

STATE OF IDAHO )  
County of KOOTENAI )<sup>ss</sup>  
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AT \_\_\_\_\_ O'Clock \_\_\_\_M  
CLERK OF DISTRICT COURT

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Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

**LOBO LODGE, INC.,** )  
 )  
 *Plaintiff/petitioner,* )  
 vs. )  
 )  
 **KOOTENAI COUNTY and the KOOTENAI** )  
 **CO. BD. OF COMMISSIOERS, ACTING AS** )  
 **THE KOOTENAI CO. BD of EQUAL..** )  
 )  
 *Defendants/respondents.* )  
 \_\_\_\_\_

Case No. **CV 2008 4220**  
**MEMORANDUM DECISION AND  
ORDER ON MOTION TO ALTER OR  
AMEND JUDGMENT**

**I. INTRODUCTION AND PROCEDURAL BACKGROUND.**

On May 13, 2009, this Court entered a Memorandum Decision and Order on Cross-Motions for Summary Judgment. On May 27, 2009, defendants/respondents Kootenai County Board of Commissioners (Board) filed a "Motion to Alter or Amend Judgment", pursuant to I.R.C.P. 59(e). On June 8, 2009, the Idaho State Tax Commission (Commission), filed a "Motion to File *Amicus Curie* Brief", and an Affidavit of Alan S. Dornfest (Commission employee), and Affidavit of Tom Katsilometes (Commission Commissioner). On June 10, 2009, plaintiff/petitioner Lobo Lodge, Inc. (Lobo Lodge), filed an "Objection to Motion to file *Amicus Curie* Brief." On June 11, 2009, the Board filed a "Response to State Tax Commission's Motion to file *Amicus Curiae* Brief." On June 29, 2009, this Court held oral argument on the Motion to File

*Amicus Curie* Brief. At the conclusion of that hearing, this Court granted the Commission's Motion to File *Amicus Curie* Brief, and on July 8, 2009, signed an Order Granting Motion to File *Amicus Curie* Brief. On July 9, 2009, the Commission filed its *Amicus Curie* Brief. On July 10, 2009, the Board filed its "Memorandum in Support of Motion to Alter or Amend Judgment." On September 3, 2009, Lobo Lodge filed its "Memorandum in Opposition to Motion to Alter or Amend Judgment." On September 18, 2009, the Board filed its "Reply Memorandum in Support of Motion to Alter or Amend Judgment." Oral argument was held on the Motion to Alter or Amend Judgment on September 24, 2009.

The following background information is from the May 13, 2009, Memorandum Decision and Order on Cross-Motions for Summary Judgment:

On July 13, 2007, the Kootenai County Board of Equalization (BOE) entered a decision which modified the landowner/taxpayer Lobo Lodge's (Lobo) original protest of valuation of its property for taxing purposes. The BOE assessed Lobo's improvements at \$1,730,772.00. R., Exhibit 3. The Kootenai County Assessor appealed that decision to the Idaho Board of Tax Appeals. Following a hearing held November 27, 2007, on May 1, 2008, the Board of Tax Appeals issued its decision which reversed the decision of the BOE, and increased the assessed value of the improvements to \$2,556,396.00. R. Exhibit 10, p. 6.

On May 29, 2008, petitioners Lobo Lodge (Lobo) filed in District Court (Kootenai County Case No. CV 2008 4220) a Notice of Appeal against respondents Kootenai County Board of Commissioners (Board) acting as the Kootenai County Board of Equalization. Lobo appeals the Board's decision regarding the valuation of Lobo's

property for the year 2007. On July 16, 2008, a similar appeal was filed by Lobo in District Court (Kootenai County Case No. CV 2008 5591), against the Board, appealing the Board's decision regarding the same property for the year 2008. On September 23, 2008, based upon the parties' stipulation, this Court entered an Order that "Any decision made by the Court on a motion for summary judgment filed in Case No CV-08-4220 shall also be controlling in Case No. CV-08-5591."

Lobo and the Board both filed motions for summary judgment on this appeal to District Court (I.R.C.P. 84; I.C. § 63-312 and § 63-511) of the Idaho Board of Tax Appeals' (IBTA) Final Decision and Order valuing the subject property using the *market* rent, as opposed to the *actual* rent, in an income capitalization valuation.

Lobo owns 7.66 acres located at the corner of U.S. Highway 95 and Neider Avenue in Coeur d'Alene, Idaho. Lobo built a building for K-Mart and then Lobo leased the property to the Sears Corporation (successor in interest to the K-Mart Corporation, for purposes of this decision the lessee is referred to as K-Mart) pursuant to an agreement entered into on September 20, 1977. The property has been continuously operated as a K-Mart store since 1978.

The lease provides for a fixed annual rent of \$255,000.00. The lease allows K-Mart to remain in possession through 2038, and binds any successors and assigns of Lobo through 2038. The initial lease term was for 25 years. That 25-year period ended October 31, 2008. Memorandum in Opposition to Lobo Lodge's Motion for Summary Judgment, p. 2; Exhibit A; Exhibit 1. After the initial 25-year period, the lease agreement gives K-Mart the option of extending the lease for seven periods of five years each at the initial rent of \$255, 000.00. *Id.* The BOE found the lease currently

generates about \$267,000.00 per year in rent, or less than half the property's potential market rent. R. Exhibit 10, p. 2.

In 2005, the Kootenai County Assessor utilized market rent, rather than actual rent, in valuing the property under the income capitalization method. Memorandum in Support of Motion for Summary Judgment (filed by plaintiff/appellant Lobo), p. 3. Generally speaking, market rent is the average rent on comparable properties, and actual rent is the rent on this specific property. For the 2005 tax year, following an appeal by Lobo, the Assessor stipulated to a valuation of \$3.8 million. Similarly in 2006, Lobo appealed the Assessor's assessment and the 2006 appeal was resolved by agreement fixing the value at \$3.8 million. In both 2005 and 2006, the land value was assessed at \$2,597,907.00 and the improvement valued at \$1,239,692.00 for a total of \$3,837,599.00.

In 2007, the assessment value of the property was valued at \$5,095,624.00, the land being valued at \$2,539,228.00 and the improvements at \$2,556,396.00. Lobo appealed the valuation and the matter came before the Kootenai County Board of Equalization. The Board reduced the valuation to \$4,270,000.00 by reducing the improvement value to \$1,730,772.00. The Assessor then appealed the Board's decision to the IBTA. Neither party contested the value of the land. The IBTA reversed the Board's decision and restored the Assessor's original valuation of \$5,095,624.00. On May 29, 2008, Lobo timely appealed the IBTA's decision to District Court pursuant to I.R.C.P. 84, I.C. § 63-312 and § 63-511.

Lobo argues that the improvements should be valued at \$1,260,772.00, and the Assessor argues the improvements should be valued at \$2,556,396.00. At issue is

whether the *actual* rent earned under the lease, versus the *market* rent for the property, should be the basis for determining the actual and functional use of the property.

In this Court's May 13, 2009, Memorandum Decision and Order on Cross-Motions for Summary Judgment, this Court held:

**IT IS HEREBY ORDERED** for the reasons stated above, Lobo's motion for summary judgment is GRANTED and the Board's cross-motion for summary judgment is DENIED. This matter is remanded to the Board for consideration of the sales comparison approach, as well as consideration of the actual rent being paid to Lobo under this long-term lease.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 29.

## II. STANDARD OF REVIEW.

A motion under I.R.C.P. 59(e) to alter or amend a judgment is addressed to the sound discretion of the court. *Lowe v. Lym*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (Ct.App. 1982) (citing *Cohen v. Curtis Publishing Co.*, 333 F.2d 974 (8<sup>th</sup> Cir. 1964)). An order denying a motion made under Rule 59(e) is appealable only on the question of whether there has been a manifest abuse of discretion. *Id.*, citing *Walker v. Bank of America National Trust and Savings Assoc.*, 268 F.2d 16 (9<sup>th</sup> Cir. 1959), cert. denied 361 U.S. 903, 80 S.Ct. 211 (1959).

Rule 59(e) proceedings afford the trial court the opportunity to correct errors of both fact or law that had occurred in its proceedings; it thereby provides a mechanism for corrective action short of an appeal. *First Security Bank v. Neibaur*, 98 Idaho 598, 570 P.2d 276 (1977). Such proceedings must of necessity, therefore be directed to the status of the case as it existed when the court rendered the decision upon which the judgment is based.

*Lowe*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (recognizing that a motion raising new issues or presenting new information, not addressed to the court prior to the decision which resulted in the judgment, is properly brought pursuant to a motion for relief from a

judgment under Rule 60(b)).

A trial court's decision to grant or deny a motion for reconsideration is reviewed for an abuse of discretion. *Jordan v. Beeks*, 135 Idaho 586, 592, 21 P.3d 908, 914 (2001). A party making a motion for reconsideration is permitted to present new evidence, but is not required to do so. *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct.App. 2006).

### **III. ANALYSIS.**

#### **A. Positions of the Parties and *Amicus* on Motion to Alter or Amend.**

The Board and the Commission as *Amicus Curiae* ask this Court to alter or amend its judgment on cross-motions for summary judgment. In support of the motion, the Board argues: (1) this Court erred in its definition of the term "actual and functional use"; (2) this Court improperly interpreted the term "actual and functional use" to require the Assessor to value a property at its investment value, rather than its market value; and (3) the Court's decision did not take into account an additional improvement to the property which only resulted in a minimal increase in rental rate. Memorandum in Support of Motion to Alter or Amend Judgment, pp. 3, *et seq.* The Board also asks this Court to correct its references throughout the Memorandum Decision and Order to the BOE, where it should properly have referred to the IBTA. *Id.*, pp. 13-14. Finally, the Board argues the Assessor did consider the sales comparison approach and, as such, this Court had no need to remand the matter to the IBTA for failure to consider the sales comparison approach in valuing the property at issue. *Id.*, p. 14.

The Idaho State Tax Commission (Commission), in its *amicus* brief, similarly argues that actual rent received does not provide market value for assessment purposes. *Amicus*

*Curiae* Brief, p. 6. The Commission goes on to review Idaho case law in support of its argument that use of actual rent is not required for determination of “actual and functional use.” *Id.*, pp. 7, *et seq.*

Lobo argues the Court correctly concluded the actual and functional use of Lobo’s property must take into consideration the actual rent being paid under the long-term fixed-rent lease at issue. Memorandum in Opposition to Motion to Alter or Amend Judgment, p. 5, quoting Memorandum Decision and Order, p. 27. Lobo argues that the Board’s and the Commission’s differentiation between “market value” and “investment value” is misplaced in the instant matter because the Affidavit of Jim Koon (submitted in opposition to the Respondents’ Motion for Summary Judgment) concludes:

[W]ith respect to a commercial property with fixed rent for 30 years, that the “market value” is synonymous with the “investment value.”...Under any and all circumstances, the value urged by Lobo Lodge, given actual contract rents, is the “market value” as that is the amount of money that an informed and knowledgeable third-party would pay in an arms-length transaction.

*Id.*, p. 7.

#### **B. New Evidence.**

Preliminarily, because motions under I.R.C.P. 59(e) are brought after judgment, new evidence may not be presented with such a motion. *Johnson v. Lambros*, 143 Idaho 468, 471 fn. 3, 147 P.3d 100, 103 fn. 3 (Ct.App. 2006). In the present case, the Commission has attached to its *Amicus Curie* Brief excerpts from: Addendum 1, MASS APPRAISAL OF REAL PROPERTY, Robert J. Gludemans, International Association of Assessing Officers, (1999); Addendum 2, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE, Appraisal Standards Board, The Appraisal Foundation (2008-2009 edition); Addendum 3, GLOSSARY FOR APPRAISAL AND ASSESSMENT, International

Association of Assessing Officers (1997), and Addendum 4, PROPERTY APPRAISAL AND ASSESSMENT ADMINISTRATION, Joseph K. Eckert, Ph.D., The International Association of Assessing Officers (1990). The Board has also attached excerpts from: Appendix A, PROPERTY APPRAISAL AND ASSESSMENT ADMINISTRATION, Joseph K. Eckert, Ph.D., The International Association of Assessing Officers (1990); Appendix B, THE APPRAISAL OF REAL ESTATE, 11<sup>th</sup> Ed.; Appendix C, MASS APPRAISAL OF REAL PROPERTY, Robert J. Gludemans, International Association of Assessing Officers, (1999); Appendix D, STANDARD ON RATIO STUDIES, International Association of Assessing Officers, (July 2007).

To the extent the Court considers the addenda and appendices submitted by the Board and the Commission to further define “market value”, “mass appraisal”, and “investment value” to be new evidence, the Court faces a problem. First, no final judgment has been entered by this Court and no I.R.C.P. 54(b) certificate has been granted by this Court. Thus, the Memorandum Decision and Order on Cross-Motions for Summary Judgment entered May 13, 2009, is an interlocutory order. Therefore, the instant motion should likely have been brought as a motion for reconsideration under I.R.C.P. 11(a)(2)(B).

In *Coeur d’Alene Mining Co. v. First Nat. Bank of North Idaho*, 118 Idaho 812, 800 P.2d 1026 (1990), the Idaho Supreme Court differentiated between motions under Rule 59(e), which require the status of the case to be “as it existed when the court rendered the decision upon which the judgment is based”, and motions under Rule 11(a)(2)(B), pursuant to which the trial court “should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order.” 118 Idaho 812, 823, 800 P.2d 1026, 1037. Unlike the purpose of Rule 59(e), corrective action short of an appeal based on the record as it existed at the time of judgment, the effect of Rule 11(a)(2)(B) is that

reconsideration:

...usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

118 Idaho 812, 823, 800 P.2d 1026, 1037, quoting *J.I. Case Co. v. McDonald*, 76 Idaho 223, 229, 280 P.2d 1070, 1073 (1955).

The Affidavit of Tom Katsilometes and the Affidavit of Alan S. Dornfest were both filed on June 8, 2009, and were filed in support of the Idaho State Tax Commission's Motion to file *Amicus Curie* Brief. However, it is obvious from those affidavits that the Idaho State Tax Commission wished to have this Court review the additional material which the Commission and the Board attached to their briefs submitted in support of the Board's Motion to Alter or Amend Judgment.

This Court has read the material provided by the Board and the Commission and finds such to be not new "facts", but really additional information. The Court views this additional material as supplemental information to assist the Court in its interpretation of the law.

### **C. "Actual and Functional Use".**

#### **1. Interpretation of Case Law.**

In its Memorandum Decision and Order on Cross-Motions for Summary Judgment, this Court stated:

Thus, because IDAPA 35.01.03.217.03.a contains no exception for the factual circumstances of Lobo's situation, IDAPA 35.01.03.217.03.a is in conflict with Idaho Code § 63-208.

The conflict is especially pointed. Idaho Code § 63-208 requires "actual and functional use *shall* be a *major* consideration when determining market value for assessment purposes" (emphasis added),

and IDAPA 35.01.03.217.03.a requires that appraisal procedures using the "...income approach to determine the market value for assessment purposes of income producing properties, except those described in Paragraph 217.03.b. of this rule, must use market rent, not contract rent." If "actual and functional use" includes actual rent when that actual rent is derived from a long-term fixed rent (which this Court finds it does), then Idaho Code § 63-208, by use of the word "shall", requires that *actual* long-term fixed rent be the primary ("major") consideration in determining market value for assessment purposes. The Idaho Legislature has spoken. On the other hand, the administrative rule expressly forbids the *actual* or contract rent *from even being considered*, let alone being the "major consideration" as required by statute.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 15-16.

Having found that the administrative rule at issue conflicts with the Idaho Code, the Court analyzed the three cases relied on by both parties at summary judgment, and now, with regard to the Supreme Court's definition of "actual and functional." This Court found significant parallels between the facts in the instant matter and *Greenfield Village Apartments v. Ada County*, 130 Idaho 207, 938 P.2d 1245 (1997), and ultimately determined that the Section 42 low-income housing restrictive covenant in *Greenfield* was actually *less* restrictive than the restrictions resulting from the 60-year binding lease at issue here.

Lobo is in a sixty-year fixed-rent lease which Lobo cannot get out of, only K-Mart can get out of this lease (and there is no economic reason for them to want to do that), and as for Lobo's property, "It cannot be used otherwise." Just as the Ada County Board of Commissioners in *Greenfield* ignored the low-income twenty-year restriction on the landowner, and the Bannock County Board of Commissioners in *Fairway* ignored the fact that the condominiums which had not sold in over ten years were being used as apartments, the Board in the present case has ignored this sixty-year fixed-rent lease Lobo has with K-Mart.

The Idaho Supreme Court in *Greenfield* concluded:

The district court's decision is vacated and remanded for valuation considering the actual and functional use of the property as low-income, rent-restricted property...

*Id.* The same result must occur in the present case.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 18-19. (citations omitted).

*The Senator v. Ada County*, 138 Idaho 566, 67 P.3d 45 (2003) involved consideration of a mobile/manufactured home park's vacancy rate in determining the actual and functional use for assessment purposes. In that case the Idaho Supreme Court upheld the District Court's and assessor's use of 3% market vacancy rates, where the park in fact had vacancy rates of 26% and 32% during the two years at issue. In the present case this Court distinguished the facts of *The Senator* from the facts of the instant case:

In *The Senator*, the Idaho Supreme Court noted: "...there is nothing similar [to a twenty-year, rent-restricted, low-income covenant] that would limit the rent that could be charged by any future purchaser of the Park." At any time *The Senator, Inc.*, could have changed its policies and allowed older "mobile homes" to co-exist with newer manufactured homes, and it could have let younger owners of mobile homes and manufactured homes co-exist with those over age 55. And, at any time *The Senator, Inc.*, could have changed the use of its land entirely by constructing other income-producing property. Any party who purchased from *The Senator, Inc.*, had the same flexibility. The same cannot be said of Lobo or any future successor of Lobo.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 23-24 (citations omitted). Finally, *Brandon Bay, Limited Partnership v. Payette County*, 142 Idaho 681, 132 P.3d 438 (2006), involved the issue of whether low-income housing tax credits were to be included in assessments for taxation purposes. This Court recognized that the central issue in *Brandon Bay* was not pertinent to this case, but quoted the following language from the Idaho Supreme Court's *Brandon Bay* decision:

This Court in *Greenfield Vill. Apartments, L.P. v. Ada County*, 130 Idaho 207, 938 P.2d 1245, held that when assessing a § 42 low-income housing project, a tax assessor must take into consideration the rent-restricted use of the property as required by former I.C. § 63-202, which requires the “actual and functional use” of property to be taken into consideration when assessing the land. Payette properly valued the property using the reduced rental rates. If only the reduced rents are considered, however, the value of the land will be artificially depressed and its true market value distorted. **Just as it would be inequitable to assess the property based upon full market rental value, because the owners are limited in what they can charge for rent,** similarly, it would be inequitable to exclude the value derived from the tax credits, which is acquired by the developer in direct exchange for charging below-market rents.

*Id.* (bold added). Lobo is every bit as “limited in what they can charge for rent” as the owner of the apartments in *Greenfield*, and every bit as “limited in what they can charge for rent” as the owner of the two apartment developments in *Brandon Bay*.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 25.

The Board argues, again, that the actual and functional use of the property in the instant matter is a big-box discount store and this remains unchanged regardless of whether K-mart pays market rent, below market rent, or above market rent.

Memorandum in Support of Motion to Alter or Amend Judgment, p. 4. The Board goes on to argue this Court’s reasoning, that a long-term restriction on rent can alter the actual and functional use of a property, improperly expands the holding of *Greenfield Village*, as this case does not involve Section 42 low-income restrictions. *Id.*, pp. 4-5.

Rather, the Board and the Commission both argue the present case is more in line with the management decisions found not to supply a basis for valuations of property in *The Senator*. *Id.*, p. 5; *Amicus Curiae* Brief, p. 8. However, the Board does not address this Court’s reasoning that, although Lobo and any possible assigns being locked into the \$260,000 annual rent for 30 more years was arguably self-inflicted by Lobo, the

situations in *Greenfield* and *Brandon Bay* are “every bit as self-inflicted by the landowner.” Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 26. Nor does the Board cite any authority for the proposition that a Section 42 low-income restriction is any more onerous than the recorded long-term low-rent restriction here. See *Id.*, p. 27.

## **2. Investment Value.**

The Board next argues the Court’s failure to give consideration to the lessee’s (K-mart’s) interest results in the property being valued at its “investment value”, not its market value. Memorandum in Support of Motion to Alter or Amend Judgment, p. 6. This argument is also made by the Commission. *Amicus Curiae* Brief, pp. 6-7. Despite this contention, however, as noted by the Court and Lobo, “market value” is defined in the Idaho Code:

“Market value” means the amount of United States dollars or equivalent for which, in all probability, a property would exchange hands between a willing seller, under no compulsion to sell, and an informed, capable buyer, with a reasonable time allowed to consummate the sale, substantiated by a reasonable down or full cash payment.

I.C. § 63-201(15). When this definition is read in conjunction with I.C. § 63-208(1), requiring actual and functional use to be a major consideration in determining market value for assessment purposes, the Board’s and the Commission’s arguments (that utilizing actual or contract rent only would establish a property’s investment value, not market value) are not on point. This Court remanded with the specific direction that, given the long-term fixed-rent lease with K-mart, “actual and functional” use must also consider the actual rent being paid. Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 27. There is nothing in this Court’s reasoning, conclusion, or

Order remanding the matter to IBTA suggesting a valuation be based only on the actual rent received.

### **3. 1990 Improvements.**

The Board argues the Court's Memorandum Decision and Order on Cross-Motions for Summary Judgment did not take the additional improvements made to the Lobo property into account. Memorandum in Support of Motion to Alter or Amend Judgment, pp. 12-13. The Board argues the improvements having been made without a commensurate rental rate increase evinces the parties' ability to freely renegotiate the lease and that the lease "as amended provides for consideration other than the rent to be paid in accordance with the lease agreement, thereby adding value to the leasehold estate." *Id.*, p. 13. Lobo responds that the Board did not previously raise the issue of the 1990 improvements made by K-mart and that the Court did take the improvements into account by virtue of recognizing the rental increase from \$225,000 to \$255,000. Memorandum in Opposition to Motion to Alter or Amend Judgment, p. 12. The only mention by the Board of additional improvements before the Court on the cross-motions for summary judgment was as follows:

It is undisputed that K Mart, with the consent of Lobo Lodge, has added on to the originally constructed building that was the subject of the original lease agreement, and that the rent did not increase in the wake of this expansion. It is further undisputed that rental rates for "big-box" department stores in Kootenai County have increased significantly from 1977 through 2007, even after adjustments reflecting the effective ages of the buildings on the subject and comparable properties are made. This can be ascertained from a comparison of the Assessor's appraisal report with the lease agreement and other documentation submitted by Lobo Lodge.

Memorandum in Support of Motion for Summary Judgment, p. 11. This statement was made in light of the argument that actual rent should not be considered as part of the actual and functional use of the property because Lobo's rent restriction is not a low-

income long-term restriction imposed by law as in *Greenfield Village*. *Id.* Having thoroughly addressed the underlying argument made by the Board, it is unclear how this Court should have further addressed the 1990 improvements.

#### **4. The End of Mass Appraisals.**

At the heart of both the Board's and the Commission's arguments is the concern that this Court's decision will impact the practice of mass appraisals currently in place.

Memorandum in Support of Motion to Alter or Amend Judgment, pp. 9-12; Amicus Curiae Brief, pp. 3-5. Lobo responds:

Neither the County nor the Commission choose to recognize that distinction [between Lobo's property and properties not limited by a long-term, fixed low-rent restriction] because it creates perceived issues with "mass appraisal." Yet, "mass appraisal," in and of itself, should not govern the valuation of a particular property if incorrect methodologies are utilized. That would be "unequal" under the Idaho Constitution.

Memorandum in Opposition to Motion to Alter or Amend Judgment, p. 11.

This Court specifically addressed the Board's and the Commission's concerns:

It could be argued that this Court's holding creates a problem as to where one "draws the line" in future valuations. In other words, if a sixty-year fixed rent requires actual or contract rent as the primary or "major" consideration, does a five-year fixed rent contract also require actual or contract rent as the primary or "major" consideration? Because the facts of this case fall so far to the right of the twenty-year contract in *Greenfield* on that continuum, and even further to the right of the ten-year contract in *Brandon Bay*, the Court need not address that concern. A five-year fixed rent may be problematic, but only because the Idaho Supreme Court has not yet addressed that situation.

Memorandum Decision and Order on Cross-Motions for Summary Judgment, pp. 26-27.

In their briefs on Motion to Alter or Amend Judgment, both the Board and the Commission argue this Court's decision in this case will result in the elimination of mass appraisals, crippling the appraisal system throughout the State of Idaho. The Commission argues:

The system falls apart if generalized data cannot be applied to the class. In this case, for example, if individualized leases have to be considered for income producing properties, then each property becomes a class of one.

*Amicus Curiae* Brief, p. 5. The Commission fails to explain “why” that cataclysmic outcome would result. The Commission concludes: “...it is not possible for an assessor to perform statutorily required mass appraisals using actual rent for each property assessed.” *Id.*, p. 12. That is not the result of this case. The result of this case is that mass appraisals *can and will continue* with all similarly situated properties, *including this property*. In the outlying, very unusual cases such as this, *if* and only if, the property owner brings an appeal, *then* the Board of Equalization (followed by the Idaho State Board of Tax Appeals and then a District Judge) *will* have to look at actual rent as *a factor* in that outlying, very unusual case involving a fixed-rate, long-term, low-rent, big-box lease. That situation will arise only *if* there is another similarly situated property in Kootenai County or even the State of Idaho, and even then, only *if* that landowner appeals.

The Board’s argument is no better. The Board argues: “...the Memorandum Decision appears to require the Assessor to conduct an individualized valuation of any property which is subject to a long-term lease in the same manner as a fee appraiser.” Memorandum in Support of Motion to Alter or Amend Judgment, p. 10. The Board claims it would be an “impossible task” “to provide such individualized valuations of all income-producing properties in Kootenai County”. *Id.* For the above reasons, this doomsday prophecy about the Court’s Memorandum Decision and Order on Cross-Motions for Summary Judgment is simply unfounded.

This alarmist “the sky is falling” argument made by the Board and the Commission ignores the reality of how appeals from tax decisions arise in the first place. Mass

appraisals *are* used in Kootenai County and in the State of Idaho. If a property owner does not agree with the result of that appraisal (whether it was based on a mass appraisal or individual appraisal), that property owner has the right to appeal. Each appeal is reviewed individually. Contrary to the argument of the Board and the Commission, this Court's decision does not do away with mass appraisals. The result of this Court's decision is that in *this* case, which involves a long-term fixed-rate low rent on a big-box store, actual rent must be considered.

The Board argues: "On the other hand, the Memorandum Decision misapplies these cases in finding that only the actual rents derived from a long-term lease may be considered in valuing the subject property, which, as detailed above, yields investment value as opposed to value." Memorandum in Support of Motion to Alter or Amend Judgment, p. 9. (emphasis in original). The portion of this quote which counsel for the Board underlined is especially troubling in light of the fact that the Board in its brief does not *cite* to any portion of this Court's Memorandum Decision and Order on Cross-Motions for Summary Judgment. Counsel for the Board repeats this argument: "Therefore, a reading of the term 'actual and functional use' to require the consideration only of actual rents in the valuation of some income-producing properties..." *Id.*, p. 11-12. Repetition of a falsehood does not make such true. This Court has reviewed every word of that Memorandum Decision and Order on Cross-Motions for Summary Judgment, and nowhere in that decision did this Court make such a statement or intimate such a statement. This Court made it clear that in a situation such as this, long-term, fixed-rate, low-rent, big-box lease, the actual lease rate is a *factor* to be considered. This Court in its earlier decision did not state that "only" the "actual rents" "may be considered."

The actual wording given by this Court in its Memorandum Decision and Order on Cross-Motions for Summary Judgment was: “This matter is remanded to the Board for consideration of the sales comparison approach, as well as consideration of the actual rent being paid to Lobo under this long-term lease.” Memorandum Decision and Order on Cross-Motions for Summary Judgment, p. 25. This Court used the word “consideration” (twice) intentionally. It is simply unfounded and disingenuous to construe that passage as the Board now does when it claims this Court made the: “...finding that only the actual rents derived from a long-term lease may be considered in valuing the subject property...”. Memorandum in Support of Motion to Alter or Amend Judgment, p. 9. (emphasis in original).

The Commission argues that mass appraisals allow 80% of all properties to be appraised by an “index” due to the fact that I.C. § 63-314(1) requires actual appraisals every five years. Amicus Curiae Brief, pp. 4-5. The inference seems to be that indexing cannot be applied to properties such as Lobo Lodge’s. However, there is no basis for this contention. After the actual rent has been *considered* on this appeal and a value is established, there is no reason why that value cannot be indexed in some manner for the following four years.

The facts of the instant matter are *so unique* as to not pose any significant threat to current appraisal techniques or methods. It could well be that there is not another big-box store in the State of Idaho, let alone Kootenai County, where the owners of the land and improvements entered into a thirty-year lease at a low-rate fixed rent. The point made by counsel for Lobo at oral argument on the Board’s Motion to Alter or Amend is well taken: “There is no evidence of another one of these out there.” At the core of the Court’s decision is the requirement that, on facts like these, actual and functional use be

considered in determining market value and given the long-term fixed rent lease in place here, “actual and functional” use must also consider the actual rent being paid.

#### **D. Board of Equalization vs. Board of Tax Appeals**

The Board raises concern over references throughout the Court’s Memorandum Decision and Order to the BOE when references should have been to the IBTA. Memorandum in Support of Motion to Alter or Amend Judgment, pp. 12-13. The Board is correct in stating the BOE agreed with Lobo, leading to the Assessor’s appeal to the IBTA, whose decision in turn was appealed by Lobo Lodge to this Court. *Id.* The Board’s request is to have the matter remanded to the IBTA if the matter is again remanded. *Id.*, p. 14. Lobo Lodge argues “...the Board of Equalization would be the appropriate body to which the remand should be made given that the Idaho Board of Tax Appeals is simply functioning in the nature of an intermediate “court of review.” Memorandum in Opposition to Alter or Amend Judgment, p. 13. Lobo Lodge cites I.C. §63-511 for support for that proposition. *Id.*

The confusion is understandable. It appears the confusion arises out of this Court’s designation of the administrative bodies involved. This Court in its Memorandum Decision and Order on Cross-Motions for Summary Judgment designated the Kootenai County Board of Equalization as “BOE”, the Kootenai County Board of Commissioners as “Board”, and the Idaho Board of Tax Appeals as “IBTA.” The “Board” reference causes some confusion because it refers to the Kootenai County Board of Commissioners *acting* as the Kootenai County Board of Equalization.

In this Motion to Alter or Amend Judgment, and in Lobo Lodge’s response, each party, understandably, seeks to have a remand back to the entity that found in their favor. This Court finds that because the remand was for additional consideration of

facts (“This matter is remanded to the Board for consideration of the sale comparison approach, as well as consideration of the actual rent being paid to Lobo under this long-term lease.”), the appropriate entity is the Board of Equalization. In deciding this Motion to Alter or Amend, this Court meant what it said in its decision: The remand goes to the Board, the Board of Commissioners acting as the Board of Equalization.

#### **E. Consideration of Sales Comparison Approach.**

The Board argues:

Finally, the Memorandum Decision’s order remanding this matter indicated that the “BOE” (actually, the SBTA) had failed to consider the sales comparison approach in valuing the subject property. Memorandum Decision, p. 28-29. The Assessor, however, did consider this approach, as can be seen in a review of the documentation contained in the agency record which was submitted by the Assessor to the SBTA. While the income approach was given the greatest weight, the sales which were considered also confirmed the ultimate value placed on the property by the Assessor.

Memorandum in Support of Motion to Alter or Amend Judgment, p. 14. Lobo Lodge appears to agree. Memorandum in Opposition to Alter or Amend Judgment, p. 13. This Court agrees with Lobo Lodge: “That having been said (that the Board did consider the sales comparison approach), the Court should remand the matter with directions to the Board of Equalization to revalue the property, for the 2007 assessment year and all other years impacted by this appeal, utilizing the actual rent paid to Lobo Lodge under its long term lease.” *Id.*, p. 14. However, this Court substitutes the word “considering” for “utilizing”.

#### **F. Valuation Decision by This Court.**

Lobo argues the Court can itself determine the fair market value for assessment purposes for the year 2007 because the sales approach, which the Court has ordered be considered on remand, was used by the Assessor. Memorandum in Opposition to



“considered.” This Court found given the peculiar facts of this case, that the Assessor’s market value, which ignored actual rents, was error. This Court appreciates the invitation to decide this valuation on appeal (only as a matter of judicial economy), however, this Court feels it has not been presented with enough facts and argument as to why actual rent should control. It may well be that given the facts and additional argument, the valuation advocated by Lobo through the consideration of actual rent, is the fair valuation of determining “current market value” under I.C. § 63-314(1). It may well be that given the facts and argument, some valuation greater than actual rent but less than market rent, is the fair valuation of determining “current market value” under I.C. § 63-314(1). The Board has the expertise to hear that evidence, listen to those arguments, and make that determination.

**IV. CONCLUSION AND ORDER.**

IT IS HEREBY ORDERED the Board’s Motion to Alter or Amend is DENIED, this matter is remanded to the Board of Equalization to revalue the property, for the 2007 assessment year and all other years impacted by this appeal, considering the actual rent paid to Lobo Lodge under its long-term, low-rate, fixed lease.

Entered this 21<sup>st</sup> day of December, 2009.

\_\_\_\_\_  
John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the \_\_\_\_\_ day of December, 2009, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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