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COURT OF APPEALS  
DIVISION II

2015 MAY 15 PM 1:26

NO. 46956-1-II

STATE OF WASHINGTON

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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SAINT-GOBAIN CONTAINERS, INC.

Appellant,

v.

LLOYD HARA, King County Assessor,

Respondent.

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ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT  
(Hon. Carol Murphy)

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**APPELLANT'S REPLY BRIEF**

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## TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. STANDARD OF REVIEW: DE NOVO .....	1
III. ARGUMENT.....	2
A. The BTA excluded evidence without regard to its own rules on admissibility of evidence and without addressing Saint-Gobain’s purposes for presenting the evidence .....	3
1. Evidence of Mr. Zelk’s appraised values for properties whose sale prices he presented to the BTA is admissible.....	4
2. Evidence of the County’s appraisals of property that forms the other half of the subject property’s economic unit is admissible .....	7
3. Excluding this evidence was a legal error.....	11
4. Excluding this evidence substantially prejudiced Saint-Gobain .....	13
B. The BTA ignored or misinterpreted the legal requirement to adjust comparable sales for changes in market conditions.....	14
1. The Assessor prefers that this Court disregard authorities on generally accepted appraisal practice .....	14
2. The Assessor denies clear evidence that his appraiser’s rejection of time adjustments was predetermined .....	17
3. To the extent the BTA accepted later efforts to justify the predetermined rejection of adjustments, the BTA committed a legal error.....	18
C. The BTA ignored or misinterpreted case law, statutory criteria, and its own precedent on treatment of environmental issues .....	20

D.	Case law, statute, regulation, and the BTA’s prior holdings required lowering Saint-Gobain’s standard of proof to a preponderance of the evidence for both years .....	22
IV.	CONCLUSION.....	25

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Boeing Co. v. Gelman</i> , 102 Wn. App. 862, 866, 872, 10 P.3d 475 (2000).....	2
<i>Cornu-Labat v. Hospital Dist. No. 2</i> , 177 Wn.2d 221, 298 P.3d 741 (2013).....	11
<i>Department of Ecology v. Wahkiakum County</i> , 184 Wn. App. 372, n.3, 337 P.3d 364 (2014).....	19, 21
<i>Griffin v. Department of Social and Health Services</i> , 91 Wn.2d 616, 590 P.2d 816 (1979).....	15
<i>Inter Island Telephone Co. v. San Juan County</i> , 125 Wn.2d 332, 883 P.2d 1380 (1994).....	6
<i>King County Hospital District v. Department of Health</i> , 178 Wn.2d 363, 309 P.3d 416 (2013).....	12
<i>Pier 67, Inc. v. King County</i> , 89 Wn.2d 379, 573 P.2d 2 (1977).....	6
<i>St. Martin's College v. Department of Revenue</i> , 68 Wn. App. 12, 841 P.2d 803 (1992).....	2
<i>Weyerhaeuser Co. v. Easter</i> , 126 Wn.2d 370, n.3, n.5, 894 P.2d 1290 (1995).....	14, 21
<i>Xerox Corp. v. King County</i> , 94 Wn.2d 284, 617 P.2d 412 (1980).....	23, 24
<i>Yakima Valley Bank &amp; Trust Co. v. Yakima County</i> , 149 Wash. 552, 271 P. 820 (1928).....	6
<b>Statutes</b>	
RCW 34.05.452(1).....	3
RCW 84.40.030(3)(a) .....	14, 24
<b>Regulations</b>	
WAC 456-09-755(1).....	3
WAC 456-10-010(1).....	4
WAC 458-14-087(3).....	23
<b>Board of Tax Appeals Decisions</b>	
<i>Chen v. Hara</i> , BTA Docket No. 10-064 (2011) .....	5
<i>Green Mountain Farms, Inc. v. Avery</i> , BTA Docket No. 78483 (2012).....	5
<i>Hagstromer v. Avery</i> , BTA Docket No. 03-114 (2005).....	5
<i>Halls v. Avery</i> , BTA Docket Nos. 11-018 and 12-058 (2012).....	5

<i>Levy v. Hara</i> , BTA Docket No. 10-078 (2011) .....	5
<i>McNee v. Franklin</i> , BTA Docket No. 66067 (2008) .....	8
<i>Merrill v. Wade</i> , BTA Docket No. 25525 (1984) .....	5
<i>Richter v. Smith</i> , BTA Docket No. 69015 (2009).....	8

**Other Authorities**

APPRAISAL INSTITUTE, GUIDE NOTES TO THE STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE OF THE APPRAISAL INSTITUTE (2013).....	16, 20
B. BOYCE & W. KINNARD, JR., APPRAISING REAL PROPERTY (1984).....	14
THE APPRAISAL STANDARDS BOARD OF THE APPRAISAL FOUNDATION, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE (2012-13 ed.) .....	12, 16, 21
THE APPRAISAL STANDARDS BOARD OF THE APPRAISAL FOUNDATION, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE U-18 (2008- 2009 ed.) .....	16
THE APPRAISAL STANDARDS BOARD OF THE APPRAISAL FOUNDATION, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE U-19 (2014- 2015 ed.) .....	16

## **I. INTRODUCTION**

Though the Assessor's brief seeks to characterize this case narrowly as concerning only tax or appraisal questions, it in fact presents legal questions that can arise in a wide variety of situations. The broader nature of this case involves an agency's failure to follow governing case law, statutes, and regulations and even its own rules, as well as its failure to decide all the issues before it. Saint-Gobain's opening brief presented four main errors based on the BTA's failure to follow (1) its own rules (on admissibility of evidence); (2) a statutory requirement (to make adjustments to sales that occurred at the peak of the market); (3) other legal requirements (on appraisal treatment of environmental issues); and (4) requirements under case law, statute, regulation, and the BTA's own prior holdings (on the applicable standard of proof). The Assessor's brief expresses no disagreement with most of the points made in Saint-Gobain's brief. For those that the Assessor disputes, he misrepresents the facts and law, often with assertions unsupported by any authority.

## **II. STANDARD OF REVIEW: DE NOVO**

As explained in Saint-Gobain's brief, the Court owes the BTA's decision no deference for several reasons: the BTA based its decision on law that is unambiguous, took positions in conflict with the valuation criteria mandated by statute, made conclusions that conflict with prior BTA decisions, and provided no rationale for its conclusions. App. Br. at

6-8, 11-12, 27. *See also Boeing Co. v. Gelman*, 102 Wn. App. 862, 866, 872, 10 P.3d 475 (2000) (giving weight to the agency’s decision on questions of law “*only* where the law is ambiguous *and* the matter falls within the agency’s expertise”) (emphasis in original); *St. Martin’s College v. Department of Revenue*, 68 Wn. App. 12, 16-17, 841 P.2d 803 (1992). The Assessor does not deny any of this.

Despite clear authority mandating no deference in reviewing this agency decision, the Assessor attempts to reach the opposite conclusion by improperly conflating the APA review standard with evidentiary standards. Resp. Br. at 4-6. The issues here do not require the Court to review the evidence; these are only questions of law subject to *de novo* review. *See, e.g., St. Martin’s*, 68 Wn. App. at 16-17.

Nor does the “abuse of discretion” standard mentioned by the Assessor apply in reviewing the BTA’s exclusion of Saint-Gobain’s evidence. Resp. Br. at 30. This is because, in excluding evidence, the BTA neglected its own rules. App. Br. at 8-9. The Assessor does not deny that an agency’s failure to follow its own rules must result in reversal under RCW 34.05.570(3)(h).

### **III. ARGUMENT**

As discussed below, none of the Assessor’s arguments should dissuade the Court from granting Saint-Gobain’s request to reverse and remand this case to the BTA.

**A. The BTA excluded evidence without regard to its own rules on admissibility of evidence and without addressing Saint-Gobain's purposes for presenting the evidence.**

Saint-Gobain's brief explained that the BTA erred in excluding evidence without regard to the BTA's own rules on the admissibility of evidence. App. Br. at 8-9. The Assessor does not deny this. Indeed, the Assessor completely ignores the BTA's rule on admissibility. For example, the Assessor continues to argue for exclusion on the basis of hearsay. Resp. Br. at 36. The BTA's rule specifically allows hearsay evidence. RCW 34.05.452(1); WAC 456-09-755(1). Nor does the Assessor deny that the excluded evidence is admissible under the standard in the BTA's rule. The Assessor's brief avoids even acknowledging that the BTA has a rule on admissibility of evidence. The fact that the BTA failed to analyze admissibility in light of its own rule is, by itself, sufficient grounds for reversal. Nothing in the Assessor's brief responds to this error.

Saint-Gobain's brief also explained that the BTA erred in disregarding Saint-Gobain's purpose in presenting the evidence. App. Br. at 9-11. The Assessor also fails to respond to this fact. Instead, the Assessor mischaracterizes Saint-Gobain's purpose in presenting the evidence as a "way of making an equalization argument" without citing anything to support this mischaracterization. Resp. Br. at 33. The Assessor

cannot wish away Saint-Gobain's real and obvious purpose of impeachment.

As explained in Saint-Gobain's brief, the BTA excluded two types of impeachment evidence: (1) Mr. Zelk's appraised values for properties whose sale prices he presented to the BTA, and (2) the County's appraisals of property that forms the other half of the economic unit that includes the subject property. The Assessor cites six BTA decisions (two of which were informal proceedings) that he claims prohibit the first type of evidence and two informal decisions that he claims prohibit the second type. Resp. Br. at 31, 36. (Informal BTA proceedings are not subject to judicial review. WAC 456-10-010(1).) The cited BTA decisions do not address the issues in this case, however. The Assessor uses them as straw man arguments: they present neither the type of evidence involved in this case nor the purpose for which the evidence was presented.

**1. Evidence of Mr. Zelk's appraised values for properties whose sale prices he presented to the BTA is admissible.**

Mr. Zelk told the BTA that the land at one of his comparable sales, the Associated Grocers site, was still worth \$38 per square foot in 2010 and 2011. AR 998-99 (Ex. R2-7 to -8), 1025 (Ex. R3-8). The BTA should have questioned the credibility of his testimony because, in another appraisal, Mr. Zelk had said that same land was worth \$19 per square foot in 2010 and 2011. AR 822-98 (Ex. A6-02 to -78). Similar discrepancies

apply to all the sales prices Mr. Zelk presented as evidence. None of the prior BTA decisions cited by the Assessor address this situation.

In the first case the Assessor cites, *Halls v. Avery*, BTA Docket Nos. 11-018 and 12-058 (2012), homeowners presented an appraisal for the 2010 value of their home and, instead of presenting another appraisal for the 2011 value, requested a 2011 value “based upon the Assessor’s reduction of all property values by approximately 15 percent from the prior year.” The BTA accepted this evidence and reduced the values for both years. So this case supports admitting evidence of other properties’ values.

Two other decisions, *Chen v. Hara*, BTA Docket No. 10-064 (2011), and *Levy v. Hara*, BTA Docket No. 10-078 (2011), do not indicate any attempt by either party to present evidence of other assessed values. Each merely includes the exact same statement (that “assessed values of other properties are not relevant evidence”), apparently as boilerplate with no corresponding facts or analysis.

In *Green Mountain Farms, Inc. v. Avery*, BTA Docket No. 78483 (2012), the taxpayer based its case on the assessed values of sales that the taxpayer itself selected as comparable. In *Hagstromer v. Avery*, BTA Docket No. 03-114 (2005), the taxpayer argued that his “assessment should be ‘equalized’ with the assessment of a similar piece of property nearby.” In *Merrill v. Wade*, BTA Docket No. 25525 (1984), the taxpayer

argued for equalization based on comparing assessed values (not sale prices) from other properties to the assessed value of the subject property. This same scenario is contemplated in the BTA's standard appeal acknowledgment letter. Resp. Br. at 32. Again, the case at bar does not present these situations.

The evidence and purpose referred to in the Assessor's straw man argument contrast with the very different evidence and purposes raised by Saint-Gobain, as shown in the following table. The BTA and Assessor say the straw man scenario evidence is inadmissible.<sup>1</sup> That is irrelevant because this case does not present that scenario. The BTA and Assessor never addressed use of evidence for the comparison that Saint-Gobain clearly articulated as its purpose.

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<sup>1</sup> *But see Inter Island Telephone Co. v. San Juan County*, 125 Wn.2d 332, 883 P.2d 1380 (1994); *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977); *Yakima Valley Bank & Trust Co. v. Yakima County*, 149 Wash. 552, 271 P. 820 (1928). These cases all held property tax assessments of property not subject to the appeals relevant for determining the correct assessed values of the subject properties.

	<b>Evidence</b>	<b>Compared to</b>	<b>Purpose</b>
<b>Straw Man</b>	Assessed values of comparable properties	Assessed value of subject property	To present an equalization argument.
<b>Real Issue</b>	Mr. Zelk's appraised values for the same assessment years of properties Mr. Zelk selects as comparable	The sale prices Mr. Zelk uses (without time adjustments) for the same properties when performing the sales comparison approach of the subject property	To challenge the credibility of Mr. Zelk, who is treating the comparables differently when valuing the subject property.
	\$19-23/sf	\$25-\$38/sf	
<b>Real Issue</b>	Mr. Zelk's appraised values for the same assessment years of 39 properties Mr. Zelk selects to justify his lack of market adjustments	Sale prices Mr. Zelk reports for the same 39 properties	To challenge the credibility of Mr. Zelk, who is treating the properties differently when appraising the 39 properties for property tax purposes versus trying to justify a lack of market adjustments for the subject property.
	\$11-\$45/sf	\$15-\$119/sf	

**2. Evidence of the County's appraisals of property that forms the other half of the subject property's economic unit is admissible.**

For the second type of evidence, the Assessor cites two informal BTA decisions for his claim that the BTA properly excluded evidence of County appraisals of property that forms the other half of the subject property's economic unit. Neither decision supports his argument. The

decisions both involve homeowners who submitted an appraisal performed by and for a nonparty to the case of property unrelated to the subject property. *Richter v. Smith*, BTA Docket No. 69015 (2009); *McNee v. Franklin*, BTA Docket No. 66067 (2008). The issue here is entirely different: the appraisals here were performed for a party to the case and of adjoining property closely related to the subject property as part of the same economic unit and assessed at the same land value as the subject property. Again, the Assessor never addresses the issues presented by the excluded evidence here.

The evidence and purpose referred to in this straw man argument again contrasts with the very different evidence and purpose that is at issue, as shown in another table below. Again, the BTA and Assessor say the straw man scenario evidence would be inadmissible. Saint-Gobain never presented that type of evidence or comparison. The BTA and Assessor never addressed the type of evidence and comparison Saint-Gobain clearly articulated as its purpose.

	<b>Evidence</b>	<b>Compared to</b>	<b>Purpose</b>
<b>Straw Man</b>	Non-party appraisal of an unrelated property	Assessed value of subject property	To argue for a value without engaging a proper appraisal of the subject property.
<b>Real Issue</b>	County's appraisals of property that forms the other half of the economic unit that includes the subject property performed for purposes of leasing or checking the accuracy of the valuation of improvements	County's appraisal of both parts of the subject property's economic unit for property tax purposes	To challenge the credibility of the County's position, which inexplicably includes different market value conclusions in different appraisals for the same economic unit's land.
	\$19-\$22/sf	\$31/sf	

Given the Assessor's claimed opposition to the evidence in his straw man argument, it is ironic that he himself presented evidence of a non-party appraisal of an unrelated property at the hearing. AR 190 (Testimony of J. Arnold). This arose in the context of one of the Assessor's four comparable sales. The Assessor used a "sales price" of \$7 million for the Museum of Flight's purchase of a parking lot for \$4.7 million. *Id.* The Assessor sought to justify treating the sale as a market transaction and using the \$7-million "sales price" based on an appraisal performed for the seller for the purpose of claiming a \$2.3 million charitable donation. *Id.* Obviously the seller had an interest in maximizing the charitable deduction by selecting the highest possible value, an issue

that Saint-Gobain raised at the hearing. AR 203. And yet, the Assessor, in valuing the subject land, relied on a “sales price” for the comparable that included the full charitable deduction amount based on a non-party appraisal. AR 204 (Testimony of J. Arnold). No evidence showed that the seller ever claimed the deduction or that the Internal Revenue Service accepted it. AR 287 (Saint-Gobain’s Proposed Findings and Conclusions). The difference between the “sales price” used by the Assessor and the price the Museum of Flight paid for the land is \$8.52 per square foot— even greater than the \$8.00-per-square-foot difference between the Assessor’s and Saint-Gobain’s values of the subject land. *Id.* In the end, the Assessor’s appraisal of the subject land relied on (1) an appraisal potentially tainted by an interest in a charitable tax deduction (2) performed for a non-party to the appeal (3) of a property wholly unrelated to the subject land. In contrast, Saint-Gobain’s excluded evidence includes (1) two appraisals not tainted in any way by a client’s interests (2) performed for King County (3) of property adjoining and closely related to the subject land as completing the same economic unit. In light of this, the Assessor’s arguments strain credulity.

The Assessor presents another red herring regarding the claimed inadmissibility of the County’s non-tax appraisal: a preliminary statement in one of the appraisal reports purporting to restrict disclosure of the report. Resp. Br. at 34. That statement has no bearing here. The County

itself disclosed the appraisal to the taxpayer, so the County is arguing for only selective enforcement of the restriction—that is, the restriction applies only when the disclosure is contrary to the County’s interests. Either way, the restriction is invalid because the appraiser prepared the report for the County. It is a public record and subject to disclosure as required by the Public Records Act. This is not like a report prepared for a private party, which is the scenario presented in the informal BTA case cited as the Assessor’s sole authority for excluding a report based on a restriction on disclosure. *Id.* A self-serving disclosure restriction cannot protect public records from disclosure. *Cornu-Labat v. Hospital Dist. No. 2*, 177 Wn.2d 221, 240, 298 P.3d 741 (2013). Nor does such a restriction give its author the right to decide what is admissible or relevant in litigation. The only relevant standard for determining the admissibility of the reports is the BTA’s rule, which the BTA did not follow and the Assessor ignores in his brief.

**3. Excluding this evidence was a legal error.**

The Assessor likewise fails to address Saint-Gobain’s point that the BTA’s error was a legal error. App. Br. at 9. Instead, he recites the standard of review for evidentiary decisions. Resp. Br. at 30. That standard only applies if the agency followed its own rules in evaluating the admissibility of the evidence. The case the Assessor cites (Resp. Br. at 30) involved an agency’s admission of additional evidence that it would

normally have excluded pursuant to its “informal policy.” *King County Hospital District v. Department of Health*, 178 Wn.2d 363, 373, 309 P.3d 416 (2013). All that case stands for is that informal policies do not necessarily limit the evidence an agency can consider. The APA most definitely requires the BTA to follow the APA evidentiary standard and the BTA’s own formal rule on evidence. Moreover, the two County appraisals at issue here already formed part of the record because the BOE had admitted and considered them. App. Br. at 11. The Assessor entirely sidesteps these legal issues.

Had the tables been turned in this case, similar impeachment evidence with respect to a taxpayer’s appraiser would be considered highly relevant. Throughout his brief, the Assessor implies that his appraiser, Mr. Zelk, should enjoy special treatment because his valuation is supposedly based on “mass appraisal.” Resp. Br. at 9-10, 12, 15, 32. That is not true. A taxing authority’s appraisal of an individual property conducted as part of an appeal is appraised as an individual property, *not* with a mass appraisal model. THE APPRAISAL STANDARDS BOARD OF THE APPRAISAL FOUNDATION, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE (“USPAP”) A-111 (Advisory Op. 32) (2012-13 ed.), *available at* <http://uspap.org/flip-book/>. The same standards apply to both parties’ appraisers.

**4. Excluding this evidence substantially prejudiced Saint-Gobain.**

The Assessor goes on to claim that excluding this evidence did not substantially prejudice Saint-Gobain because the BTA heard the evidence and mentioned the two County appraisals of the property that completes the subject property's economic unit. Resp. Br. at 33 n.21, 36. This is not a correct view of the harm to Saint-Gobain in excluding the evidence. First, the Assessor's argument overlooks the first type of excluded evidence discussed above: the BTA's decision says nothing of Mr. Zelk's many conflicting appraisals of properties whose sale prices he presented to the BTA.

Also, the BTA's mere mention of the County's two appraisals of the other half of the subject property's economic unit fails to demonstrate any weighing of the evidence. App. Br. at 11-12, 27. The BTA has a duty to weigh the evidence and articulate its reasons for giving the appraisals no weight. *Id.* The Assessor does not deny that the BTA has this duty and did not fulfill it. This failure constitutes another legal error. *Id.* at 12. All the excluded evidence undermines Mr. Zelk's and the Assessor's credibility in appraising the subject land. The crux of this case is whether their appraisal is reliable, so excluding this evidence greatly prejudices Saint-Gobain.

**B. The BTA ignored or misinterpreted the legal requirement to adjust comparable sales for changes in market conditions.**

Saint-Gobain's brief explains the requirement under Washington law and generally accepted appraisal practice to adjust comparable sales for changes in market conditions. App. Br. at 12-20. The Assessor's brief does not deny that RCW 84.40.030(3)(a) requires the Assessor to make adjustments to the sale price of each comparable property to reflect the state of the market at the time of the sale compared to the valuation date of the appraisal. App. Br. at 12-13. These same requirements accord with generally accepted appraisal practice under USPAP. *Id.* at 13-14. The Assessor disagrees that his appraisers must comply with these requirements.

**1. The Assessor prefers that this Court disregard authorities on generally accepted appraisal practice.**

The Assessor calls Saint-Gobain's citations of appraisal authorities "extra-record references." Resp. Br. at 22 n.13. Professional literature on generally accepted appraisal practice serves as secondary authority and need not be presented as evidence. In at least one case, the Washington Supreme Court located an appraisal text not cited in briefs or in the record and relied on that text as an authority on generally accepted appraisal practice. *Weyerhaeuser Co. v. Easter*, 126 Wn.2d 370, 377 n.3, 385-86, 387 n.5, 894 P.2d 1290 (1995) (quoting B. BOYCE & W. KINNARD, JR., APPRAISING REAL PROPERTY (1984)). The superior court in this case did

not object to citing appraisal texts, only to attaching a document (the Appraisal Institute Guide Note discussed in the Assessor’s brief, Resp. Br. at 22-23) to the briefing. Nothing required Saint-Gobain to have presented any specific appraisal text as evidence or to have cited it to the Board. The case cited by the Assessor for this argument (Resp. Br. at 22) is inapposite: it merely comments on the absence of certain evidence in that very different case (such as evidence concerning an individual’s medical condition); it is silent on the subject of citing secondary authorities. *Griffin v. Department of Social and Health Services*, 91 Wn.2d 616, 631, 590 P.2d 816 (1979). The Assessor claims that citing the Guide Note is the equivalent of raising a new argument, but he offers no support for this claim. Saint-Gobain argued the issue reflected in the Guide Note before the BTA. *See, e.g.*, AR 293 (Saint-Gobain’s Proposed Findings and Conclusions), 407-08 (Saint-Gobain’s Trial Brief) (explaining that the Assessor’s rejection of time adjustments to his pre-recession sales from 2006 and 2007 conflicts with the “radical changes in the economy and the real estate market after that time”).

Next, The Assessor objects to citing appraisal guidance on USPAP unless it is strictly “part of USPAP.” Resp. Br. at 22 n.13. Though not everything included in the USPAP publication is strictly part of USPAP, the Appraisal Standards Board (“ASB”), which issues USPAP, explains that the types of guidance cited in Saint-Gobain’s brief “illustrate the

applicability of [USPAP] Standards in specific situations and offer advice from the ASB for the resolution of specific appraisal issues and problems.” THE APPRAISAL STANDARDS BOARD, *supra*, at U-i. The Assessor also objects to applying guidance adopted in 2011. Resp. Br. at 23. The Appraisal Institute’s Guide Note on market adjustments to comparables in declining markets existed well before the Assessor submitted his post-assessment justification to the BTA in 2013. AR 1018 (Ex. R3-1). Moreover, the underlying USPAP Standard 1-4, on which this Guide Note expressly provides guidance, existed well before these assessment dates. APPRAISAL INSTITUTE, GUIDE NOTES TO THE STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE OF THE APPRAISAL INSTITUTE 36 (2013). *Compare* THE APPRAISAL STANDARDS BOARD OF THE APPRAISAL FOUNDATION, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE U-18 (2008-2009 ed.) *with* THE APPRAISAL STANDARDS BOARD OF THE APPRAISAL FOUNDATION, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE U-19 (2014-2015 ed.) (stating exactly the same USPAP Standard 1-4).

Importantly, the Assessor nowhere argues that the appraisal authorities cited by Saint-Gobain are wrong in their explanation of generally accepted appraisal practice and application of the legally binding USPAP Standards to specific scenarios. County appraisers must conform to generally accepted appraisal practice. The Assessor presumably prefers

that the Court not review these authorities because they demonstrate that Mr. Zelk violated this legal duty and that the BTA thus erred in adopting his value.

**2. The Assessor denies clear evidence that his appraiser's rejection of time adjustments was predetermined.**

The Assessor denies that his appraisal relied on a predetermined, unsupported rejection of adjustments for changes in market conditions. Resp. Br. at 22 n.12. The Assessor is highly selective about the evidence in making this claim. He completely ignores (1) the statement in Mr. Zelk's appraisal report that "No market trends (market condition adjustments, time adjustments) were applied to sale prices" in adherence to the Assessor's guidelines (AR 365 (Ex. A13-9)); (2) Mr. Zelk's certification that his report's statements "are true and correct" (AR 362 (Ex. A13-6)); (3) his testimony acknowledging this statement despite initially denying it and later attempting to justify it as though the reality were otherwise (AR 245 (Testimony of Mr. Zelk)); and (4) the clear admission by another county appraiser in his testimony earlier in the same hearing that the Assessor issued the same blanket instruction for the 2009 assessment (AR 89-90 (Testimony of Mr. Arnold)). The Assessor points instead to statements in which Mr. Zelk tried to obfuscate these facts. But the Assessor does not refute any of these four facts. To the extent Mr. Zelk made claims to the contrary, he did so without reconciling the

discrepancies between such claims and these four facts. Most importantly for this Court's purposes, the BTA failed to address this issue in its decision though Saint-Gobain clearly raised it. *See, e.g.*, AR 284, 293 (Saint-Gobain's Proposed Findings and Conclusions).

At least two consequences flow from the use of predetermined criteria in an appraisal: (1) an ethical violation, and (2) an absence of the exercise of the requisite appraisal judgment on a key issue in the appraisal. The Assessor's brief addresses neither of these issues. It ignores the fact that accepting a client's predetermined conclusion is an ethical violation under USPAP. The Assessor also ignores Saint-Gobain's point that the BTA's failure to address this issue is an error warranting reversal under the APA. App. Br. at 19-20. The Assessor wrongly claims that this case involves only "differences of appraisal judgment." Resp. Br. at 7. Certainly an appraiser is not exercising appraisal judgment when he accepts his client's predetermined conclusion that market conditions have not changed between the time of the market's peak and the Great Recession.

**3. To the extent the BTA accepted later efforts to justify the predetermined rejection of adjustments, the BTA committed a legal error.**

In light of the Assessor's efforts to justify the absence of adjustments for changed market conditions, Saint-Gobain's brief explained that Washington law requires the Assessor to reveal his

valuation process to the taxpayer before any appeal hearings. App. Br. at 17. Here, however, the Assessor concealed his valuation process, withholding evidence that his appraiser testified was the sole justification for the absence of adjustments. *Id.* And yet, the Assessor’s brief embraces and even emphasizes the concealed nature of the appraisal process in his brief, referring vaguely to the Assessor’s “computer model” and “statistical calibration of detailed, Area-wide sales data.” Resp. Br. at 9.

If we pay attention to the man behind the curtain, we find that the Assessor’s data consists merely of 39 random sales from a very broad area. The Assessor calls them a “snapshot view of overall, unfiltered sales data” by which he supposedly proves no change in market conditions. *Id.* at 19. The Assessor never demonstrates any special “model” or “careful and considered review of relevant sales data”—merely the list of 39 sales that he submitted to the BTA after the hearing. *Id.* at 21. None of the sales is of the same property; they are of widely dissimilar properties with a wide range of prices. AR 305-11 (Ex. A14).

No appraisal authority approves of this random “snapshot” method that the Assessor invented in his brief to justify the lack of adjustments. App. Br. at 19. *See also Department of Ecology v. Wahkiakum County*, 184 Wn. App. 372, 377 n.3, 337 P.3d 364 (2014) (observing that, where counsel cite no authorities in support of a proposition, one should assume this is because they were unable to find any). Disclosure of authority—or

lack of authority—is especially important in a technical area like valuation. If the taxpayer’s valuation expert had invented methods with no support in peer-reviewed publications, particularly in an area like this where ample peer-reviewed authority exists, it is doubtful he would have been allowed to testify at all. Here, the Assessor’s random “snapshot” method fails to justify his predetermined refusal to adjust for market conditions.

This attempted justification is also at odds with the Assessor’s concession that the subject property’s market was inactive as a “reaction to adverse economic conditions within the Duwamish MIC during the relevant time interval.” Resp. Br. at 16. The Assessor agrees that sales virtually stopped occurring for this market and location during the Great Recession. *Id.* Given uncontroverted evidence of a dearth of sales, the BTA erred in ignoring this hallmark of market decline: “A declining market will likely exhibit very little sales activity.” APPRAISAL INSTITUTE, *supra*, at 41 (quoted at App. Br. at 13). Accepting no market adjustments, as though the market were stable, is a serious error in standard appraisal practice and under Washington law. Nothing in the Assessor’s response should persuade this Court otherwise.

**C. The BTA ignored or misinterpreted case law, statutory criteria, and its own precedent on treatment of environmental issues.**

The subject land and the property most comparable to it both have

environmental contamination, but the BTA distinguished the two on the basis of environmental stigma for one and *no* environmental stigma for the other. Consideration of environmental issues requires “a reasonably certain estimate of the costs of cleanup, including a formal plan and timetable.” *Weyerhaeuser*, 126 Wn.2d at 384-85; App. Br. at 21. This requirement accords with the Appraisal Standards Board’s observation that analysis of environmental stigma must be based on market data. THE APPRAISAL STANDARDS BOARD, *supra*, at A-20; App. Br. at 21. The Assessor cites no authority to the contrary nor any evidence of the requisite cleanup estimate, formal plan, timetable, or market data on stigma. The BTA ignored the legal requirement for such evidence.

The Assessor argues that this requirement applies only to a reduction in the assessed value of contaminated property, not to consideration of comparable properties in the sales comparison approach. Resp. Br. at 28-29. Neither the Assessor nor the BTA point to any authority whatsoever—whether law or appraisal texts—for the BTA’s unfounded distinction between the 8th and Othello property and the subject land. *See Department of Ecology*, 184 Wn. App. at 377 n.3 (noting that a failure to cite authority for a proposition suggests that none exists).

The Assessor also claims that citing the Appraisal Standards Board’s observation on the need for market data constitutes a “new argument” on appeal. Resp. Br. at 29 n.18. The Assessor’s claim is not

true. Saint-Gobain raised this same issue of the lack of evidence of stigma before the superior court. CP Sub Nos. 14 (Pet'r Br. at 16) and 18 (Pet'r Reply Br. at 10). Neither Washington law nor generally accepted appraisal practice support rejecting a comparable for environmental stigma without market data.

Rejecting this comparable makes even less sense in light of the seller's commitment to deliver the 8th and Othello property in clean condition. App. Br. at 22-23. This is another point that the Assessor does not deny. Nor does the Assessor disagree that the County's non-tax appraisal treated both properties as clean in its sales comparison approach. *Id.* The County's non-tax appraiser and Saint-Gobain's appraiser treated the properties consistently in conformance with Washington law. The BTA's decision to the contrary is a legal error.

**D. Case law, statute, regulation, and the BTA's prior holdings required lowering Saint-Gobain's standard of proof to a preponderance of the evidence for both years.**

Saint-Gobain presents two reasons for lowering the standard of proof from clear, cogent and convincing evidence to a mere preponderance. The first is based on when the Assessor developed his valuation evidence: only his initial valuation factors, not those developed on appeal, enjoy the heightened standard of proof. App. Br. at 25-26. The Assessor neither denies nor otherwise acknowledges this reason for lowering the standard of proof. The second reason is that the Assessor

failed to follow the statutory valuation criteria or his valuation was flawed as a matter of valuation theory. *Id.* at 26-27. The Assessor's only response is to claim his valuation has no flaw or invalidity. Resp. Br. at 6-7.

The Assessor argues that *Xerox Corp. v. King County*, 94 Wn.2d 284, 288, 617 P.2d 412 (1980), allows this Court to disregard the errors at issue here. Resp. Br. at 7. The *Xerox* case does not support his argument. In *Xerox*, the trial court ordered a reduction in the assessed value. King County appealed, raising technical details about the expert witnesses' "trade level" analysis. Unlike King County's appeal in *Xerox*, Saint-Gobain's appeal presents legal issues, not technical appraisal differences. For example, the issue of adjustments for market conditions is so basic that the regulations governing county boards of equalization explain that adjustments are needed even if the difference between the valuation date and sale date is only five months:

Any sale of property prior to or after January 1st of the year of revaluation **shall be adjusted to its value as of January 1st** of the year of revaluation, reflecting market activity and using generally accepted appraisal methods. For example, for revaluation year 1990, a sale of the subject property or similar property in September 1986 **must be adjusted**, based upon market activity for that local area, to show what that sale would have been worth as of January 1, 1990. Similarly, for the revaluation year 1990, a sale of the subject property or similar property in May 1990 **must be adjusted**, based upon market activity for that local area, to show what that sale would have been worth as of January 1, 1990.

WAC 458-14-087(3) (emphasis added). Here, the BTA accepted

application of 2006 and 2007 sale prices to valuation dates in 2010 and 2011 with no adjustments for the change in market conditions. Simply recognizing the basic legal requirement for adjustments is a far cry from becoming “embroiled” in technical appraisal details that only expert witnesses understand.

According to the Assessor’s argument, if the parties both rely on a sales comparison approach, differences between the appraisals are only matters of “appraisal judgment” and apparently cannot rise to the level of legal errors. Resp. Br. at 7. This misinterpretation of the *Xerox* case would render meaningless the list of criteria in RCW 84.40.030(3)(a) on how to perform the sales comparison approach properly. Moreover, as discussed above, where the appraisal client dictates a predetermined conclusion for one of those criteria (*i.e.*, no adjusting for changes in market conditions), the appraiser has not exercised “appraisal judgment.”

The Assessor does not deny that the BTA failed to demonstrate any weighing of the evidence for the one year that the BTA agreed should be judged by a preponderance. App. Br. at 27. Nothing in the BTA’s decision distinguishes how it was weighing the two years as between the two different standards. Nor does the Assessor deny that this failure is an error under Washington law. *Id.* The Assessor instead claims that lowering the standard of proof for one year was an error. Resp. Br. at 6 n.4. The Assessor did not appeal the decision, so his claim of error now is

irrelevant. As discussed, the BTA should have lowered the standard of proof for both years.

#### IV. CONCLUSION

The BTA failed to follow (1) its own rules on admissibility of evidence; (2) the statutory requirement to make adjustments to sales that occurred at the peak of the market; (3) legal requirements on appraisal treatment of environmental issues; and (4) the requirements to lower the standard of proof to a preponderance of the evidence. The Assessor has not shown otherwise. The BTA's multiple legal errors substantially prejudice Saint-Gobain and require remedy.

RESPECTFULLY SUBMITTED this 15th day of May, 2015.

GARVEY SCHUBERT BARER



Norman J. Brung, WSBA #16234

Michelle DeLappe, WSBA #42184

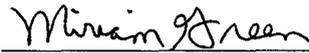
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 15, 2015, I caused the foregoing document to be served on the person identified below via messenger delivery:

Michael J. Sinsky, WSBA #19073  
Office of the Prosecuting Attorney  
516 Third Avenue, W400  
Seattle, WA 98104  
Attorney for: Respondent

DATED AT SEATTLE, WASHINGTON this 15th day of May, 2015.



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Miriam Green  
Legal Assistant to Norman J. Bruns  
and Michelle DeLappe

GSB:6970954.2

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