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DIVISION II

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NO. 46956-1-II

STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE OF WASHINGTON
BY *ca* DEPUTY

DIVISION II

SAINT-GOBAIN CONTAINERS, INC.,

Appellant,

v.

LLOYD HARA, KING COUNTY ASSESSOR,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CAROL MURPHY

BRIEF OF RESPONDENT

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I. INTRODUCTION

Saint Gobain Containers, Inc. (“Saint Gobain”) has sought Administrative Procedure Act review of a Washington State Board of Tax Appeals decision affirming 2010 and 2011 property tax assessments by the King County Assessor.¹

II. STATEMENT OF THE CASE

A. Saint Gobain Property.

Saint Gobain owns a 12.76 acre property just south of downtown Seattle, within the Duwamish Manufacturing Industrial Center, one of the most intensely developed manufacturing areas in the Pacific Northwest. AR 994 Saint Gobain’s site is considered prime industrial land. It is zoned IG1-U/85 (Industrial General – Utility), has full utilities and has ready access to major truck, rail and water transportation routes. AR 993-94 The property includes 1,400 feet of East Marginal Way South frontage, providing visibility and access along its east boundary and sixty feet of Duwamish River frontage access to the west. *Id.* East Marginal Way South serves as the major north-south feeder to major highways and provides easy access to I-5. *Id.* Rail access is afforded by an active rail spur that runs the length of the eastern property boundary. *Id.* The following map

¹ This APA review is based upon the Board of Tax Appeal’s certified hearing record. RCW 34.05.558. Citations to the Board’s certified administrative record appear with the relevant page numbers as “AR ___.”

The Assessor then appealed the County Board's decision to the State Board of Tax Appeals. BTA No. 80437. AR 1086. The appeal was issued formal BTA number 12-026, after Saint Gobain requested that the matter be converted to a formal hearing. AR 1082

2. 2011 Assessment - Board of Equalization.

Saint Gobain also petitioned the Board of Equalization for a reduction of its \$21,839,900 assessment for 2011. On October 10, 2012, the County Board issued an order sustaining the assessed land value of \$17,229,800. AR 1081 Improvement value was, however, reduced from \$4,610,900 to \$2,004,400, based in part on the Assessor's agreement to such a reduction. *Id.* The total 2011 assessed value was accordingly revised from \$21,839,900 to \$19,234,200. *Id.*

Saint Gobain then filed a formal BTA appeal of its 2011 assessment. BTA No. 12-320. AR 1078. AR 1078-81.

3. BTA Consolidated Review

The 2010 and 2011 assessment appeals were consolidated before the Board of Tax Appeals (BTA).² After a full day of hearing and subsequent closing argument by telephone, the Board issued a January 14, 2014 decision, affirming the assessed values. AR 25-38. The following

² The BTA also consolidated, considered and rejected Saint Gobain's informal appeal of its 2009 \$19,130,700 assessment. BTA No. 76904. AR 26. The informal decision is not reviewable and is therefore not at issue here.

chart summarizes the Land (L), Improvement (I) and Total (T) values for the 2010 and 2011 assessment years (AY) at issue. As noted above, improvement value is not in dispute. AR 1062-63.

	ASSESSED VALUE	TAXPAYER ASSERTED VALUE	BTA VALUE
2010 AY BTA 12-026	L \$17,229,800 (\$31/sq. ft.) I \$ 2,164,100 T \$19,393,900	L \$12,800,000 (\$23/sq. ft.) I \$ 2,164,100 T \$14,964,100	L \$17,229,800 I \$ 2,164,100 T \$19,393,900
2011 AY BTA 12-320	L \$17,229,800 (\$31/sq. ft.) I \$ 2,004,400 T \$19,234,200	L \$12,800,000 (\$23/sq. ft.) I \$ 2,004,400 T \$14,804,400	L \$17,229,800 I \$ 2,004,400 T \$19,234,200

C. Assessments Affirmed by Superior Court

Saint Gobain sought further Administrative Procedure Act (APA) review of its 2010 and 2011 property tax assessments in the Thurston County Superior Court. CP 4 - 23. Following scheduled briefing, Sub Nos. 14, 16 and 18, and oral argument before the Honorable Carol Murphy, the Superior Court entered judgment on November 18, 2014 affirming the Board of Tax Appeals' final decision regarding Saint Gobain's 2010 and 2011 property tax assessments. Sub No. 22.

On December 3, 2014, Saint Gobain filed its Notice of Appeal seeking review by Division II of the Court of Appeals. Sub No. 23.

III. ARGUMENT

A. Standard of Review is Deferential

The Court of Appeals sits in the same position as the Superior Court when reviewing BTA decisions under the APA. *Steven Klein, Inc. v.*

Dept. of Revenue, 336 P.3d 663, 665 (2014). Such review is based upon the BTA's record, not that of the lower court. *Valley Fruit v. Dept. of Revenue*, 92 Wn.App. 413, 417, 963 P.2d 886 (1998).

Both the BTA and Courts presume that the assessed value is correct, and appellants bear the burden of proving by clear, cogent and convincing evidence that the challenged value is erroneous.

Upon review by any court, or appellate body, of a determination of the valuation of property for purposes of taxation, it shall be presumed that the determination of the public official charged with the duty of establishing such value is correct but this presumption shall not be a defense against any correction indicated by clear, cogent and convincing evidence.

RCW 84.40.0301.³ Clear, cogent and convincing evidence means a quantum of proof necessary to convince a trier of fact that the ultimate fact in issue is "highly probable." *In re Sego*, 82 Wn.2d 736, 513 P.2d 831 (1973). Under this deferential standard, the assessor is "afforded considerable discretion" in selecting the proper valuation method. *Folsom v. Spokane County*, 106 Wn.2d 760, 769, 725 P.2d 987 (1986). "The taxpayer retains the burden of persuasion at all times." *Weyerhaeuser v. Easter*, 126 Wn.2d 370, 381, 894 P.2d 1290 (1995).

There are two circumstances in which the review standard may properly shift to a lesser preponderance standard. **First**, if a taxpayer

³ The deference required by RCW 84.40.0301, applies to the Assessor's value, and not to the local review board's decision. See 1986 Op. Att'y Gen. No. 3 at 8.

proves by “clear, cogent, and convincing” evidence that an assessor has erred “on a specific value” within the overall assessment, “the standard of proof shifts to preponderance of the evidence for all contested issues related to that value.” *Weyerhaeuser v. Easter*, 126 Wn.2d 370, 381 (1995) (emphasis added). In other words, “[c]orrections which invalidate only one part of an assessment do not overcome the presumption on the remainder.” 126 Wn.2d at 382. **Second**, if a taxpayer establishes by “clear, cogent, and convincing” evidence that an assessor's overall approach or technique was flawed or invalid, “the standard of proof shifts to a preponderance of the evidence for all issues.” 126 Wn.2d at 381.

Neither of these two circumstances exists here. The Assessor’s correction of 2011 improvement values did not alter the required standard of proof regarding the remaining land value assessment at issue here. *See Weyerhaeuser*, 126 Wn.2d at 382 (correction of part of the assessment does not affect the presumption on the remainder).⁴ Likewise, for reasons discussed in greater detail below, there is no flaw or invalidity in the

⁴ The BTA incorrectly applied a “preponderance of the evidence” standard to its 2011 assessment review because the Assessor’s reduced its original assessed value from \$21,839,900 to \$19,234,200 in that year. AR 36 That value change was, however, based solely on an agreed reduction in improvement value (from \$4,610,100 to \$2,004,400). AR 27 There was no dispute over corrected improvement values before the BTA. Correction of that part of the assessed value therefore did not properly affect the presumption applicable to the remaining land value at issue before the BTA. *Weyerhaeuser*, 126 Wn.2d at 382.

Assessor's overall valuation approach or technique here that properly alters the presumption. Both the Assessor and taxpayer rely upon a comparable sales approach. The value differences were essentially due to the selection of different comparable sales and related comparable sale price adjustments. In reviewing such differences of appraisal judgment, the clear, cogent and convincing standard governs. *See Xerox Corp. v. King County*, 94 Wn.2d 284, 288, 617 P.2d 412 (1980) (court refuses "to become embroiled" in dispute over matters of appraisal judgment).

APA standards generally governing judicial review of agency adjudicative orders are likewise deferential. *See RCW 34.05.570(3)*.

Under the error of law standard, the court may substitute its interpretation of the law for that of the agency, but it substantially defers to the agency's interpretation, particularly where the agency has special expertise. The court affirms an agency's factual findings unless they are not supported by substantial evidence. The court may also grant relief from an agency order that is arbitrary and capricious, meaning that "the decision is the result of willful and unreasoning disregard of the facts and circumstances." We review an administrative law judge's evidentiary decisions for abuse of discretion.

KC Public Hospital District v. Dept. of Health, 178 Wn.2d 363, 372, 309 P.3d 416 (2013) (citations omitted). Courts review the evidence in the light most favorable to the party that prevailed in the highest administrative forum to exercise fact-finding authority. *Sprint Spectrum v. Dept. of Revenue*, 174 Wn.App. 645, 653-654, 302 P.3d 1280 (2013).

Even in cases where an error has been found, relief is authorized under the APA only if the Court determines that the party seeking judicial review has been “substantially prejudiced” by the agency action complained of. RCW 34.05.570(1)(d).

B. Assessed Values Were Properly Supported

There are essentially two substantive components to Saint Gobain’s challenge. The taxpayer incorrectly argues that: (1) comparable sales used by the County to support the assessed values were not properly adjusted to account for market conditions; and (2) the BTA failed to properly consider environmental contamination issues relating to one of its comparable sales. Some additional background is necessary in order to place these issues in proper context.

1. Valuation Standards

RCW 84.40.030 specifies that property is to be valued at one hundred percent of its true and fair market value. Unless otherwise indicated by statute, fair market value is determined on the basis of the property's highest and best use: the most profitable, likely use to which the property can be put. WAC 458-07-030. Here, the parties agree that the existing use represents the property’s highest and best use.

RCW 84.40.030(3) provides that a property’s “true and fair value” is appropriately determined based upon sales of the subject property or of

comparable properties within the past five years. Assessors may also use methods, such as a cost or income capitalization approach, to establish value. RCW 84.40.030(3)(b). The parties do not dispute that the sales comparison approach provides the best indicator of value in this instance. The crux of the value dispute here is, rather, over whether additional adjustments⁵ to the Assessor's comparable sale prices were required to reflect land values on the applicable 2010 and 2011 assessment dates.

2. 2010 and 2011 Assessments

King County's annual assessment of industrial property occurs through a "mass appraisal" process, in which three full years of verified sales data for the relevant neighborhood (in this case, the SODO/Duwamish Industrial District - Area 35) is considered as part of a computer model that is used to determine individual property values within a defined geographic area. AR 357-392 A property's fair market value is derived under this mass appraisal model based upon a statistical calibration of detailed, Area-wide sales data that accounts for a variety of relevant factors such as the nature of the property's allowed uses (e.g.,

⁵ As part of a comparable sales analysis, sale prices may be adjusted by appraisers: to reflect a comparable sale's special financing terms or necessary demolition or repair expenses; to account for size, location or allowed use differences between the assessed property and comparable sale site; or, as Saint Gobain urges in this case, to reflect inflationary or deflationary differences in market conditions between the date of the comparable property sale and the effective date of the assessment.

retail, office, restaurant, industrial), size and location. *Id.* These modeled values are reviewed and validated by the Area's appraiser before the parcel's assessment is finalized. AR 380-81.

In both 2010 and 2011, the assessed land value of Saint Gobain's property was determined to be \$17,229,800, or \$31 per square foot. Saint Gobain contends that land value in both years should instead have been set at \$12,800,000, or \$23 per square foot.

3. Support for Assessments Was Provided to BTA.

In proceedings before the BTA, the Assessor provided extensive testimony and data supporting the \$31 per square foot assessment of Saint Gobain's land. The Assessor's BTA Appeal Response for the 2010 assessment is set forth at AR 992 to 1017. The Assessor's Appeal Response for assessment year 2011 is provided at AR 1018 to 1044. These Assessor responses highlighted four representative, comparable land sales, each of which involved industrial-zoned parcels, larger than five acres, located east of the Duwamish River, in Assessment Area 35. AR 248; 998-1000; 1016-17; 1024 -1026; 1043-44; 1049-53.

- Assessor comparable sale 1, depicted in the aerial photo at AR 1050, is a 5.3 acre, Area 35 parcel consisting of an obsolete building requiring demolition and inferior location due to uncertainties and disruption involving adjacent railroad track upgrades and other visibility/access concerns. AR 137-38, 998, 1026. The property sold in November of 2006 for \$5,150,000, with an additional \$2.4 million budgeted by the buyer at the time of sale

for demolition and asbestos abatement. *Id.* The Assessor adjusted the sale price to arrive at a **\$32.68 per square foot** value. *Id.*

- Assessor comparable sale 2, pictured in the aerial photo at AR 1051, is a fifty-five acre Associated Grocers site that sold in April of 2007 for \$91,000,000, or **\$37.90 per square foot**. AR 181-84, 998-99, 1025. The Area 35 property is improved with buildings that are to be torn down as part of the site's redevelopment of the site. *Id.* Because any interim financial benefit of such improvements is likely offset by the added holding costs and future tear down expenses, no increase or decrease in the sale price was attributed to improvements. *Id.*⁶
- Assessor comparable sale 3, shown in the aerial photo at AR 1052, is a 6.8 acre, Area 35 site that includes three MIC/H zoned parcels located adjacent to Assessor comparable 2. AR 184-89, 999, 1025-26. The property sold in July of 2007 for \$6,500,000, with additional \$1,500,000 budgeted at the time of sale by the buyer for the removal of structures and site remediation. *Id.* The adjusted sale price was **\$26.97 per square foot** value. *Id.*
- Assessor comparable sale 4, identified in the aerial photo at AR 1053, is a 6.4 acre parcel in Area 35, purchased in February of 2007 by the Museum of Flight Foundation for museum activities. AR 189-90, 1000, 1026. The parcel was purchased at \$7,000,000, or **\$24.85 per square foot**. *Id.* The buyer paid \$4.7 million of this total in cash and the remaining \$2.3 million was provided as a charitable donation to the Museum by the seller. AR 189-90.

The values indicated by the Assessor's representative sales thus range between \$24.85 to \$37.90 per square foot. AR 1000 The Assessor determined that sale 1 (**\$32.68 per square foot**), though inferior to the subject, was the most comparable due to its proximity to Saint Gobain

⁶ The taxpayer's 2009 appraisal likewise included the Associated Grocer site as a comparable sale priced at \$37.80 per square foot, similarly concluding that no adjustment for improvements was warranted, AR 533, and deeming the location of the property to be "similar" to Saint Gobain's. AR 535.

property and similarity of market force influences. *Id.* The other three sales were considered relevant for consideration but were given less weight in the Assessor's \$31 per square foot land value determination. *Id.* Saint Gobain's Opening Brief makes no comment on the validity of the Assessor's comparable sales, except to suggest that sale prices should have been further adjusted for time or market conditions.

In addition to highlighting these representative land sales, the Assessor's BTA Appeal Responses provide extensive sales data verifying how mass appraised values reflect the particular market conditions operating within the relevant Duwamish Industrial Area. AR 992 - 1044. Conditions within this area are atypical insofar as the supply of available developable land is very restricted; there is significant tension between commercial development pressures emanating from downtown Seattle and zoning restrictions seeking to protect the area's limited industrial uses; sales are relatively scarce; and a high proportion of properties are owner occupied. AR 165, 232-33, 997. When sale transactions within the area do occur, it is often without active marketing. AR 167. Neighboring property owners commonly have agreements along the lines of "if you ever want to sell, come talk to me, I'm sure we can work something out; it's just a part of how things are done here." *Id.* Assessment staff explained that owners tend to account for more than 50 percent of the market, with owners

commonly purchasing neighboring property in efforts to control their own destiny as a business and provide extra adjacent space. AR 163-64.

Data and related testimony provided by the Assessor illustrate three important realities characterizing the particular market conditions in the Duwamish Industrial Area that have bearing on Saint Gobain's challenged assessments.

First, land values are significantly affected by location. Land values tend to be markedly lower in the southern portion of Area 35 than in northern areas where Saint Gobain property is located, which are closer to the port and downtown. AR 165-69, 526, 995-96, 1004-06; 1022, 1032-33. Values likewise tend to be significantly lower for properties located west of the Duwamish River in Assessor Area 36 than east of the Duwamish within Assessor Area 35, where Saint Gobain's site is located. AR 148, 169-72, 526, 996-97, 1007-09, 1022-23, 1034-36.

Second, Duwamish Industrial Area land values per square foot are not as sensitive to the parcel size as is often the case for properties outside of this industrial area. AR 172-74, 997, 1010-1013, 1023, 1037-40, 326.

Third, unlike many other areas where properties were being sold at discounted prices during the recession, parcels within the Duwamish Industrial Area were generally not being marketed for sale during this time frame. Rather, the market in this area "went quiet and there were very few

transactions.” AR 178 Given this scarcity of sales, market evidence did not support the notion that industrial land values within this area were significantly impacted by the economic downturn in the manner that many other properties across the country were affected. AR 174-75, 210-12, 232- 234, 242-46, 318-23, 997-98, 1014-15; 1021, 1023-24, 1041-42. To the contrary, the objective consideration of broad, unfiltered sales data during relevant time periods indicates that the market within this area remained relatively static, without significant declines. AR 232-33, 244-46, 317-23, 995, 997-98, 1014-15, 1021, 1023-24, 1041-41.

Saint Gobain’s challenge here is largely directed at this third reality, and the Assessor’s related decision not to adjust comparable sale prices for time and market conditions. County appraisers who determined Saint Gobain’s land value and testified before the BTA are extraordinarily familiar with the unique market operating in the Duwamish Industrial Area, with decades of specialized valuation experience in the particular area. AR 162, 209. Subsection 4 below, outlines the substantial evidence supporting the Assessor’s decision not to adjust comparable sales for time.

4. Assessor appropriately decided not to adjust sales for time.

Saint Gobain’s appeal challenges the BTA’s affirmation of the Assessor’s considered decision to not adjust its comparable sale prices

based on recessionary market factors between the time such sales occurred and the 2010 and 2011 valuation dates.⁷ Ample evidence within the record supports the BTA's determination that

Due to the scarcity of truly comparable land sales in the subject's market area, quantifiable time adjustments to comparable sales cannot be made with certainty. Time-trending for market changes is not a significant factor in weighing the parties' sales evidence.

CR 30. The Assessor carefully considered whether time/market adjustments were warranted and determined that market information at the relevant time was simply not sufficient to justify such adjustments. AR 232-33, 244-46, 317-23, 995, 997-98, 1014-15, 1021, 1023-24, 1041-41.⁸

This is not to say that time/market impacts were not reflected in the Assessor's consideration of sales data. The mass appraisal model utilized Area sales data for the full three year period preceding the assessment date. This approach effectively took into consideration any net value changes over the three year period. AR 232, 244, 365 ("Utilization of three years of market information absent a trend adjustment was applied through calibration of the model structure.").

⁷ RCW 84.40.020 provides that "[a]ll real property in this state subject to taxation shall be listed and assessed every year, with reference to its value on the first day of January of the year in which it is assessed."

⁸ Mass appraisal reports for Area 35 likewise point out that the infrequent sales occurring in the Area during the relevant time period reflected relatively stable values, and that no market condition or time adjustments were accordingly applied. AR 371-72

The market reaction to adverse economic conditions within the Duwamish MIC during the relevant time interval was not to sell properties at discounted prices, but rather to wait and see how the market developed. The market in this area simply “went quiet and there were very few transactions.” AR 178 While there was an acknowledged drop in sale frequency within the industrial area, Assessor testimony and data provided to the BTA, summarized below, make clear that industrially zoned land values largely remained stable through the period of 2007 through 2011.

a. Data supporting decision not to adjust was provided.

The Assessor’s BTA Appeal Responses provided an overview of the relevant sales data, verifying the relative stability of industrially zoned land values within the Duwamish Industrial Area. Table 6 within the responses provided a comparative summary of average and median sale prices for 39 property sales that occurred within the Duwamish areas: between January 31, 2006 and February 15, 2012, between August of 2008 and June of 2010 and between April of 2008 and June of 2010. AR 997, 1024. Median sales during these intervals were stable at \$33, \$30 and \$30 per square foot respectively. *Id.*

Saint Gobain incorrectly argues that the Assessor failed to provide background data supporting its data summary. While Table 6 mislabeled its data source as “Addendum I,” the addendum data used to support the

table calculations was in fact provided in full in the attached reports at AR 1024-25 and 1041-42 (listing 39 sales between January 31, 2006 and February 15, 2012).

The BTA was not confused by the mislabeling of Table 6 Addendum I, as Saint Gobain suggests. *See* AR 251-52 (BTA confirming that list of 39 sales attached to Assessor report correlated to the Table 6 reference to 39 sales).⁹ The Board did, however, seek clarification of the time intervals analyzed on Table 6. In order to clarify the point of the data associated with the 39 identified sales, the Board requested that the County reexamine and resubmit its Table 6 information within ten days. AR 255-56. Saint Gobain's response to the clarification was due ten days thereafter. AR 256.

The Assessor's clarifying exhibit was provided on August 14th. AR 317-23. Using the same 39 property sales occurring in Areas 35 and 36 within the 2006 and 2012 time period, the Assessor's submittal shows average and median sale prices for 2006 – 2007, 2008 – 2009, 2010 through 2011 and for the combined period of January 2006 through

⁹ Saint Gobain incorrectly asserts that Addendum I information was never produced and that an adverse inference should accordingly be drawn from the County's purported failure to produce such data. In fact, the data was plainly provided – it was just not under the heading "Addendum I." AR 1024-25 and 1041-42

February of 2012.¹⁰ AR 318 As with Table 6, the data indicates no drop in median sale prices within Area 35, within Area 36 and within both areas combined during any period between 2006 and 2012. *Id.* The tables clearly illustrate that, no matter what way you look at the unfiltered sales data, median sale prices were not collapsing within the Duwamish Industrial Area at time of recession.

Purportedly in response to the County's requested post-hearing submittal, Saint Gobain submitted two new exhibits. A twelve page document from the taxpayer's appraiser Joseph Creech did not purport to address the time adjustment analysis presented in the County's submittal or to make any comparisons between sale prices at any time intervals. AR 305-16. Rather, the submittal attempted to justify Saint Gobain's value conclusion by excluding from the complete list of 39 sales, properties smaller than 2 acres, involving different zoning or located north of Spokane Street. AR 308. The document averages the unadjusted sale prices of the ten remaining parcels -- without analyzing whether those

¹⁰ The County's illustration of table data year by year, rather than using confusing time intervals that were in the original tables, was consistent with the BTA's direction. AR 303-04. In response to the County's inquiry of whether Table 6 data should be presented for "each year, '6, '7, '8, '9, '10," the Board indicated. "That's up to you." AR 255

sales were actually comparable¹¹ or otherwise adjusting sale prices for added expenses known to have been incurred as part of the sale transactions, for any east/west or north south price differential or any other factors. AR 309 While this essentially meaningless manipulation of data does highlight the fact that many of the 39 sales included in the Table 6 analysis were not comparable to Saint Gobain property, the County by no means suggested that they were. The point of the County's 39 sale analysis was **not** to provide a comparable sale analysis. Rather, it is to provide a snapshot view of overall, unfiltered sales data at varied intervals in order to objectively and impartially consider the impact of time and market conditions on sale prices within the whole industrial area. AR 210-12, 216, 253 It was not to suggest that the 39 sales were all comparable to the subject or to otherwise undertake a comparable sales analysis of fair market value on the basis of such raw data – but rather to present a broadly inclusive and impartial data set of all relevant sales referenced by the Assessor and Saint Gobain in order to verify the Assessor's market condition analysis.

¹¹ Ironically, the criteria used by Mr. Creech to exclude sales in the post-hearing submittal disqualified three of the six comparables listed in Saint Gobain's own appraisals on grounds that they were too dissimilar to warrant consideration. *Compare* sales at AR 631 *with* sales at AR 309 (eliminating Saint Gobain's under-two-acre comparables 4, 5 and 6).

A second post-hearing document from Saint Gobain's tax director Jeff Shonkwiler likewise did not purport to speak to the time comparison illustration provided by the County. AR 312-16. Rather, the document points out that some of the 39 sales included in the Table 6 analysis were assessed at less than their actual sale price. *Id.* For reasons discussed in more detail below, the Board properly granted the County's motion to strike such nonresponsive evidence regarding assessments of other properties as irrelevant. AR 40-41.

Additional evidence likewise supports the Board's determination that quantifiable time adjustments were not required. In discussing the appropriateness of making a date of sale adjustment, Saint Gobain's own appraiser acknowledged in his reports the "lack of significant data to apply an appropriate or accurate quantitative adjustment" regarding time or market conditions. AR 542, 630. The determination that market conditions within the Duwamish Industrial Area do not justify adjustments for time is further reflected by the parties' stipulation to improvement values that show no significant market drop in value between assessment year 2007 and 2011. AR 559. Moreover, Saint Gobain and the Assessor each retained steady values for the subject over the 2009, 2010 and 2011 years that were at issue before the BTA.

b. Decision not to time adjust comparable sales was based on appropriate consideration of market data.

While Saint Gobain argues that the County's decision not to adjust comparables for time was predetermined by department guidelines not to apply market trends within the mass appraisal model, the County appraiser responsible for valuing Saint Gobain property in the two years at issue certainly did not share that perspective in his valuation of the subject. AR 244-49. "I did consider time, but I made no adjustments for time. But it wasn't because I was directed not to make adjustments for time." AR 244. The "guidelines" were not considered to be rules that limited the appraiser's discretion. AR 246. Decisions not to adjust for time and market conditions were based on and supported by a careful and considered review of relevant sales data. AR 232-33 Such evidence did not provide a reliable basis for making time or market adjustments. As noted above, modeled values were each reviewed and validated by the area's appraiser before the parcel's assessment was finalized. AR 380-81 While the model itself did not trend for time, any such impacts were reasonably taken into account by considering three years of market

information in calibrating the model structure.¹² AR 365

c. Saint Gobain's reliance on non-record Appraisal Institute Guide Note is improper and unsupportive.

Saint Gobain seeks to bolster its time adjustment theory by arguing that an Appraisal Institute Guide Note required time adjustments. Opening Brief at pp. 13-14. Such argument was never presented to or argued before the Board and is therefore not appropriately considered in this matter. *See* RCW 34.05.558 (APA review on the record). *Griffin v. Department of Social and Health Services*, 91 Wn.2d 616, 631, 590 P.2d 816 (1979) (Failure to raise issues during administrative hearing precludes their consideration on review).¹³ Indeed, Saint Gobain raised its Guide Note

¹² Saint Gobain argues that because the decision not to adjust for time was purportedly predetermined, the Assessor violated USPAP ethics rule at p. U-7. This assertion is readily belied by the record, which revealed the appraiser's understanding of Assessor guidelines and approach in implementing them. *Supra* at p. 28.

¹³ Saint Gobain similarly makes additional extra-record references to an Appraisal Institute frequently asked question response (FAQ at F-76) and advisory opinion (Advisory Opinion A-20), inaccurately suggesting that these are legally binding USPAP requirements. Neither the Advisory Opinion nor the FAQ excerpts referenced by Saint Gobain are part of USPAP. The Appraisal Institute makes this clear at the very outset of the publication cited by Saint Gobain. USPAP Foreword at U-4 ("The publication also includes the Advisory Opinions and Frequently Asked Questions (FAQs) as additional reference materials. These reference materials are forms of "other Communications" provided by the ASB for guidance only and are not part of USPAP."). These references should likewise be disregarded because they were never presented to the Board or Court in this matter. *See* RCW 34.05.558. *Griffin v. Department of Social and Health Services*, 91 Wn.2d 616, 631, 590 P.2d 816 (1979).

argument for the first time in an attachment to its Superior Court Reply. Sub No. 18. The Superior Court rejected the approach and struck the extra-record evidence. Sub No. 22. Saint Gobain makes no mention of the Superior Court's ruling regarding this matter.

In any event, reliance on the Guide Note is misplaced. Saint Gobain incorrectly suggests that the Guide Note is part of USPAP and therefore sets forth a legal requirement. In fact, the Appraisal Institute specifies that "[t]he Guide Notes are not part of the Standards of Professional Appraisal Practice but provide guidance on how the standards requirements may apply to specific situations." Sub No. 21 at p. 1. Moreover, the particular Guide Note 11 was not even adopted until November 16, 2011, after each of the assessments at issue were established. Sub No. 20 at p. 3

Even if, for sake of argument, consideration of Guide Note 11 was proper in this context, it largely affirms the Assessor's approach here. As the County's evidence shows and the Guide Note confirms: time adjustments are difficult to support without current transactions, Guide Note p. 1 (Sub No. 18 at p. 11); "[g]eneralizations about macro-economic trends in the broader geographic area are not necessarily applicable to a specific market area" such as the Duwamish MIC, Guide Note p. 5 (Sub No. 18 at p. 14); when as in this case, there are virtually no current

comparable sales, appraisers may, as in this case, apply other methods such as surveying market participants¹⁴ to determine whether adjustment is appropriate. Guide Note at p. 6 (Sub No. 18 at p. 15). Under these circumstances, adjustments are to be made “as appropriate.” *Id.* Where, as in this case, assessor staff determined that the relevant market data did not indicate a defined market decline in the given area, the Guide Note does not suggest that a market adjustment should nonetheless occur.

5. Saint Gobain Appraisals

Saint Gobain sought to support its \$23 per square foot land value with one appraisal that included both assessment years 2009 and 2010, and another for assessment year 2011 alone. AR 475-682. The appraisals, prepared by Joseph Creech, identified the same six comparative sales for the 2010 and 2011 years at issue. AR 543-52, 631-339. The BTA properly determined that they were insufficient to show that the property was overvalued. AR 36-37.

The Assessor’s industrial area appraiser Bruce Zelk, distinguished each of the taxpayer’s comparable “sales” and, using property descriptions, maps, photographs and relevant sales data, credibly

¹⁴ Assessor staff involved in this case has extensive experience focused on the particular industrial area at issue. AR 162, 209. Apart from the objective sales data provided at the hearing, they routinely spoke with brokers and key market players and tracked development related matters in order to obtain a solid sense of the particular, relevant market trends and factors impacting land values in the Duwamish MIC. AR 163 -167

demonstrated that they were less reliable indicators of the subject's value than those highlighted by the Assessor. AR 217-32; 1054, 1056-61. More specifically, three of Saint Gobain's sales are located west of the Duwamish, entirely outside of Area 35.¹⁵ AR 1048. Sale 1 is a nine-acre, parcel acquired by eminent domain at \$31 per square foot, the same value that is challenged here. AR 545, 1054. Sale 3 is a multi-parcel, three-acre site that sold for a \$20 per square foot price that was established in the fall of 2006. AR 547, 1056. Sale 5 is an irregular, long and thin, one-acre parcel¹⁶ with minimal utility that sold without being marketed for \$15.37 per square foot. AR 549, 1060. Of the three Saint Gobain sales actually located within Area 35, comparable 2 (a contaminated site discussed in greater detail in the following subsection a) and comparable 4 (a long thin, 1.5 acre property) were both listings, not actual sales. AR 546, 548. The other, comparable 6, was a .4 acre lot in an area inferior to the subject, that sold for \$30 per square foot without being actively marketed. AR 550-51.

Finally, while the taxpayer's appraisal included a comparable ground lease analysis, Mr. Creech indicated in both his report and

¹⁵ Saint Gobain's appraiser acknowledged that properties west of the Duwamish tend to sell for less than those to the east. AR 148.

¹⁶ Mr. Creech indicated that comparable sale properties should be above three acres, and preferably above five acres, to reflect uses and economies comparable to the 13-acre subject. AR 132, 149. He later acknowledged that sites under two acres should not be included because they have a different highest and best use. AR 306, 309 (eliminating consideration of Creech comparables 4, 5 and 6).

testimony that he placed little emphasis on that approach. AR 142, 552-53, 642. Indeed, his appraisals indicate that “in this analysis, sole emphasis is placed on the sales comparison approach.” AR 554. The Board further determined that the ground lease analysis applied an incorrect capitalization rate¹⁷ and; given Mr. Creech’s own testimony, reasonably decided to give no weight to this approach. AR 30 and 31.

a. BTA properly considered contamination issues

While Saint Gobain argued that its comparable 2 parcel was most similar to the subject and the best indicator, both County and taxpayer experts noted that the status of this 8th and Othello comparable as a “listing,” and not an actual sale, make it a “less reliable indicator of market value.” AR 157, 224, 539. Moreover, while Saint Gobain analyzed this comparable site value based upon a fundamental assumption that the property did not have environmental issues, *See* AR 546, 633, Mr. Creech subsequently learned that that this assumption was far from accurate. In fact, the site suffers from significant contamination issues, necessitating environmental review and cleanup through formal proceedings before the

¹⁷ Mr. Creech acknowledged at the hearing that appraisers would normally apply a lower capitalization rate when valuing industrial land without improvements. AR 145 The analysis is flawed for other reasons as well. For example, while a range of comparable rents was identified at between \$0.14 to \$0.19 per square foot, AR 648, the analysis instead capitalized rent at \$0.10 per square foot, an amount incorrectly described as being only “slightly below” the comparable range. AR 640.

Washington State Department of Ecology (DOE). AR 137-38. The appraiser admitted at the hearing that the DOE's website lists contaminants and indicates that the owner of the site and DOE are currently in negotiations to work out a plan of how much contamination there is onsite and what the full scope of cleanup will be. AR 138. Assessor staff was aware of the contamination problems associated with this site and determined that the listing price of this parcel in the process of an environmental remediation process was not a reliable indicator of fair market value. AR 225-27.

Saint Gobain has sought to minimize the analytical impact of Mr. Creech's fundamental misunderstanding by claiming that its property also has some ground water contamination. Such efforts to analogize the serious contamination problems associated with the comparable listing to the subject property ring hollow. The comparable listing is the subject of an active Department of Ecology cleanup action, and is impacted by all of the attendant risks of litigation, stigma and other value implicating matters identified by Assessor staff during the hearing. AR 225-27. Saint Gobain submitted no report or other evidence to the Board showing the extent of contamination on its property, suggesting a required clean-up, or otherwise quantifying the nature or impact of contamination. To the contrary, Saint Gobain candidly conceded that any groundwater

contamination does not interfere with the use of the site, that it has made no determination regarding any associated cost to cure, and that, in four prior board hearings, it did not even raise groundwater as having an implication on its property's fair market value. AR 117. Indeed, Saint Gobain's own appraiser values the Saint Gobain site as "clean," with no environmental issues. AR 551, 638. The BTA appropriately found that the validity and credibility of Saint Gobain's comparable listing were significantly diminished. AR 36

Saint Gobain incorrectly argues that the Board was legally required to give greater weight to the contaminated listing under *Weyerhaeuser v. Easter*. In *Weyerhaeuser*, the Court simply held that a property owner seeking to reduce the assessed value of property based upon its contamination must make a threshold showing of: "(1) the existence of contamination, (2) the existence of a requirement for cleanup, and (3) a reasonably certain estimate of the costs of cleanup, including a formal plan and timetable" before claiming pollution control expenses as a deduction from their property value. *Weyerhaeuser Co. v. Easter*, 126 Wn.2d 370,

384-385, 894 P.2d 1290, 1298 (1995).¹⁸ Here, in marked contrast, neither the Board nor Assessor sought to appraise or assign a particular contamination value impact to the 8th and Othello listing. To the contrary, both simply determined that the listing status and environmental clean-up requirements associated with the listing site were too dissimilar to the Saint Gobain property and likely sale price too uncertain to afford it any significant weight in a comparable sales analysis.

The Taxpayer's Listing No. 1¹⁹, the property at 8th and Othello, although relied upon by the Taxpayer as its best comparable to support its value estimates for all three assessment years, suffers from ongoing environmental issues. Contamination has created a stigma associated with the required cleanup resulting in perceived significant risk and uncertainty to potential buyers. As a result, the validity and credibility of this comparable is significantly diminished.

CR 36. This conclusion is well-supported by the record.

¹⁸ Saint Gobain makes a new argument that an Advisory Opinion referenced at USPAP A-20 legally required the Assessor to effectively disregard the environmental stigma associated with cleanup of the 8th and Othello listing. Such argument was never presented to the Board or Superior Court and is not properly raised for the first time on appeal. *See* Fn. 13 *supra*. Moreover, the Advisory Opinion is not part of USPAP, and does not purport to establish a legal requirement. *Id.* In any event, the excerpt pertains to valuation of a contaminated property and is not a limitation on an assessor's discretion to exclude a dissimilar contaminated listing from its comparable sales analysis.

¹⁹ The BTA's decision identifies Taxpayer Comparable Sale No. 2 as "Taxpayer Listing No. 1" AR 34.

6. BTA properly excluded irrelevant and immaterial exhibits.

Under the APA, an agency's evidentiary decisions are reviewed for abuse of discretion. *KC Public Hospital District v. Dept. of Health*, 178 Wn.2d 363, 372, 309 P.3d 416 (2013). Saint Gobain takes issue with the BTA's decision to exclude two categories of material it sought to introduce. For reasons discussed below, the Board was well-within its discretion in deciding not to consider both sets of evidence.

a. Assessments of other properties properly excluded.

Saint Gobain sought to introduce a number of exhibits highlighting, not comparable sale prices, but the assessed values of other properties that sold in the Duwamish Area. AR 815-913 (assessed values of Assessor comparable sales), AR 312-16 (assessed values of selected Table 6 properties). The County moved to exclude such evidence on relevance grounds. AR 444-50. The Board allowed Saint Gobain to present its evidence in full at the hearing subject to the County's objection, and thereafter granted the motion, excluding this evidence as irrelevant. AR 39-42

RCW 84.40.030 specifies that, under the sales comparison approach utilized in this case, the true and fair value determination before the BTA is to be based upon sales of the subject property or sales of

similar properties made within the past five years – and not on the basis of another property’s assessed value. In keeping with this statutory parameter, the Board has consistently and repeatedly held that the assessed values of other properties are not relevant evidence in an assessment appeal. *See e.g. Halls v. Kitsap County Assessor*, BTA Nos. 11-018 and 12-058 (August 31, 2012); *Chen v. King County Assessor*, BTA No. 10-064 (November 9, 2011) (“assessed values of other properties do not constitute relevant evidence of the subject property’s market value, nor does the assessed value of the subject property from a previous or future assessment year”); *Levy v. King County Assessor*, BTA No. 10-078 (May 23, 2011) (“assessed values of other properties are not relevant evidence”); *Green Mountain Farms, Inc. v. Kitsap County Assessor*, BTA No. 78483 (August 13, 2012) (assessed value of comparable sales is not relevant evidence.). *See also Hagstromer v. Kitsap County Assessor*, BTA No. 13-114 (May 31, 2005) (“Board of Tax Appeals is not authorized to ‘equalize assessment values,’ meaning setting the assessment value by comparing the assessment valuation of the subject property to the assessment value of another properties.”).

BTA determinations not to consider assessed values of other properties (or of the assessed property in a prior year) are based upon practical considerations as well as these legal limitations.

To value a particular property by comparison to assessed values of other properties would require first determining whether those comparable's assessed values represent 100 percent true and fair values. To make those determinations would require comparing sales prices of other properties comparable to the comparables. Only after determining that a comparable's assessed value is 100 percent of market value would it then be possible to utilize that evidence to value the particular property under consideration. That would be a rather indirect, wasteful and roundabout method when the sales could be compared directly to the property under consideration in the first instance.

Merrill v. Wade, BTA No. 25525 (April 6, 1984).

This limitation is so fundamental to the BTA process that the Board's standard appeal acknowledgment letters in these and other cases make a special point to advise parties upfront and in no uncertain terms that "this Board has no authority to consider evidence which compares the subject's assessed value to the assessed value of other properties." AR 465, 466, 469.

There is no merit to Saint Gobain's contention to the BTA that exhibits should have been admitted on the alternative ground of impeaching the Assessor's assertion that time adjustments were not warranted. CR 419. In this respect, Saint Gobain contradicts itself: arguing with one voice that the Assessor's mass appraisal guidelines for the Duwamish Industrial Area improperly preordained and precluded time adjustments, and contending with another voice that differences between sale prices and assessed values of other properties show that the County

was making time adjustment in its Duwamish Industrial Area assessments.²⁰

While couched in terms of impeachment, Saint Gobain's efforts to highlight the assessed values of other industrial area properties was simply a roundabout way of making an equalization argument, that it was valued differently than other assessed properties. As indicated in RCW 84.40.030, true and fair value for tax purposes is to be based upon sales of properties that are similar to the subject – not on the assessed value of such properties. After allowing Saint Gobain to put on its full case regarding the assessments of other properties²¹, the BTA properly excluded Saint Gobain's assessment equalization evidence as irrelevant and immaterial.

b. Neighboring property appraisals properly excluded.

Saint Gobain also sought to introduce two appraisals of a neighboring County-owned property. AR 685-814. The property analyzed in the two reports is located across the street from the subject and is utilized by Saint Gobain in its industrial operations. Neither appraisal purports to either value Saint Gobain's property or suggest that its analysis

²⁰ Saint Gobain incorrectly asserts that its assessment comparisons are of County comparable sales and not its own. In fact, only three of the sixteen property assessments itemized at AR 314-16 were County comparable sales. Saint Gobain's assertion to the contrary, this excluded document likewise set forth assessment values of a number of Saint Gobain's own comparables. *Id.*

²¹ Under these circumstances in which the Board heard all of Saint Gobain's evidence, the decision certainly did not result in substantial prejudice.

would be the same for the property at issue. The County moved to exclude the appraisals of the neighboring property as irrelevant and immaterial. AR 445-50, 393-97.

Apart from the fact that the appraisals value different property, their consideration in this context was likewise improper because: (1) the Sampson report expressly limits its scope to January 1, 2009 valuation of the County property's leasehold building and improvement interests, *see AR 692*; and parties here have already stipulated to the subject's improvement value in the 2010 and 2011 assessment years at issue; and (2) the Greenleaf report includes explicit direction restricting its use to instances where written authorization for such use is provided by the report's author, and no such written authorization is provided for use in this tax assessment proceeding context, AR 711. *See Richter v. Mason County Assessor*, BTA No. 69015 (February 10, 2009) (excluding appraisal of property other than subject in part based upon owners' failure to submit written evidence indicating that the appraiser had granted permission to use the appraisal). The taxpayer nonetheless urged the Board to consider the appraisals of the neighboring property as evidence of its own land value.

While Saint Gobain initially identified the appraisers who prepared the reports, Mr. Sampson and Mr. Greenleaf, among its witnesses, it did

not produce either to testify at the hearing. With no opportunity to cross-examine the appraisers about their assumptions and conclusions²² or regarding the applicability of their analysis to the subject property,²³ the County additionally moved to exclude the two appraisals on hearsay grounds. AR 55.

The Board deferred its ruling on the County's motion until after the hearing, allowing Saint Gobain to present any and all hearing testimony regarding the challenged evidence. It then properly issued an order granting the County's motion to exclude the two appraisals on relevance grounds. AR 39-42. This evidentiary decision was likewise a proper exercise of the Board's discretion. As noted above, RCW 84.40.030 directs that the determination of a property's true and fair value for tax assessment purposes is to be based upon sales of the subject property or sales of similar properties within the past five years. Appraisals of properties other than those actually before the Board are not

²² For example, while the Sampson report identified many of the same comparable sales as the County, it did not adjust sale prices to account for purchase-related expenses that were properly noted in sale prices utilized by the Assessor. *Compare* AR 867 (Sampson assumed sale prices) *with* AR 998 – 1000 (sale prices applied by the Assessor).

²³ While County and Saint Gobain properties share common uses and location, they have distinct features with different value implications. For example, the County property has significant submerged land portions, extensive Duwamish River frontage subject to shoreline environment regulation, significant fill areas and virtually no frontage or visibility along East Marginal Way. AR 452.

relevant. *See Richter v. Mason County Assessor*, BTA No. 69015 (February 10, 2009) (“appraisal of the neighbor’s property was not relevant evidence of the subject property”); *McNee v. Clark County Assessor*, BTA No. 66067 (June 18, 2008) (neighboring property appraisal is not relevant in determining market value of the subject).

While relevance alone provided a sufficient basis to exclude these two exhibits, the Board could just as readily have based its decision on hearsay grounds. *See Pacific Land Partners v. Dept. of Ecology*, 150 Wn.App. 740, 753, 208 P.3d 586, 592 (2009) (Court may affirm board order on any basis established by the pleadings and supported by the record).

Finally, exclusion of these documents would not afford an appropriate basis for relief in this case because Saint Gobain was not “substantially prejudiced” by this decision. *See RCW 34.05.570(1)(d)* (party must show that challenged action resulted in substantial prejudice in order to obtain APA relief). Here, after hearing all evidence presented by Saint Gobain regarding the exhibits, the Board expressly determined that, even if the appraisals had been properly before it, they would have been given no weight. AR 34, 35. This determination is supported, not only by the line of Board decisions making clear that true and fair value is to be determined based upon sale values, and not assessed values, *see AR 41*;

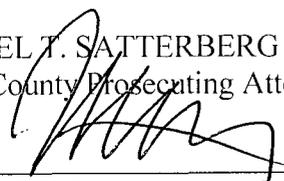
but also due to the fact that the reports did not provide any indication that their analysis would likewise apply to Saint Gobain's neighboring property, and because preparers of those reports were not present to testify regarding their assumptions and conclusions or regarding the applicability of their analysis to the subject property. Under these circumstances, the Board appropriately determined that relevance would be too attenuated and uncertain to afford weight to the reports.

IV. CONCLUSION

The Board of Tax Appeals' decision to affirm the assessed value of Saint Gobain's property in 2010 and 2011 was supported by substantial evidence in the record and by relevant legal considerations. Appellant has not met its burden of showing either by "clear cogent and convincing evidence" or by a preponderance of the evidence that the assessed values at issue in this case were incorrect. King County therefore respectfully requests that the Court affirm the Board's decision and deny Saint Gobain's 2010 and 2011 assessment appeals.

DATED this 16th day of March, 2015.

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS FOR
THE STATE OF WASHINGTON
DIVISION II

SAINT-GOBAIN CONTAINERS, INC.,

Appellant,

v.

LLOYD HARA, KING COUNTY
ASSESSOR,

Respondent.

No. 46956-1-II

CERTIFICATE OF SERVICE

1. I am a legal secretary employed by King County Prosecutor's Office, am over the age of 18, am not a party to this action and am competent to testify herein.
2. On March 16th, 2015, I did cause to be delivered by Legal Messenger a true copy of the Brief of Respondent King County and this Certificate of Service to the following:

Norman J. Bruns and Michelle DeLappe
GARVEY SCHUBERT BARER
1191 Second Ave. 18th Floor
Seattle, WA 98101-2939

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 16th day of March, 2015.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: Amy Tower
Amy Tower, Legal Assistant to
MICHAEL J. SINSKY, WSBA #19073
Senior Deputy Prosecuting Attorney
Attorneys for King County