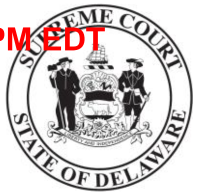
EFiled: Jun 16 2016 06:17PM EDT
Filing ID 59158744
Case Number 218,2016



IN THE SUPREME COURT OF THE STATE OF DELAWARE

COMMERCE ASSOCIATES, LP and and 1000 COMMERCE CENTER, LP,	)	
Appellants,	)	No. 218, 2016
v.	)	
NEW CASTLE COUNTY OFFICE OF ASSESSMENT and NEW CASTLE COUNTY BOARD OF ASSESSMENT REVIEW,	)	APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE C.A. No. N15A-07-009 DCS
Appellees.	)	

APPELLANTS' OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

This appeal presents a simple and straightforward question: did New Castle County (the "County") err when it refused to consider depreciation in determining the assessment for appellants' office condominiums and instead treated them as brand new, even though they are over thirty years old? The answer is equally simple and straightforward: yes, the County erred. Delaware case law teaches that all relevant factors which affect a property's value must be considered in setting a property's assessment. Here, though, the County refused to take age, wear and tear, obsolescence and actual physical condition (*i.e.*, depreciation) into account, even though depreciation is a relevant factor in determining fair market value for a property. Despite the fact that the office condominiums at issue in this case are more than thirty years old, the County treated the property as if it were brand new and refused to consider depreciation; and, the New Castle County Board of Assessment Review (the "Board") upheld the County's assessment.[1]

On appeal to the Superior Court, appellants focused solely on the depreciation issue and presented numerous reasons why the County's (and Board's) refusal to consider depreciation was wrong as a matter of law and fact; but, after noting appellants' argument about depreciation in the section of its

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[1] A transcript of the hearing before the Board appears in the Appendix beginning at A-9; a copy of the Board's written decision, the "Board Decision," appears in the Appendix at A-195.

opinion entitled "Parties' Contentions," the Court below never addressed the argument and instead simply concluded that the Board's decision was supported by substantial evidence. *See Commerce Associates, LP v. New Castle County Office of Assessment*, Del.Super., C.A.No. 15A-07-009 DCS (April 1, 2016) (copy attached as Ex. A) (the "Opinion"). Yet, because the County and Board wrongly refused to consider depreciation, the Board's Decision is contrary to law and not supported by substantial evidence, inasmuch as it ignores depreciation. After the Court below issued the Opinion, appellants brought this appeal.

On appeal, the appellants, Commerce Associates, LP and 1000 Commerce Center, LP (together, "Commerce"), renew their argument and ask this Court to address the argument ignored by the Court below – that it was legal error for the County to ignore the effects of age, wear and tear, obsolescence, and all of the other factors which make up depreciation on the fair market value of Commerce's property.

SUMMARY OF ARGUMENT

1. Delaware law requires that all relevant factors be considered when setting a property's tax assessment. Here, the County erred when it refused to consider the effect of depreciation in determining the value of the appellants' property for property tax purposes.

STATEMENT OF FACTS

The Commerce Building, located at 1201 Orange Street, is an 11-story office building where each floor is its own separate condominium unit. The first floor lobby, the elevators and other portions of the building constitute the "common elements" of the condominium. Commerce's property, the subject of this appeal, consists of the 7th, 8th, 9th and 10th floors (the "Property"). A-4, 45, 62.[2]

The Commerce Building was constructed in 1983. A-4. Coincidentally, 1983 is also the "base year" used by the County for property tax assessments. In New Castle County, all property is assessed at its estimated fair market value as of July 1, 1983, but based on its current condition.[3]

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[2] The original appeal to the Board was actually five separate appeals for five separate condominium units consolidated for purposes of the hearing before the Board since all five units are located in the Commerce Building. A-10. However, the owner of the 4th floor unit decided not to appeal to the Superior Court and so this case only concerns the four units owned by Commerce.

[3] The Delaware Constitution requires that all taxpayers be treated equally, or "uniformly," so as to ensure that each property owner is paying his or her fair share of taxes as compared to other taxpayers. Del. Const., Art. VIII, Sec. 1. By using the same valuation date for all properties, uniformity is achieved on the theory that property values all tend to rise and fall in the same relation to each other and therefore each property owner's relative share of the tax burden remains the same as the overall market rises and falls. Delaware courts have long recognized and approved New Castle County's use of the 1983 "base year" approach to achieve uniformity. *See, e.g., Tatten Partners v. New Castle County,* 642 A.2d 1251, 1254 n.1 (Del.Super. 1993), *aff'd,* 647 A.2d 382 (Del. 1994). In doing so, however, Delaware courts have stressed that all relevant factors which affect value must be considered. *Delaware Racing Ass'n v. McMahon*, 340 A.2d 837, 843 (Del. 1975).

To determine the 1983 fair market value, Delaware courts have recognized two primary approaches – one can either take the current fair market value of the property and, using an appropriate index to account for inflation and changes in real estate values over time, factor the current fair market value back to 1983 (this is sometimes referred to as "factoring back" or "trending back" the present value); *or* one can determine what the fair market value of the property *would have been* in 1983, based on *its current condition*, using data from 1983.[4] In theory, either approach should yield approximately the same result.

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[4] In *New Castle County v. New Castle County Bd. of Assessment,* 2008 WL 1904266, *3 (Del.Super.) (emphasis added), *aff'd*, 970 A.2d 257 (Del. 2009) (Table), the Superior Court explained how the base year method works:

> New Castle County has opted to use the base year method of assessment for purposes of uniformity. Under the method, the true value in money, that is, ***fair market value, is determined for each property, then that value is factored back to 1983 values***, the year of the last general reassessment. A fixed rate of taxation is then applied to the base year assessment to reach a uniform result.

Sussex County also uses a base year for assessment purposes, although it uses 1974 as its base year. In *Seaford Associates, L.P. v. Bd. of Assessment Review*, 539 A.2d 1045, 1046 (Del. 1988) (emphasis added), this Court explained:

> Sussex County real estate assessments are based on a 1974 base tax year. Thus the appraiser's task is to ***first determine a present (1986) valuation and then "factor back" that valuation to the base year***. . .

In both cases (and numerous others), the courts started with present fair market value, and then trended that fair market value back to the base year. *See, e.g., First*

Here, Commerce used both approaches to determine the 1983 fair market value. It used data from 1983 to estimate a 1983 value directly, and it determined today's current fair market value and then trended that value back to 1983. Critically, though, Commerce used data and estimates based on the Property's current status as a "class B" office building and used 1983 data relating to older buildings.

In determining fair market value, Commerce used the three main methods for doing so: the income, sales and cost methods.[5] Commerce used all three methods with respect to determining the 1983 value based on 1983 data, and used the income and sales methods, with current data, to determine a current fair market value, which it then trended back to 1983. Critically, in performing these analyses,

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Union Bank of Delaware v. New Castle County Dept. of Land Use, 1999 WL 1236569 (Del.Super.).

[5] Generally speaking, appraisers use three main methods to determine a property's fair market value: (1) the cost approach, (2) the income approach, and (3) the market approach. *See, e.g., Tatten Partners,* 642 A.2d at 1256-1260. With the cost approach, one looks at the cost of comparable unimproved land, adds the cost of constructing the improvements, and then deducts for depreciation, or "wear and tear." *Id.* at 1256. With the income approach, one determines the net income generated by a property and then divides that amount by a capitalization rate (or the required rate of return). *Id.* at 1258. Finally, with the market (or sales comparison) approach, one looks at the market value of comparable properties, usually by looking at recent sales prices, and makes adjustments for the differences between such properties and the property at issue. *Id.* at 1260.

Commerce took into account the current age and current condition of the Property – something which the County did not do.

Commerce Presents A Conservative Valuation That Considers Depreciation And Estimates The July 1, 1983 Value At $249,900 Per Floor

Commerce presented its valuation analysis through the testimony of Richard Stat, an experienced commercial real estate developer whom the Board recognized as an expert witness. A-18-19. Stat presented an income analysis, a sales comparison analysis and a cost analysis using 1983 data. A-23-27. He also presented an income and sales analysis based on current data, to determine a current fair market value, which he then trended back to 1983. A-27-29. During the course of Stat's testimony, the Board recognized several times that his analysis was very conservative, and that he erred on the side of over-stating value, rather than taking aggressive positions that would yield a lower value (and therefore a lower assessment). *See, e.g.,* A-40-41 ("I think from my perspective it's very obvious just in the beginning testimony that you have tried to be very conservative and tried to give a worst-case situation from the appellant's standpoint and not try to, you know, chip away at dollars and cents to make it look better for yourself"); A-96-97 ("And the second thing I look for is has it been done in such a way that makes it always favorable to the appellant, and I don't see that at all. I think they have taken an extremely conservative approach").

Central to Stat's analysis, and a crucial factor in determining the Property's value, is the Property's condition today. It is approximately 32 years old. A-28. Although once considered a premiere property, or "class A," time has not been as kind to the Commerce Building as it has to other buildings, such as the Hercules Building, 222 Delaware Avenue or 1201 Market Street, and the Commerce Building is now considered a "class B" building. A-64.

Ultimately, based on his analysis, Stat concluded that each of the individual condominium units comprising the Property has a July 1, 1983 value of $249,900. A-17. The current assessment, however, is $432,900. *Id.*

The County Refuses To Consider Depreciation In Valuing The Property

At the start of presenting its case, the County made a startling admission. Specifically, the County conceded that for *any* property built in 1983 or thereafter, it treated the property as if built in 1983 and made no adjustment for age (or depreciation) or obsolescence. *See* A-107-108. Specifically, the County stated:

> We do not factor back. We don't factor back anything, any of our appraisals. Everything is based on 1983 cost and 1983 sales. We do not factor back.

And, in response to a direct question about whether the County makes adjustments for depreciation, the County witness responded "no." A-108. Later, another County witness confirmed the County's position that current data and the current condition of the Property is, in the County's view, irrelevant, stating: "A building

built in 1983, we can't show depreciation now because it would not reflect the '83 value. It was a new building then." A-108. Finally, in respect to a question from the Board Chair about what condition the County considered the building to be in today, the County witness responded: "It's irrelevant for assessment purposes." A-122. Not surprisingly, then, the County was of the view that its assessment, based on the brand new condition of the Property in 1983 that ignored the Property's current condition, was accurate and should be upheld.

The Board Upholds The County Assessments

At the conclusion of the hearing, the Board briefly discussed the matter and ultimately voted to uphold the County's current assessments – notwithstanding the undisputed fact that the County's analysis completely ignored the Property's current condition, age, obsolescence and depreciation. *See* A-189-193. The Board's issued its Decision shortly thereafter. A-195-199. Commerce appealed to the Superior Court, but the Court simply upheld the Board and, in doing so, said nothing about whether it was proper or improper for the County and Board to ignore depreciation.

ARGUMENT

I. IT IS LEGAL ERROR TO IGNORE A PROPERTY'S AGE AND CURRENT PHYSICAL CONDITION (*I.E.*, DEPRECIATION) IN VALUING A PROPERTY FOR TAX ASSESSMENT PURPOSES

A. Question Presented: Is It Legal Error To Ignore Depreciation?

In the Court below, Commerce argued at length that it was legal error for the County to ignore depreciation. *See, e.g.,* A-221 ("[b]y ignoring depreciation, the Board acted contrary to law").

B. Standard Of Review: *De Novo* Review Applies To Legal Questions

This Court reviews administrative decisions directly. *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 380 (Del. 1999) *citing Stoltz Management Co., Inc. v. Consumer Affairs Bd.*, 616 A.2d 1205, 1208 (Del. 1992). A decision by the Board of Assessment Review will be reversed where the Board acted "contrary to law, fraudulently, arbitrarily or capriciously." 9 *Del.C.* §8312(c); *Board of Assessment Review v. Stewart*, 378 A.2d 113, 116 (Del. 1977).[6] Here, the Board erred as a matter of law, and questions of law are reviewed *de novo*. *See, e.g.,*

[6] A board's decision will also be reversed where (1) it is not supported by substantial evidence, *Delaware v. New Castle County Dept. of Land Use*, 2003 WL 220509 *5 (Del.Super.), *aff'd,* 842 A.2d 1201 (Del. 2004), or (2) it is not the result of "an orderly and logical deductive process." *Rodney Square Investors v. Board of Assessment Review*, 1983 WL 482333 *1 (Del.)(Order). Here, because the Board's Decision ignored depreciation, it is also not supported by substantial evidence and not the result of an orderly and logical deductive process. However, for purposes of this appeal, it is enough to show that the Board erred as a matter of law.

Pipher v. Parsell, 930 A.2d 890, 892 (Del. 2007) ("[o]n appeal, questions of law are reviewed *de novo*"); *Wyatte v. Unemployment Ins. Appeals Bd.*, 2016 WL 552882 *1 (Del. Super) ("Questions of law are reviewed *de novo* 'to determine whether the Board erred in formulating or applying legal concepts'").

C. Merits Of The Argument: The County Erred As A Matter Of Delaware Law In Refusing To Take Depreciation Into Account For Thirty-Year-Old Property

The question presented by this appeal is simple and straightforward:

> Must the County consider the current condition of the Property and take into account all factors about the Property that affect value, including depreciation, even though the County uses a "base year" system for setting assessments?

The answer to this question is equally straightforward and simple: "yes." Delaware courts have repeatedly stressed that the County and the Board both have a duty under Delaware law and the Delaware Constitution to ensure that taxes are assessed fairly and uniformly. *Del.Const.*, Art. VIII, Sec. 1. Property is to be assessed at its "true value in money," which means "fair market value" – "the price which would be agreed upon by a willing seller and a willing buyer, under ordinary circumstances, neither party being under any compulsion to buy or sell." 9 *Del.C.* §8306(a); *Seaford Associates v. Board of Assessment Review*, 539 A.2d 1045, 1045 (Del. 1988); *Fitzsimmons v. McCorkle*, 214 A.2d 334, 338 (Del. 1965). "**[A]ll elements entering into the value of property are relevant and must be considered by the assessors.**" *Delaware Racing Ass'n v. McMahon*, 340 A.2d

837, 843 (Del. 1975) (emphasis added). Indeed, at the Board hearing, the Board's attorney made this very point, when he explained to the Board:

> I'll just note that the courts have said the board should be considering all factors affecting value. That includes functional obsolescence and depreciation.

Tr. at 102.

Yet, despite this clear command, the County and the Board refused to consider depreciation here because, as it happens, the Commerce Building was constructed in 1983, which just so happens to be the "base year" used by the County for assessment purposes. Since the building was built in 1983, the County takes the view that, even though the building is now over 30 years old, and even though there are many newer, more modern buildings with less age and wear and tear, the County can ignore depreciation in this case. A-107-108, 122. This argument is wrong for many reasons.

1. Depreciation is a part of every value calculation and can't simply be ignored.

Generally speaking, there are three methods used to determine a property's fair market value: (1) the cost approach, (2) the income approach, and (3) the market approach. *See, e.g., Tatten Partners*, 642 A.2d at 1256-1260. Depreciation is a factor in each approach.

With the cost approach, one looks at the cost of comparable unimproved land, adds the cost of constructing improvements, and then deducts for

depreciation, or "wear and tear," as well as obsolescence (that is, improvements which have no value or are obsolete in today's market and therefore would not be constructed today). *Id.* at 1256. With the income approach, one determines the net income generated by a property and then divides that amount by a capitalization rate (or the required rate of return). *Id.* at 1258. Finally, with the market (or sales comparison) approach, one looks at the market value of comparable properties, usually by looking at recent sales prices, and makes adjustments for the differences between such properties and the property at issue. *Id.* at 1260.

Significant in all of the foregoing methods is the element of depreciation. In determining the fair market value of an existing property, one must consider its age and how run down (or depreciated) the property has become. A brand new office building, generally speaking, is going to be worth more than a 30-year-old building that the market has otherwise passed by for reasons such as inadequate location or newer competition. A brand new building is more likely to have modern amenities that buyers and tenants desire, as compared to an older building built in a different era. A brand new building is less likely (at least in the short term) to need major repairs or replacement of existing building systems. All things being equal, newer office buildings will be worth more than older office buildings of the same size.

Given the effect on value that depreciation can have, it is no accident that depreciation (and obsolescence) play a role in determining a property's value using

the cost approach to value. As *Tatten* and other cases recite, in determining the value of a property using the cost approach, one estimates the cost of constructing the improvements "brand new," and then deducts from that cost for depreciation and obsolescence. In the absence of adjusting for depreciation and obsolescence, the estimate would be too high.

Depreciation plays a similar role in the sales and income approaches to value. If the comparable properties used for the sales approach are all new, or relatively new, and the property subject to analysis is 30 years old, then the sales approach analysis is going to be in error unless adjustments are made for the newer condition of the comparables. Comparing new properties to a 30-year-old property, without adjustment, is the proverbial comparison of apples to oranges. Similarly, in the income approach, rental rates for older, less attractive buildings (sometimes referred to as "class B" space) will be less than rental rates for newer, more modern buildings (sometimes referred to as "class A" space). If one uses rental rates from "class A" buildings to estimate the value of a "class B" building, the analysis is going to overstate the value.

Thus, the County's refusal to consider 30 years of depreciation and obsolescence is demonstrable error and contrary to Delaware case law, which holds that all factors affecting value must be considered. Yet, the County refuses to consider depreciation here in its cost approach. A-107-108, 122. Similarly, in

its sales approach, because the County refuses to consider age or depreciation, it is using sales comparables that aren't comparable to Commerce's Property. *See* A-206.[7] Finally, with respect to the income approach, the County is using inappropriate rental and vacancy rates because it is using rates from new or newer buildings in 1983 and not 30-year-old buildings. A-136. Apples to oranges won't do. The County erred as a matter of law in ignoring depreciation and obsolescence, and this matter should be sent back to the Board for a new hearing.

2. Other Delaware cases recognize and incorporate depreciation occurring after the "base year."

One need look no further than two Delaware Supreme Court cases, as well as several Superior Court decisions, to understand that depreciation plays a critical role in the assessment process despite the use of a "base year" system.

In *Seaford Associates, L.P. v. Bd. of Assessment Review*, 539 A.2d 1045 (Del. 1988), one shopping center, the 20-year-old Nylon Center, "was beginning to experience the effects of competition from a new regional shopping center," the Village Center. *Id.* at 1046. The Nylon Center therefore sought a reduction in its

[7] The one-page exhibit introduced by the County at the hearing shows that the County considered 16 condominium units in its sales comparison approach, although 6 were from one bulk sale and 5 from another bulk sale. More significantly, though, only 5 of the 16 sales were for units that were older than 3 years, and those 5 units were all only 10 years old. No adjustment was made by the County to account for the age difference between any of these units and the 32-year-old age of the Property.

assessment – the increased competition having led to lower income and therefore a lower value. Sussex County sought to preclude use of the income approach for value, claiming that it only used the cost approach, and use of another method would have ramifications for the County. The Sussex County Board of Assessment Review sided with the County and held that uniformity would be violated if anything but the cost approach were used – but the Delaware Supreme Court rejected the Board's position, explaining:

> Accurate valuation of the property is essential to fairness in the assessment process. . . . Uniformity merely requires that **present market value be factored back to a base year**.

Id. at 1048, 1049 (emphasis added). Thus, the Nylon Center ultimately obtained a lower assessment based on 1986 conditions, 1986 data, and changes affecting the Property since the 1974 base year. Significantly, the Court explained that uniformity was achieved when the present market value was factored back to the base year. Using base year data that does not reflect present conditions, as the County has done in this case, would violate the Supreme Court's holding in *Seaford*.

Similarly, in *New Castle County v. New Castle County Bd. of Assessment Review*, 2008 WL 1904266 (Del.Super.), *aff'd*, 970 A.2d 257 (Del. 2009) (Table) (text available in Westlaw, 2009 WL 790360), the County applied only a one-time 5% depreciation rate to outdoor plant and equipment installed by Verizon and

subject to assessment. Verizon appealed to the Board, arguing that its outdoor plant and equipment continued to age and depreciate, and that a one-time 5% depreciation was not accurate. The County responded, in part, by claiming that it applied the one-time adjustment to all utility companies and a change for Verizon would violate uniformity. The Board sided with Verizon and ordered the assessment reduced from $190,179,300 to $110,803,300 – an almost $80 million reduction. On appeal, the Superior Court and this Court both affirmed the Board, with this Court explaining that:

> The Superior Court judge cited case law to support his conclusion that **when the [current] property value is discounted back to the 1983 value base year, uniformity results**. . . . the Board did not err as a matter of law by factoring the property value back to 1983 and . . . using a fairer, more accurate, depreciation rate.

Id. at *3 (emphasis added). Here, conversely, despite uncontroverted evidence that the Property has depreciated over time, the County refused to consider depreciation and the present condition of the property (claiming it "irrelevant") and the Board agreed. Such a result is contrary to this Court's *New Castle County* decision.

Recently, in *Ren Centre L.L.C. v. New Castle County Office of Finance,* 2016 WL 399328 (Del.Super.), involving the Renaissance Centre Building constructed in 2007, the Superior Court remanded the matter back to the Board because "the Board intended to assess the building at a value that accounted for depreciation" but the calculations used by the Board omitted depreciation. *Id.* *2.

It is inconsistent (and therefore arbitrary, capricious and contrary to law) for the Board in the *Ren Centre* case to apply depreciation to a building constructed only nine years ago, but to ignore depreciation for a building built over 30 years ago.

Moreover, in *Excelsior Associates, L.P. v. New Castle County Dept. of Finance,* 1995 WL 347380 (Del.Super.), the Superior Court specifically approved the valuation analysis presented by the office building owner that took depreciation into account for a building constructed in 1983. *See Id.* *1 ("Excelsior purchased the lot in 1982 and built the office building in 1983"). In the *Excelsior* case, Excelsior's appraisal used the cost approach to determine a 1994 value (the year of the tax appeal) that incorporated depreciation and then factored the value back to 1983. He also used 1983 cost data to determine a 1983 cost of construction and then applied depreciation to that figure – even though the building was built in 1983. The County made no attempt to rebut Excelsior's expert and the Superior Court ordered the assessment set in accordance with the valuation determined by Excelsior's expert – a value that took into account depreciation for a building constructed in 1983.

In sum, the County and the Board are not free to ignore depreciation or any other factor which affects value. All relevant factors that affect value, including age, obsolescence, wear and tear and depreciation, must be considered. The mere happenstance that a building was constructed during or shortly after the "base

year," does not excuse the County from having to consider depreciation and its effects on value.

3. By ignoring depreciation for some, but not all properties, the County violates uniformity, and creates assessments which do not fairly distribute the tax burden.

At its core, Delaware's property tax system is designed so that property owners pay their fair share of the overall tax burden based on the value of their property compared to the value of other properties. A property worth twice another property should pay twice as much in property taxes. This is why Delaware courts hold that all factors which affect fair market value are to be taken into consideration, and the Delaware Constitution requires uniformity in the treatment of similarly-situated taxpayers – so that the tax burden is properly distributed.

The County's method of ignoring depreciation for properties constructed in or after 1983, though, results in an inequitable distribution of the tax burden, as this case demonstrates. By treating a property built in 1983 the same as a property built in 1993 or 2003 or 2013, the County is artificially inflating the value of the property constructed in 1983 as compared to the value of a newer, more modern property built in 2013. Moreover, the County will consider depreciation for properties built before 1983, meaning that some properties get the benefit of depreciation, while others do not.

Thus, the County's purposeful decision to ignore depreciation for some, but not all, properties is contrary to (i) the instruction of Delaware courts to consider all relevant factors, (ii) other cases where depreciation has been considered for properties constructed after 1983, and (iii), perhaps most importantly, the central goal of the property tax assessment system – that is, the equitable distribution of the tax burden. The County's decision to ignore depreciation leads to an *in*equitable distribution of the tax burden by taxing some property owners at a greater value than their properties are worth when compared to the value of other properties. The County's decision to simply ignore depreciation cannot stand.

4. The Court below erroneously held that the Board acted within its discretion in upholding the County's erroneous method.

The Court below erred because it viewed this case simply as one of whether the Board's Decision is supported by substantial evidence or not. The Superior Court upheld the Board because it concluded that: "[i]t was within the Board's discretion to find the County's methods of valuation more persuasive than the Appellants' proffered methods." Opinion at 25. Ordinarily there would be nothing wrong with such a statement, but here the question is not one of weighing the evidence – it is a legal question as to whether the County can treat all properties constructed after 1983 as brand new, or whether, in using the base year system, one must nevertheless assess the property as it currently exists.

The County purposely excluded depreciation from its analysis, and even admitted so on the record. The Board's own attorney cautioned the Board that Delaware case law calls for all relevant factors to be considered. By refusing to consider a relevant factor as to value, the County (and Board) committed legal error.

Moreover, the Board isn't free to affirm the County's assessment when it knows the assessment was performed contrary to law; or, put another way, while the Board may have discretion to weigh evidence, it does not have discretion to accept the County's methods when those methods are demonstrably contrary to Delaware law. Indeed, in creating the Board, the General Assembly gave the Board specific instructions, stating in part that: "[i]f the Board should find that the assessment is greater than it should be, the Board ***shall order*** the Chief Financial Officer [of the County] to reduce the assessment." 9 *Del.C.* §1318(2) (emphasis added). Here, upon discovering that the County completely ignored depreciation – a relevant factor which affects value – the Board was and remains obligated to reduce the assessment to take depreciation into account so that the tax burden is more equitably apportioned.

CONCLUSION

When property is being assessed for tax purposes, it is assessed in its current condition. As the Board's attorney told the Board, "all factors affecting value," are to be taken into consideration. A-110. By refusing to consider the Property's current condition and treating the Property as if it were brand new in 1983, the County and the Board have erred.

The use of a base year for property tax purposes does not mean that all properties constructed in 1983 and thereafter are to be treated as new. The tax burden is to be shared between taxpayers based on the relative worth of their properties. Treating all properties built in and after 1983 as brand new fails to take into account the change in physical condition, obsolescence, wear and tear, and depreciation that some properties have experienced such that it affects value; or, put another way, the County's system of ignoring depreciation for newer properties violates uniformity. The base year method involves taking *current* fair market value back to 1983 – in that way, the relative value of properties to each other is maintained. *Tatten, supra; Seaford Properties, supra.* If one is going to use 1983 data, as the County prefers to do, then that data must take into account the *current* condition of the property. Failure to do so results in an unfair and uneven distribution of the tax burden – and is error pure and simple, because the County is not taking into account all factors which affect value.

This is not a case where the Board heard competing evidence of value and simply chose to credit the testimony of one side over that of the other. This is a case where the County's valuation method is fundamentally flawed and contrary to law in that it completely ignores an important factor in determining value. The Decision of the Board should be reversed and the matter remanded for a new hearing.

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June 16, 2016