

IN THE SUPREME COURT

STATE OF OHIO

APPEAL FROM THE BOARD OF TAX APPEALS

BEDFORD BOARD OF EDUCATION,)

Appellee,)

vs.)

CUYAHOGA COUNTY BOARD OF)
REVISION, CUYAHOGA COUNTY)
AUDITOR, AND TAX COMMISSIONER)
OF THE STATE OF OHIO,)

Appellees,)

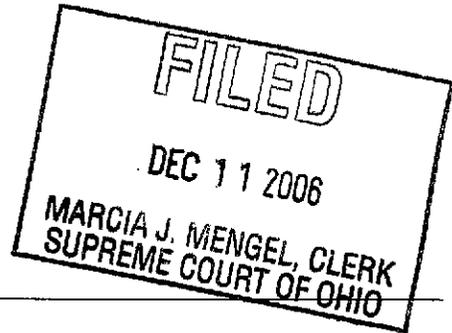
and)

FIRST INTERSTATE HAWTHORNE LTD.)
PARTNERSHIP,)

Appellant.)

SUPREME COURT CASE
NUMBER 05-2311

BOARD OF TAX APPEALS
CASE NUMBERS 2004-A-287
AND 2004-A-288



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LAW AND ARGUMENT

The Appellee, Bedford Board of Education has filed a brief in this appeal. This reply brief of the Appellant, First Interstate Hawthorne Ltd., responds to the issues and arguments raised by the Appellee, Bedford Board of Education (hereinafter Appellee or Board of Education) in their brief.

The Appellee, like the Board of Tax Appeals, sidesteps the issue in this case: what is the fair market value of parcel 795-06-022. The Appellee attempts to convince this Court, as it did the Board of Tax Appeals, that the parcel cannot be valued separate from the shopping center of which it is a part. However, the value of the entire shopping center is not at issue in this appeal. And, whether the subject property is valued as part of that shopping center (which no party, not even the Appellee or Board of Tax Appeals have attempted to do) or separately, a value still has to be assigned to parcel number 795-06-022. The County Auditor, Board of Revision, and Appellant each valued the property for what it is, retail space and land. Supp. at pages 1-24, and 50-55.

The Appellee suggests that because the property is oddly configured that it cannot be valued. Oddly configured parcels are valued by assessing officers across the globe everyday, it is not an impossible task as alleged by the Appellee and believed by the Board of Tax Appeals. No matter how difficult the task one still has to arrive at a value for parcel 795-06-022. See See Dublin Senior Community L.P. v. Franklin Cty. Bd. Of Revision (1997), 80 Ohio St. 3d 455, 460 (noting that “[t]he answer that it is difficult... is not sufficient... it must be done, because we tax real estate in this case). The property is comprised of 50,957 square feet of retail space and 8.51 acres of land, these are the objective parameters that define the valuation issue in this case. The County Auditor and the Appellant utilized the income approach to value the property. Supp. at pages 10, 21, and 54-55. The County Auditor also considered the cost approach. Supp. at pages

21-25 and 52-53. And, the Cuyahoga County Board of Revision considered the relevant unit of value to be \$29.50 per square foot. Supp.at page 24.

In several sections of their brief the Appellee criticize the Appellant for failing to rebut the evidence submitted by the Appellee at the hearing before the Board of Tax Appeals. The Appellant submits that there was nothing to rebut. The Appellee's evidence consisted of an opinion by a real estate appraiser that was unsubstantiated, never reduced to writing, and not supported by market information. Supp. at pages 33-35 (Transcript at pages 28-35). Mr. Nash never performed a highest best use analysis to determine whether the property would be worth more if valued as part of a larger shopping center. Supp. at page 33-35 (Transcript at pages 28-35). As a result, the Board of Tax Appeals adopted an appraiser's opinion of highest and best use who did not perform a highest and best use analysis. See Supp. at pages 33-35 (Transcript at pages 28-35). Mr. Nash never determined whether his opinion of the highest and best use of the property met the four criteria for highest and best use. See The Appraisal of Real Estate, Twelfth Edition, at page 307.

At page 1 in their brief the Appellee states that the issue in this case is "whether the Ohio Board of Tax Appeals ("BTA") was required to affirm a decision of a Board of Revision when it had been established that there was no evidence supporting the same." This characterization of the appeal is not correct. The issue is whether the Board of Tax Appeals decision and order is reasonable and lawful. The Appellant submits that the Board of Tax Appeals decision is unreasonable because there is no evidence in the record to support the decision. Secondly, the Board of Tax Appeals decision is unlawful because the Board of Tax Appeals has failed to carry out the statutory mandate contained in Revised Code Section 5717.03.

I. THE BOARD OF TAX APPEALS DECISION AND ORDER IS UNREASONABLE.

In his testimony before the Ohio Board of Tax Appeals the Appellee's appraiser, Timothy C. Nash, acknowledged that there was no market data before the Board of Tax Appeals to support his findings and conclusions with respect to the highest and best use of the property and the relevant economic unit. Supp. at pages 33-35 (Transcript at pages 28-35). As a result, the Board of Tax Appeals decision and order in this case is based on nothing more than Mr. Nash's unsubstantiated opinion. He did not prepare a report, he did not supply the Board of Tax Appeals with any market data to support his findings, and the Board of Tax Appeals decision and order based upon his testimony is unreasonable. There is nothing in the record and this appeal for this Court to review to determine whether the Board of Tax Appeals factual findings in this case are reasonable. There is simply no evidence (objective market data) in the record to support the Board of Tax Appeals decision in this case.

What is in the record in this case is the Cuyahoga County Auditor's analysis which clearly, contrary to the claims of the Appellee, identifies the retail area and land assessed by the County Auditor in this case. See Supp. at pages 20-23 and 50-55. The property valued by the Appellant in its materials before the Board of Revision is the exact same property valued by the Cuyahoga County Auditor in his record card. See Supp. at pages 6, 9, and 16 and 18. The Appellee's claim at page 13 in their brief that the County Auditor valued something else ignores the actual evidence contained in the record in this case, the Appellee cites no evidence in support of their claim to the contrary. Moreover, there is nothing in the record to support the Appellee's allegation at the top of page 24 in their brief that the County Auditor allocated a value to the subject property after valuing it as part of a larger property. In fact, the evidence in this case points to just the opposite. See Supp. at pages 20-24 and 50-55. The other evidence in the

record in this case is the Board of Revision's oral hearing worksheet and journal entry which appear as Exhibit "F" in the Transcript on Appeal. Supp. at page 24. Based upon the Board of Revision's review of the Appellant's evidence, which is Exhibit "D" from the Transcript on Appeal, containing income and expense information and capitalization rates valuing the property between \$1,083,371.66 to \$1,265,280.59 based on the 2001 and 2002 information, the Board of Revision valued the property at a fair market value of \$1,500,000. There has been no evidence in the form of opinion or otherwise to contradict this valuation evidence. The Appellee submitted no appraisal or valuation evidence before the Ohio Board of Tax Appeals for the Appellant to rebut. Mr. Nash did not appraise the property nor did he prepare an analysis of highest and best use and economic unit in support of this "opinion" before the Board of Tax Appeals.

The Appellee's assertion at page 11 in their brief that "the BTA did not find that 795-06-022 could not be valued..." is not correct. The Board of Tax Appeals clearly held that the parcel could not be valued "separate from the remaining complex." See Board of Tax Appeals decision and order at page 6. At some point in the real property assessment process parcel 795-06-022 has to be valued. The Board of Tax Appeals completely misses this point. The hypocrisy in this case is that the Board of Tax Appeals found that they could not value the property separate from the shopping center of which it is a part and then affirmed a valuation of the parcel by the County Auditor that valued the parcel separate from the rest of the shopping center. As a result the Board of Tax Appeals decision is internally inconsistent and thereby unreasonable. See Ridgeview Center, Inc. v. Lorain Cty. Bd. of Revision (1987), 42 Ohio St. 3d 30 (Board of Tax Appeals decision that was internally inconsistent reversed and remanded).

The Appellant submits that the income approach best captures the value of the real property and the Board of Revision's decision reflects the disparity between the actual income and expense information for the property and the Cuyahoga County Auditor's projections in the

record cards. The Board of Tax Appeals decision and order rejecting this evidence in favor of the unsubstantiated opinion of an appraiser is unreasonable. The Appellant submits that it affirmatively appears from the record that the Board of Tax Appeals adopted an appraiser's opinion of highest and best use and economic unit where the appraiser did not perform a highest and best use analysis or collect and submit data in support of his opinion. Supp. at pages 33-35 (Transcript at pages 28-35).

II. THE BOARD OF TAX APPEALS DECISION AND ORDER IS UNLAWFUL.

The Appellee in their brief in this appeal, as they did before the Board of Tax Appeals, argue that the Board of Tax Appeals can act as a Court of appeals and as a fact finder. The arguments espoused by the Appellee at pages 14 and 15 in their brief are incompatible with the arguments made beginning at page 16 in their brief. In the first sentence at page 14 in their brief the Appellee characterizes the issue before this Court as "whether the BTA was required to affirm the decision of the Board of Revision..." Then at page 16 the Appellee acknowledges that "the BTA is not the administrative equivalent of a court of appeals." It makes a difference to litigants whether the body they are before is a fact finder or a reviewing court. The cases cited by the Appellant in their original brief at pages 9-10 in this case show that Board of Tax Appeal has moved from fact finder to a reviewing court and this trend has made it difficult for parties to know how to prepare and present a case before the Board of Tax Appeals. The Appellant submits that the statute, Revised Code 5717.03 as interpreted by this Court controls and that the Board of Tax Appeals is required to render an independent determination of value in each appeal, not act as a reviewing court. See Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision (1988), 37 Ohio St. 3d16, 25 (The BTA or the court of common pleas is to hear the case denovo); Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision (1996), 76 Ohio St. 3d 13,17 (The BTA's failure to find value based upon its own independent analysis of the evidence is unreasonable and

unlawful.); Black v. Bd. of Revision (1985), 16 Ohio St. 3d 11, 13 (the court is required to make an independent determination concerning the valuation of the property at issue); Park Ridge Co. v. Franklin Cty. Bd. of Revision (1987), 29 Ohio St. 3d 12, 14 (The provisions of R.C. 5717.05 require the common pleas court to consider the administrative record from the board of revision.). In this appeal the Board of Tax Appeals failed to render an independent determination of the taxable value of the Appellant's property based on the evidence in the record in the appeal.

The Appellee at page 29 at their brief attempts to reduce the Appellant's case to the fact that the Board of Education did not present evidence of value from its appraiser to support its appeal to the Board of Tax Appeals. This is not correct. The Appellant's appeal is that the Board of Tax Appeals should not rely on the unsubstantiated opinion of an expert in overturning a Board of Revision decision. When no evidence is submitted on appeal to the Board of Tax Appeals, the Board of Tax Appeals does not sit as a court of appeals in reviewing the evidence before the Board of Revision. The Board of Tax Appeals is required to render an independent determination of value. The Board of Tax Appeals did not do that in this case. As a result, the Board of Tax Appeals decision is unlawful. The Board of Tax Appeals failed to carry out the statutory mandate contained in Revised Code 5717.03.

CONCLUSION

For the foregoing reasons, the Appellant First Interstate Hawthorne Ltd. Partnership respectfully requests that this Court reverse the decision and order of the Ohio Board of Tax Appeals and remand the case to the Ohio Board of Tax Appeals with instructions to find the fair market value or true value in money of the subject real property to be \$1,500,000 as of January 1, 2002, for a corresponding taxable value, utilizing a 35% common level of assessment of \$525,000.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant was mailed via regular U.S. mail postage prepaid, the 8th day of December 2006 to the following: Thomas A. Kondzer, Kolick and Kondzer, 24500 Center Ridge Road, Suite 175, Westlake, Ohio 44145-5697, Attorney for the Appellee Bedford Board of Education, Timothy J. Kollin, Assistant County Prosecutor, Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, Attorney for the Appellees Cuyahoga County Board of Revision and Cuyahoga County Auditor, and James Petro, Ohio Attorney General, State Office Tower, 17th Floor, 30 East Broad Street, Columbus, Ohio 43215-3428, Attorney for the Appellee Tax Commissioner of the State of Ohio.


Todd W. Sleggs (0040921)

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OHIO BOARD OF TAX APPEALS

Bedford Board of Education,
Appellant,

vs.

Cuyahoga County Board of Revision,
Cuyahoga County Auditor, and First
Interstate Hawthorne Ltd,
Appellees.

CASE NOS. 2004-A-287,
2004-A-288

(REAL PROPERTY TAX)

DECISION AND ORDER

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Entered NOV 10 2005

Ms. Margulies and Mr. Eberhart concur. Mr. Dunlap dissents.

This cause and matter came on to be considered by the Board of Tax Appeals upon two notices of appeal filed herein by the above-named appellant, from a decision of the Cuyahoga County Board of Revision. In said decision, the board of revision determined the taxable value of the subject property for tax year 2002.

The matter was submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcript certified to this board by the county board of revision, the evidence and testimony presented at a hearing before this board, and the briefs submitted by counsel to the appellant board of education and counsel to the appellee property owner.

The subject real property is located in the Oakwood taxing district, specifically parcel number 795-06-022, and consists of in-line stores, a portion of a parking lot, and several strips of land that are all part of a larger shopping complex. It is best described in appellant's brief, as follows:

"[T]he north end of the center is anchored by a large single tenant retail store previously occupied by K-Mart, and now by a Levin Furniture store. *** Below this is a strip center consisting of a number of small retail shops ('in-line space'), with a second large single tenant store occupied by a Sam's Club store anchoring the in-line space on the east. Across an alley-way to the east is yet another larger single tenant retail store, this one occupied by Office Max. ***

"*** The actual parcel at issue is comprised of the in-line stores situated between Levin Furniture/K-Mart and Sam's Club, the parking lot in front of Office Max, and several strips of land. The parcel upon which the property owner filed its complaint includes none of the three larger retail stores or anchors, and does not include the parking area actually in front of the in-line stores." Appellant's Brief at 3-5.

The value of the parcel, as determined by the auditor and by the board of revision, is as follows:

		AUDITOR	
		TRUE VALUE	TAXABLE VALUE
Land	\$ 1,580,100		\$ 553,000
Building	1,419,900		497,000
Total	\$ 3,000,000		\$ 1,050,000

		BOARD OF REVISION	
		TRUE VALUE	TAXABLE VALUE
Land	\$ 750,000		\$ 262,500
Building	750,000		262,500
Total	\$1,500,000		\$ 525,000

Appellant contends that the board of revision has undervalued the property in question and claims the property's market value is that which the auditor had determined. It is the property owner's position that the board of revision's value should be retained, based upon the information it submitted to the board of revision.

Initially, this board notes the decisions in *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336, 337, and *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493, 495, wherein the Supreme Court held that an appealing party has the burden of coming forward with evidence in support of the value which it has claimed. Once competent and probative evidence of true value has been presented, the opposing parties then have a corresponding burden of providing evidence which rebuts appellant's evidence of value. *Id.*; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318, 319. Thus, the burden is upon the appealing party, the board of

education, to establish, through the presentation of competent and probative evidence, a different value than that found by the board of revision. See *Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325; *Bd. of Edn. of the Columbus City School Dist. v. Franklin Cty. Bd. of Revision* (Nov. 28, 1997), BTA No. 1996-S-93, unreported.

When determining value, it has long been held by the Supreme Court that "the best evidence of 'true value in money' of real property is an actual, recent sale of the property in an arm's-length transaction." *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129; *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410. Absent a recent sale, as in the instant matter, true value in money can be calculated by applying any of three alternative methods provided for in Ohio Adm. Code 5703-25-07: 1) the market data approach, which compares recent sales of comparable properties, 2) the income approach, which capitalizes the net income attributable to the property, and 3) the cost approach, which depreciates the improvements to the land and then adds them to the land value. However, no appraisals were offered to this board and only an "owner's opinion of value" was entered into evidence before the BOR.

In support of its position that the Cuyahoga County Auditor accurately valued the subject property, the appellant argues that the board of revision improperly relied upon the information offered by appellee property owner. In consideration of appellant's position, we must review what transpired at the BOR.

Specifically, before the BOR, the property owner presented an "opinion of value" that suggested the value of the subject, as of January 1, 2002, was \$1,000,000. A representative of the property owner appeared and verified that the information offered had been taken from the owner's records. Provided within the owner's opinion were "the 1998 through 2002 income and expense statements for the property that show the decline in income at the property as vacancy has increased. Also attached is a rent roll as of September 18, 2000 and a summary of the store tenants with the square footage and percentage of center space each tenant occupies. The valuation set forth in the complaint is based on the historic income and expense information for the property, the vacancy at the property, and the prospect for a turnaround at the center." S.T. at Ex. D. In its property description, the opinion stated that "[t]his location has developed as an area of light industrial buildings as opposed to retail. The primary retail location in this area has developed *** in Macedonia. This has had a negative impact on this property. The property under complaint consists of 50,957 square feet of retail shopping center area." Id. at Ex. D.

After considering the foregoing, the BOR decreased the subject's market value to \$1,500,000, but there are no details in the record to indicate how the BOR arrived at its conclusion, i.e., a value less than the auditor's, but more than that requested by the property owner.

We have previously considered the use of an "owner's opinion of value" at the board of revision level in *Olentangy Bd. of Edn. v. Delaware Cty. Bd. of Revision* (Dec. 18, 1998), BTA No. 1997-M-848, unreported, where we held:

“As complainant, the property owner presented a written ‘Opinion of Value’ (‘Opinion’) at the hearing before the BOR. Such Opinions are regularly presented to boards of revision throughout the state. This Board has been critical of such Opinions when they are presented solely by persons representing property owners without any identification of the author thereof or underlying substantiation. *Grand Development Co. v. Cuyahoga Cty. Bd. of Revision* (June 5, 1998), B.T.A. No. 97-J-312, unreported; *Society Nat’l. Bank v. Montgomery Cty. Bd. of Revision* (Aug. 25, 1995), B.T.A. No. 94-P-875, unreported; *Society Nat’l. Bank v. Carroll Cty. Bd. of Revision* (June 9, 1995), B.T.A. No. 97-J-450, unreported; *Parkview Manor Company v. Cuyahoga Cty. Bd. of Revision* (June 9, 1995), B.T.A. No. 94-A-228, unreported.” Id. at 4-5.

See, also, *Kettering–Moraine City School Dist. Bd. of Edn. v. Montgomery Cty. Bd. of Revision* (July 20, 2001), BTA No. 1998-L-1003, unreported. While the author(s) of the subject owner’s opinion of value was identified at the BOR hearing, the author was not present to testify or be cross examined concerning the basis for the conclusions made within the report or to provide insight into the opinion’s preparation, including the underlying support for the positions expressed.

It is the appellant board of education’s position that the BOR improperly relied upon the owner’s opinion of value in making its valuation conclusions regarding the subject property. Specifically, the BOE contends that the subject is only a portion of a larger, single economic unit, a shopping complex, and, as such, it would be improper to value the subject parcel separate from the remaining complex. We agree.

At the hearing before this board, the BOE offered the testimony of Timothy C. Nash, MAI. As an expert real estate appraiser, Mr. Nash testified that he considered the subject property part of a single economic unit made up of the entire

shopping complex. He stated that, "If this is for assessment purposes and you want to know what this parcel is worth, we should be appraising the whole economic unit which is under one ownership, which is one physical property and has one parking area for everybody, an open parking area, and generally sells that way for this size shopping center." H.R. at 25.

While Mr. Nash acknowledged that the subject parcel could be sold independently from the remainder of the shopping complex, he testified that it was his belief, based upon his observance of the market over the years, that it would not be typical. H.R. at 29-30. He testified that the subject parcel alone does not normally constitute a single economic unit based upon how it is configured. H.R. at 17. For example, the parking lot that is part of the subject parcel does not service the subject in-line stores, but the adjacent stores, and the parking lot for the subject in-line stores is part of an adjacent parcel. H.R. at 23. Thus, it is Mr. Nash's opinion that, in conjunction with the remaining shopping complex, the subject "property will serve its highest and best use as a single unit." *Park Ridge Co. v. Franklin Cty. Bd. of Revision* (1987), 29 Ohio St.3d 12. Based upon the configuration of the subject parcel and Mr. Nash's representations on how such a shopping complex is traditionally viewed in the market, we agree that it would logically follow that the highest and best use of the subject property is as a single economic unit.

Further, there is no evidence in the record to support the BOR's valuation of the subject. While it could be assumed that the BOR utilized the information contained in the property owner's opinion of value to some extent, it

obviously did not adopt the property owner's position in its entirety. There is nothing to which we can point as the basis for its ultimate determination, and without an understanding of the basis for its action, we cannot rely upon its conclusions. See *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564. Thus, based upon the foregoing concerns, we will rely upon the county auditor's valuation of the subject, as set forth in the property record cards included in the statutory transcript.

Accordingly, we find, based upon the preponderance of the evidence before this board, the value of the subject real property for tax year 2002 shall be as follows:

	TRUE VALUE	TAXABLE VALUE
Land	\$ 1,580,100	\$ 553,000
Building	1,419,900	497,000
Total	\$ 3,000,000	\$ 1,050,000

It is the decision and order of the Board of Tax Appeals that the Cuyahoga County Auditor shall list and assess the subject property in conformity with this decision.

Mr. Dunlap dissenting.

I disagree with the foregoing decision and order and, accordingly, dissent.

Appellant BOE challenges the determination of the BOR reducing the value accorded the subject property by the county auditor.

It is axiomatic the burden of persuasion is on the appealing party to establish, through the presentation of competent and probative evidence, a different value than that found by the board of revision. Assigned the burden of proof, the BOE is required to provide sufficient probative evidence to establish the value sought (\$3,000,000) accurately and reliably represents the true value of the subject.

In support, appellant submits evidence and testimony tending to show the subject parcel to be a portion of a multi-parcel "economic unit." That is, appellant argues because of the parcels' status as an integrated part of an economic unit consisting of a number of parcels, the BOR's specific decrease in its individual value is improper and, therefore, by default, the auditor's value (i.e., \$3,000,000) should be reinstated.

In my view, while the subject parcel may be legitimately characterized as part of an economic unit, appellant has failed to show the auditor's value is anymore indicative of true value than the decision of the BOR. Why the subject was assigned a true value of \$3,000,000 is never explained. Likewise, neither the true value of the entire economic unit nor a breakdown of the values assigned the other related parcels (if, in fact, an allocation was undertaken) is presented.

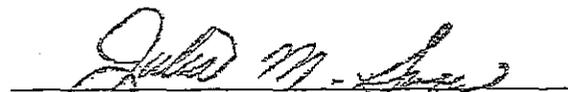
Moreover, we are cited to no specific authority finding it is unwarranted for a BOR, pursuant to a legitimate complaint, to determine the individual value of a permanent parcel that may be part of an economic unit.

I would find that appellant has failed to meet its assigned burden of proof. In response to appellant's contention that there is insufficient evidence to support the BOR's decision, I note the property owner-appellee provided the BOR with specific evidence in support of the allegations contained in its complaint, verified and explained via testimony from an officer who also responded to extensive questioning by the BOR. In my judgment, the record establishes that the property owner's presentation to the BOR in support of the decrease complaint is adequately probative and correspondingly, the BOR's value determination reasonably reconciles the evidence and testimony presented for its consideration.¹

Accordingly, for the foregoing reasons, I respectfully dissent.

BOARD OF TAX APPEALS			
RESULT OF VOTE	YES	NO	DATE
Ms. Margulies	plm		11/3/05
Mr. Eberhart	RFE		11-9-05
Mr. Dunlap		WED	11-4-05

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.


 Julia M. Snow, Board Secretary

CCY
 C/S

¹ Additionally, while it is well settled that a decision of a BOR is not entitled to a presumption of correctness, its findings need not be completely disregarded. The BOR's expertise and its proximity to and familiarity with a subject property ought to be acknowledged and recognized. If, as herein, the record demonstrates the BOR received substantial evidence and testimony regarding value, relatively uncontroverted, and the individual members participated significantly in the proceedings, a corresponding decision adjusting the auditor's values should be accorded consideration and weight, at least to the extent it reflects and corroborates the evidence in the record.

or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation or order by the commissioner is required, by the person to be given by the director of budget and management if the revenues affected by such decision would accrue primarily to the State treasury, or by the county auditors of the counties to the highest general tax funds of which the revenues affected by such decision would primarily accrue. Appeals from the determination by the director of development under division (B) of section 5709.62 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the determination is required by law to be given. Appeals from a decision of the tax commissioner concerning an application for a property tax exemption may be taken to the board of tax appeals by a school district that filed a statement concerning such application under division (C) of section 5712.7 of the Revised Code. Appeals from a determination by the director of JO and family services under section 5733.42 of the Revised Code may be taken to the person to whom the notice of the determination is required by law to be given under that section.

Such appeals shall be taken by the filing of a notice of appeal with the board and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the director of development if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation or order by the commissioner or determination by the director of development as provided in section 5703.52, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of such appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt, provided by the authorized delivery service shall be treated as the date of filing. The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner or director to the taxpayer, enterprise, or other person of the final determination or determination complained of, and shall also specify the errors therein complained of, but failure to attach a copy of such notice and incorporate it by reference in the notice of appeal does not invalidate the appeal.

Upon the filing of a notice of appeal, the tax commissioner or the director, as appropriate, shall

certify to the board a transcript of the record of the proceedings before the commissioner or director, together with all evidence considered by the commissioner or director in connection therewith. Such appeals or applications may be heard by the board at its office in Columbus or in the county where the applicant resides, or it may cause its examiners to conduct such hearings and to report to it their findings for submission, or rejection, of the appeal and the evidence required to it by the commissioner or director. But upon the application of any interested party the board shall order the hearing at additional expense, and it may make such investigation concerning the appeal as it considers proper.

As amended by SB 174, Laws 1973, HB 920, Laws 1976, HB 634, Laws 1977, HB 351, Laws 1981, HB 260, Laws 1983, SB 124, Laws 1985, HB 324, Laws 1985, SB 149, Laws 1990, HB 662, and SB 287, Laws 2000, SB 204, Laws 2002, Executive September 6, 2002.

Sec 5712.03 Decisions of the board of tax appeals, confirmation effect.—(A) A decision of the board of tax appeals on an appeal filed with it pursuant to section 5710.1, 5712.01, or 5717.02 of the Revised Code shall be entered of record on the journal together with the date when the order is filed with the secretary for publication.

(B) In case of an appeal from a decision of a county board of revision, the board of tax appeals shall determine the taxable value of the property whose valuation or assessment by the county board of revision is complained of or in the event the complainant and appeal is against a discriminatory valuation, shall determine a valuation which shall correct such discrimination, and shall determine the liability of the taxpayer for taxation if that valuation is in issue, and the board of tax appeals's decision and the date when it was filed with the secretary for publication shall be certified by the board by journalization and all persons who were parties to the appeal before the board or sought to be listed, if such person is not a party to the appeal, by the county auditor of the county in which the property involved in the appeal is located, and to the tax commissioner.

In correcting a discriminatory valuation, the board of tax appeals shall increase or decrease the value of the property whose valuation or assessment by the county board of revision is complained of by a per cent or amount which will cause such property to be listed and valued for taxation on an equal and uniform rule.

(C) In the case of an appeal from a review, redetermination, or correction of a tax assessment, valuation, determination, finding, computation, or order of the tax commissioner, the order of the board of tax appeals and the date of the entry thereof upon its

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of improved properties, there may be little if any question of possible change in the property's use at the date of valuation because the market is significantly built-up and properties are being sold on the basis of their continued use.

In the development of an appraisal, the appraiser must distinguish between highest and best use of the land as though vacant and highest and best use of the property as improved. The appraisal report should clearly identify, explain, and justify the purpose and conclusion for each type of use and, if a separate conclusion of highest and best use of land as though vacant was not made, explain and justify why it was omitted.

To clarify the distinction between the highest and best use of 1) the land or a site as though vacant and 2) property as improved, consider a single-family residential property located in an area zoned for commercial use. If there is market demand for a commercial use, the maximum productivity of the land as though vacant will most likely be based on a commercial use. In this case, the single-family improvements may contribute little if any to the value of the property as a whole. If, however, the market value for residential use is greater than the market value for the permitted commercial use less demolition costs, then the highest and best use of the property as improved will be for continued residential use.

In the analysis of highest and best use of land as though vacant, the appraiser seeks the answers to several questions. First:

Should the land be developed or left vacant?

If the answer to this question is that the land should be developed, a second question is:

What kind of improvement should be built?

The third question the appraiser asks relates to the highest and best use of the property as improved, which is a distinct concept developed by valuation theorists and practitioners to answer an important question that the original concept does not address. This question is:

Should the existing improvements on the property be maintained in their current state or should they be altered in some manner to make them more valuable?

Appraisal theory holds that as long as the value of a property as improved is greater than the value of the land as though vacant, the highest and best use is the use of the property as improved. In practice, however, a property owner who is redeveloping a parcel of land may remove an improvement even when the value of the property as improved exceeds the value of the vacant land. Investors are not likely to pay large sums for the underlying land simply to hold onto the property until the value of the remaining improvement has decreased to zero. The costs of demolition and any remaining improvement

value are worked into the test of financial feasibility for redevelopment of the land.

The timing of a specified use is an important consideration in highest and best use analysis. In many instances, a property's highest and best use may change in the foreseeable future. For example, the highest and best use of a farm in the path of urban growth could be for interim use as a farm, with a future highest and best use as a residential subdivision. (The concept of interim use, which is a special situation in highest and best use analysis, is discussed in more detail later in this chapter.) If the land is ripe for development at the time of the appraisal, there is no interim use. If the land has no subdivision potential, its highest and best use would be for continued agricultural use. In such situations, the immediate development of the land or conversion of the improved property to its future highest and best use is usually not financially feasible.

The intensity of a use is another important consideration. The present use of a site may not be its highest and best use. The land may be suitable for a much higher, or more intense, use. For instance, the highest and best use of a parcel of land as though vacant may be for a 10-story office building, while the office building that currently occupies the site has only three floors.

Testing Criteria In Highest and Best Use Analysis

In addition to being reasonably probable, the highest and best use of both the land as though vacant and the property as improved must meet four implicit criteria. That is, the highest and best use must be

1. Physically possible
2. Legally permissible
3. Financially feasible
4. Maximally productive

These criteria are often considered sequentially.¹ The tests of physical possibility and legal permissibility must be applied before the remaining tests of financial feasibility and maximum productivity. A use may be financially feasible, but this is irrelevant if it is legally prohibited or physically impossible.

¹ Although the criteria are considered sequentially, it does not matter whether legal permissibility or physical possibility is addressed first, provided both are considered prior to the test of financial feasibility. Many appraisers view the analysis of highest and best use as a process of elimination, starting from the widest range of possible uses. The test of legal permissibility is sometimes applied first because it eliminates some alternative uses and does not require a costly engineering study. It should be noted that the four criteria are interactive and may be considered in concert.