

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'Clock _____ M
CLERK OF DISTRICT COURT

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,)
vs.)
)
KOOTENAI COUNTY and the KOOTENAI)
CO. BD. OF COMMISSIOERS, ACTING AS)
THE KOOTENAI CO. BD of EQUAL..)
)
Defendants.)

Case No. **CV 2008 4220**

**MEMORANDUM DECISION AND
ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT**

I. INTRODUCTION AND PROCEDURAL BACKGROUND.

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 move 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 value 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.

On September 29, 2008, the Board filed its Motion for Summary Judgment. On

October 3, 2008, Lobo filed its Motion for Summary Judgment. Briefing was filed and oral argument was held on March 25, 2009.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996); *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 662 (1982).

Such a rule is proper where the matter is to be tried to a jury, because even though evidentiary facts may be undisputed, those evidentiary facts may yield conflicting inferences as to what the ultimate facts of a case are. *Id.* If such conflicting inferences are possible, then summary judgment would deprive the parties of the right to have the jury make the decision on the matter. *Id.* Where both parties file motions for summary judgment relying on the same facts, issues and theories, the fact that both parties have filed summary judgment motions alone does not in itself establish that

there is no genuine issue of material fact. *In the matter of the Estate of James Everett Montgomery, Jr.*, 2009 Opinion No. 29, 09.6 ISCR 239, 240 (March 4, 2009); *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518, 650 P.2d 657, 661, n. 1. This is so because by filing a motion for summary judgment a party concedes that no genuine issue of material fact exists under the theory that he is advancing, but does not thereby concede that no issues remain in the event that his adversary seeks summary judgment upon different issues or theories. *Id.*

In summary judgment in a case scheduled for a court trial, the Court as the trier of fact is entitled to arrive at the most probable inferences based on the undisputed evidence properly before the Court. *J.R. Simplot Co. v. Bosen*, 144 Idaho 611, 615, 167 P.3d 748, 755 (2006). A trial court's findings of fact will only be set aside if unsupported by substantial, competent evidence, i.e. if clearly erroneous. *Neider v. Shaw*, 138 Idaho 503, 506, 65 P.3d 525, 528 (2003). The Supreme Court freely reviews questions of law. *Id.*

Idaho Code § 63-3812 sets forth that a taxpayer, assessor, the state tax commission or any party appearing before the board of tax appeals aggrieved by a decision of the board of tax appeals may appeal to the district court. I.C. § 63-3812; *see also Blanton v. Canyon County*, 144 Idaho 718, 720, 170 P.3d 383, 385 (2007).

Appeals may be based upon any issue presented by the appellant to the board of tax appeals and shall be heard and determined by the court without a jury in a trial de novo on the same issues in the same manner as though it were an original proceeding in that court. The burden of proof shall fall upon the party seeking affirmative relief to establish that the decision made by the board of tax appeals is erroneous. A preponderance of the evidence shall suffice to sustain the burden of proof. The burden of proof shall fall upon the party seeking affirmative relief and the burden of going forward with the evidence shall shift as in any other civil litigation. The court shall render its decision in writing, including therein a concise statement of the facts found by the court and conclusions of law reached by the court. The court may affirm, reverse or modify the order, direct the tax collector of the county or the state tax commission to refund any taxes found in such appeal to be erroneously or

illegally assessed or collected or may direct the collection of additional taxes in proper cases.

I.C. § 63-3812(c). “The county assessor's valuation of property for purposes of taxation is presumed correct, and the burden of proof is on the taxpayer to show by clear and convincing evidence that the taxpayer is entitled to the relief claimed.” *Troy G. and Linda M. Mitchell v. Board of Equalization Nez Perce County*, 138 Idaho 52, 53, 57 P.3d 763, 764 (2002), citing *Roeder Holdings, L.L.C. v. Board of Equalization of Ada County*, 136 Idaho 809, 41 P.3d 237 (2002); *Greenfield Village Apartments v. Ada County*, 130 Idaho 207, 209, 938 P.2d 1245, 1247 (1997); citing *Merris v. Ada County*, 100 Idaho 59, 64, 593 P.2d 394, 399 (1979); *Ada County v. Sears, Roebuck & Co.*, 74 Idaho 39, 46-47, 256 P.2d 526, 530 (1953). It is not enough merely to challenge the method of assessment. *Title & Trust Company (Idaho Title Co.) v. Board of Equalization, Ada County*, 94 Idaho 270, 486 P.2d 281 (1971). “A taxpayer must show that the valuation fixed by the assessor was manifestly excessive, fraudulent or oppressive; or arbitrary, capricious and erroneous resulting in discrimination against the taxpayer. *Id.* The district court did not err in holding that the Mitchells had failed to make the requisite showing regarding the valuation of their residence.” 138 Idaho 52, 54, 57 P.3d 763, 765.

III. ANALYSIS.

A. The Meaning of Actual and Functional Use in Idaho Code § 63-208.

This Court’s analysis is on the valuation of Lobo’s real property improvements by the Board for the year 2007. Again, the parties have stipulated that any decision by this Court on summary judgment regarding the 2007 valuation of Lobo’s property by the Board is binding for 2008. The parties also agree there is no genuine issue of material fact. The parties agree the land value of the property is not at issue, only the value of

the improvements is in dispute. The Board agrees that this long-term lease agreement Lobo has with K-Mart/Sears, is an authentic lease, made in an arms-length transaction many years ago.

As stated above in the “introduction” section, in determining the value of those improvements, at issue is whether the *actual* rent Lobo earned on the lease, versus the *market* rent for comparable properties, should be the primary basis for determining the “actual and functional use” of the property, as used in Idaho Code § 63-208. In order to solve that issue, the parties have focused this Court on determining whether the word “use” in the phrase “actual and functional use” in Idaho Code § 63-208 pertains to *how* that property is used or what rent is generated from that use. The parties advocate the Court (and the assessor in the first instance) primarily consider either the *long term lease and low actual rent* (as advocated by Lobo), or *the actual use to which the improvements are put*, in this case an older, discount retail (big-box) store (as advocated by the Board).

In determining the value of those improvements, this Court is cognizant of the fact that “...when assessing real property, the assessor shall consider the sales comparison approach, the cost approach, and the income approach.” *Troy G. and Linda M. Mitchell v. Board of Equalization Nez Perce County*, 138 Idaho 52, 53, 57 P.3d 763, 764, citing IDAPA 35.01.03.217.02. The BOE found that the Assessor determined the “...actual and functional use was determined to be as a ‘discount retail store.’” R., Exhibit 10, p. 2. The BOE noted the Assessor looked at cost and income methods of valuing the building, and arrived at a value of \$2,813,892.00 using the cost approach, and \$2,556,396.00 using the income approach, and considered the income approach the most indicative of subject’s current market value. *Id.* The BOE also noted IDAPA 35.01.03.217.03.a requires “market rent” not contract or actual rent, citing *The Senator v. Ada County*, 138 Idaho 566, 67 P.3d

45 (2003), with approval. *Id.*, pp. 2-3.

In upholding the assessor in the present case, the BOE held in its decision:

Idaho's market value standard clearly holds a property's value is sought, not the value of an individual ownership, i.e. Respondent's "leased fee" as landlord. Market value from an appraisal discipline and legal standpoint requires due consideration of market rent. Rule 217.03.a makes this clear. Property is assessed/valued for tax purposes under a hypothetical ownership in fee simple. This has varied practical benefits, but perhaps most importantly, it is the prime basis for uniformity in taxes. Were individual or partial ownerships considered for taxation, or individual management decisions considered controlling such as proposed in the *Senator* case, taxes of "like" properties would be materially different. There is the further difficulty of requiring contract rent consideration where the State Legislature has not required such information be annually reported.

In summary, market value is customarily estimated with attention to market rent. This was the basis for the Assessor's valuation of subject as an older income producing property. Due consideration was given the property's "actual and functional use" as a discount retail store. The original assessment was well supported by consideration of the three (3) approaches to value. Subject's market value in fee simple was reasonably estimated.

Id., p. 5. The BOE made it clear that market value is what the assessor used in valuing Lobo's property, and market value is what the BOE used in upholding the assessor's valuation. The BOE made it clear that "Market value from an appraisal discipline and legal standpoint requires due consideration of market rent." Thus, there is no indication that either the assessor or the BOE took into account, in any fashion, the actual rent Lobo earns on this long-term lease with K-Mart.

There is a trilogy of Idaho Supreme Court cases which guide this Court in its finding that "actual and functional use" in Idaho Code § 63-208 requires consideration of the *long term lease and low actual rent* (as advocated by Lobo), and not simply *the actual use to which the improvements are put*, in this case an older, discount retail (big-box) store (as advocated by the Board), which, in turn, would allow comparison with other discount retail stores and the use of market rent. The trilogy, in order that they were decided, consists of: *Greenfield Village Apartments v. Ada County*, 130 Idaho 207, 938 P.2d 1245 (1997); *The*

Senator v. Ada County, 138 Idaho 566, 67 P.3d 45 (2003); and *Brandon Bay, Limited Partnership v. Payette County*, 142 Idaho 681, 132 P.3d 438 (2006). Before discussing that trilogy, this Court will discuss the Idaho Statutes and administrative rules that are involved.

In determining the value of those improvements, this Court is being asked to determine the relationship between: a) “market value,” as defined by I.C. § 63-201(10), b) “actual and functional use” as used in I.C. § 63-208, which “shall be a major consideration when determining market value for assessment purposes”, and c) IDAPA 35.01.03.217.03.a, which reads: “The appraisal procedures, methods, and techniques 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.” Memorandum in Support of Motion for Summary Judgment (Filed by Plaintiff/Appellant Lobo Lodge, Inc.), pp. 7-9; [Respondents’] Memorandum in Support of Motion for Summary Judgment, p. 5. Lobo argues the assessor’s valuation was improperly based upon hypothetical market rents. Memorandum in Support of Motion for Summary Judgment (Filed by Plaintiff/Appellant Lobo Lodge, Inc.), p. 9. Lobo argues because its lease binds any successors and assigns of Lobo, the lease should be construed as a restrictive covenant and this Court should utilize the actual rent Lobo earned pursuant to the analysis of the Idaho Supreme Court in *Greenfield Village Apartments v. Ada County*, 130 Idaho 207, 938 P.2d 1245 (1997). *Id.*, pp. 9-10. Idaho Code § 63-201(10) defines “market value” as follows:

63-201. DEFINITIONS. As used for property tax purposes in title 63, chapters 1 through 23, Idaho Code, the terms defined in this section shall have the following meanings, unless the context clearly indicates another meaning:

* * *

(10) "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.

Idaho Code § 63-208 sets forth rules pertaining to market value, and states "actual and functional use" shall be a major consideration when determining market value for assessment purposes:

63-208. RULES PERTAINING TO MARKET VALUE -- DUTY OF ASSESSORS. (1) It shall be the duty of the state tax commission to prepare and distribute to each county assessor and the county commissioners within the state of Idaho, rules prescribing and directing the manner in which market value for assessment purposes is to be determined for the purpose of taxation. The rules promulgated by the state tax commission shall require each assessor to find market value for assessment purposes of all property, except that expressly exempt under chapter 6, title 63, Idaho Code, within his county according to recognized appraisal methods and techniques as set forth by the state tax commission; provided, that the actual and functional use shall be a major consideration when determining market value for assessment purposes.

(2) To maximize uniformity and equity in assessment of different categories of property, such rules shall, to the extent practical, require the use of reproduction or replacement cost less depreciation as opposed to historic cost less depreciation whenever cost is considered as a single or one (1) of several factors in establishing the market value of depreciable property. The state tax commission shall also prepare and distribute amendments and changes to the rules as shall be necessary in order to carry out the intent and purposes of this title. The rules shall be in the form as the commission shall direct, and shall be made available upon request to other public officers and the general public in reasonable quantities without charge. In ascertaining the market value for assessment purposes of any item of property, the assessor of each county shall, and is required to, abide by, adhere to and conform with rules promulgated by the state tax commission.

Note this statute says "...the actual and functional use *shall* be a major consideration, when determining market value for assessment purposes." (emphasis added). Thus, due to the word "shall", it is mandatory that "actual and functional use" *must* be considered, but also, "actual and functional use" must be the *major* consideration in determining market value for assessment purposes. This sets the stage for the interplay between this statute

and the administrative rule.

The applicable Idaho Administrative Rule is Idaho State Tax Commission Rule 217 (IDAPA 35.01.03.217), which reads:

217. RULES PERTAINING TO MARKET VALUE DUTY OF COUNTY ASSESSORS (RULE 217). Section 63-208, Idaho Code. (3-30-07)

01. Market Value Definition. Market value is the most probable amount of United States dollars or equivalent for which a property would exchange hands between a knowledgeable and willing seller, under no compulsion to sell, and an informed, capable buyer, under no compulsion to buy, with a reasonable time allowed to consummate the sale, substantiated by a reasonable down or full cash payment. (7-1-97)

a. The assessor shall value the full market value of the entire fee simple interest of property for taxation. Statutory exemptions shall be subtracted. (7-1-97)

b. Personal property shall be valued at retail level. (7-1-93)

02. Appraisal Approaches. Three (3) approaches to value will be considered on all property. The three (3) approaches to market value are: (3-30-07)

a. The sales comparison approach; (3-30-01)

b. The cost approach; and (3-30-01)

c. The income approach. (3-30-01)

03. Appraisal Procedures. Market value for assessment purposes shall be determined through procedures, methods, and techniques recommended by nationally recognized appraisal and valuation associations, institutes, and societies and according to guidelines and publications approved by the State Tax Commission. (3-30-07)

a. The appraisal procedures, methods, and techniques 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. (3-30-07)

b. When considering all three approaches to value, the appraisal procedures, methods, and techniques, using the income approach to determine the market value for assessment purposes of low-income housing properties receiving tax credits under Section 42 of the Internal Revenue Service Code, must use actual rent plus the monetary benefit of any income tax credits. (3-30-07)

04. Cross Reference. For clarification of the income to include when using the income approach to value low-income housing properties receiving tax credits under Section 42 of the Internal Revenue Service Code, see *Brandon Bay, Ltd. Partnership v. Payette County*, 142 Idaho 681, 132 P.3d 438 (2006). (3-30-07)

Thus, at issue is the applicability of this Idaho Administrative Rule, Idaho State Tax Commission Rule 217, which requires the assessor, when using the income approach to

value property, use market rent in valuing real property as opposed to contract rent (IDAPA 35.01.03.217.03.a), in light of Idaho Code § 63-208, which states: "...the actual and functional use *shall* be a major consideration, when determining market value for assessment purposes." Lobo argues that, to the extent Idaho Tax Commission's administrative rule (which requires market rent not actual or contract rent be used in the income approach) conflict with statutory requirement (that "actual and functional use" shall be a major consideration when determining market value for assessment purposes), the statute controls. Memorandum in Support of Motion for Summary Judgment (Filed by Plaintiff/Appellant Lobo Lodge, Inc.), p. 9. Lobo provided no citation for its proposition that the statute controls, but that is an accurate statement.

The administrative rules promulgated by the Attorney General of the State of Idaho under IDAPA "shall deal with all general functions and duties performed in common by several agencies." I.C. § 67-5206(2). It would seem obvious that an administrative rule promulgated by the Idaho Attorney General and applicable to agencies would not trump a statute by the Idaho Legislature which governs petitions of review in District Court.

Opinions of the attorney general are considered advisory and not binding on the courts. *O'Shaughnessy v. Wolfe*, 685 P.2d 361, 363 (Mont.1984); *Wulfschuhle v. State Department of Revenue*, 234 Kan. 241, 671 P.2d 547, 553 (1983); *Marston's, Inc. v. Roman Catholic Church of Phoenix*, 132 Ariz. 90, 644 P.2d 244, 248 (1982); *Prante v. Kent School District No. 415*, 27 Wash.App. 375, 618 P.2d 521, 526-27 (1980); *Goodin v. Board of Education of Independent School District No. 14 of McCurtain County*, 601 P.2d 88, 90-91 (Okla.1979). They are, however, entitled to deference. *Moore v. Panish*, 32 Cal.3d 535, 652 P.2d 32, 37, 186 Cal.Rptr. 475, 480 (1982); *Goodin, supra*, 601 P.2d at 91.

Holly Care Center v. State, Dept. of Employment, 110 Idaho 76, 82, 714 P.2d 45, 53 (1986). While rules and regulations enacted by administrative agencies may be given the force and effect of law, they do not rise to the level of statutory law; only the

legislature can make law. *Mead v. Arnell*, 117 Idaho 660, 664-66, 791 P.2d 410, 416-18 (1990). It would seem to this Court that if IDAPA 35.01.03.217.03.a. applies, this Court would be allowing the Attorney General to make law, circumventing the statute in this case, Idaho Code § 63-208. “Nevertheless, it is also the law that administrative rules are invalid which do not carry into effect the legislature’s intent as revealed by existing statutory law, and which are not reasonably related to the purposes of the enabling legislation.” *Holly Care Center*, 110 Idaho 76, 78, 714 P.2d 45, 47, (1986), *citing*: *Halford v. City of Topeka*, 234 Kan. 934, 677 P.2d 975, 980-81 (1984); *Ferguson v. Arizona Department of Economic Security*, 122 Ariz. 290, 594 P.2d 544, 546 (1979); *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971). It is the court’s duty to interpret the law. *In re Speer*, 53 Idaho 293, 300, 23 P.2d 239, 241 (1933); *Scott v. Gossett*, 66 Idaho 329, 335, 158 P.2d 804, 807 (1945). Within that duty is the responsibility of deciding whether an administrative rule contradicts the wording of a statute.

We reiterate that which declared in *Speer* and *Gossett*: it is this Court’s duty to interpret the law. Within that duty is the responsibility of deciding whether an administrative rule contradicts the wording of a statute. It would be contrary to our oaths of office, that we uphold the Constitution of the State of Idaho, to permit the legislature to decide what administrative rules do or do not conflict with statutory law, because this in essence would constitute an abrogation of the judicial power in violation of art. 2, § 1 and art. 5, §§ 2 and 13 of the Idaho Constitution.

Holly Care Center, 110 Idaho 76, 81-82, 714 P.2d 45, 52-53.

The case law from other jurisdictions is in accord. “It is axiomatic that an administrative rule cannot contradict or conflict with the statute it attempts to implement.” *Hyatt Corp. v. Honolulu Liquor Com’n*, 69 Haw. 238, 241, 738 P.2d 1205, 1206-07 (Hawaii 1987), *citing* *Agsalud v. Blalack*, 67 Haw. 588, 591, 699 P.2d 17, 19 (Hawaii 1985). *In re Waiola O Molokai, Inc.*, 103 Hawai’i 401, 423, 83 P.3d 664, 686 (Hawai’i 2004) states:

The rule of judicial deference, however, does not apply when the agency's reading of the statute contravenes the legislature's manifest purpose. See *Camara v. Aghsalud*, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984) ("To be granted deference, ... the agency's decision must be consistent with the legislative purpose."); *State v. Dillingham Corp.*, 60 Haw. 393, 409, 591 P.2d 1049, 1059 (1979) ("[N]either official construction or usage, no matter how long indulged in, can be successfully invoked to defeat the purpose and effect of a statute which is free from ambiguity...."). Consequently, we have not hesitated to reject an incorrect or unreasonable statutory construction advanced by the agency entrusted with the statute's implementation. See, e.g., *Government Employees Ins. Co. v. Dang*, 89 Hawai'i 8, 15, 967 P.2d 1066, 1073 (1998); *In re Maldonado*, 67 Haw. 347, 351, 687 P.2d 1, 4 (1984).

The Montana Supreme Court has held:

The courts have uniformly held that administrative regulations are 'out of harmony' with legislative guidelines if they (1) 'engraft additional and contradictory requirements on the statute' (citation omitted); or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature. *Arizona St. Bd. of Funeral Directors v. Perlman*, (1972), 108 Ariz. 33, 492 P.2d 694.

Board of Barbers of Dept. of Professional and Occupational Licensing of the State of Montana, 192 Mont. 159, 161, 626 P.2d 1269, 1270 (Mont.1981).

This Court finds that at least as applied to these facts, IDAPA 35.01.03.217.03.a. is in conflict with Idaho Code § 63-208. As can be seen by the effective dates of the various subsections of IDAPA 35.01.03.217, at one point in time, IDAPA 35.01.03.217.03.a was in conflict with Idaho Code § 63-208 regarding Section 42 property, because IDAPA 35.01.03.217.03.b and c had not yet been added. The Idaho Supreme Court decided *Greenfield* in 1997, and issued the *Brandon Bay* decision in 2006. Both of these cases came to the same conclusion regarding Section 42 low-income property, and in 2007, apparently it was determined that since the Idaho Supreme Court was consistent in how Section 42 property should be valued, IDAPA 35.01.03.217.03.b and c be added. It started with a court decision.

Counsel for the Board argued to the Hearing Officer Linda Pike that while the

Assessor must give major consideration to the actual and functional use of the property, the important word is “use”, and that the statute does not read “actual and functional rent.” Tr. p. 69, Ll. 13-17. Counsel for the Board encouraged the Hearing Officer to look at *The Senator* and the cases cited within that case. *Id.*, Ll. 18-24. Indeed, the Hearing Officer read and cited *The Senator* in her decision. R. Exhibit 10, p. 3. Unfortunately, that was the *only* case the Hearing Officer cited in her decision. If the *singular* long-term (sixty-year) fixed-rent completely binding and irrevocable decision Lobo made in 1978 with K-Mart when Lobo built this property for K-Mart, were similar to the *two* business decisions made during the 1990’s (many years after the trailer park was built) by the landowner in *The Senator*, then this Court would agree that there is no conflict between IDAPA 35.01.03.217.03.a and Idaho Code § 63-208. However, as set forth below, this Court finds that when other Idaho Supreme Court cases are read *in conjunction* with *The Senator*, the singular long-term fixed-rent completely binding and irrevocable decision Lobo made in 1978 with K-Mart when Lobo built this property for K-Mart is more similar to the binding decisions made in *Greenfield* and *Brandon Bay*. 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.

Given the facts of this case, with a long-term fixed-rent contract, this Court finds the administrative rule IDAPA 35.01.03.217.03.a. is in conflict with Idaho Code § 63-208, as applied by the Idaho Supreme Court in the three cases making up the trilogy.

That brings us back to the trilogy. These three Idaho Supreme Court cases will be discussed in the same order. This Court finds this trilogy leads to three criteria that require a remand in the present case, making it necessary for the Board to consider actual rent under this long term lease. The three criteria are: 1) the fact that Lobo’s improvements were built for K-Mart for the specific purpose of a discount retail (big-box) store; 2) the fact that Lobo’s lease with K-Mart was for a long term; and 3) the fact that Lobo and its successors are bound to that long-term low-rent lease, and the only party that can get out of that lease is K-Mart.

Greenfield Village Apartments v. Ada County, 130 Idaho 207, 938 P.2d 1245 (1997), concerned valuation of a low-income (Section 42 of the Internal Revenue Code, 26 U.S.C. § 42) apartment complex built by Greenfield Apartments, L.P. (Greenfield). 130 Idaho 207, 208, 938 P.2d 1245, 1246. The apartments were constructed under that act and the owner had to enter into a regulatory agreement with the Idaho Housing Agency. *Id.* That agreement contained a restrictive covenant that for twenty years bound the owner and all subsequent purchasers of the apartments to rent restrictions. *Id.* In exchange, the

owner received a low-income tax credit of \$258,012.00. *Id.*

While the present case is not Section 42 low-income property, there are significant parallels. Lobo built this property for K-Mart. When Lobo built this property for K-Mart it entered into a very long term lease of sixty-years, from October 31, 1978 to October 31, 2038. The Board points out that after October 31, 2003, the lease is renewable every five years for another five-year period, but only at K-Mart's discretion. Memorandum in Opposition to Lobo Lodge's Motion for Summary Judgment and Reply Memorandum in Support of Kootenai County's Motion for Summary Judgment, p. 2. In other words, if K-Mart wants to continue to rent this big-box store at a very reduced rent, it may elect to do so every five years, (and apparently has done so in 2003 and 2008) for the next twenty-nine years, and Lobo can do nothing about that fact.

In every sense, the rental restrictions on Lobo are greater than those on Greenfield. Greenfield was bound for twenty years; Lobo is bound for sixty years. Greenfield is limited to restrictive rents (which presumably are tied to inflation indices), where Lobo is contractually bound for the *same* rent in 1978 as it is in 2038. Just as Greenfield is powerless to rescind the low income rent restriction on its apartments, Lobo is powerless to rescind its sixty-year lease with K-Mart.

Similar to the present case, in *Greenfield*, Ada County wanted Greenfield's property to be appraised as "...apartment rental property on the open market without consideration of the fact that it issued as low-income housing" and free of the restrictive covenants. 130 Idaho 207, 210, 938 P.2d 1245, 1248. To that argument, the Idaho Supreme Court held:

The County's position ignores the significance of the requirement of I.C. § 63-202 that "actual and functional use shall be a major consideration when determining market value for assessment purposes." The "actual and functional use" of this property is as rent-restricted, low-income housing. It cannot be used otherwise.

In *Fairway Dev. Co. v. Bannock County*, 113 Idaho 933, 750 P.2d 954 (1988), this Court considered valuation of a condominium complex. Despite the fact there were fifty-six units, only nine had sold as condominiums in a ten-year period. The remaining units were rented as apartments. The Bannock County Assessor used the market data approach in valuing the property, comparing the unsold units with similar property that had sold as condominiums. This Court remanded for reconsideration of the valuation, noting “that assessments pursuant to an approved method of appraisal may still be arbitrary, capricious and unreflective of fair market value in the actual and functional use of the property.” 113 Idaho at 938, 750 P.2d at 961. In the case at hand the County has also ignored the “actual and functional use” of the property.

The County argues that the valuation by Greenfield's appraiser is unreliable, because he valued the property by using sales figures of non-rent subsidized properties and then reduced or discounted those figures in consideration of the restricted rental income without recognizing the value added by the tax credit. The record on the proper treatment of the tax credit is not fully developed in the present appeal. That question may be developed upon remand in determining the proper valuation of the property. Regardless of the effect of the tax credit, the County did not consider the actual and functional use of the property as required by I.C. § 63-202, and the case must be remanded.

Id. The first paragraph quoted above also describes Lobo's situation with K-Mart. 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.” *Id.* 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.

The Senator v. Ada County, 138 Idaho 566, 67 P.3d 45 (2003), concerned a property that was built for one purpose that later changed, and there were other business decisions made by the owner of the real property that effected the occupancy rates. The Senator, Inc., owned a mobile home park that was built in 1968. 138 Idaho 566, 568, 67 P.3d 45, 47. In 1976, federal law changed requiring mobile housing built before 1976 to be called a mobile home and mobile housing built after 1976 to be called a manufactured home. *Id.* In the early 1990's, The Senator, Inc., decided it would phase out mobile homes from the park and only rent spaces for manufactured homes. *Id.* In 1993, the Senator, Inc., also decided to restrict its renters to those aged 55 years or older. *Id.*

When assessed in 1999 and 2000, the park had vacancy rates of 26% and 32%, respectively. The assessor used market vacancy rates of 3%. The Senator, Inc. appealed and the district court affirmed the assessor's valuations. The Idaho Supreme Court affirmed the district Court. After a lengthy analysis of the definition of "actual and functional use", the Idaho Supreme Court held: "...the actual and functional use of real property is its existing use and the use for which it was designed and intended." 138 Idaho 566, 570, 67 P.3d 45, 49. The Idaho Supreme Court's analysis of "actual and functional use is as follows:

The legislature has not defined the phrase "actual and functional use." When interpreting a statute, we must begin with the literal words of the statute, giving the language its plain, obvious and rational meaning. *Thomson v. City of Lewiston*, 137 Idaho 473, 50 P.3d 488 (2002). Our goal is to give effect to the purpose of the statute and the legislative intent in enacting it, which may be implied from the language used or inferred on grounds of policy or reasonableness. *Id.* The interpretation of a statute is an issue of law over which we exercise free review. *State v. Maidwell*, 137 Idaho 424, 50 P.3d 439 (2002).

Real property is typically valued at its highest and best use. That determination takes into consideration the uses that are legally

permissible, physically possible, financially feasible, maximally profitable, and reasonably probable in order to arrive at the highest value for the property. The highest and best use of real property may not be its present use, or the use for which any of its improvements were designed.

In 1971 the legislature added to what was then Idaho Code § 63-202 (the forerunner of Idaho Code § 63-208) the requirement that “the actual and functional use shall be a major consideration when determining market value of commercial and agricultural properties.” Ch. 317, § 1, 1971 Idaho Sess. Laws 1264. In 1996, the legislature repealed former Idaho Code § 63-202 and enacted Idaho Code § 63-208, which retains the requirement that the actual and functional use shall be a major consideration when assessing real property, but it does not limit that requirement to commercial and agricultural properties. Ch. 98, §§ 1 & 3, 1996 Idaho Sess. Laws 308, 309, 318-22. It is apparent that the legislature inserted this requirement so that real property would not automatically be appraised at its highest and best use. See *Fairway Development Co. v. Bannock County*, 113 Idaho 933, 750 P.2d 954 (1988) (distinguishing cases from other jurisdictions because statutes in those jurisdictions required that real property be assessed according to its highest and best use rather than its actual and functional use). Although the actual and functional use may be the highest and best use, the two phrases are not meant to be synonymous.

The word “actual” means: “**1.** existing in act or fact; real: *an actual case of treason; actual expenses; an actual hardship.* **2.** existing now; present; current: *the actual position of the moon.*” WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 15 (1989 Barnes & Noble, N.Y.) (italics in original). The word “functional” means: “**1.** of or pertaining to a function or functions: *functional difficulties in the administration.* **2.** having or serving a utilitarian purpose; capable of serving the purpose for which it was designed: *functional architecture; a chair that is functional as well as decorative.*” *Id.* at 574 (italics in original). Considering the definitions of “actual” and “functional” and the legislature's apparent purpose in adding that requirement, **the actual and functional use of real property is its existing use and the use for which it was designed or intended.**

Id. (bold added). The Idaho Supreme Court then analyzed the facts in light of that interpretation of “actual and functional use”:

The Park argues that as a matter of law the actual and functional use of rented spaces differs from the actual and functional use of unrented spaces. We disagree. What is being valued for assessment purposes is the real property, not the business being operated on the real property. The actual and functional use of the real property is as a mobile home/manufactured home park. The assessed value of the Park's real property is simply an opinion regarding the probable sale price of the real

property if it were sold for use as a mobile home/manufactured home park, assuming there was a willing seller, under no compulsion to sell, and an informed, capable buyer, with a reasonable time allowed to consummate the sale and a reasonable down or full cash payment. The Park's actual vacancy rate may or may not affect that probable sale price, depending upon the cause of the vacancy rate. Both the rented and unrented spaces are designed and intended for use as mobile home/manufactured home rental spaces. The actual and functional use of a space does not change merely because it becomes vacant or occupied.

We addressed a similar issue in *Riverside Development Company v. Vandenberg*, 137 Idaho 382, 48 P.3d 1271 (2002). The issue in *Riverside Development* was the value of unsold subdivision lots. The assessor determined that the actual and functional use of the unsold lots was as single-family residence lots, and the assessor valued them at their retail value, based upon the sales price of lots that had sold. The taxpayer contended that the actual and functional use of the unsold lots was as inventory and that as inventory they had a lower value. We upheld the district court's finding that the actual and functional use of the unsold lots was as single-family residential lots. Similarly, in this case the actual and functional use of the Park's unrented spaces is as mobile home/manufactured home rental spaces, not as an inventory of lower-valued unrented spaces.

The Park argues that *Greenfield Village Apartments, L.P. v. Ada County*, 130 Idaho 207, 938 P.2d 1245 (1997), and *Fairway Development Co. v. Bannock County*, 113 Idaho 933, 750 P.2d 954 (1988), support its position. In the *Greenfield Village* case, the taxpayer owned a low-income rental housing project that was subject to a restrictive covenant that bound the owner and all subsequent owners to restricted rent charges for twenty years. After considering all three appraisal methods, the assessor valued the apartment complex based upon the sales comparison approach. When doing so, he did not take into account the restrictive covenant, but used as comparable sales apartment complexes that did not have a similar restriction on rental income. This Court held that by failing to take the restrictive covenant into consideration, the assessor had ignored the property's actual and functional use. As we stated, "The 'actual and functional use' of this property is as a rent-restricted, low-income housing. It cannot be used otherwise." 130 Idaho at 210, 938 P.2d at 1248. In *Greenfield Village*, the restrictive covenant had to be taken into consideration when estimating the probable sale price (market value) of the real property because any purchaser would be bound by the rent restrictions in the covenant. Here, there is nothing similar that would limit the rent that could be charged by any future purchaser of the Park.

In the *Fairway Development* case, the issue was the valuation of a fifty-six-unit apartment complex that had been converted into condominiums. Upon the filing of the document to convert the apartments into

condominiums, the assessor began assessing the units as condominiums rather than apartments, which increased their assessed value by 337%. The assessor used the sales comparison approach to value the unsold units, based upon the sales of other condominium units in the county. The taxpayer sold nine condominium units, but during the ensuing ten years did not sell any more units and continued renting the unsold units as apartments. We held that by focusing entirely upon the classification of the unsold units as condominiums rather than upon their actual use as apartments, the assessor had failed to give major consideration to the actual and functional use of the units.

Certainly it cannot be said on this record that exclusive use of the market data approach based on sales of condominiums (when none have been sold for ten years) gives *major consideration* to the “actual and functional” use. It may not result in accurate or fair appraisals to define all other Bannock County condominiums as “similar properties” to Fairway Estates and so use the values of those properties as the basis for assessing Fairway.... Here, we hold that Fairway cannot be assessed with attention given only to its property's classification as “condominium.”

113 Idaho at 937-38, 750 P.2d at 958-59 (italics in original). In the *Fairway Development* case, we did not hold that unrented apartments should be valued differently than rented apartments.

In this case, the district court did not err in finding that the actual and functional use of the vacant and the occupied rental spaces was the same. Their actual and functional use was as mobile home/ manufactured home rental spaces.

138 Idaho 566, 570-72, 67 P.3d 45, 49-51. The statement: “What is being valued for assessment purposes is the real property, not the business being operated on the real property”, is not true in the present case. The parties have agreed there is no dispute as to the value of the real property in the instant case, and the only dispute is over the value of the improvements. Even if that statement could be applied to the improvements to the real property, the facts are different compared to the present case. The Idaho Supreme Court went on to hold:

The Park's actual vacancy rate may or may not affect that probable sale price, depending upon the cause of the vacancy rate. Both the rented and unrented spaces are designed and intended for use as mobile

home/manufactured home rental spaces. The actual and functional use of a space does not change merely because it becomes vacant or occupied.

138 Idaho 566, 570-71, 67 P.3d 45, 49-50. In the present case, Lobo's property is entirely rented. Lobo's property was "designed and intended" to be used as one big discount retail (big-box) store, not several smaller retail "spaces". While as to the real property, "The actual and functional use of a space does not change merely because it becomes vacant or occupied", the same might not be said of *improvements* to real property. Finally, in the present case we are not concerned with whether Lobo's property is "vacant or occupied". What is at issue is the long-term, fixed, low-rent to which Lobo is bound.

The pertinent portion of the Idaho Supreme Court's analysis in *The Senator*, as applied to the present case, is where the Idaho Supreme Court discussed *Greenfield*:

This Court held [in *Greenfield*] that by failing to take the restrictive covenant into consideration, the assessor had ignored the property's actual and functional use. As we stated, "The 'actual and functional use' of this property is as a rent-restricted, low-income housing. It cannot be used otherwise." 130 Idaho at 210, 938 P.2d at 1248. In *Greenfield Village*, the restrictive covenant had to be taken into consideration when estimating the probable sale price (market value) of the real property because any purchaser would be bound by the rent restrictions in the covenant. Here, there is nothing similar that would limit the rent that could be charged by any future purchaser of the Park.

138 Idaho 566, 571, 67 P.3d 45, 50. As discussed above, Lobo's sixty-year fixed-rent lease which Lobo cannot get out of is like Greenfield's twenty-year, rent-restricted, low-income housing, and as to both Lobo's property and Greenfield's property: "It cannot be used otherwise." *Id.*, citing *Greenfield*, 130 Idaho 207, 210, 938 P.2d 1245, 1248. 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.

A different result by the Idaho Supreme Court in *The Senator* would have created an untenable situation. Every year, all income-producing property in the State of Idaho that is broken up into multiple lessees, multiple spaces, multiple units, etc., would have to be valued according to the *then existing* occupancy/vacancy rate. The practical result of this Court’s decision in the present case still allows the Board to make adjustments if K-Mart at any time vacates the property. Real estate is valued every year, and if K-Mart leaves, the Assessor and if need be, the Board, and therefore, the County, can react. And in 2038, the County, acting through the Assessor, and if need be, the Board, can react to the changed circumstances.

Finally, in *Brandon Bay, Limited Partnership v. Payette County*, 142 Idaho 681, 132 P.3d 438 (2006), the Idaho Supreme Court had the opportunity to again look at two low-income (26 U.S.C. § 42) apartment developments. The issue, after *Greenfield*, was whether the tax credits to the landowner should be included in the real property assessment of the apartments for taxation purposes by Payette County. 142 Idaho 681, 682, 132 P.3d 438, 439. The Idaho Supreme Court held the tax credits should be included in the assessment. 142 Idaho 681, 684, 132 P.3d 438, 441. While the central issue in *Brandon Bay* is not pertinent to the present case, the following analysis from *Brandon Bay* is pertinent:

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. 130 Idaho at 211, 938 P.2d at 1249. 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*.

Each party in this case has, appropriately, argued at length why the facts of this are similar to the trailer park vacancies in *The Senator* (the Board) or similar to *Greenfield/Brandon Bay* Section 42 limitations (Lobo). If placed on a continuum, with the facts of *The Senator* (trailer park vacancies can’t be used to show “actual and functional use”) on the left, and the facts of *Greenfield/Brandon Bay* (long-term low-rent restrictions under Section 42 can be used to show “actual and functional use”) on the right, the facts Lobo finds itself in would be even *further* to the right. This is because, as noted above, in every sense, the rental restrictions on Lobo (60-year rent restriction) are of much longer duration than those found in *Greenfield* (20-year rent restriction) and *Brandon Bay* (10-year rent restriction). The landowners in *Greenfield* and *Brandon Bay* were limited to restrictive rents, but those rents, unlike the present case where rent is fixed, were in a range (30% of the gross income limitation applicable to such unit, and do not include utilities or supportive services, 26 U.S.C. § 42 (g)(2)(A) & (B)), and the amount of credit that can be claimed by the landowner is adjusted to inflation (26 U.S.C. § 42 (h)(3)(A)-(C)). On the other hand,

Lobo is contractually bound for the *same* rent in 1978 as it is in 2038. As the Court pointed out in oral argument, if the Board's assessment remains, Lobo faces the "double whammy" due to its being locked into a long-term low-rent lease (which Lobo inflicted on itself thirty-one years ago): 1) no matter who owns the property, Lobo or any subsequent buyer, they will be stuck with the lessee (K-Mart) who will not want to non-renew that lease because it is so favorable, yet at the same time they are paying property taxes which are based on market rents which are more than twice the actual contract rent, and 2) since the county assessed this property at market lease rates instead of actual contract lease rates, the result would be the sale price of this property would be less because no willing buyer will pay the same price for Lobo's property with this long-term rent restriction, as compared to any other big-box store without that restriction which rents at current market lease rates. At oral argument, counsel for Lobo mentioned the following third factor for the "triple whammy". Lobo has the opportunity to earn percentage rents under this lease in addition to the base rent of \$255,000.00 per year, but those percentage rents are offset by property taxes. Thus, if Lobo were to be entitled to percentage rents, those would be reduced or eliminated with the higher property tax assessment, which is based on a lease less than half the market rate. While it could be argued that all of this was self-inflicted by Lobo thirty-one years ago, the situation in *Greenfield* and *Brandon Bay* is every bit as self-inflicted by the landowner.

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. This Court can find no legitimate distinction between those two cases dealing with Section 42 property, and the binding, long-term, low-rent lease Lobo entered into thirty-one years ago. The Board wishes to make that Section 42 distinction determinative. Lobo argues it is the long-term, low-rent lease inherent with Section 42 property, that makes those cases similar to Lobo's situation. Counsel for the Board argued to the Hearing Officer that *Greenfield Village* involved a legal, recorded deed restriction for a 20-year period, and to obtain the tax credit they had to record that deed restriction according to federal law. Tr. p. 70, L. 21- p. 71, L. 3. The argument continued that this case is not a matter of federal law, but rather a voluntary lease agreement. *Id.*, p. 71, Ll. 4-13. Both statements are true, but Lobo's lease is recorded, and the Board provides no argument as to why a federal statute is any more onerous than a completely binding contract.

This Court has considered that Section 42 distinction and finds it to be a distinction without a difference. This Court has read through all of 26 U.S.C. § 42, and can find no feature or features of that federal statute making a Section 42 contract any more onerous than the contract entered into between Lobo and K-Mart.

This Court finds as a matter of law that "actual and functional use" of Lobo's property is as a discount retail (big box) store, but, given the long-term fixed-rent lease with K-Mart, "actual and functional use" *must* also consider the *actual rent* being paid in that long-term fixed-rent lease with K-Mart. Accordingly, this matter must be remanded to the Board for such consideration. *Greenfield Village Apartments v. Ada County*, 130 Idaho 207, 209, 938 P.2d 1245, 1247 (1997), citing *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d

527, 529 (1992); *Idaho County Nursing Home v. Department of Health and Welfare*, 120 Idaho 933, 940, 821 P.2d 988, 995 (1991) and *Love v. Board of County Commissioners of Bingham County*, 105 Idaho 558, 671 P.2d 471 (1983).

B. The BOE Failed to Take Into Consideration the Sales Comparison Approach.

In determining the value of those improvements, this Court is cognizant of the fact that "...when assessing real property, the assessor shall consider the sales comparison approach, the cost approach, and the income approach." *Troy G. and Linda M. Mitchell v. Board of Equalization Nez Perce County*, 138 Idaho 52, 53, 57 P.3d 763, 764, citing IDAPA 35.01.03.217.02. *The Senator v. Ada County*, 138 Idaho 566, 569, 67 P.3d 45, 48 (2003), citing IDAPA 35.01.03.217.02. The BOE found that the Assessor determined the "...actual and functional use was determined to be as a 'discount retail store.'" R., Exhibit 10, p. 2. The BOE noted the Assessor looked at cost and income methods of valuing the building, and arrived at a value of \$2,813,892.00 using the cost approach, and \$2,556,396.00 using the income approach, and considered the income approach the most indicative of subject's current market value. *Id.*

Even though Lobo argues the income approach is the most indicative of the current market value of Lobo's property (Memorandum in Support of Motion for Summary Judgment (filed by plaintiff/appellant Lobo), p. 8, per the IBTA Order p. 2), the BOE failed to consider the sales comparison approach. Because IDAPA 35.01.03.217.02 by use of the word "shall", requires consideration of all three methods, this error is fatal to this assessment of Lobo's property. This Court may reverse the Board's decision or remand the case for further proceedings. *Greenfield Village Apartments v. Ada County*, 130 Idaho 207, 209, 938 P.2d 1245, 1247 (1997), citing *Dovel v. Dobson*, 122 Idaho 59, 61, 831 P.2d 527, 529 (1992); *Idaho County Nursing Home v. Department of Health and*

Welfare, 120 Idaho 933, 940, 821 P.2d 988, 995 (1991) and *Love v. Board of County Commissioners of Bingham County*, 105 Idaho 558, 671 P.2d 471 (1983). This Court finds it is appropriate for this matter to be 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.

IV. CONCLUSION AND ORDER.

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

Entered this 13th day of May, 2009.

John T. Mitchell, District Judge

Certificate of Service

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

Lawyer
John F. Magnuson

Fax #
208 667-0500

| **Lawyer**
Patrick M. Braden

Fax #
208 446-1621

Jeanne Clausen, Deputy Clerk