Beach Club at approximately \$154 million as of January 1, 2014. Although there was no material renovation or expansion of the Yacht and Beach Club in 2014, the Property Appraiser assessed the same real property as of January 1, 2015, at \$336,922,772, an increase of approximately 118%, Disney claims that the just value as of January 1, 2015 should have been \$188,673,081. Just value, a legal term, is synonymous with "fair market value". *Walter v. Schuler*, 176 So.2d 81, 85 (Fla. 1965). Fair market value is also a legal concept related precisely to the appraisal concept of "market value."

The main reason for this increase was because the Property Appraiser, using the income approach to determine the just value of the real property included approximately \$74 million of ancillary income from Disney's sale of food, beverages, merchandise, and other goods and services attributed to retail and restaurant shops operating on the premises of the Yacht and Beach Club. The main issue in this case is whether it was legally proper to include this ancillary income in determining the just value of said property.

Disney also challenged the method used by the Property Appraiser to account for the other amounts of deducting other intangible assets, including the value of skilled management, assembled work force, goodwill, transportation systems, and Disney "Magic Bands" (plastic wrist bands given to hotel guest that act as room keys, fast passes to rides, and the ability to charge expenses to their room), and other items from the fair market value of the subject property in determining which amounts to exclude intangible assets from fair market value. The method used by the Property Appraiser is the so-called "Rushmore" method.

BACKGROUND

The subject of this case is the hotel property known as the Disney Yacht & Beach Club Resort located at 1700 Epcot Resorts Boulevard, Bay Lake, Orange County, Florida. The hotel was constructed in 1990 and features 1,197 guest rooms, 70,000 square feet of conference/meeting space, multiple dining outlets, several retail stores, a spa/beauty parlor and other recreational amenities all situated on 65 acres of land. This property is located adjacent to Disney's Epcot theme park attraction, and a lagoon on which there are located other hotel properties, including the Sheraton Walt Disney World Swan Hotel, the Westin Walt Disney World Dolphin Hotel, and the Disney Boardwalk Hotel.

*2 This statutory action challenges the Property Appraiser's just (market) valuation as of January 1, 2015 of the Yacht and Beach Club. The Property Appraiser established the January 1, 2014 just value of the subject property at \$154,229,462. As of January 1, 2015, the Property Appraiser established the just value of the property at \$336,922,722, an increase of more than 118 percent, which is the increased valuation Disney is challenging in this lawsuit.

Pursuant to Article VII, Section 4, Const. Fla. (1968), the just value established by the "assessed (capped) value" for a non-Homestead property can increase no more than 10% over the previous year's assessed value for all taxing districts except schools. The assessed value as of January 1, 2015 was \$169,652,408, a 10% increase over the 2014 assessed value. Therefore, in this case, any ruling reducing the just value determination would affect only the tax as to the school district in Orange County, the Orange County Public Schools.

ISSUE

The issue is whether the Property Appraiser's just value appraisal of the subject property for January 1, 2015 of \$336,922,722 improperly failed to deduct the business income generated by the operation of restaurant and other retail businesses operating on the premises of the hotel property, as opposed to income solely from the room rentals of the hotel as well as the rental value of the restaurant and retail businesses operating on the subject property.

The Court determined by its Order Granting Partial Summary Judgment dated March 15, 2018 that the Property Appraiser's 2015 assessment enjoys a presumption of correctness, although it reserved for trial the issue of using the actual ancillary income versus a rental value for the restaurant and retail space at the subject property.

While ordinarily the Court would state the precise numbers used by the different appraisers, the parties to this action stipulated to entry of a confidentiality order. Disney's Exhibits 8 through 11 have been admitted under seal. Accordingly, in deference thereto, the Court will not disclose specific financial information in this Final Judgment that would fall under the Confidentiality Order. However, if Disney wishes to keep these exhibits sealed, it must file an appropriate motion under Fla. R. Jud. Admin 2.420(e) within 30 days of this Order.

PERTINENT FACTS

In order for the Property Appraiser to establish a just value and appraised value of the subject property, Deputy Director Neil F. Nikkinen, Deputy Director, Real Estate Assessment, of the Property Appraiser's Office, sent a letter (Def. Ex.

l)to Disney and other commercial property owners requesting that Disney complete and return an Income and Expense Survey to the office no later than April 24, 2015 to be used in calculating the assessment of the subject property under the income approach method. The letter stressed that the information submitted would be deemed strictly confidential and not subject to disclosure absent a court order, pursuant to Florida Statute Section 195.027(3). The letter warned that failure to submit the requested information by that date, information submitted subsequent to that deadline would preclude the use of said information in later proceedings, including circuit court hearings, unless the Property Appraiser granted specific exceptions, pursuant to Florida Statute Section 194.034(1)(d) (2009) and *Higgs v. Good*, 813So.2d (Fla. 3rd Cir. 2002). Disney declined to provide that information by that date, which is its right. *Palm Corporation v. Homer*, 261 So. 2d 822 (Fla. 1972), *Higgs v. Good*, 813 So. 2d 178 (Fla. 3d DCA 2002). Disney had never provided its income and expense information to the Property Appraiser's office for at least the preceding 28 years.

*3 In *Higgs*, the property appraiser of Monroe County sent out a notice to taxpayer Good requesting income and expense figures as to the property being assessed, noting that if the taxpayer failed to do so by a certain date, the property appraiser would not consider data submitted after that date in determining the assessed value of the real estate. Good failed to timely submit the requested information and subsequently offered said figures to challenge the ultimate assessment. However, the belated figures were rejected by the property appraiser. Good challenged the ultimate assessment because of this rejection. The circuit court agreed with Good and ordered the property appraiser to accept the belatedly submitted figures and reassess the property. The Third District Court of Appeal reversed the circuit court, denied Good's challenge, stating in part at 179:

It is not difficult to discern that—in the absence of the enforcement of the submission deadline—a taxpayer could await notice of the assessed valuation and, if it is lower than fair-market value, say nothing and enjoy the break; or if the valuation is higher than the owner likes, *then* submit the data and insist upon its use.

We conclude that it was error for the trial court to allow Good to defer the submission of the income data until it pleased him to submit it (tardily), then use the data to demand either administrative or judicial reduction of his property's tax assessment valuation. It is inappropriate for a taxpayer to conceal an ace-in-the-hole for subsequent play against an official who is attempting to carry out his duties. See *Pier House Joint Venture v. Higgs*, 555 So. 2d 899 (Fla. 3d DCA 1990) (income data inadmissible because the property owner failed to reveal same in a timely fashion upon request of the property appraiser). If all taxpayers followed Good's example the Appraiser's office could be hamstrung.

Higgs v. Good, 813 So. 2d at 179.

Accordingly, the Court finds that Disney is barred from asserting the specific items it now claims should have been considered as intangible assets. However, this does not preclude Disney from challenging the use by Property Appraiser's Office of the items identified by the Property Appraiser as “Ancillary Income,” as will be discussed below.

Since Disney did not provide the specific income and expense figures requested, the Property Appraiser had to use its best efforts to determine said income and expense figures using other methods.

The January 1, 2015 just value of the subject property was made by J. Richard Tuck, who holds the MAI and CCIM designations, is a State-certified general appraiser under Chapter 475, Part II, Florida Statutes and holds a Certificate for Hotel Real Estate Investments and Asset Management from Cornell University.

The Orange County Property Appraiser's office has an agreement with the Florida Department of Revenue and the Orange County Comptroller's office. Those agreements require the Property Appraiser to keep the information provided strictly confidential. Under those agreements, the Department of Revenue furnishes sales tax information from hotels and Orange County furnishes information as to the Orange County tourist development tax, which is only charged against rooms revenues of hotels. Disney provides one number to the Department of Revenue, for all of its many hotels at

Walt Disney World, so the Property Appraiser's office was not able to determine total revenues for the subject property from this source. Although Disney reported its room revenues to Orange County for each hotel, the evidence established that only one number was provided to the Property Appraiser's office by the Comptroller.

Property Appraisers Calculation of Just Value

The Property Appraiser's office performed a valuation of the subject property using its Computer Assisted Mass Appraisal (CAMA) system, which is a hybrid cost/market approach to value. The CAMA value of the subject property was \$384,211,429, or \$320,979 per room.

*4 Mr. Tuck determined that the most appropriate approach to value the subject property as well as all of the hotel properties in Orange County was the income approach to value, because this is the basis on which investors buy and sell hotels.

The income approach to value is based on the "IRV" formula, which is net operating income [I] divided by overall capitalization rate [R] equals value [V]. An appraiser who knows any two of the three factors can derive the third; for example, if the appraiser wants to derive an overall capitalization rate from the market, he or she can divide the net operating income in the year of sale [I] by the sale price of a property that sold [V] to determine the overall capitalization rate [R].

The Property Appraiser's office looks to various sources to derive market data, that is, data about the market generally, not any specific property. Disney does not report its operating results to STR, formerly Smith's Travel Research, or any other market research authority, so STR's figures for the Lake Buena Vista area do not include any of Disney's hotels,

Mr. Tuck was able to approximate the revenues of the Yacht & Beach Club Hotel by adding up the "rack" (walk-up) rates of the reporting hotels, dividing that number into the rack rate of the subject property, and applying that percentage to the reported total revenues of the reporting hotels, after deductions of tens of millions was made from the reported income before the allocations were made therefore, according to Mr. Tuck, assuring that not all of the income was used.

Even though the subject property is owner-operated and there is no franchise, Mr. Tuck allowed both a franchise fee of 6% of revenues and a management fee of 4% of revenues included in the 80% expenses to account for intangible personal property (IPP) and business value, in accordance with the so-called "Rushmore Approach" to hotel valuation. Mr. Tuck testified that customary and typical operating expenses of 70-75% for non-owner operated hotels in the subject class include within them the management, franchise, royalty and marketing fees. In addition, the typical 70-75% operating expense ratio includes the expenses of the food and beverage departments (such as food and beverage employees) on similar convention hotels, since the food and beverage operation is not typically leased out. Even though the subject property is owner-managed and does not have a franchises affiliation, Mr. Tuck deducted typical market derived management and franchise fees. By applying an even higher overall expense ratio of 80%, Mr. Tuck testified that he effectively removed all possible intangible personal property and business value from the subject property. The deduction for the allocation of central laundry was brought about because the subject property does not have laundry facilities; the Disney hotels share central laundry facilities that have their own assessments. The allocated share is intended to prevent double taxation of the laundry property.

Mr. Tuck's income approach resulted in following value calculations:

• Gross potential rooms income	\$131,071,500
• Less: Vacancy and collection loss (25%)	32,767,875
• Effective gross rooms income	98,303,625

• Plus: Ancillary income	*5 73,727,719
• Adjusted Gross Income	172,031,344
• Less expenses but not property taxes (80%)	137,625,075
• Net operating income	34,406,269
• Divided by Overall rate: 7% capitalization rate plus 2.732% property tax rate	.09732
• Equals property value	353,535,679
• Less: Tangible Personal Property	(15,973,391)
• Less: Allocation of Central Laundry	(639,516)
• Equals Real Estate Value	\$336,922,772

Disney's Calculation of Just Value

Disney utilized Todd Jones, MAI, CRE, FRICS to calculate the just value of the subject property. Unlike Mr. Tuck, Mr. Jones had the benefit of actual income and expense figures provided by Disney.

Mr. Jones adjusted the average daily rate in order to account for the non-real property contribution from Disney's Magical Express, Extra Magic Hours, the Magic Bands, and the complimentary transportation service, thus substantially lowering the average daily room rate, and therefore substantially lowering the gross potential room income, which in turn would lower the calculation of just value of the property. Mr. Jones calculated a projected rental value of the restaurant and retail services of \$17,968,735, which Disney claims should be substituted for the ancillary income figure calculated by Mr. Tuck. The Court finds the projected rental value of the restaurant and other retail services to be reasonable and acceptable to the Court, and the Court will utilize said figure in determining the just value of the subject property.

Mr. Jones had the lowest loaded capitalization rate of the three, which would result in the highest indicated value for the subject property, all other things being equal, based on the inverse relationship between capitalization rate and value indication. Therefore, according to Mr. Jones, applying the Jones capitalization rate to the net operating income figure resulted in a value indication for the real and tangible personal property comprising the subject property of \$199,652,611. Subtracting Mr. Jones' estimate of tangible personal property (\$10,140,014) and the separately assessed laundry facility Disney now values at \$839,516, Mr. Jones determined that the real property just value for the subject property of \$188,673,081 as of January 1, 2015, compared to Mr. Tuck's real property just value of \$336,922,772.

CONCLUSIONS OF LAW

The Court has jurisdiction of the subject matter and the parties pursuant to sections 194.171 -. 181, Florida Statutes.

While many well-qualified experts testified to different opinions on the appropriate methods to be used in the case in determining just value of the subject property, the Court can resolve the disputed issues by relying mostly on the expert testimony of both Mr. Richard Tuck on behalf of the Property Appraiser, and Mr. Todd Jones on behalf of Disney.

Disney has the burden of proof in this case as prescribed by sections 194.301(2) and 194.3015, Florida Statutes (2009). Disney's burden was to show by a preponderance of the evidence that the challenged assessment did not represent the just value of the subject property. § 194.301(2)(a)(1), Fla. Stat. If Disney satisfies that burden, any presumption of correctness is overcome. § 194.301(2)(b), Fla. Stat.

*6 All property within the State of Florida must be assessed as of January 1st of each year. § 192.042, Fla. Stat. Article VII, Section 4 of the Florida Constitution (1968) establishes “just value” as the standard for ad valorem taxation within the State. The terms “just value,” “fair market value,” and “full cash value” are legally synonymous. *Walter v. Schuler*, 176 So. 2d 81 (Fla. 1965).

Article VII, section 1(a), Florida Constitution, provides that “no tax shall be levied except in pursuance of law,” Property taxes arise purely out of statute and, therefore, can be levied, assessed, and collected “only by the express method pointed out by statute.” *State ex rel Seaboard Air Line R.R. v. Gay*, 35 So. 2d 403, 456 (Fla. 1948).

Section 193.011, Florida Statutes (1991), provides the factors that must be considered in deriving “just valuation:”

(1) The present cash value of the property, which is the amount a willing purchaser would pay a willing seller, exclusive of reasonable fees and cost of purchase, in cash or the immediate equivalent thereof in a transaction at arm's length;

(2) The highest and best use to which the property can be expected to be put in the immediate future and the present use of the property, taking into consideration any applicable judicial limitation or local or state land use regulation and considering any moratorium imposed by executive order, law, ordinance, regulation, resolution, or proclamation adopted by any governmental body or agency or the Governor when the moratorium or judicial limitation prohibits or restricts the development or improvement of property as otherwise authorized by applicable law. The applicable governmental body or agency or the Governor shall notify the property appraiser in writing of any executive order, ordinance, regulation, resolution, or proclamation it adopts imposing any such limitation, regulation, or moratorium;

(3) The location of said property;

(4) The quantity or size of said property;

(5) The cost of said property and the present replacement value of any improvements thereon;

(6) The condition of said property;

(7) The income from said property; and

(8) The net proceeds of the sale of the property, as received by the seller, after deduction of all of the usual and reasonable fees and costs of the sale, including the costs and expenses of financing, and allowance for unconventional or atypical terms of financing arrangements. When the net proceeds of the sale of any property are utilized, directly or indirectly, in the determination of just valuation of realty of the sold parcel or any other parcel under the provisions of this section, the property appraiser, for the purposes of such determination, shall exclude any portion of such net proceeds attributable to payments for household furnishings or other items of personal property.

§ 193.011, Fla. Stat. (1991). In this case, the parties agree that the Property Appraiser considered all eight factors, but relied exclusively on item (7), the income from the property.

Under the Florida Constitution, intangible personal property can only be taxed by the State. Art. VII, § 9(a), Fla. Const.; *GTE Fla., Inc. v. Todora*, 854 So. 2d 731, 733 (Fla. 2d DCA 2003). The Florida Constitution therefore “prohibits local government entities from levying ad valorem taxes on intangible personal property.” *Holly Ridge Ltd. P'ship v. Pritchett*,

936 So. 2d 694, 699 (Fla. 5th DCA 2006). Thus, if the Assessment includes value attributable to Disney's intangible personal property, it is "constitutionally infirm." *Havill v. Scripps Howard Cable Co.*, 742 So. 2d 210, 212 (Fla. 1998).

*7 The parties agree that a county property appraiser's assessment of real property must include only the just valuation of the real property. See Fla. Dep't of Rev., *The Florida Real Property Appraisal Guidelines*, § 5.1 (Nov. 26, 2002) [hereinafter *Guidelines*] ("Only real property ... should be included in just valuations of real property."). "Real property" is statutorily defined as "land, buildings, fixtures, and other improvements to land." § 192.001(12), Fla. Stat. (2017). County appraisers assessing real property are therefore required to exclude any value that is not attributable to the land, buildings, fixtures, and other improvements to land. See *Guidelines*, § 5.1; *Appleby v. Nolle*, 682 So. 2d 1140, 1142 (Fla. 4th DCA 1996).

Among the value not attributable to "land, buildings, fixtures, and other improvements to land" is value attributable to "intangible personal property." See *Appleby*, 682 So. 2d at 1142. Intangible personal property is statutorily defined as "money, all evidences of debt owed to the taxpayer, all evidences of ownership in a corporation or other business organization having multiple owners, and all other forms of property where value is based upon that which the property represents rather than its own intrinsic value." § 192.001(11)(b), Fla. Stat.

Disney established that the Assessment included substantial value attributable to Disney's intangible personal property as follows.

The Property Appraiser's assessment included approximately \$74 million of income from Disney's sale of food, beverages, merchandise and other services on the hotel property, identified by the Property Appraiser as "Ancillary Income." Unlike rental income, Disney's income from its restaurants and other profit centers is not revenue attributable to the "land, buildings, fixtures, and improvements to land," but is rather revenue attributable to Disney's non-rental business activities *on the real property*. Under well-established Florida law, the Property Appraiser cannot lawfully include that non-rental income to value Disney's real property using the income method of appraisal.

Ancillary Income

The Property Appraiser acknowledged at trial that the Assessment included substantial value derived from Disney's business activities on the real property in selling food, beverages, merchandise and other items/services. The Property Appraiser argued that this income is not income to a "business," value, or "intangible" value, but is income that is "inextricably intertwined" with the real estate. The Property Appraiser therefore argued that he could lawfully capitalize all income of the hotel including the net income from food and beverage and other retail operations in determining the value of the hotel's real property. The Court holds that it is improper to consider the income from the business activities conducted on the property in establishing just value of the subject property.

The Property Appraiser's arguments to include such income are contrary to Florida law. In *Scripps Howard*, 742 So. 2d at 213-14, the Florida Supreme Court rejected an appraiser's use of an income approach in valuing tangible personal property of a business because the appraiser failed to properly exclude value attributable to other assets (including intangible assets) of the business enterprise. The court stated that the income approach "requires the property appraiser to estimate the future income that a prospective purchaser could expect to receive from the business enterprise," which consists of "all the assets of the business—tangible personal property, real property, and intangible assets." *Id.* at 213. After the appraiser discounts the future income to present value, "the appraiser has one value for the entire property." *Id.* The court then made clear that the appraiser must deduct from that single value "the values of real property, intangible assets, and other nontaxable items, to ensure that the income is solely attributable to the tangible personal property of the business enterprise," and not to the business's other income. *Id.* (emphasis added).

*8 Because the property appraiser in that case was unable to “segregate specific items and identify their values,” the Florida Supreme Court held that the property appraiser's valuation was “constitutionally infirm.” *Id.* The court stated that, under the property appraiser's income approach, it was “unlikely that the value of intangible assets and other nontaxable items [could] be subtracted in a non-arbitrary fashion to reveal the just valuation of the tangible personal property.” *Id.*

Here, in using the income approach to value Disney's real property, the Property Appraiser also had a duty to deduct the values of nontaxable items, specifically tangible and intangible assets “to ensure” that the income used is “solely attributable to” Disney's real property. *Id.* But by simply concluding that the \$74 million of income from food, beverage, and other items was “inextricably intertwined” with the real estate, the Property Appraiser breached that duty and unconstitutionally taxed value from Disney's intangible property.

While a property appraiser can assess value using rental income or income that an owner generates from allowing others to use the real property, the property appraiser cannot assess value using income from the taxpayer's operation of a business *on the real property*. *Metro. Dade Cty. v. Tropical Park Inc.*, 231 So. 2d 243, 246 (Fla. 3d DCA 1970).

In *Tropical Park*, the court affirmed a trial court ruling that a real property assessment overvalued the property because it was improperly influenced by income derived from the taxpayer's lucrative horse racing operation under a pari-mutuel wagering license. *Id.* The trial court concluded that the assessor could not increase the real property assessment based on income from the horse racing operation because that income was not “derived from the use of the land,” but instead was from “the business operated on it.” *Id.* at 245. The trial court found that allowing the assessor to value the real property using income from the horse racing business “would amount to double taxation to the taxpayer.” *Id.*

In affirming, the Third District Court of Appeal recognized and approved the trial court's “crucial finding” that the “property was over-valued because it operates a horse racing track and holds a highly valued racing permit and that income from the operation of a business of this nature cannot be the basis for the value set for the land.” *Id.* The court found that the evidence supported the trial court's conclusion that “the income or profit of the race track business was not assignable to the real estate but rather to the intangible rights which have been granted the owner by the state in the form of a license to conduct pari-mutual wagering.” *Id.* at 246.

Similarly, here, the Property Appraiser overvalued the hotel's real property by including value that was not assignable to the real property, but rather was assignable to Disney's business activities on the real property (in operating restaurants and stores). Like the taxpayer in *Tropical Park*, Disney's income from the restaurants and stores was not assignable to the real estate, but rather to Disney's intangible rights in separately operating the businesses.

The Property Appraiser argues that the Rushmore method is an accepted appraisal practice that allows him to include value from Disney's business activities on the real property. But even if the Rushmore method is an accepted appraisal practice, it cannot be used in a manner that violates Florida law. *See Scripps Howard*, 742 So. 2d at 215 (holding that income approach, as applied, was unconstitutional). Here, by including value attributable to Disney business activities on the real property, the Property Appraiser has applied the Rushmore method in a way that violates Florida law.

*9 The Property Appraiser's suggestion that Disney's income from the restaurants and stores is not business or intangible value is rejected by the Court. The testimony at trial demonstrated that the restaurants and stores operate independent of the room rentals. Renting rooms does not entitle guests to free food and beverages at the restaurants. Instead, hotel guests and outside visitors are free to decide whether to purchase food, beverages, retail items or services at those locations.

In addition, the operation of the restaurants and retail businesses are open to the public and not restricted to guests of the hotel. Thus, substantial income from these establishments is not related to the room rentals paid by said guests. Income

derived from those intangible assets cannot be used to establish the just value of Disney's "land, buildings, fixtures, and other improvements to land."

The Property Appraiser contends that the intangible assets identified by Disney do not qualify as intangible property. He relies on case law from Kansas, Wisconsin, and Iowa, and on a report prepared by a special committee of the International Association of Assessing Officers. But none of those authorities apply Florida law.

Under Florida law, many of the items identified above have been recognized as intangible personal property. *See GTE Fla.*, 854 So. 2d at 733; *Fla. Scripps Howard Cable Co. v. Havill*, 665 So. 2d 1071, 1075-76 (Fla. 5th DCA 1995), *approved*, 742 So. 2d 210 (Fla. 1998). Because the items are "other forms of property where value is based upon that which the property represents rather than its own intrinsic value," they meet Florida's definition of intangible personal property. §192.001 (11)(b), Fla. Stat.

The Property Appraiser is essentially asking this Court to unlawfully expand the statutory definition of "real property" to include something other than "land, buildings, fixtures, and other improvements to land." § 192.001(12), Fla. Stat. But Florida courts "are bound by the definition contained in section 192.001(12)." *Wilkinson v. St. Jude Harbors, Inc.*, 570 So. 2d 1332, 1333 (Fla. 2d DCA 1990). Any expansion of that definition must be provided by the legislature. *Id.* It cannot be done by "the courts through a liberal interpretation of the applicable statute." *Id.* (rejecting property appraiser's argument that transferable development rights should be considered taxable real property).

Income from selling food, beverages, merchandise and services is simply not reflective of the value of Disney's land, buildings, fixtures, and other improvements to land. The Property Appraiser's attempt to include Disney's non-realty components of value in this case amounts to the unconstitutional double taxation of Disney's intangible personal property.

Under section 194.30 1(2)(b), Florida Statutes, if a party challenging an assessment meets its burden of proving that the assessment is invalid, "the court shall establish the assessment if there is competent, substantial evidence of value in the record which cumulatively meets the criteria of s. 193.011 and professionally accepted appraisal practices." As discussed above, had Disney submitted these figures timely, it would have met its burden of proving that the Property Appraiser's entire assessment is invalid. Because Disney did not timely submit specific income and expense figures as requested by the Property Appraiser, the Court will not consider those figures in this case, and accepts Mr. Tuck's calculations as to income and expense, except for the inclusion of the ancillary income. Although the rental income figures used by Mr. Jones were not submitted prior to this court action, the Court will use Mr. Jones' figures in place of Mr. Tuck's improper inclusion of the ancillary income. Because there is competent, substantial evidence of value in the record that allows the Court to establish the assessment of Yacht and Beach Club, the Court will establish the assessment, using the figures submitted by Mr. Tuck and Mr. Jones as indicated. This Court notes that the net effect is that the calculations are not materially different under the parties' calculations once the ancillary income figures are excluded, and the Court's failure to consider Disney's other claimed intangible assets is of no consequence in this case. The Court finds that the Property Appraiser's use of the Rushmore method in this case failed to specifically exclude the ancillary income previously discussed.

*10 While no Florida appellate court has addressed the Rushmore method, the California Court of Appeal recently rejected it. In *SHC Half Moon Bay v. County of San Mateo*, 171 Cal. Rptr. 3d 893, 911 (Cal. Ct. App. 2014), the court held that a county appraiser's real property assessment of a hotel improperly included value derived from the hotel owner's intangible assets. *Id.* In so holding, the court rejected the appraiser's argument that all intangible value was removed by simply deducting a management and franchise fee. *Id.* The court stated:

[T]he deduction of the management and franchise fee from the hotel's projected revenue stream pursuant to the income approach did not—as required by California law—identify and exclude intangible assets such as the hotel's assembled workforce, the hotel's leasehold interest in the employee parking lot, and the hotel's agreement with the golf course operator.

Id. at 908. The court noted that the appraiser's "reliance on the deduction of the management and franchise fee—and its refusal to identify and value certain intangible assets—is akin to paying 'lip service to the concept of exempting intangible assets from taxation,' ..." *Id.* at 911 (quoting *GTE Sprint Comms. Corp. v. County of Alameda*, 32 Cal. Rptr. 2d 882, 889 (Cal. Ct. App. 1994)).

The Property Appraiser's approach in this case is similar to the flawed income approach used in *GTE Florida, Inc. v. Todora*, 854 So.2d 731, 732 (Fla. 2d DCA 2003). There, the appraiser improperly included the value of intangibles (goodwill, assembled work force, managerial skills, etc.) when he assessed tangible personal property used in a telecommunications network. *Id.* at 733. In applying the income approach, the appraiser also included revenue from the telephone company's business operations (i.e., sales of telephone service). *Id.* The Second District Court of Appeal struck down the assessment because the income-based valuation "improperly included non-taxable intangible assets" and no adjustment was made to eliminate that value. *Id.* at 736.

COURT'S JUST VALUE CALCULATION

Accordingly, the Court will perform the just value calculation as follows.

The Court had before it the income approach calculations performed mainly by Mr. Tuck and Mr. Jones. The Court finds, and the parties agree that the income approach is the most appropriate method of appraisal for the subject property. This method requires the Property Appraiser to determine the net operating income and then dividing that figure by the overall rate (capitalization rate plus the property tax rate) to determine the real estate value.

Using Mr. Tuck's figures but removing that Ancillary Income of \$73,727,719 and replaces it with the projected rental income of the restaurant and retail operations as determined by Mr. Jones of \$1,743,408, the calculations would be as follows:

Mr. Tuck's income approach resulted in following value calculations:

• Gross potential rooms income	\$131,071,500
• Less: Vacancy and collection loss (25%)	32,767,875
• Effective gross rooms income	98,303,625
• Plus: Ancillary income	1,743,408
• Adjusted Gross Income	100,047,033
• Less expenses but not property taxes (80%)	80,037,626
• Net operating income	20,009,407
• Divided by Overall rate: 7% capitalization rate plus 2.732% property tax rate	.09732
• Equals property value	205,604,264
• Less: Tangible Personal Property	(15,973,391)
• Less: Allocation of Central Laundry	(639,516)

• Equals Real Estate Value

\$188,991,157

Therefore, the revised just value for the Yacht and Beach Club for 2015 is \$188,991,357. This revised just value shall be utilized for a determination of the taxes due for the public school assessments and the Yacht and Beach Club's total 2015 property tax bill adjusted accordingly. The 2015 assessed value of \$169,652,408 for all other purposes remains unchanged. Pursuant to Article VII, Section 4, Const. Fla. (1968), the just value established by the "assessed (capped) value" for a non-Homestead property can increase no more than 10% over the previous year's assessed value for this property.

*11 In future years, if Disney wishes the Property Appraiser to consider excluding other items of intangible assets in its income calculations, it would behoove Disney to provide such figures when requested to avoid the same problems encountered in this case. The Property Appraiser is still free to challenge any claims of specific intangible assets so identified by Disney.

CONCLUSION

The Property Appraiser's Assessment of Disney's Yacht and Beach Club Resort is unconstitutional and invalid. The Property Appraiser has substantially increased the amount of Disney's tax bill by unlawfully including value attributable to Disney's intangible property, specifically the valuation established by the Property Appraiser of the ancillary income figures.

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Final Judgment is entered in favor of Plaintiff, Walt Disney Parks and Resorts US, Inc. and against Defendant, Rick Singh, as Orange County Property Appraiser.
2. Defendant Singh is hereby directed to issue certificates of correction within ten (10) days from date hereof, revising the 2015 just value to \$188,991,357. The 2015 assessed value of \$169,652,408 is unchanged.
3. Upon receipt of certificates of correction, Defendant Tax Collector is hereby directed to recalculate the amount of taxes due for 2015 based upon the revised value, the millage rate then in effect and the prior tax payments made, including credit for early payment discounts.
4. Defendant Tax Collector shall thereafter pay the refunds directly to Plaintiff, Walt Disney Parks and Resorts US, Inc.
5. Plaintiff, Walt Disney Parks and Resorts US, Inc. shall file an appropriate motion under Fla. R. Jud. Admin. 2.420(e) within thirty (30) days of this Order if it wishes to keep its exhibits sealed.
6. The Court shall retain jurisdiction for the purpose of enforcing the provisions of this judgment as well as for taxing costs in favor of Plaintiff, Walt Disney Parks and Resorts US, Inc.

DONE AND ORDERED in Chambers in Orlando, Orange County, Florida, 3rd day of July, 2018.

<<signature>>

THOMAS W. TURNER

SENIOR JUDGE

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