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November 20, 2024

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RE: CVS V. DAVIDSON COUNTY ASSESSOR'S OFFICE, APD Case No. 53.02-225482J

Enclosed is a/an *ORDER* rendered in this case.

Administrative Procedures Division
Tennessee Department of State

Enclosure(s)

**BEFORE THE ADMINISTRATIVE JUDGE ON BEHALF OF
THE TENNESSEE BOARD OF EQUALIZATION**

IN THE MATTER OF:

CVS,
Petitioner,

and

WALGREENS,
Intervenor,

v.

**DAVIDSON COUNTY ASSESSOR'S
OFFICE,**
Respondent.

APD Case No. 53.02-225482J

**Nos./Parcel: 114549, 118819 / 14900037200
114550, 118749 / 14712005500
115324, 118746 / 05800021300
115325, 118742 / 11715000100
115326, 118745 / 07214003100
115327, 118818 / 09114021200
115328, 118743 / 14604019600
115329, 118820 / 09504000600
115330, 118821 / 05108003200**

Tax Years 2017, 2018, 2019, 2020

ORDER GRANTING MOTION

This matter came to be heard before Administrative Judge Claudia Padfield, assigned by the Tennessee Secretary of State, Administrative Procedures Division (APD), upon the RENEWED MOTION TO COMPEL DISCOVERY filed by Respondent, Davidson County Assessor's Office, on January 12, 2023. On February 20, 2024, the Chancery Court for the State of Tennessee, Twentieth Judicial District, Davidson County, issued a MEMORANDUM AND FINAL ORDER ON JUDICIAL REVIEW. Said ORDER directed that "the discovery order should be reversed and this matter remanded to the ALJ to determine whether the requested gross sales data is within the permissible scope of discovery under Rule 26.02 of the Tennessee Rules of Civil Procedure." The remand was as to the ORDER issued by Administrative Judge Jerome Cochran on March 15, 2023.

In preparation for the motion hearing, the following documents were filed on July 15, 2024:
1) INTERVENOR'S BRIEF ON REMAND filed by Intervenor, Walgreens; 2) THE DAVIDSON COUNTY ASSESSOR OF PROPERTY'S BRIEF UPON REMAND IN SUPPORT OF THE RENEWED MOTION TO COMPEL; and 3) TAXPAYERS' BRIEF ON REMAND IN OPPOSITION TO METRO ASSESSOR'S MOTION

TO COMPEL DISCOVERY filed by Petitioner, CVS. The motion hearing was held in Nashville, Tennessee, on July 22, 2024. Petitioner was represented by attorney Marshall Albritton. Intervenor was represented by attorney Caren Nichol. Respondent was represented by attorneys Lexie Ward and Joshua Thomas. The transcript with the attached exhibits was filed on August 22, 2024. All parties filed a post-hearing brief on September 9, 2024.

SUMMARY OF THE EVIDENCE

The following witnesses testified on Respondent's behalf: 1) David Walden, appraiser;¹ and 2) Richard Marchitelli, appraiser.² The following witnesses testified on Intervenor's behalf: 1) Ben Jones, appraiser,³ and 2) William Shell, commercial real estate broker. The following witnesses testified on Petitioner's behalf: 1) Brian Reynolds, appraiser; 2) Jay Catignani, property tax consultant; 3) Davis Gravely, property tax consultant; and 4) K.C. Conway, appraiser. Four exhibits were entered into evidence:

- 1) Relevance of Retail Sales in Valuation report, NPV Advisors, July 15, 2024
- 2) Significance of Retail Sales report, Cushman & Wakefield, June 17, 2024
- 3) Appraisal Report on Real Property, Tax Years 2010-2014, Cushman & Wakefield, January 17, 2017
- 4) Exhibit 35.1, page 704, The Appraisal of Real Estate, 14th Edition, Appraisal Institute

FINDINGS OF FACT

- 1) Appraisers use various methods and data to assess the value of a commercial property.
- 2) While some appraisers decline to consider gross sales data, that is not the case for all appraisers.

¹ Mr. Walden was recognized as an expert in appraising retail stores and the use of gross sales data.

² Mr. Marchitelli was recognized as an expert in appraising retail stores and the use of gross sales data.

³ Mr. Jones participated and testified by telephone pursuant to TENN. CODE ANN. § 4-5-312.

- 3) Sales brokers, including brokers for CVS and Walgreens, have reported sales volumes as a selling point in support of an asking price.
- 4) High sales volumes can suggest a strong market demand.
- 5) A location that has a higher sales volume can be seen as a safer and more lucrative investment.
- 6) Retail sales volumes are one of many factors that market participants can use when considering a potential investment or appraising a particular property.
- 7) As the gross sales data for a location is not always available, it is possible to perform a satisfactory and reliable appraisal without the information.
- 8) As a general principal, it is better to have more data, rather than less, when performing an appraisal. Gross sales data is one data point among many that could be used by an appraiser.
- 9) Gross sales data can be used to a) perform an occupancy cost analysis, b) determine whether the rent is above or below market rent, c) determine the strength of the location, d) observe general sales trends that would indicate highest and best use of the property, and e) evaluate investment opportunities of various locations.
- 10) Gross sales data serves a purpose of informing appraisers of the overall characteristics, strengths, threats posed, opportunities, and overall competitiveness and attractiveness of a particular location. This information could be especially important when comparing multiple CVS locations to one another.

APPLICABLE LAW AND ANALYSIS

Discovery in administrative cases is meant to be informal when practicable. When this is not achievable, “discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure.” TENN. COMP. R. & REGS. 1360-04-01.11(1). The sentiment for informal

discovery and applicability of the Tennessee Rules of Civil Procedure is echoed under the State Board of Equalization Rules. STATE BOARD RULE 0600-01-.11(4). No type of information is specifically excluded from being discoverable under either the Tennessee Uniform Administrative Procedures Act or the State Board Rules.

The scope and limit of discovery are outlined in TENN. R. CIV. P. 26.02. The first criterion is that discovery is permissible when it is “relevant to the subject matter involving in the pending action[.]” TENN. R. CIV. P. 26.02(1). Relevance has been construed to be much broader in the context of discovery than the question of what is admissible into evidence at a hearing. “[T]he subject matter of a case is not limited to the merits of the case because ‘a variety of fact-oriented issues may arise during litigation that are not related to the merits.’” *Thomas v. Oldfield*, 279 S.W.3d 259, 262 (Tenn. 2009) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

Discovery is permissible “if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* Not only must the information sought be relevant, it also “must have some logical connection to proving [Respondent’s] case and/or obtaining” the relief sought. *West v. Scholfield*, 460 S.W.3d 113, 125 (Tenn. 2015).

Concerns about proprietary information and maintaining its confidentiality were addressed by Chancellor Patricia Head Moskal in the MEMORANDUM AND FINAL ORDER ON JUDICIAL REVIEW issued on February 20, 2024. Chancellor Moskal ruled that the parties had already entered into a protective order under TENN. R. CIV. P. 26.03, that the information sought was protected by TENN. CODE ANN. § 37-5-303(d)(2), and that TENN. CODE ANN. § 10-7-503(a)(5) made the data exempt from disclosure to the public. Despite Chancellor Moskal’s ruling, Petitioner and Intervenor have continued to argue that risk associated with the disclosure of the proprietary data outweighs the need for the information. “[T]he confidential nature of information does not preclude its discovery

where the information is within the permissible scope of discovery in the context of pending proceedings.” MEMORANDUM AND FINAL ORDER, p. 12. As these arguments were already rejected by Chancellor Moskal, they will not be entertained here.

Tennessee does not require that any particular appraisal methodology be used in valuing property for ad valorem tax purposes. *See, Willamette Indus., Inc. v. Tenn. Assessment Appeals Comm’n*, 11 S.W.3d 142, 149 (Tenn. Ct. App. 1999), which held there is no authority mandating the use of a single appraisal methodology for any particular case type). Instead, Tennessee law provides that an assessor use “appropriate assessment manuals issued by the division of property assessments and approved by the state board of equalization.” TENN. CODE ANN. § 67-5-602(a). The statute provides a number of factors to be considered when determining the value of commercial property, including the current use and “all other factors and evidence of value generally recognized by appraisers as bearing on sound, intrinsic and immediate economic value at the time of assessment.” *Id.* at (b)(9) and (c)(1)(A).

Respondent has sought gross sales data from Petitioner’s various tenants who rent Petitioner’s real property, asserting that the information is relevant to assist in determining the properties’ ad valorem tax values. Recent administrative decisions have been divided on the issue of whether gross sales data is discoverable. In large part, the more recent cases ruling that discovery of gross sales data was prohibited relied upon an interpretation of STATE BOARD RULE 0600-01-.11 that has now been rejected.⁴ Those prior cases did not discuss TENN. R. CIV. P. Rule 26.02’s

⁴ *See, Walgreen Co. v. Shelby County Assessor’s Office*, SBOE Nos. 117345 et al, Tax Years 2017-2021; *Lowe’s Home Centers Inc. v. Madison County Assessor’s Office*, SBOE No. 97514, Tax Year 2014; *Lowe’s Home Centers Inc. v. Marion County Assessor’s Office*, SBOE Nos. 9675 et al, Tax Years 2014-2021.

application to questions of the relevance of the information sought through the discovery process or if the information was reasonably calculated to lead to admissible evidence.

Tennessee taxpayers, not assessors, have used gross sales data to justify a reduction in value from that asserted by the assessor. In *Rich's Real Estate Inc.*, Shelby County, SBOE No. 115643, Tax Year 2017, the taxpayer's expert appraiser used the decline in gross sales to justify a lower valuation of the property. This is an example of where an appraiser in Tennessee found the use of gross sales data useful in making the valuation analysis.

Petitioner and Intervenor have argued that the information sought is not relevant to appraising real property. Petitioner and Intervenor argue that a credible, reliable appraisal of the real property does not require the gross sales data. While not binding, it is instructive that other courts have rejected this argument. In one such case the Minnesota Tax Court determined that "gross sales information is relevant in evaluating retail locations. This, in turn, makes gross sale information relevant to determining market value." *Lowe's Home Centers, LLC v. Cnty. Of Anoka*, 2018 WL 1997709, at *5 (Minn. Tax Regular Div. Apr. 13, 2018). The Court granted the county's motion to compel discovery under the broad definition of their Rule 26.02, which mirrors the language of Tennessee's rule of civil procedure. As here, the Minnesota Court was not concerned with whether the information sought would ultimately be admissible at a hearing, only whether the information sought was discoverable under the relevant rules of civil procedures. Similarly in Ohio, whose Rule 26 compares closely to Tennessee's, the Board of Tax Appeals ruled that "documents indicating gross sales revenue are discoverable and relevant to the determination of value of the subject property." *Aldi, Inc. v. Cuyahoga Cnty. Board of Revision*, 2001 WL 1152949, at *2 (Ohio Bd. Tax App. Sept. 21, 2001). Other states having determined that gross sales data is

relevant in the discovery process weighs in favor of the assessor's argument that some appraisers find this information helpful in performing their analysis.

Gross sales data can be reliable evidence of superior locations for retailers. As noted by Mr. Marchitelli, an expert in appraising retail stores and the use of gross sales data, this information can reflect a location's quality and desirability. This allows an appraiser to make location adjustments from store to store. A reduction of sales can also indicate whether the physical attributes of the property are continuing to serve the property. The taxpayer has challenged the initial assessment of value as concluded by the assessor. As such, the taxpayer has put at issue what the proper appraisal figure should be but is now attempting to limit the information the assessor has determined would help establish that very figure, thereby restricting the assessor's ability to complete its task.

It should also be noted that Petitioner had previously represented to Respondent that gross sales were not a factor in determining any rental rates for the subject properties. However, upon receipt of the lease summaries, it was clear that gross sales data was a factor when determining a percentage rent provision for at least three of the stores located on the subject properties. Despite this, Petitioner continues to assert that the gross sales data is not relevant.

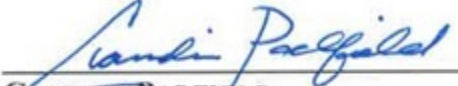
The requested gross sales data is within the scope of TENN. R. CIV. P. 26.02. Respondent specifically requested "a history of gross sales for the five years immediately preceding the tax year under appeal." When performing a sales comparison approach, it is a common appraisal practice to rely upon comparable sales from the three years prior to the relevant tax year at issue. As such, the request for the gross sales data for the previous five years is excessive and unduly

burdensome to the taxpayer. Accordingly, the RENEWED MOTION TO COMPEL DISCOVERY is hereby **GRANTED** as to the three years prior to the tax years in question.

This matter is hereby scheduled for a telephone pre-hearing conference on **December 17, 2024, at 8 a.m. Central Time**. At that time, all parties shall call the APD bridge line at 615-253-3521. The parties should be prepared to discuss the discovery schedule and to finalize the hearing date and method/location.

It is so **ORDERED**.

This ORDER entered and effective this the **20th day of November, 2024**.



CLAUDIA PADFIELD
ADMINISTRATIVE JUDGE
ADMINISTRATIVE PROCEDURES DIVISION
OFFICE OF THE SECRETARY OF STATE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this the **20th day of November, 2024**.