

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MERLE HAY MALL LIMITED
PARTNERSHIP,

Plaintiff,

v.

CITY OF DES MOINES BOARD OF
REVIEW, Dee Dee Steger,
Chairperson,

Defendant.

NO. CE 51-26576

MERLE HAY MALL LIMITED
PARTNERSHIP,

Plaintiff,

v.

POLK COUNTY BOARD OF REVIEW,
Ralph Woodward, Chairman,

Defendant.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND JUDGMENT ENTRY

FILED
POLK COUNTY IOWA
1955 OCT -5 AM 10:06
JERRY L. HILSS
CLERK DISTRICT COURT

BE IT REMEMBERED, that commencing on the 1st day of May, the matter of Plaintiff's Appeal from the Action of the Board of Review for both the City of Des Moines and Polk County came on for hearing before the Court; the Plaintiff appearing through its General Partner, Mr. J. William Holland and represented by counsel, William J. Koehn and Deborah Tharnish, and the Defendant, City of Des Moines Board of Review, Dee Dee Steger, Chairperson, appearing through Mr. James E. Maloney, City Assessor, and represented by its counsel, William R. Stiles, and the Defendant, Polk County Board of Review, Ralph Woodward, appearing through Mr. Larry Armel, Chief Deputy Assessor, and represented by its counsel, David W. Hibbard. The Court, having

heard the evidence offered by the Plaintiff and Defendants and being fully advised in the premises, FINDS:

FINDINGS OF FACT

1. The Plaintiff, Merle Hay Mall Limited Partnership, is the owner of the following described real estate:

City of Des Moines

Parcel Nos.: 9472-002-000; District 100, Map 223
9472-001-003; District 100, Map 223
9472-004-002; District 100, Map 223

Polk County

Parcel No.: 2103-003-00; District 31-2, Map 268B

Said parcels include the following legally described real estate:

Lot 1 in Merle Hay-Aurora Place, an official plat now included in and forming a part of Des Moines and Urbandale, Polk County, Iowa; Except, an irregular shaped tract of land described as Commencing at the Southwest Corner of said Lot 1, thence, N89°46'00"E along the South Line of said Lot 1, 167.73 feet to the Point of Beginning, thence, N00°14'00"W, 17.00 feet, thence, N89°46'00"E, 100.00 feet thence, N00°14'00"W, 15.00 feet thence, S70°57'00"E, 21.20 feet thence, S73°55'30"E, 51.00 feet thence S85°39'30"E, 100.30 feet, thence, N89°46'00"E, 350.00 feet, thence, N85°11'30"E, 50.20 feet, thence N89°46'00"E, 69.44 feet, thence, S00°00'00"E along the lot line of said Lot 1, 11.00 feet, thence, S89°46'00"E along the South line of said Lot 1, 739.43 feet to the Point of Beginning; and

All of Lots 2 and 2A in said Merle Hay-Aurora Place; and

That part of Lot 3 in said Merle Hay-Aurora Place described as Beginning at the Southwest Corner of said Lot 3, thence, N90°00'00"E along the South Line of said Lot 3, 302.28 feet, thence, N00°02'03"W, 163.00 feet, thence N90°00'00"W along a line parallel with and 163.00 feet North of the South Line of said Lot 3, 302.42 feet to the West Line of said Lot 3, thence S00°05'00"E along the West Line of said Lot 3, 163.00 feet to the Point of Beginning.

The above legally described real estate encompassing the four noted tax parcels shall hereafter be referred to as "the Property."

2. The assessments for each parcel as confirmed by the respective Boards of Review for the years in question (the 1994 assessment was not changed from the 1993 assessment) are:

January 1, 1993 and January 1, 1994			
	Land	Buildings	Total
9472-002-000	\$1,016,000	\$7,929,000	\$8,945,000
9472-001-003	\$3,816,000	\$20,858,000	\$24,674,000
9472-004-002	\$179,000	\$1,076,000	\$1,255,000
2103-003-00	\$488,640	\$2,830,230	\$3,318,870
		Total	\$38,192,870

3. The Plaintiff timely filed a protest of the assessments to the Board of Review for the City of Des Moines and the Board of Review for Polk County.

4. Thereafter the Plaintiff duly and timely appealed the respective decisions of the Boards of Review, claiming that the assessed valuation of the Property is more than the assessed value authorized by law.

5. Merle Hay Mall is a regional or super regional shopping center. The terms are used more or less interchangeably by the parties' witnesses. The entire shopping center includes four department stores which are referred to as anchors, a number of retail stores, which are not large department stores, and which are referred to by the witnesses as "in-line tenants" or "mall tenants." The mall tenants and the anchors are connected to one another by the enclosed mall or corridor, which is open to the public, as well as by service corridors, which are not open to the public. These spaces are referred to by the witnesses as the common area. The Property includes Younkers, the mall tenants space including common area, a

six-story office building, theater, two parking ramps, ground level parking lots, and sidewalks. Not included in this appeal is the property encompassing the Sears store, Kohl's, Montgomery Wards and the two detached office buildings located on the North end of the Plaintiff's property.

6. The Plaintiff presented evidence of value through its General Partner, Mr. J. William Holland, Frank Sedlacek, a project manager for Weitz Construction Company, Michael J. Kelly, MAI, an appraiser, and Matthew Kimmel, MAI, an appraiser. Additionally, the Plaintiff called Dr. Jeffrey Fisher, a professor, who testified concerning business enterprise value as it relates to super regional shopping centers (malls).

7. Mr. Holland's testimony adopted the value placed on the Property by Mr. Sedlacek at \$18,216,956.00, which did not include any value for the land, certain soft costs, site improvements, the office tower and the theater.

8. Mr. Sedlacek testified that his value approach was based solely on the cost approach; and, in particular, on the amount to replace the existing structure in its present configuration. He employed a useful life on the existing structure based on his experience in the industry on when material had to be replaced, and when management or owners typically replace certain items for cosmetic reasons. Using such useful lives he arrived at the remaining life for certain components plus a residual value. Based upon this approach, he arrived at a depreciated value for the Property of \$18,216,956.00. Said value, according to Mr. Sedlacek, did not take into account any

value for the underlying land, the theater, or the office tower, nor many of the soft costs, such as loan fees, construction interest, lease-up commissions, cost of leasing, and entrepreneurial profit considered by the other appraisers.

9. Mr. Kelly arrived at a value in his appraisal (Exhibit 23) of \$38,000,000.00 for what he described as the going concern value for all the property rights at Merle Hay Mall. At trial, he noted an error in that appraisal and changed his report, increasing the value by \$1,000,000.00 to \$39,000,000.00.

10. Mr. Kelly's appraisal consisted of three parts. The first part set forth the \$39,000,000.00 value for the entire going concern, but excluded the value of Younkers. Secondly, he set forth a value of the real estate only (land and buildings) at \$23,100,000.00. Thirdly, he set a value on Younker's Store separately at \$5,250,000.00.

11. Mr. Kelly's testimony indicated that Younker Store's value of \$5,250,000.00 was not included within the \$39,000,000.00 going concern value for the Mall (all property except anchors and the office building). He further testified that there was a business enterprise component within the value attributable to the Mall that was an intangible property right not subject to assessment. He indicated that that component could be quantified by subtracting the tangible real estate value from the going concern value, leaving an intangible business value of \$15,900,000.00.

12. Matthew Kimmel was called on behalf of the property owner. He is an experienced appraiser of real estate. Mr. Kimmel has an

M.A.I. designation. He is a partner in Arthur Anderson, L.L.P., which has appraised numerous regional shopping centers.

13. Mr. Kimmel utilized the three traditional approaches to valuing this property - comparable sales, cost and income. In his analysis, Mr. Kimmel assumed that this regional shopping center had a "going concern value" comprised of its real estate value plus its business enterprise value. Throughout the report, Mr. Kimmel has made adjustments to the data to separate the business enterprise value of the shopping center from its real estate value. The business enterprise value was thus excluded from the valuation conclusion contained in the report. Mr. Kimmel concludes that Merle Hay Mall has a taxable value of \$29,800,000.00.

14. Dr. Jeffrey Fisher testified regarding the concept of excluding from the valuation of a super regional mall what he identified as the business enterprise operated by the Mall owner. He described this as business enterprise value which he stated was an intangible property right that should be excluded in real property assessments.

15. Dr. Fisher defined business enterprise value as the measurable and transferrable present worth of the business organization, management, assembled work force, skills, working capital, legal rights (trade names, business names, franchises, agreements, etc.) that have been assembled to make the business a viable and valuable entity in its competitive market.

16. Mr. Kelly also testified as to the definition of business enterprise value which he used simultaneously with business value as

the value enhancement from marketing and management skills in assembling, principally, the anchor tenants and secondarily, the smaller, in-line mall tenants. He did not believe that it necessarily involved the other aspects identified by Dr. Fisher and as contained in the definition in *The Appraisal of Real Estate*, by the Appraisal Institute (Exhibit M-2).

17. Notwithstanding the fact that Mr. Kelly, Mr. Kimmel and Dr. Fisher did not agree upon the components of business enterprise value, the Court finds that the term business enterprise value is the value enhancement resulting from items of intangible personal property such as marketing and management skill, an assembled work force, working capital, trade names, franchises, patents, trademarks, contracts, leases and operating agreements. This definition is contained in The Appraisal of Real Estate, tenth edition, published in 1992. The definition is contained in a section of that book discussing the treatment which real estate appraisers might give to "property components that are not 'real property'".

18. Mr. James E. Maloney is the City Assessor for the City of Des Moines, Iowa. Mr. James E. Maloney testified that he did not recognize the validity of the business enterprise valuation concept in the valuation of super regional shopping centers. It was his testimony that it simply did not exist; therefore, the assessment amounts by the City did not take into account the existence of a business enterprise value at Merle Hay Mall. Mr. Maloney testified that if this concept were adopted it would permeate all commercial property, i.e., strip centers, office buildings, and apartments.

19. Mr. Maloney testified that the applicable statute, § 441.21(2) of the Iowa Code requires that assessments of real property shall exclude the value of a business which uses the property as distinguished from the value of the property as property. He further testified that the operations of a super regional mall was using property as property and only the value of the businesses at that site, i.e., the businesses operated by the mall tenants and anchors, should be excluded under the express language of the statute.

20. Larry Armel is the Deputy County Assessor. Mr. Armel testified that he is familiar with the concept of business value and the attempts to apply the theory to regional shopping centers to reduce the assessable value of those properties. He also believes that the business enterprise value of a shopping center is an integral part of the rental function performed by the landlord and that it cannot be separated from the value of the property.

21. Mr. Dale C. Hyman is the Chief Deputy Assessor for the City of Des Moines, Iowa. Mr. Dale C. Hyman, Chief Deputy Assessor, testified that he requested but was not given income and expense statements from the Plaintiff for utilization in arriving at the January 1, 1993 and January 1, 1994 assessment amounts. He used a cost approach and an income approach using assumptions since the actual numbers were not made available by the Plaintiff. He testified that there were no comparable sales in the City or State, and therefore, used the cost and income approach to valuation. Mr. Hyman testified that he gave equal weight to each of the two approaches in arriving at the assessment amount and then compared the assessment to

the assessments for Southridge Mall in Des Moines and Valley West Mall located in West Des Moines, Polk County, Iowa. After determining a value by these means, Mr. Hyman recommended to the Board of Review a downward adjustment, which they made.

22. The Defendants called three MAI designated appraisers, Mr. Peter Korpacz, Mr. Patrick J. Schulte and Mr. Clifford T. McClure.

23. Mr. Peter Korpacz's appraisal (Exhibit U) placed the market value of the subject Property at \$40,000,000.00, while Mr. Schulte's appraisal (Exhibit K) placed it at \$45,000,000.00, and Mr. McClure's appraisal (Exhibit L) placed it at \$47,000,000.00.

24. Peter Korpacz is an M.A.I. appraiser with extensive experience in valuing regional shopping centers. Mr. Korpacz is the author of "The Korpacz Report", a quarterly publication analyzing and reporting development and market trends across the nation in the regional shopping center sales market. Most of his business involves appraising regional shopping centers for the buyers and sellers. His company has appraised more than 60 regional shopping centers in the past two years.

25. Mr. Korpacz made an appraisal of the value of the fee simple estate of the real property at the Merle Hay Mall as of January 1, 1993, using all three approaches. He indicated that the cost approach would not be used at all by the market participants who were his clients and that many of the variables of the cost approach are highly judgmental which leads to inconsistent analysis by various appraisers.

In his income approach, Mr. Korpacz made two analysis - one using a ten year discounted cash flow analysis very similar to Mr. Kimmel's,

but without subtracting for business enterprise value, and one using a direct capitalization method which measures value based upon income for one year only. Mr. Korpacz favors the income approach because his experience indicates the income approach to be more accurate than the cost or comparable sales approaches and because this method mirrors the analytical process employed by the investors in this type of property. Mr. Korpacz concluded the value for the fee simple estate of Merle Hay Mall at \$40,000,000. Mr. Korpacz testified that his analysis is a conservative one, which yields a low value. The Court finds that Mr. Korpacz is a very experienced and knowledgeable appraiser and that his appraisal conclusion is very credible.

26. Mr. Schulte also gave primary reliance on the income approach but also did the cost and sales comparison approaches. Mr. Schulte included a value for leasehold improvements at Merle Hay Mall - those done by the tenant and those done by the mall owner. Mr. Korpacz, Mr. Kelly and Mr. Kimmel testified that they had not included a value in their opinion for leasehold improvements since they believed that such improvements may not be of any use to subsequent tenants.

27. Mr. McClure also gave primary reliance on the income capitalization approach to value but also included both the cost and sales comparison approaches. Mr. McClure also added value for the leasehold improvements of the landlord and those done by the tenants.

28. Mr. Schulte testified that he did not recognize the concept of business enterprise value and that the Uniform Standards of Professional Appraisal Practice, or the American Appraisal Institute

did not require or even recognize it as an accepted appraisal practice.

29. Mr. McClure also did not recognize the concept of business enterprise value and did not account for it in his appraisal. He did testify that the excludable business value, which was the net business income earned by tenants from their retail operations, was excluded from consideration in arriving at his appraisal of market value.

30. Dr. George Karvel is a professor and holder of the Minnesota Chair in Real Estate at the College of Business at St. Cloud State University. He testified that there was no empirical study or data that justified the application of the theory of business enterprise value in super regional malls. Dr. Karvel noted that the business value proponents theorize that if the value of a mall (arrived at by the cost approach) is less than the market value, the difference must be business enterprise value.

31. Dr. Karvel testified that proponents identify the business enterprise value as arising out of the entrepreneurship of the developer and management. The proponents believe that it exists due to the ability to attract anchors, the correct mix of in-line mall tenants and continued above normal or super normal management. The proponents state that the evidence of such enterprise is in super normal rents (primarily percentage rates) collected.

32. Dr. Karvel testified how percentage rents operated (Exhibit FF) and showed how renewals resulted in percentage rent being incorporated into and becoming part of base rents.

33. Dr. Karvel then demonstrated (Exhibits JJ, KK, and HH) how percentage rents were nothing more than a means to keep up with inflation. Exhibit HH showed the increase in sales per square foot compared to the inflation forecast of sales per square foot. The Exhibit compared the inflation from the Bureau of Labor Statistics to the median sales per square foot by malls as reported by the Urban Land Institute in its publication, "*Dollars and Cents of Shopping Centers.*" Further, the Exhibit was amended at trial by putting the actual sales figures of Merle Hay Mall on the chart. The conclusion was that such malls in general, and in particular, Merle Hay Mall's sales per square foot did not even keep abreast of inflation. Therefore, Dr. Karvel, testified that there was no evidence of super normal rents, super management, nor entrepreneurialship value in super regional shopping centers.

34. Dr. Karvel further testified that the cost approach by business enterprise value proponents was generally low due to the failure to take into account developer's entrepreneurial profit and also resulted from the use of unrealistically short useful lives and understated land values.

35. Dr. Kerry Vandell is the Professor of Real Estate and Urban Land Development and Chair of the Department of Real Estate and Urban Land Economics at the University of Wisconsin. He testified that if an appraiser using the income capitalization approach to value used market rents, such an appraiser would automatically have excluded any business value, if such existed. Dr. Vandell testified that although theoretically business enterprise could be present to some extent in

super regional malls, he had never seen it and doubted that it would ever amount to any significant amount. Dr. Vandell identified business value as evidenced by above-market rents. Thus, if an appraiser used market rents, he or she would automatically exclude any business value if it were present. Further, he testified that percentage rents were not an indication of business enterprise value. It was Dr. Vandell's testimony that it did not matter what the rents were tied to (they could be tied to the phases of the moon) but all rents had to be considered and evaluated to determine if they constituted market rents. He stated that a proper method to appraise commercial property for assessment purposes was to appraise it as if there were a generic set of leases in place at market rents.

36. The Court finds that competent evidence reveals values as follows:

Appraiser	Appraisal Amount
Kelly (\$39,000,000 + \$1,200,000 for the office tower, \$3,600,000 for leasehold improvements and \$5,250,000 for Younkers)	\$49,050,000
Korpacz (\$40,000,000 + \$3,600,000 for leasehold improvements)	\$43,600,000
Schulte	\$45,000,000
McClure	\$47,000,000
Kimmel (\$38,000,000 as adjusted by McClure, \$1,200,000 for office tower and \$3,600,000 for leasehold improvements)	\$42,800,000

ISSUE

The primary issue before the Court is the determination of the property that is subject to assessment under the applicable statute, Iowa Code, § 441.21, as it pertains to Merle Hay Mall (the "Property"). The Plaintiff contends that a portion of the Property consists of an intangible business enterprise value that is not subject to assessment while the Defendants contend that all real property rights are subject to assessment and that there is no separate and distinct business enterprise value associated with the Property. The issue of burden of proof or the shifting thereof is resolved upon the Court's determination of the above issue.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties to this action and over the subject matter of this controversy.

2. The case involving the January 1, 1994 appeal of the assessment for Merle Hay Mall involves common questions of law and substantially the same common questions of fact since the assessment amounts for the same parcels were unchanged by the assessor or the Boards of Review. Therefore, the Court does hereby consolidate the 1994 appeal case no. CE000-28855 with the instant case, and this decision shall represent the decision for both appeals for each of the respective years.

3. Iowa Code § 441.21(3) (1995) places the burden of proof upon the Plaintiff to prove that the assessment for the Property is in excess of that authorized by law as alleged by Plaintiff in its Petition.

4. Iowa Code § 441.21(1)(a) requires that all property subject to taxation shall be valued at its actual value. Actual value shall be the fair and reasonable market value of such property. Market value is defined in Iowa Code § 441.21(b) as "the fair and reasonable exchange in the year in which the property is listed and valued between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and each being familiar with all the facts relating to the particular property."

5. If the market value cannot be readily established by comparable classes of property, "the assessor may determine the value of the property using the other uniform and recognized appraisal methods including its productive and earning capacity, if any, industrial conditions, its cost, physical and functional depreciation and obsolescence and replacement cost, and all other factors which would assist in determining the fair and reasonable market value of the property but the actual value shall not be determined by use of only one such factor." Iowa Code § 441.21(2) (1995).

6. The City and County Assessor testified, as did all the appraisers, that finding good, reliable comparables was difficult. Therefore, little or no weight was given to the sales comparison approach to valuation by the assessors or the appraisers. The Court finds that the valuation of Merle Hay Mall cannot be readily established solely by the sales comparison approach (basing market value on the market value of similar classes of property). Therefore, other uniform and recognized appraisal methods should be allowed in arriving at market value. Cablevision Associates VI v. Fort Dodge,

Iowa, Board of Review, 424 N.W.2d 212 (Iowa 1988); Payton Apartments, Ltd. v. Board of Review of City of Des Moines, 358 N.W.2d 325 (App. 1984).

7. There is no presumption as to the validity of the assessment established by the City and County Assessors as may have been adjusted by the respective Boards of Review. Iowa Code § 441.39.

8. The burden of proof in tax assessment appeals is one of persuasion. Metropolitan Jacobsen Development Venture vs. Board of Review of City of Des Moines, 524 N.W.2d 189, 192 (Iowa 1994). If the Plaintiff fails to shift the burden of proof, the Plaintiff must prove by a preponderance of the evidence that the challenged valuation is excessive. Post-Newsweek Cable v. Board of Review, 497 N.W.2d 810, 813 (Iowa 1993).

9. The Plaintiff who offers competent evidence by at least two disinterested witnesses that the market value of the Property is less than the market value determined by the assessor can shift the burden upon the persons (Board of Review) seeking to uphold the assessed value. Iowa Code s 441.21(3) (1995). The Iowa Supreme Court has held that the value testimony of the witnesses must be consistent with the statutory scheme. Boekeloo v. Board of Review of City of Clinton, 529 N.W.2d 275, 279 (Iowa 1955); Ross v. Board of Review, 417 N.W.2d 462, 465 (Iowa 1988).

10. Mr. Frank Sedlacek used only the cost approach to market value and since Iowa Code § 441.21(2) precludes the use of only one such factor to arriving at market value, the Court does not rely upon his testimony as a determinate of market value. Additionally, Mr.

Sedlacek did not provide a complete cost approach value since he did not include the value of the land, the indirect or soft costs, site improvements, the theater and the office buildings, and did not use a customary and normal method of depreciation. His testimony will be given consideration in evaluating the cost approach used by the other experts; however, the Court concludes that his testimony did not provide substantial evidence of the value of the entire property subject to assessment.

11. The Court must first look to the evidence presented by the Plaintiff to see if it carried its requisite burden of proof so as to establish that the assessment for the Property was greater than authorized by law and to determine if the Plaintiff shifted the burden of proof to the Defendants.

12. The Plaintiff presented appraisals by two appraisers with MAI designations, Michael Kelly and Matthew Kimmel. Each of these appraisers failed to appraise the office tower at Merle Hay Mall which constituted part of the Property. However, both Plaintiff and Defendants stipulated following the presentation of evidence that the market value of the office tower was \$1,200,000.00.

13. Both appraisals purport to value the market value of the fee simple interest as required by Iowa law, of Merle Hay Mall as opposed to the leased fee interest. Iowa Code § 441.21. Taxation of real property in Iowa encompasses all interests in the property, including the landlord's interest (the leased fee) and the tenant's interest (the leasehold) even though the party named on the assessment case

owns less than the entire interest. Oberstein v. Adair County Board of Review, 318 N.W.2d 817, 819 (Iowa App. 1982).

14. The Iowa statute (Iowa Code Chapter 441) requires all property subject to taxation to be valued. The property thus subject to taxation is the real property which is defined as "all interests, benefits and rights inherent in the ownership of physical real estate; the bundle of rights with which the ownership of the real estate is endowed." See, The Dictionary of Real Estate Appraisal, Exhibit "X." Real property is distinguishable from real estate which includes only the "physical land and appurtenances attached to the land, e.g., structures." See The Dictionary of Real Estate Appraisal, Exhibit "X."

15. The only statutory exceptions to taxation of the whole of real property are (1) special value or use value of the property to its present owner; and (2) the good will or value of a business which uses (or occupies) the property as distinguished from the value of the property as property. Iowa Code § 441.21(2) (1995).

16. Both Kelly and Kimmel separated a business enterprise value from the real property interest to be valued labeling it as an intangible property right. Under appraisal standards and appraisal textbooks, intangible personal property is not part of the real property interests. USPAP Standard 6-2 (1995 Edition); The Appraisal of Real Estate, 10th Ed., Appraisal Institute p. 412.

17. Utilizing the concept of excluding the value of a retail business operated on the real property being assessed, both Kelly and Kimmel found that part of the ownership of the real property of Merle

Hay Mall constituted a business enterprise by the owner that they excluded from the value of the Property. Each testified that this concept was not universally accepted nor widely employed by all appraisers.

18. Thus, the Court must determine if this approach or theory concerning the exclusion of an alleged business enterprise owned by the owner of a super regional mall such as Merle Hay Mall is a uniform and recognized appraisal method such that proper weight can be given to their appraisals.

19. Only one case has been brought to the attention of the Court which deals with the acceptability of business enterprise value. State ex. rel. N/S Associates v. Board of Review of Village of Greendale, 164 Wis.2d 31, 473 N.W.2d 554 (Wis. App. 1991). In the Greendale case the Wisconsin Court of Appeals rejected the concept of business enterprise value as separate and apart from the value of the Mall Property. The property owner in Wisconsin set forth the same arguments which are propounded by the Plaintiff: (1) that the replacement cost of the Mall, minus depreciation, is the maximum that a buyer would pay for the property, and (2) that the difference between the replacement cost and the market price is nontaxable "business enterprise value." The Wisconsin court rejected the property owner's argument, stating that the income-producing capacity of the mall is inextricably intertwined with the land, the buildings and the improvements thereon and is therefore subject to taxation. Id. at 563. The Wisconsin Court based its analysis on the same factors which our court has used: whether there is an alleged

nontaxable special use or use value which transfers with the property. The Wisconsin court found that if the value inherently accompanies the property and is useable by a potential buyer, then the value is real property and is fully taxable.

State ex rel N/S Associates was reaffirmed in Wisconsin two years later in the case of Waste Management v. Kenosha County, 501 N.W.2d 883 (Wis. App. 1983). In that case, the owner argued that the income method of valuing the property was inappropriate because it included income attributable to the business enterprise, not the property. Id. at 885. The owner's argument is identical to the argument made by the Plaintiff in this case. The Wisconsin Court again rejected that argument, stating that the value was interrelated to the property and transferable with the property. Id. at 887.

20. This analysis is consistent with that which has been used by the Iowa Supreme Court in several tax assessment cases. In Maytag Company v. Partridge, 210 N.W.2d 584 (Iowa 1973), at pages 590-591, the Iowa Supreme Court held that machinery was not to be valued as mere inert separate components for sale on a used equipment market, but should instead be valued as productive components in an operating enterprise which have an earning capacity that must be considered by the assessor in valuing the property.

21. The court in Equitable Life Insurance Company v. Board of Review of City of Des Moines, 281 N.W.2d 821, 825 (Iowa 1979) held that use value is not present in an office building property if a subsequent purchaser of the property could be interested in using the property in the same way as the taxpayer. A purchaser of Merle Hay

Mall would utilize the property in the same fashion it is being utilized by the plaintiff, profiting from the same or similar leases.

22. A similar analysis was used by the court in Riso v. Pottawattamie Board of Review, 362 N.W.2d 513 (Iowa 1985), at page 518 where the court held that rents based on percentage of sales were not based on good will considerations but were merely additional evidence of the real property's value in being attractive to lessees who pay that kind of rent.

23. Merle Hay Mall's sole reason for existence is to lease real property space to commercial tenants; therefore, any value created by its operation and reflected in the market price is inextricably intertwined with the real property and must be assessed as part of the real property. The income generated by leasing space to tenants, including all aspects of that leasing, reflects the real property's source of value. The assessor must include in the property's market value any value attributable to the transferable income-producing capacity. Id.

24. Consequently, the Court concludes that the Plaintiff failed to shift the burden of proof and to carry its burden of proof in that both Kelly's and Kimmel's appraisals failed to comply in all respects with the assessment statute requirements (Iowa Code § 441.1 and § 441.2 (1995)) in order to arrive at market value of the Property. The Iowa Supreme Court has held that the value testimony of the witnesses must be consistent with the statutory scheme. Boekeloo v. Board of Review of City of Clinton, 529 N.W.2d 275, 279 (Iowa 1995); Ross v. Board of Review, 417 N.W.2d 462, 465 (Iowa 1988). It should be noted

that Mr. Kelly, in Part I and Part III of his appraisal, did complete an appraisal including all real property rights of the Property and reflected a market value of \$44,250,000.00. Notwithstanding the fact that said \$44,250,000 does not take into account the value of leasehold improvements and office tower, said appraisal amount fails to demonstrate that the combined City and County assessment of \$38,192,870 was more than that authorized by law.

25. The Plaintiff places a great deal of emphasis upon the analysis of the Supreme Court in the cablevision cases, especially Post-Newsweek Cable v. Board of Review, 497 N.W.2d 810 (Iowa 1993). In doing so, the Plaintiff believes that the methodology employed by the Court in valuing certain tangible assets of a cablevision company should be applicable in valuing the real property interests in a super regional shopping center such as Merle Hay Mall. Plaintiff alleges that such methodology which emphasizes the cost approach will eliminate the intangible business enterprise of the Plaintiff. The income approach, it is argued, mistakenly includes such intangible assets. However, the Court finds that the exclusion of a market equivalent of a management fee from gross rental income (as done by each appraiser) excludes any potential of including any value attributable to the owner's business of providing management services. In the cablevision cases, the assessors were attempting to value trunk and distribution systems, head end equipment and microwave equipment by using income derived from all assets of the cablevision company (taxable and non-taxable). In the instant case, the gross income used by all the appraisers was rental income derived from leasing real

property at Merle Hay Mall. This would appear to the Court as a classic example of an owner of property utilizing it as property not operating a separate and non-intertwined business. Therefore, the Court concludes that the analysis of the cablevision cases does not necessitate a new approach to the appraisal of regional shopping centers (malls) different from the approaches that have become the uniform and customary approaches to valuation for real property interests.

26. The court also finds that the extraction of business enterprise value from the overall taxable value of this regional shopping center is not a uniform and recognized appraisal method.

27. Notwithstanding the fact that the Plaintiff failed to carry its burden of proof, and even if the Court would have found that the burden shifted, the Court finds that the Defendants provided substantial, competent evidence that substantiated the assessed value confirmed by the respective Boards of Review.

28. The Court finds that the Iowa Supreme Court has found that the value of improvements to property must be included in the fee simple regardless of whether they are installed by the lessor or the lessee. Ruan Center Corp. v. Board of Review of City of Des Moines, 297 N.W.2d 538, 541 (Iowa 1981). Kelly's, Korpacz's and Kimmel's appraisals did not include these values. The Court finds that a reasonable value for leasehold improvements is \$10/square foot for a total value of \$3,600,000 for the Property and should be added to each of their respective appraisals.

29. Mr. Schulte rendered a complete appraisal of all property within the subject parcels, appraised all real property interests including leasehold improvements and utilized the uniform and recognized methods of (1) cost approach, (2) income capitalization approach, and (3) sales comparison approach. He gave significant weight to the income approach which he testified was the most reliable for this Property and determined market value of the fee simple for the Property to be \$45,000,000.

30. Mr. McClure also rendered a complete appraisal of all property within the subject parcels, appraised all real property interests including leasehold improvements. He utilized the uniform and recognized methods of (1) cost approach, (2) income capitalization approach, and (3) sales comparison approach. Mr. McClure gave greater weight to the most reliable approach (in his opinion), the income capitalization approach. Thus, he established the market value of the fee simple of the subject Property to be \$47,000,000.

31. The Court finds the testimony and appraisals by Mr. Schulte and Mr. McClure to be in conformity with the Iowa statutory scheme and within accepted and uniform standards of valuation; and consequently more credible than other valuation testimony offered in this case.

32. Thus, all valuation evidence presented on behalf of the Defendants (as well as Volume I and III of Mr. Kelly's appraisal and Mr. Kimmel as adjusted by Mr. McClure) substantiates the fact that the value placed upon the Property by the Assessors was not a value greater than that authorized by law. The Court therefore, affirms the value set by the respective Boards of Review.

33. The burden which the plaintiff bears is one of persuasion. Sears, Roebuck and Company v. Sieren, 460 N.W.2d 887, 889 (Ia. App. 1990); Metropolitan Jacobson Development Venture v. Board of Review of the City of Des Moines, 524 N.W.2d 189, 192 (Ia. 1994). The court finds that the plaintiff has failed to meet this burden of persuasion. The testimony of the appraisers supports the assessment as determined by the assessors and their respective boards of review.

34. The Plaintiff offered evidence showing that the Younkens lease was substantially below market due to the fact that the Plaintiff failed to provide a complete pass through of the real estate taxes as was done with other anchor tenants. Therefore, the Plaintiff argued that this factor should be taken into account in the valuation of the Younkens property notwithstanding law to the contrary in Iowa. The Court is not persuaded that the law has or should be changed such that below-market leases should be considered in valuing property. Oberstein v. Adair County Board of Review, 318 N.W.2d 817 (Iowa App. 1982).

35. The Iowa statute provides that upon hearing the testimony and other evidence, the trial court may increase, decrease, or affirm the amount of the assessment on appeal. Iowa Code § 441.39 (1995). The Court affirms the Boards of Review assessment amount, since the Court finds substantial evidence indicating a valuation for the Property in excess of the assessment amounts for January 1, 1993 and January 1, 1994. In fact, the Court finds that credible evidence establishes a value of \$43,600,000 (\$8,400,000 for the land and \$35,200,000 for the improvements) for all parcels included in the

matter submitted to the Court. However, since neither Board directly appealed, the Court, relying upon Excel Corp. v. Pottawattamie County, N.W.2d 225, at 230 (Iowa App. 1992) and Central Life Assoc. Soc. v. City of Des Moines, 212 Iowa 1254, 1262, 238 N.W. 535 at 538 (Iowa 1931), chooses not to increase the value but rather to affirm the values established by the respective Boards of Review.

36. The Court further finds that the evidence produced by the Plaintiff failed to substantiate any claim that the Property's value was adversely affected by environmental concerns.

JUDGMENT ENTRY


IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the decision of the Board of Review of the City of Des Moines and the Board of Review of Polk County is upheld and affirmed, that the assessed and actual value (market value) of the Property on January 1, 1993 and on January 1, 1994 for the Property legally described in paragraph 1 of the Findings of Fact is affirmed at the assessed value set opposite each parcel number:

January 1, 1993 and January 1, 1994			
	Land	Buildings	Total
9472-002-000	\$1,016,000	\$7,929,000	\$8,945,000
9472-001-003	\$3,816,000	\$20,858,000	\$24,674,000
9472-004-002	\$179,000	\$1,076,000	\$1,255,000
2103-003-00	\$488,640	\$2,830,230	\$3,318,870
		Total	\$38,192,870

The Treasurer of Polk County and the Auditor of Polk County, Iowa, are ordered and directed to confirm their records regarding these assessed values and to correspondingly assess and tax the Property in conformity with this decision.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of this action are assessed against the Plaintiff.

Entered on this 4th day of October, 1995.



GEORGE BERGESON, JUDGE
FIFTH JUDICIAL DISTRICT

Original filed.

copies to:

William Koehn, Esq.
Deborah M. Tharnish, Esq.
DAVIS LAW FIRM
The Financial Center
666 Walnut Street, Suite 2500
Des Moines, IA 0309-3993
ATTORNEYS FOR PLAINTIFF

William R. Stiles
SMITH, SCHNEIDER, STILES, et. al.
1000 Equitable Building
Des Moines, IA 50309-3715
**ATTORNEY FOR DEFENDANT, CITY OF DES MOINES
BOARD OF REVIEW**

David W. Hibbard
Assistant Polk County Attorney
Room 340
Polk County Administration Bldg.
111 Court Avenue
Des Moines, IA 50309
**ATTORNEY FOR DEFENDANT, POLK COUNTY BOARD
OF REVIEW**