

**IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA**

**CVS EGL FRUITVILLE SARASOTA FL, LLC
and HOLIDAY CVS, LLC
Plaintiffs,**

v.

**Case No. 2007CA6083NC
Consolidated with:
Case No. 2008CA10567NC
Case No. 2009CA3867NC**

**JIM TODORA, as Property Appraiser for
Sarasota County, Florida; BARBARA FORD
COATES, as Tax Collector for Sarasota County, Florida;
and JAMES A. ZINGALE, as Executive Director of the
Florida Department of Revenue,
Defendants.**

**AMENDED FINAL JUDGMENT ON REMAND
Ad Valorem Tax Years 2006, 2007, 2008**

THIS CAUSE is before the court on remand in compliance with the mandate issued in *CVS EGL Fruitville Sarasota Fl, LLC v. Todora*, 124 So. 3d 289 (Fla. 2d DCA 2013) which reversed the Final Judgment in favor of the defendants.

The parties have provided proposed amended Final Judgments, memoranda, and trial transcripts, and a hearing was conducted on May 30, 2014, at which time the parties urged the court to make legal and factual findings favoring their clients in accordance with their view of the appellate court's opinion. The court has reviewed the submissions of the parties, reviewed its notes from the trial, and considered relevant portions of the trial transcript.

The appellate court determined the Final Judgment was infused with a misunderstanding of the correct legal standard to be used in cases of this type, and directed the trial court to re-evaluate the record evidence using only the standards set forth in §194.301. To do this, the trial court must determine whether the presumption of correctness in favor of the Property Appraiser was retained or lost. If retained, the taxpayer must prove the assessment was in excess of just value by a clear and convincing standard. If lost, plaintiffs may prove an excessive assessment by a preponderance of the evidence.

In determining whether the presumption survived or vanished, the court is required to analyze whether the Property Appraiser (1) failed to properly consider the §193.011 criteria, or (2) arbitrarily used appraisal practices that are not generally applied. *Id.*, 292-93.

I. Background

Plaintiffs are lessees of ten CVS stores located in Sarasota County, Florida. They are challenging the Property Appraiser's ad valorem tax assessments for years 2006, 2007, and 2008 on all ten parcels. Named as defendants are Jim Todora, who was the elected Property Appraiser at the time of the assessments,¹ Barbara Ford-Coates, the county tax collector, and Jim Zingale, executive director of the Florida Department of Revenue. Only the Property Appraiser actively participated in the trial on behalf of the other defendants, who are nominal parties.

After having their position rejected by the county Value Assessment Board (VAB), plaintiffs filed three separate complaints which were consolidated for trial. Each complaint contains eleven counts addressing the same ten properties and are virtually the same except for the year in which the assessment was made. The eleventh count alleges due process violations which were not addressed at trial.

II. Controlling Legal Principles

Challenges to the Property Appraiser's official assessments are evaluated by the court in light of statutory and other legal principles. Foremost among these is the Florida Constitution, Article VII, §4, which mandates that all property be assessed at "just value," which is synonymous with "fair market value," i.e., the amount a purchaser, willing but not obliged to buy, would pay a seller who is willing but not obliged to sell. *Walter v. Schuler*, 176 So. 2d 81, 85 (Fla. 1965).

What is to be valued is the unencumbered fee simple estate because it is on this interest that the assessment is based. *Department of Revenue v. Morganwoods Greentree, Inc.*, 341 So. 2d 756 (Fla. 1976). How to do this is a subject much in contention in this litigation.

In implementing the constitution, the legislature in §193.011, Florida Statutes (2006) set forth eight factors that Property Appraisers must consider in order to determine just value. They are:

- (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 costs 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, local or state land use regulation, or historic preservation ordinance, 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

¹ Bill Furst replaced Jim Todora as Property Appraiser in 2008. For simplicity, they will be referred to collectively as "Property Appraiser" or defendants. Challenges by plaintiffs are also pending in other cases for years 2009, 2010, and 2011.

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.

The burden of proof to be borne by the challenger for the years in dispute, 2006, 2007, and 2008, is outlined in §194.301, Florida Statutes (2006):

194.301. Presumption of correctness

In any administrative or judicial action in which a taxpayer challenges an ad valorem tax assessment of value, the property appraiser's assessment shall be presumed correct. This presumption of correctness is lost if the taxpayer shows by a preponderance of the evidence that either the property appraiser has failed to consider properly the criteria in s. 193.011 or if the property appraiser's assessment is arbitrarily based on appraisal practices which are different from the appraisal practices generally applied by the property appraiser to comparable property within the same class and within the same county. If the presumption of correctness is lost, the taxpayer shall have the burden of proving by a preponderance of the evidence that the appraiser's assessment is in excess of just value. If the presumption of correctness is retained, the taxpayer shall have the burden of proving by clear and convincing evidence that the appraiser's assessment is in excess of just value. In no case shall the taxpayer have the burden of proving that the property appraiser's assessment is not supported by any reasonable hypothesis of a legal assessment. If the property appraiser's assessment is determined to be erroneous, the Value Adjustment Board or the court can establish the assessment if there exists competent, substantial evidence in the record, which cumulatively meets the requirements of s. 193.011. If the record lacks competent, substantial evidence meeting the just value criteria of s. 193.011, the matter shall be remanded to the property appraiser with appropriate directions from the Value Adjustment Board or the court.

The court acknowledges that in no event does the taxpayer “have the burden of proving that the property appraiser’s assessment is not supported by any reasonable hypothesis of a legal assessment.” This is a consequence of §194.3015, Florida Statutes (2009), which changes prior case law to the contrary and which is retroactive in its application.

III. Reconsideration of the Presumption: Is It Lost or Retained?

In considering the application of the presumption, it is necessary to distinguish between the opinion reached by the Property Appraiser and his in-house expert upon whose judgment the challenged assessments were fixed for each taxable year, and the opinions later rendered at trial by the parties’ competing experts. This is because the critical time period for examining the Property Appraiser’s practices in regard to consideration of the eight statutory criteria is before or at the time the assessments are made, not after the fact, when valuations are contested. Whether plaintiffs have proven the assessments to be excessive will be discussed below.

As required by §194.301, the court starts its analysis by indulging the presumption that the Property Appraiser’s valuation is correct. In weighing the evidence to overcome the presumption there are two threshold questions:

1. Has the Property Appraiser failed to consider properly the criteria identified in §193.011? or
2. Has the appraiser arbitrarily based his assessment on appraisal practices which are different from the appraisal practices generally applied to comparable property within the same class in Sarasota County?

Section 193.011 says that “[i]n arriving at just valuation as required under s. 4, Art. VII of the State Constitution, the property appraiser shall take into consideration” the eight factors enumerated in the statute. In effect, those eight factors anticipate the use of the three traditional approaches to real estate appraising: sales comparison, income-capitalization, and cost, and include elements that often are integral to one or all three appraisal methodologies, such as highest and best use, location and size of the subject property.

In general, the sales comparison or market approach analyses recent sales of similar properties to arrive at the market value of the subject property. In the income-capitalization approach, the Property Appraiser is required to estimate the future income a prospective purchaser could expect to receive from the property, then the amount of projected future income is discounted to present value by applying a capitalization rate. The cost approach considers the cost that a prudent purchaser would pay to acquire an equally desirable substitute on the open market. It values the original, reproduction or replacement cost of the property, less an allowance for depreciation. *Havill v Scripps Howard Cable Co.*, 742 So. 2d 210, 213. However, there is no legal requirement that the appraiser use all three approaches, only that he consider them; *Mastroianni v. Barnett Banks, Inc.*, 664 So. 2d 284, 288 (Fla. 1st DCA 1995).

The question to be answered by the court, according to §194.301, is whether the eight criteria of §193.011 were properly considered, and upon that answer rests the survival of the presumption.

The Property Appraiser's in-house appraiser, Jim Ashburn, testified both as a fact witness and an expert. In discussing how the initial assessments were made, he said both sales comparison and income-capitalization approaches were "considered" by his office, but in reality only a nod to those two approaches was made. This is because each year's assessment of commercial property was made using Computer Assisted Mass Appraisal (CAMA) software, and CAMA in Sarasota County generates valuations based largely on the cost approach.

Given the number of commercial properties in the county and the abbreviated time the Property Appraiser has to certify the ad valorem tax roll and transmit it to the Department of Revenue -- six months after start of the taxable year (January 1 to June 30) -- CAMA is indispensable to the process. The independent appraisal experts at trial consistently opined that the income-capitalization approach would be the preferred method of arriving at just value for the subject properties, but the court agrees to this extent with the Property Appraiser - that the cost approach is one of the allowed valuation methodologies under §193.011 for arriving at just value.

However, in this case, the Property Appraiser "arrived at" the tax valuation by using primarily the cost approach (as contained within the Computer Assisted Mass Appraisal software system used by the Property Appraiser) and the highest and best use of the property.

At the time of preparing the tax assessments, the Property Appraiser ignored or, at best, gave only a passing nod toward consideration of the other two major appraisal valuation methods: the income-capitalization approach and the sales comparison approach. To "consider," in the context of the statute, means to think carefully about the matter before making a decision. The evidence here does not support the conclusion that such a thoughtful process was followed in regard to the eight criteria. The penalty for not considering each of the statutory factors is the loss of the presumption. *Havill v. Scripps Howard Cable Co.*, 742 So. 2d 210 (Fla. 1998).

Thus, the court finds the presumption provided by §194.301 is lost.

The presumption having vanished, the burden of proof is placed on the taxpayer to prove by a preponderance of the evidence that the appraiser's assessment is in excess of just value.²

IV. Have Plaintiffs Proven an Excessive Assessment by a Preponderance of the Evidence?

An overview of the primary witnesses' testimony on the valuation issues follows.

A. Stephen J. Matonis, MAI

Plaintiffs' primary witness on valuation was MAI appraiser Stephen J. Matonis. In arriving at fair market value, Mr. Matonis says he followed the Uniform Standards of Professional Appraisal Practice or USPAP. He employed all three approaches to valuation, using as the highest and best use for the subject properties the category of general commercial retail. For this overview, the court will summarize his analysis as it relates to a representative property, the CVS

² The alternate basis for invalidating the presumption was not proven. There is no convincing evidence that the Property Appraiser's assessments were arbitrarily based on appraisal practices which were different from the practices generally applied to comparable properties within the same class. Section 194.301, Florida Statutes (2006).

store located at 2811 Clark Road for the tax year 20006. Similar procedures were used for all 10 properties for the three years in contention.

To arrive at the highest and best use, one of the first steps in the appraisal process, Mr. Matonis says he used four standard sequential tests described in The Appraisal of Real Estate, 13th Edition. He evaluated legal uses of the property, the physically possible uses, the financially feasible uses, and the maximally productive uses. He says he looked for the use that results in the highest value using these tests.

If the property were vacant, the highest and best use would be to construct an 11,000 to 12,000 square foot retail property developed to market standards, with three to four bays of general commercial retail use, in other words a small commercial strip center; or as stated in his report:

It is our opinion that the highest and best use of the property "as vacant," or the "ideal improvement" of the property, is some type of retail or commercial use consistent with surrounding development in the market that is developed to market standards when demand dictates."

[Exhibit P-34, p.17]

If improved, while continued use as a drug store is financially feasible, his report says:

Based on our analysis, there does not appear to be any alternative use that could reasonably be expected to provide a higher present value than the current use, and the value of the existing improved property exceeds the value of the site, as if vacant. For these reasons, retail and commercial use is concluded to be maximally productive, and the highest and best use of the property as improved. *Id.*

He rejected drug stores as a highest and best use because that would require him to do a leased fee analysis, which would not lead him to a value for the unencumbered fee simple interest. In addition, if the property went vacant tomorrow, he says there are no other drug stores in the market available to buy it. Walgreens is already nearby and it would have no interest in buying another drug store so close in proximity. This is true of the other nine properties.

He found the sales comparable approach to be the most useless of the three. He identified only one Sarasota County property of sufficient similarity to use in his analysis. The others were out-of-county and because his opinion of value required a degree of subjective adjustments of relatively dissimilar commercial properties - like furniture stores and medical offices - he did not find it a reliable path to fair market value. He reached a value of **\$1,735,000** using comparison of sales.

Matonis explained the process he followed to obtain a value using the cost approach. First, he developed the land value. Second, he estimated replacement cost of new existing improvements under current market conditions. Third, he estimated the accrued depreciation which was deducted from replacement cost new so as to arrive at depreciated replacement cost of the

improvements. Fourth, he added land value to depreciated value of improvements, plus a percent of entrepreneurial profit.

To arrive at the land value, for the 2006 valuation of 2811 Clark Road, he located a number of commercial property sales in Sarasota County. All his land sales were before January 1 of that year and zoned commercial. They were comparable in size, adjusted for location, access, and exposure. He found a value range of \$19.46/sq. ft. to \$ 27.01/ sq. ft. He used \$25.00/sq. ft.

The total square footage of the property was 54,836 square feet. Multiplied by \$25.00/sq. ft. gave a rounded land value of **\$1,370,000**.

To arrive at replacement cost of new existing improvements he used Marshall's Valuation Service, a standard reference source. However, Marshall's numbers do not include indirect cost (legal, accounting, appraisal, engineering, concurrency, government fees), nor entrepreneurial profit so this had to be added. He said Marshall's supported the property being a "good Class C property."

To reach an accurate conclusion as to the structure's square footage, because of the overhang and area used for the store's drive-through pharmacy window, he used the gross building area of 13,688 square feet, not the 11,200 net square feet area inside the store. Marshall's suggested the figure of \$99.31/sq. foot for a building of this quality. Multiplying total square footage (13,688) times \$99.31, gave a base replacement cost new of \$1,359,355.

To this he added 12% indirect cost relating to the structure and site improvements, and a 15% entrepreneurial incentive or profit for a total pre-depreciation value of a new store of **\$1,879,650**.

The next step was to depreciate the structure and its site improvements. Mr. Matonis used the age-life method to calculate age depreciation. This involves dividing the effective age of the building by its economic life, and he found 16% age depreciation. Site improvements also were depreciated, but at 38% because they have a shorter life span.

He also included what is variously known as functional, external, or economic obsolescence. To this type of depreciation he attached a figure of 40%. This is based on his comparison of contract rents being paid by CVS and the rents paid by second generation commercial occupants of former drug store properties. Since he believed the highest and best use of the property to be for general commercial retail, to the exclusion of drug stores, he says it would sell for 40% less than it did prior to being sold. It would be necessary to convert the property to accommodate such inferior commercial uses, and this would be reflected in the lower rents that would be paid by the new tenants as well as the resulting sales price.

Applying all the depreciation percentages, the building (16%), site improvements (35%), and functional obsolescence (40%), his final market value using the cost approach was **\$1,750,000**.

But for the statutory mandate that he consider all three methodologies, he would not have wasted his time on the cost calculation. This is because he believed it would be obvious to the trained

professional eye that the income approach would be the most predictive of market value, and that the cost option would produce an inferior result.

To use the income-capitalization approach, first, the appraiser had to find what the property would rent for on the open market. Since he excluded drug stores as potential user of the space, he concluded that there were a limited number of tenants for his type of space. He noted that former Eckerd drug stores were occupied by such businesses as West Marine, Discount Auto, Modern Furniture, and Dollar General. The average rent for the eight properties he selected for this analysis ranged from \$8.50/sq.ft. - \$18/sq. ft., an average of \$13.91/sq. ft. For his purposes he used \$15.00/sq. ft. primarily because of the Clark Road property's superior location.

Multiplying the total leasable area (11,200 sq. ft.) by the rental rate (\$15.00/sq.ft.) provides income of \$168,000. To get to Net Operating Income (NOI) of \$148,176, the appraiser deducted from \$168,000, 10% for projected vacancy and collection expenses and 2% for management and administrative expenses. He then divided the NOI, \$148,176, by a capitalization rate of 8% arriving at a stabilized property value of \$1,852,200, to which he deducted a 6% standard leasing commission and a "lease up" cost for tenant improvements of \$5.00/sq. ft. His final value for the Clark Road store using the income approach was **\$1,660,000**, or 148.21/sq. ft.

B. Tom Blazejack, MAI

Tom Blazejack was one of the witnesses called to buttress the Property Appraiser's position that his assessments were in a fair range of just value. Like Mr. Matonis, he is an MAI with experience appraising properties for ad valorem tax purposes, including free standing drug stores. He says he was retained to appraise the unencumbered fee simple interest, and in doing so, he adhered to USPAP rules. He employed all three traditional methodologies for the ten subject properties. In the process he did this by completing written appraisals which were presented in summary format.

In determining highest and best use, Blazejack analyzed the properties both as currently improved and as vacant, using the same four criteria as Matonis: The use must be physically possible, legally permissible, financially feasible, and maximally productive. If vacant, his opinion was that the properties should be land banked until a user was identified for the property. As improved, drawing from a market category of high rent businesses he considered as comparable for the ten locations, such as banks, quick service restaurants, donut and coffee shops – and which also included drug stores - his opinion was that the highest and best use, would be to develop the sites as freestanding drugstores. In his view, unlike the alternative businesses included in this class - banks, restaurants and the like - little renovation would accompany the continuation of the subject sites in their current use, making drug store operations the superior choice among the other market options for the most economically productive use.

The appraiser used the CVS store at 2811 Clark Road as a representative example to demonstrate the methodology he used for all 10 stores. He conducted a comparison of sales, and like Mr. Matonis, Blazejack wound up giving little weight to that approach. It appears there was a lack of truly comparable improved property sales in the county. Nevertheless, from a list of 30 commercial properties, for sales comparison purposes he selected six ranging from July, 2004, to

June of 2007, and although a couple of these were drug stores sales, they were scattered throughout the county and few were in or near the neighborhood of the subject properties. The properties selected for comparison were far from ideal, but were the best available in the market. They ranged from November of 2003 to January of 2009. No time adjustments were made because the appraiser found a prolonged flat market for this segment of commercial properties.

In the final analysis adjustments for size, location, and physical characteristics proved problematic for these commercial properties, discouraging any solid conclusions of fair market value. His final estimate of value using sales comparison, for what little it was worth, was **\$2,900,000.**

Mr. Blazejack used the following procedure for the cost approach:

1. He estimated the land value as if vacant, using the sales comparison process.
2. He estimated the improvements' replacement cost new, including indirect cost.
3. He estimated the necessary developer's overhead and profit for the type of property being appraised.
4. He added the land value, replacement cost new, and profit to calculate the total cost new.
5. He estimated the accrued depreciation, if any, from physical, functional, and external causes.
6. Finally, he deducted the accrued depreciation from the total cost new of the property.

To estimate land value, if vacant, for all ten properties he chose 36 commercial vacant land sales in Sarasota County. The sales were within a broad range, and included transactions from January, 2003 to August, 2008. These were mapped so their proximity to the subject properties could be determined. From this master list, subsets of the sales closest to the subjects were considered for each individual store. This minimized the impact differing neighborhood demographics might have on the comparison process. Adjustments were made to account for differences in parcel size, shape, and other physical characteristics.

It is standard practice to adjust for changes that occurred in the market before and after the valuation date, which for 2006 was January 1. However, to do so requires an empirical finding that there were demonstrable changes in the subject market. After arraying all of the commercial land sales over time he found no remarkable variations so he could not adjust sales for market condition changes. Moreover, secondary sources he consulted, such as the Maddux Report, more or less supported this conclusion and his data showed small changes in the overall market rents, and negligible vacancy changes in Sarasota County's commercial retail market over the same time period.

For the 2006 appraisal of the representative property at 2811 Clark Road, he selected six sales from the total array of 36 for the cost approach. He used land sales both before and after the valuation date of January 1, 2006, and adjusted them for physical characteristics. His preferred land sales ranged from January, 2003, to September of 2007. As noted above, since he had no data supporting market changes, he made no adjustments for this reason.

To arrive at a square foot price, using the adjusted values of the subcategory of properties closest to the subject parcel, he established a narrower range of values and obtained an average by

discarding the highest and lowest value. He arrived at \$40.00/sq. ft. Multiplied by the total area of the site, 54,836 sq.ft., gives an estimated land value of \$2,190,000, rounded.

To get to replacement cost new of improvements, Mr. Blazejack had access to CVS's actual construction costs. In addition, he used Marshall Valuation Service for 2006. This gave a per square foot cost for the basic structure of \$84.88, or \$950,656, (\$84.88 x total building area, 11,200 sq. ft.). To this was added indirect costs of \$461,971, which included such things as real property taxes during construction, site improvements, marketing and leasing costs, 1% cost of obtaining permanent financing, 3% other soft costs, and an entrepreneurial profit of 10%. Before depreciation, the total cost of improvements was \$1,412,627.

Taking 5% for the base structure based on Marshall computerized computations, and 35% for the appraiser's opinion of site improvement depreciation, the depreciated cost was \$1,333,594. Mr. Blazejack found no functional/economic obsolescence. The final fair market value of the Clark Road property using the cost approach on January 1, 2006, was **\$3,520,000**.

To begin the income-capitalization analysis, he first established the rental rate. To do this he looked at market rents of freestanding retail buildings, many of which were outside Sarasota County. He selected properties using standard appraisal resources, such as CoStar and LoopNet, looking for parcels occupied by economically productive businesses. For 2006, as to 2811 Clark Road, he settled on market rents for fourteen free standing buildings, five of which were in Sarasota County. Four drug stores were included in this data set, along with four restaurants, a book store, coffee shop, donut shop, auto parts store and two banks.

The market rents varied with each property depending on the location, the characteristics of each property, and the land to building ratio. He found the rents for these properties were unaffected by the identity of the tenant. His conclusion was that market rent for 2811 Clark Road property was \$23.00/sq.ft.³ This rate varied only slightly over the three taxable years in question. It should be noted that the CVS stores are located on corners of prime signalized intersections on major roads.

To assist in determining rental rates, demographic reports on the subject properties were compiled to evaluate their maximum sales potential and most economically productive uses. These proved to be businesses at similar prime locations such as banks, quick service restaurants, coffee shops, as well as drug stores, which the data showed commanded some of the highest rents in the market. The demographic studies included factors like population, number of households, median household income, and healthcare spending within three and five minute drive time from the subject properties. These reports helped confirm that demand was high for upper end rents.

Using the rental rate of \$23.00/sq. ft., the appraiser deducted expenses, such as property taxes, insurance, property maintenance, and asset management reserves to arrive at Net Operating Income (NOI) of \$242,203. A capitalization rate of 7.5% was selected after looking at

³ Blazejack noted that the contract rent being paid at this site was \$20.73/sq.ft., but was not used because he was tasked to appraise the unencumbered fee simple interest which requires use of market rents. His opinions of fair market value were reached without regard to any leases or encumbrances on the property.

investment survey data, improved sales information, mortgage and equity return rates, and individual characteristics of each property. The NOI was divided by the cap rate rendering a retrospective rounded market value using the income approach of **\$3,230,000**, adjusted to **\$3,200,000** as a final figure.

Predictably, Mr. Blazejack's opinion of an extended flat market for comparable sales was challenged on cross-examination, as were the time periods he chose for selection of comparable properties. He conceded such a position could not be sustained as to the residential market, which was in flux from a number of factors both national and local. Nevertheless, it appears his opinions regarding post-date sales complied with conditions set forth in Florida Department of Revenue Bulletin PTO 08-02, and except for a couple of outliers, his study over five or six years of market data indicated sales in Sarasota County were stable during the time frames reflected on his list of improved property sales, at least for this discrete sector of free standing commercial retail properties. Evidence to the contrary was not persuasive.

Blazejack was also faulted for his failure to adhere to certain aspects of The Florida Real Property Appraisal Guidelines (2002) when conducting his appraisals. However in Section 1.3, Description of Guidelines, it states:

The term "guideline" is defined as an indication or outline of policy or conduct. Section 195.062(1), Florida Statutes, states that these real property appraisal guidelines shall not have the force or effect of administrative rules. Therefore, these guidelines are not rules as defined by the Florida Administrative Code, and it is not the intent of the Department of Revenue for these guidelines to be interpreted as rules. Other than the applicable provisions of Florida law, manual of instructions, and regulatory requirements, the use of these guidelines is left to the discretion of Property Appraisers.

Consequently, it was in Blazejack's discretion, as it was for the Property Appraiser, to disregard non-binding Guidelines. However, while cross-examination revealed several embarrassing typographical errors in Mr. Blazejack's written reports, none of these seriously undermined the reliability of the process by which he arrived at conclusions regarding fair market value.

In any event, after considering the totality of the evidence the court finds Tom Blazejack's conclusions are within a fair range of just value arrived at by the Property Appraiser largely through his use of the cost approach.

C. Review of the In-House Property Appraiser's Just Value Process

As to the quality of the Property Appraiser's valuations upon which the assessments were based, while it is correct that the government's in-house expert did not consider all eight statutory factors, resulting in a pulverulent presumption, this is not to say that the approach he employed, largely following the cost methodology, rendered a flawed just valuation.

To the contrary, using CAMA and other resources, he touched the necessary bases to obtain fair market value using this approach. Following standard appraisal practice, he determined the cost a prudent purchaser would pay to acquire an equally desirable substitute on the open market. Then he valued the original, reproduction or replacement cost of the property, less an allowance for depreciation. *Mazourek v. Wal-Mart Stores, Inc.*, 831 So. 2d 85 (Fla. 2002).

The assessed values, which the appraiser recorded on the property record cards and placed in evidence, represented the value of the land as if vacant, plus the value of the improvements. The value of the land as if vacant was based on sales of similar parcels of vacant land in Sarasota County. These were then adjusted to account for differences between the comparables and the subject.

To determine the value of the improvements, the Property Appraiser developed a base rate utilizing data from Marshall Valuation Service as well as local sales and construction cost data. The base rate was adjusted to reflect the specific characteristics of the subject property, and then depreciated. The depreciated cost was added to the land value to arrive at the final assessed value for each property. Notably, three CVS construction contracts admitted into evidence show that the Property Appraiser's estimates of replacement cost were similar to the actual costs incurred by CVS in constructing three drug stores in Sarasota County in 2008. The method used to assess the subject properties was the same method used by the Property Appraiser to assess other freestanding retail stores in Sarasota County.

While the proof was conflicting, overall the evidence shows that despite its shortcomings – at least in comparison to the income approach - the cost approach was properly employed by the Property Appraiser and that it was an acceptable method for appraising the subject properties, especially where basic income data was not readily available in a short time frame and there are questions about whether the income data includes non-realty components. In instances where the subject property was encumbered by a lease that does not necessarily reflect market value, and where determining market rent requires a high degree of speculation, use of the cost approach to reach just value has been approved by the Florida Supreme Court. *See Schultz v. TM Florida-Ohio Realty Ltd. Partnership*, 577 So. 2d 573, 575 (Fla. 1991); *Town of Bay Harbor Island v. Lancelot Associates*, 243 So. 2d 437, 438 (Fla. 3d DCA 1971).

D. A Problem with Plaintiffs' Case: Opinion Regarding Highest and Best Use.

The experts' assignment was to appraise the unencumbered fee simple interest to determine fair market value on the date of assessment. To do this they have to indulge the fiction that there is a hypothetical buyer and a hypothetical willing seller, neither under duress, who would effectuate the deal. As noted, the experts diverge on the pivotal issue of who should be included in this class of hypothetical buyers. The Property Appraiser says other drug stores should be included in the pool of potential hypothetical buyers along with other commercial tenants. The taxpayer says in the real world drug stores have to be excluded, and since there are no potential drug store purchasers in this category of hypothetical buyers, as a class they must be eliminated.

This difference of opinion informs their respective conclusions regarding the second criterion of §193.011. Mr. Matonis, on behalf of CVS, starts with the premise that if the subject properties

went vacant tomorrow, there would be no other drug stores in the market available to buy them. Since drug stores are excluded as potential hypothetical buyers, the most economically productive use of the property is for general commercial retail purposes. He testified:

Q. [By Ms. Johnson] What is your opinion of the highest and best use as improved of this property at 2811 Clark Road?

A. My opinion of the highest and best use is general retail commercial use. It could be sold – rented to one of several users: a rental furniture, rental equipment place, maybe even an Ace Hardware, auto parts store, furniture parts, all – all of those types of users would - - could use a stand alone, 11,200 square-foot building. [Matonis Trial Transcript, p. 344.]

Accordingly, in the income approach, the one he says is most predictive of just value, for example, Mr. Matonis uses as exemplars several second generation former Eckerd stores subsequently occupied by enterprises such as Discount Auto, Laminate Kingdom, and Teragram Realty. The result is a considerable reduction in property values as these and similar businesses generate less income than a fully operational drug store, \$15.00 per square feet rent on average versus the \$25.00 per square feet rent paid by CVS.

In formulating the highest and best use, the decision to exclude drug stores from the pool of potential hypothetical buyers permeates Matonis' analysis. By way of illustration, it leads to the conclusion that the highest and best use of the CVS property at 2811 Clark Road is as a small commercial strip center, occupied by such things as banks, hardware, furniture or auto parts stores.

Highest and best use is only one of the §193.011 elements to be considered, but it can have a significant and disproportionate impact on the appraisal process, influencing the proper consideration of other criteria and the resulting valuations. Determination of the "Use" factor is one of the first steps an appraiser makes on the road to just value. If he starts out in the wrong direction he does not arrive at the right destination. Such is the case here.

Section 193.011(2) requires appraisers attempting to arrive at just value to consider "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 . . . ;" and "'Immediate future' use means use which is 'expected immediately.'" *Sec. Mgmt. Corp. v. Markham*, 516 So. 2d 959, 963 (Fla. 4th DCA 1987).

Moreover, it has been said that "The 'Use' factor set forth in F.S. 193.011 is entitled to great weight in the assessment process of each parcel of land." *Lanier v. Walt Disney World Co.*, 316 So. 2d 59, 62 (Fla. 4th DCA 1975); accord, *Robbins v. Adlee Developers*, 556 So. 2d 503, 504 (Fla. 3d DCA 1990). And as noted by the Supreme Court, discussing the subject:

The character of a particular parcel - whether as improved or unimproved land . . . is determined as of January 1st and continues throughout the tax year regardless of any change in its character during that year. And all of the legislative directives in this field appear to have been designed to make sure that, in doubtful areas, the assessment will be made on the basis of the

actual use to which the property is designed to be put during the particular tax year. *Lanier v. Overstreet*, 175 So. 2d 521, 523-24 (Fla. 1965).

Certainly, the ten properties under consideration in this case can fairly be considered as having immediate and future actual uses as drug store operations in each of the three tax years challenged here. To ignore this fact in the formulation of highest and best use taints the totality of the appraisal process that follows and undermines the validity of the taxpayers' opinions. The government appraisers are permitted to assume an unidentified hypothetical occupant and, contrary to CVS's argument, their recognition of the market reality that the properties are most suitable for productive use as drug stores is not the same thing as saying that the assessment is based on CVS continuing as the tenant. The Property Appraiser's choice of drug stores as appropriate activities to be considered acceptable in connection with his highest and best use determination was not arbitrary and was consistent with professionally accepted appraisal practices.

Furthermore, regardless of CVS's choice of highest and best use, the court rejects the taxpayer's premise that an established market for drug stores is non-existent in regard to these ten locations. Competitors in the market, such as Wal-Mart Express, or even smaller local drug store owners interested in expanding, may fairly and properly be considered by appraisers for inclusion in the pool of hypothetical buyers. The fact that they have not made a move in the market does not mean they or other savvy drug store investors would not, given a vacancy in one or more of these high value and prime locations. It was not out of bounds for government appraisers to consider the possibility as one of a number of reasonable hypotheses.

Both of the primary valuation experts, Stephen Matonis and Tom Blazejack, considered the salient elements of §193.011 in reaching their opinions. One used a somewhat higher quality of data but in support of a flawed highest and best use. The other used an appropriate highest and best use, relying in some instances on data approaching the limits of professional appraisal standards but which nevertheless provided a foundation of competent substantial evidence sufficient to confirm the government's conclusion of just value.

In considering whether CVS met its burden, the court assessed the quality of Mr. Blazejack's opinions of fair market value offered to rebut the taxpayer's proof. While his appraisal work was far from perfect, using some comparables and time frames near the edge of what is professionally acceptable, he was able to touch the component bases of §193.011, hitting some harder than others and giving them varying degrees of weight. Consistent with the statute the factors were "considered" or thoughtfully addressed in the process of arriving at valuations. His results substantiate that the challenged assessments are not excessive.

V. Conclusion

After reviewing the testimony of all expert witnesses, including the opinions of Dr. Barry Diskin and Jim Ashburn, their related reports and exhibits, and after due consideration of the arguments in regard to the interesting leased fee versus unencumbered fee simple debate advanced by Dr. Lennhoff, the court is unable to accept CVS's determination of highest and best use. And because of the pivotal role §193.011(2) played in the formulation of plaintiffs' opinions, for this reason as well as others discussed herein, there is a lack of competent substantial evidence to

support CVS's retrospective fair market values, meaning here the proof is not sufficiently relevant and material that the court can accept it as adequate to support the just value conclusions CVS's experts have reached. *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

The court finds by the greater weight of the evidence that the taxpayer has not proved the Property Appraiser's assessments were substantially off the mark or in excess of just value. **The taxpayer's burden of proving excessive assessments by the preponderance of evidence has not been met.**

The Property Appraiser's valuations based primarily on an appropriately conducted and acceptable cost approach are affirmed. They are re-stated below:

<u>Address</u>	<u>Parcel ID</u>	<u>2006 Value</u>	<u>2007 Value</u>	<u>2008 Value</u>
4301 Bee Ridge	0061-16-0052	\$4,046,000	\$4,232,500	\$3,720,000
2811 Clark	0088-13-0002	\$3,172,600	\$3,335,000	\$3,005,800
5250 Clark	0097-01-0001	\$3,345,900	\$3,503,400	\$3,257,800
8546 S. Tamiami	0124-13-0026	\$3,111,700	\$3,297,500	\$2,869,500
1111 N. Tamiami	0165-14-0005	\$3,664,100	\$3,840,000	\$4,062,100
100 N. US 41 Bypass	0410-04-0002	\$3,816,600	\$3,770,000	\$3,832,700
4090 S. Tamiami	0460-04-0002	\$2,991,500	\$3,296,200	\$3,167,400
14998 S. Tamiami	1002-14-0001	\$2,249,500	\$2,827,200	\$2,708,200
3709 N. Tamiami	2004-15-0048	\$2,463,400	\$2,609,200	\$2,487,100
2773 Fruitville	2028-16-0010	\$2,697,100	\$2,841,600	\$2,675,000

NOW THEREFORE, it is ORDERED and ADJUDGED:

- A. The Property Appraiser's 2006, 2007 and 2008 assessments of the subject property are confirmed.
- B. Judgment is entered in favor of defendants, who shall go hence without day.
- C. The court reserves jurisdiction to award of costs in favor of the defendants.

DONE AND ORDERED THIS 1st DAY OF JULY, 2014, IN SARASOTA, SARASOTA COUNTY, FLORIDA.



LEE E. HAWORTH, CIRCUIT JUDGE



cc: James Spoonhour, Esq.
Sherri Johnson, Esq.
Milan Brkich, Esq.
Carrol Cherry, Esq.