

IN THE SUPREME COURT OF OHIO

ST. BERNARD SELF STORAGE,
LLC

Appellant

v.

HAMILTON COUNTY BOARD
OF REVISION, et al.

Appellees

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CASE NO. 06-884

Appeal from the Ohio
Board of Tax Appeals

Board of Tax Appeals
Case No. 2003-T-1532

MERIT BRIEF OF APPELLEE
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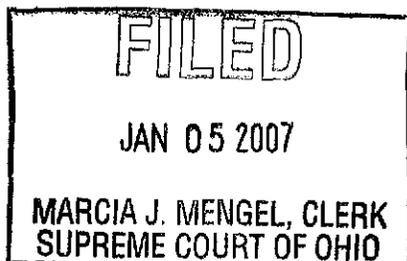
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Appellant’s First Assignment of Error:

The Board of Tax Appeals erred to the prejudice of the Appellant taxpayer by disregarding the recent arm’s length sale of the subject property, contrary to established precedent. (Decision and Order of BTA entered April 28, 2006.) 15

Appellant’s Proposition of Law No. 1:

Where real property has been the subject of a recent arm’s length sale between a willing seller and a willing buyer, the sale price of the real property shall be the true value for taxation purposes. 15

Authorities:

<u>Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision</u> (2005), 106 Ohio St.3d 269, 2005-Ohio-4979, 834 N.E.2d 782	16
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Appellant’s Second Assignment of Error:

The Board of Tax Appeals erred to the prejudice of the Appellant taxpayer by ignoring the sale price of the real property and relying upon Appellee’s

appraisal which ignored the contemporaneous sale of the subject real property, contrary to established precedent. (Decision and Order of BTA entered April 28, 2006.) 17

Appellant’s Proposition of Law No. 2

Where there is a sale of real property recent to the tax lien date in an arm’s length transaction, the best evidence of “true value in money” is the proper allocation of the lump sum purchase price between the real property and the personal property sold in this transaction, and not an appraisal ignoring the contemporaneous sale. 17

Authorities:

Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (2005),
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Appellant’s Proposition of Law No. 3

When real property is being valued for taxation purposes, the business factors and the real property factors must be separated. 20

Authorities:

Cincinnati Bell v. City of Cincinnati (1998), 81 Ohio St.3d 599,
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The Appraisal of Real Estate, 12th Ed.
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Appellant’s Fourth Assignment of Error:

The Board of Tax Appeals erred to the prejudice of the Appellant taxpayer by failing to require the Appellee to rebut the sale price of the subject real property in its recent arm’s length sale, which is the best evidence of true value, contrary to established precedent. (Decision and order of BTA entered April 28, 2006.) 29

Appellant’s Proposition of Law No. 4

Once the taxpayer has presented competent, reliable, and probative evidence of the true value of the real property by the sale price in a recent arm’s length transaction specifying the value of the real property, other parties asserting a different value have the burden to rebut the taxpayer’s evidence by proving with competent, reliable, and probative evidence that the sale price is not the best evidence of true value. 29

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II. STATEMENT OF FACTS

The Appellant filed a complaint with the Board of Revision (BOR) on January 31, 2003 alleging the value of its property, a self-storage facility on 4.04 acres was \$1,012,200 based on “an arms-length purchase of subject property on August 15, 2000 for \$975,000.” (Appellant’s Supplement Vol.I, p.1) (The total purchase price was \$1,950,000, minus \$25,000 for personal property. (Appellant’s Supplement, Vol.I,p15) .) The BOR held a hearing on the complaint on September 18, 2003 at which time it took testimony from James Ollman, identified as the managing member of St. Bernard Self-Storage LLC (hereinafter St. Bernard) and Doug Thoreson, an appraiser from the County Auditor’s office.(Appellant’s Supplement, Vol. II,pp.228-264).

The BOR decided the real property should be valued at \$1,925,000, finding the allocation not appropriate and finding the “business was inextricably intertwined” with the real estate. On October 29, 2003 the Appellant filed an appeal to the BTA. (Appellant’s Supplement, Vol.II,pp.263-264, T.,pp.36-37)

At the BTA hearing, the Appellant again argued that approximately 50% of the value of the property was non-taxable (business value.) Once again it presented the testimony of Mr. Ollman. In addition, the Appellant presented the testimony and appraisal of Jerry Fletcher, a real estate appraiser and Joseph Rippe, a CPA who prepared a “business value appraisal” that sought to “validate” the purchase price.

The testimony of each witness is summarized as follows:

1. James Ollman

Mr. Ollman is the managing partner with a 10% interest of the LLC which owns

the property. He testified that the Appellant purchased the property in August of 2000 for \$1,950,000. He testified that he had never been involved in the purchase or operation of a self-storage facility before and that he had no expertise in the field at the time of purchase.

(Appellant's Supplement Vol.I I p.301, T. p. 140) The contract of sale and closing statement provides for a 4% real estate commission on the total purchase price. There was also a mortgage and promissory note of \$1,550,000 secured by the real estate. (Appellant's Supplement Vol. I, p.300, T., pp. 135-136) No other products or services were sold on the property other than the rental of space.

Mr. Ollman, with no experience in the field, determined what it would cost to buy land and additionally spoke to unknown "contractors" about what it would cost to build the facility. Mr. Ollman's estimate of the "cost" was his value of the real estate and the difference between it and the sales price was either "goodwill" or business value (whether the "cost" included soft costs, e.g. financing, legal fees, etc., and entrepreneurial profit was not clear.) (Appellant's Supplement Vol. II, p. , T. p.p.126, 178). Mr. Ollman also testified that his federal tax returns showed depreciable assets, excluding land , of \$1,753,600. (Appellant's Supplement, Vol. II, p307 ,T.p.165) In addition there was never a non-compete clause negotiated. (Appellant's Supplement Vol. II, p.305 ,T. p.158) Mr. Ollman also testified that the recent changes in the sales tax constituted double taxation on him, although his counsel later stipulated that the sales tax and real estate tax are separate types of taxes levied on different things.

2. Joseph Rippe

Joseph Rippe is a CPA who is a business value analyst. He was asked to do a report to "validate" the sales price. (Appellant's Supplement Vol. II, p322 ,T. p. 226) He said he

was not qualified to do a real estate appraisal. (Appellant's Supplement Vol. II, p.323 ,T.p. 229)

He said he had never analyzed a self-storage facility before this case.(Appellant's Supplement Vol. II, p.326,T.p.242) He did not do a study of any market derived figures. Instead, he simply took a three- year average of the subject's actual net operating income (NOI) and applied a capitalization rate of 22% to arrive at a value he claimed for the business as a severable item apart from the real estate. He admitted that his report was not meant to be in conformity with professional standards. (Appellant's Supplement Vol. II, p322-323 ,T.pp.226-227) He admitted he did not do a market study of financing or cap rates to arrive at the figures he used.

(Appellant's Supplement Vol.II, p235 ,T.p.238) His 22% capitalization rate is a rate equivalent to the cost of venture capital, as Dr. Norman Miller (one of the Auditor's experts) pointed out later.

(Appellant's Supplement Vol. II, p.398,T. pp.90-91). His analysis was also dependent on the individual buyer's "plan." He stated the business value is dependent on whether the site is owner-operated or leased. His report expresses no opinion of value as of the tax lien date.

His value of the business (which is considerably less than Mr. Ollman's opinion, and less than some of the projections of Mr. Fletcher) was \$752,916. When asked what assets comprise this value, the answer essentially was "customer lists." (Appellant's Supplement Vol. II, p.324,T.p. 231) This customer list generates a venture capital risk factor, because the customer tends to be short-term of 3 months or so. The land and buildings are separate real property and no personal property tax returns are filed.¹ He also stated in a sale of a business there is

¹ Appellant's brief implies that the buildings are easily movable and therefore impliedly suggests they are personal property. It appears only that the shell of the buildings might be able to be moved by dismantling it. Clearly the concrete base could not be moved. Their expert, Mr. Fletcher, in cross examination, specifically says they are not personal property and not a single witness for either side argued that the property was anything other than real estate.(Appellant's

generally a non-compete agreement. (Appellant's Supplement Vol II, p325,T. p.236)

Mr. Rippe's report and testimony were an after-the-fact attempt to back into or validate the sales price (but does not equal the sales price) . He admitted his report is not an "appraisal." He admitted he had no market evidence to support it. . Despite no evidence to support it, his premise was that a questionable transient customer list was worth \$752,916 as a severable asset.

3. Jerry Fletcher

Jerry Fletcher is a real estate appraiser who offered a report which attempted to value the real estate apart from the "business value or goodwill, if any." (Appellant's Supplement Vol. I p.67). He in fact says he did not analyze good will. (Appellant's Supplement Vol II, p.358 ,T. pp.358, 370)

Mr. Fletcher adopted a methodology that has no basis in any real estate book, seminar, or professional paper. His value was dependent in part on his novel theories that essentially are "The Fletcher Method." (Appellant' Supplement Vol II,p.371, T.pp.421- 422). He in fact had never done this type of " Fletcher Method" in any other appraisal report he has written in all the years of his practice. (Appellant's Supplement Vol II, p370,T.pp368-369.)

The Fletcher report essentially consisted of two parts. The first part is a more conventional appraisal to value the subject property. The second part employs the "Fletcher Method" to claim less than half the value of the property is taxable as real estate.

A. The Traditional Part of the Appraisal

In this case, Mr. Fletcher stated the total value is \$1,740,000. (The BTA adopted the sales price of \$1,925,000.)

supplement Vol II, p , T, pp.229-230, 405-406)

Mr. Fletcher's report relied on the three commonly accepted methods of appraising property outlined below. After analyzing the value of the property by the commonly accepted methods, he then employed a methodology not employed or sanctioned by anyone but him to cut the value in half.

1) The Cost Approach

In his cost approach, Mr. Fletcher used four out of five sales of vacant land that were not developed into self-storage facilities, but rather developed into different office or industrial uses. Many of the land sales suffered from significant topographical problems as admitted by Mr. Fletcher. (Appellant's Supplement Vol. II, p361, T.p.382) . Mr. Fletcher only valued the bricks and mortar and not the other rights and privileges that form real property. (Appellant's Supplement Vol. II, p371, T. pp.371, 420)

B. Depreciation

Mr. Fletcher treated all the buildings as being the same age. He chose the oldest one to be the age of all the buildings despite the fact that the buildings were constructed over a five-year period. (Appellant's Supplement Vol II, p.362 , T.pp. 385-386)

Additionally, Mr. Fletcher stated there should be 15% deduction for "external (overbuilding)." This, despite the fact that the subject is the only such facility in St. Bernard and the property operates at or near market occupancy level. On p. 48 of his report and elsewhere he states the physical occupancy as 83% (this apparently does not include outside units which have nearly 100% occupancy).² (Appellant's Supplement Vol. I p.129 , Volume II,p.365, T.p.395)

² Interestingly, in the Amicus Brief filed by the Ohio Storage Owners Association it states "the average occupancy rate for Ohio is between 80-84% (with 70% being the general benchmark for business viability" (p. 6 Amicus Brief) The amicus brief belies Mr. Fletcher's claim for this

Had Mr. Fletcher not treated all the buildings as five years old and had he not used a deduction for external obsolescence his cost approach would have essentially equaled the sales price. If the cost and total value are the same in his report, by his own methodology and theory, there would be no business value .

2) The Income Approach

Mr. Fletcher developed his cap rate from the sales on p. 54 of his report. When repeatedly asked on cross examination whether these reported cap sales included real estates taxes in the expenses, he replied that they did. (Appellant's Supplement, Vol.II,pp370-371,T.pp.418-419). He then applied the rough mid point to which he added the tax additure effectively double counting the impact of the taxes because his base cap rate included real estate taxes. If Mr. Fletcher had not double counted for this factor, his value would have approximated the sales price.

3. The Sales-Comparison Approach

Mr. Fletcher's values were not significantly different from Mr. Thoreson. However it should be noted that in none of the sales used by Mr. Fletcher or Mr. Thoreson was any allocation made for business value, reflecting the fact that the market does not recognize such an allocation as legitimate.

4. Summary

As can be seen, the traditional appraisal of Mr. Fletcher as performed by him yields a value similar to Mr. Thoreson and to the sale. If he had performed a cost approach without the deductions for depreciation and external obsolescence, his cost approach would

deduction.

essentially equal the sale price and the argument about business value would disappear.

(B) Part Two - "The Fletcher Method"

Despite the above, Mr. Fletcher then entered new and uncharted waters in attempting to divide the value between real estate and "business value or goodwill." He employed the following three methods to arrive at business value (a value different from both Mr. Rippe and Mr. Ollman - which brings to five the number of different opinions on the business value):

- The value of the Income Approach minus the Cost Approach = Business Value.
 - Sales Tax Ratio Study.
 - Warehouse Ratio Study.
- 1) Cost Equals Value

As can be seen from above, the bottom line in the case is that Mr. Fletcher determined the value of this income producing property was what he found in the cost approach. He simply subtracted his cost approach from his income approach. He alternatively subtracted his cost approach from the sales price to arrive at an even different value. (Appellant's Supplement, Vol. II, p.370, T.p.368)

2) Warehouse Rents Ratio

This is an amended "Fletcher Method" approach never before seen. (Appellant's Supplement Vol. II, p.371, T. p. 421) Despite limited similarity between a large industrial warehouse and a self-storage facility, Mr. Fletcher determined (without offering any market evidence), that some warehouse rents are half of self-storage rents, therefore half the value of self-storage rents should be business value.

No support was offered for the theory or methodology, or the numbers floated about.

3) The Sales Ratio Analysis

Mr. Fletcher argued, as did Messrs Ollman and Rippe that because a sales tax on the storage of personal property is levied on the price paid by the customer for the use of the facility, a double tax is levied on the owner. (Appellant's Supplement Vol II, p.360, T.p.375)

R.C. 5741.02 levies a tax on the "storage, use, or other consumption in this state of tangible personal property or services." By stipulation, the parties agreed that the sales tax and real estate tax are different types of tax levied on different things.

- 1) The Real Estate Tax is an ad valorem tax. The sales tax is an excise tax.
- 2) The subject of each tax is different. The real estate tax is imposed on real property. There is no personal liability. The sales tax is imposed on consumer transactions.
- 3) The jurisdiction is different. The real estate tax is levied and collected by the County Auditor. The sales tax is levied by the State and administered by the Ohio Department of Taxation. (Appellant's Supplement Vol II, p.377, T.pp.7-9)

The argument that the sales tax indirectly affected the rental rate is misplaced as the testimony was that occupancy remained the same or increased after the tax was imposed.

(Appellant's Supplement, Vol. II, p.299, T.pp.131-132)

Despite all this, Mr. Fletcher divides the total of the real estate taxes paid plus the sales tax and divides it by the sales tax to arrive at a ratio he applied to the total value. This calculation arrived at a business value of \$650,760 (remember he has already stated the business

value elsewhere as \$620,000, \$870,000 as well as Mr. Rippe's belief that it was \$752,916 and Mr. Ollman's belief that it was \$950,000).

4) **Summary**

As Mr. Fletcher admitted, these alternative approaches have no support in any text, seminar, or literature. This is his own invention, which we refer to as the "Fletcher Method". (Appellant's Supplement Vol.II, p.378, T.p.422, Supplement p.359, T.pp.373-374)

B. The County Auditor's Case

1. **Doug Thoreson**

The Auditor presented the testimony and appraisal report of Doug Thoreson, a state certified commercial appraiser. Mr. Thoreson has extensive private experience in construction and real estate. (Appellant's Supplement Vol. II, p.379, T. pp.13-15) He displayed a firm grasp of the self-storage industry and has had experience appraising self-storage facilities before.

At the BTA Mr. Thoreson completed a full narrative appraisal report using the three commonly accepted methods expressing an opinion of value of \$2 million. Mr. Thoreson utilized the three accepted methods of appraising property:

A. Cost Approach

In his cost approach he found no comparable land sales in St. Bernard. He utilized four sales that were developed into self-storage units. This is in keeping with the consistent use theory of land. In contrast Mr. Fletcher used land sales developed into other uses with some serious topographical problems. (Appellant's Supplement Vol.II, p.382, T. pp 25-29)

Mr. Thoreson then utilized Marshal and Swift to arrive at a determination of depreciation which he applied to each building based on its age unlike Mr. Fletcher's false

assumption that all the buildings were five years old. Mr. Thoreson properly relied more heavily on the income and sales comparison approach. (Appellant's Supplement Vol. II, p.381, T. pp. 21 et.seq.)

B. The Income Approach

As pointed out above, the difference in capitalization rates and the use of the tax additure is what principally accounts for the difference in the two appraisals. As pointed out, Mr. Fletcher relied on cap rates from the market that include real estate taxes and then adds a tax additure to them, effectively double counting the impact of taxes and understating the value of the property.

On the other hand, Mr. Thoreson quite correctly developed cap rates from the market and adjusted them to reflect for the presence of real estate tax expenses and then correctly applied the additure. (See p. 38 of Thoreson report). (Appellant' Supplement Vol. II, pp.384-386, T. pp. 34-43)

C. The Sales Comparison Approach

As indicated above, Mr. Fletcher and Mr. Thoreson arrived at nearly identical values under the sales comparison approach. The overall difference was insignificant. (Appellant's Supplement Vol. II, pp.386-388, T. pp.43-50)

2. Norman Miller

The County's next expert was Dr. Norman Miller. Dr. Miller has a Ph.D. in Finance. He is currently the Chairman of the Real Estate Department at the University of Cincinnati. He has taught and lectured at some of the most prestigious universities in the world. He is the author of several books on real estate, one of which is the standard text for graduate studies in real estate at MIT and other major universities. Dr. Miller is also the author of numerous articles on a variety

of subjects in real estate and finance. Significantly, in 1995 he co-authored and published "In Defense of the Land Residual Theory and the Absence of A Business Value Component for Retail Property" by Norman C. Miller and Stephen E. Roulac. Journal of Real Estate Research, Vol. 10, No. 2, 1995, reprinted in Business Enterprise Anthology edited by David Lenhoff (Chicago: Appraisal Institute, 2001). In addition Dr. Miller has wide experience dealing with commercial lenders and brokers. He sits on and advises various investment boards. He began and hosts the "Cincinnati Roundtable" which periodically brings together local real estate experts and speakers from around the country on real estate related topics.

Under his direction, the University of Cincinnati publishes the U.C. Roundtable Cap Rate survey which periodically publishes local cap rates for commercial and industrial properties. (Appellant's supplement Vol. II, pp. 390-393, T.pp. 80-89) (Appellee's Supplement, pp. 1-7)

Dr. Miller was primarily called to analyze the theory of business value in commercial properties and to demonstrate the flawed methodology employed by the taxpayer's experts, Mr. Rippe and Mr. Fletcher.

Dr. Miller reviewed the arguments made in his article "In Defense of the Land Residual Theory" above and how his arguments pertain to all commercial property. (Appellant's supplement Vol.II, pp. 393-394, T. pp. 69-75) As pointed out, while every development must have an entrepreneurial profit (otherwise it would not be developed) any "excess productivity becomes logically attached to the land despite the strong temptation to assign such value elsewhere."

As indicated, the temptation is strong to assign the value to some intangible, calling it goodwill or business value, which theoretically escapes real estate taxation. In addition to

avoiding paying real estate taxes and proper conveyance fees, any value assigned to goodwill is eligible for a more rapid depreciation schedule.

As the article points out, "establishing even a small proportion of total value as attributable to business value could imply the potential for billions of dollars of property tax appeals cases." Dr. Miller further states that "option value" is not generally understood by appraisers, which erroneously leads to theories of business value. While all commercial retail has an element of management this is not a separately quantifiable asset. To the extent that a competitive advantage is created by business acumen, it is short lived. The argument about "business value" is a two-edged sword. If this property suffered high vacancies and low rents, would we seriously expect the Appellant to be satisfied with his real estate value and upset about the lack of business value?

In the present case, there is no competitive advantage. In this case the apparent argument is not that the value of the real estate is incrementally enhanced by an intangible business value, but rather that the "business" is movable and severable from the real estate.

Dr. Miller points out this simply is not true. While it might be possible for the owner to open up another facility down the street, he is not moving this business, but in fact starting another business. (And in fact he could not move down the street because apparently there is no substantial land to develop. Neither appraiser utilized any comparable land sales in St. Bernard, further belying the argument that the Appellant could simply move down the street and his transient customers would follow him).

Without the land and the buildings, the only thing left is short term contracts and a managerial relationship. However, as Dr. Miller points out, all commercial property has an

aspect of managerial service. However there is no market study that this relationship has any quantifiable value for a self storage facility. If there is no severable, portable business there is no severable business value attendant thereto. (Appellant's Supplement Vol.II, p. 396, T.pp.81-84.)

Dr. Miller also pointed out that the methodology used by Mr. Rippe is fundamentally flawed in that it assumes the value of short-term transient tenants can have a quantifiable value that would be purchased on the open market. Mr. Rippe ignored the rate of return for debt and applied the much higher return he derived to the entire income stream as if no debt were possible. He ignored the leverage actually used and typically used for real estate, treating it like an all cash purchase. If he had considered the debt and the actual debt cost he would have had a value close to the Auditor's value. He may have called this a business valuation approach but in fact it was applied as if it were a real estate valuation approach. (Appellant's Supplement Vol. II, pp.397-400, T.pp. 88-100) (Appellee's Supplement, p. 8)

The value here is in the land and improvements and its associated rights, i.e. the bundle of sticks that denotes real property as distinguished from the mere bricks and mortar of real estate. As Dr. Miller demonstrated, applying a cap rate appropriate for market cap rates for self-storage facilities would indicate a value, using Mr. Rippe's other information, near \$2 million.

Dr. Miller's testimony solidifies Mr. Thoreson's approach to the property as lacking in any severable business with a separately quantifiable non-taxable value. Any value enhancement above the market (of which there is none) would be captured in the land residual theory. There is simply nothing here apart from the land and buildings that is transferable or moveable that would sell on the open market. Dr. Miller's testimony demonstrated that business value does not exist

in this property as a separate quantifiable asset.³

Summary

The Board of Tax Appeals ruled that the sale of the property was recent and arms-length and held that any attempt to justify the allocation of the sales price was the taxpayer's burden. The BTA said "we can find no support" for an allocation for business value (BTA Decision and Order, p. 9.) The BTA further held that it was valuing real property and real property includes "all rights and privileges belonging or appertaining thereto." *R.C. 5701.02* This includes something more than just the land and physical improvements. The BTA found the value to be that established by the sales price of \$1,925,000. (BTA Decision and Order, pp. 9-11)

This appeal is now before this Court pursuant to the taxpayer's notice of appeal.

III. ARGUMENT

Appellant's First Assignment of Error:⁴

The Board of Tax Appeals erred to the prejudice of the Appellant taxpayer by disregarding the recent arm's length sale of the subject property, contrary to established precedent. (Decision and Order of BTA entered April 28, 2006.)

Appellant's Proposition of Law No. 1:

Where real property has been the subject of a recent arm's length sale between a willing seller and a willing buyer, the sale price of the real property shall be the true value for taxation purposes.

Appellant's proposition of law correctly sets forth the law. However, the BTA committed

³ If in fact this property had any goodwill or business value, it would have belonged to the seller. The fact that the seller was never asked to agree to a non-compete agreement indicates there was no concern with the seller opening up a self-storage facility down the street and "stealing" the transient customers list that the appellant argues are worth \$750,000 or more.

⁴ We have listed Appellant's Assignments of Error, although such are not appropriate under S. Ct. Prac. R. VI (2)(b)

no error here because its decision adopted the sales price as the value of the property .

The Appellant's argument is that the BTA had to accept the arbitrary allocation made by the parties. Clearly, this is not the law. If, for example, the Appellant had allocated \$1 to the real estate and the remainder to business value, would the Appellant seriously argue that the BTA would have to accept such an allocation and that "the BTA's opinion should have ended at that point with a reduction in the value to the actual sale price paid for the real estate." (Appellant's Brief, p. 15)?

In this case the allocation was called into question. The BOR found it not to be proper. The burden was always on the taxpayer to prove the propriety of the allocation and especially so at the BTA once the BOR found that the allocation was not proper. The BTA also found the allocation improper and decided the sales price was the best evidence of value, following Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (2005), 106 Ohio St.3d 269, 2005-Ohio-4979, 834 N.E.2d 782 and Lakota Local School Dist. v. Butler Cty. Bd. of Revision (2006), 108 Ohio St.3d 310, 2006-Ohio-1059, 843 N.E.2d 757.

The Appellant acknowledges as much in his second proposition of law when he states:

Where there is a sale of real property recent to the tax lien date in an arm's length transaction, the best evidence of "true value in money" is the proper allocation of the lump sum purchase price between the real property and the personal property sold in this transaction, and not an appraisal ignoring the contemporaneous sale. (Appellant Brief, p. 17) (emphasis added)

The Appellant in his brief (p. 17) states:

This Court recognized the same principle in the context of allocation for personal property in Buckeye International, Inc. v. Limbach (1992), 64 Ohio St.3d 264, 266, 1992-Ohio-55, 595 N.E.2d 347, stating, "The best evidence of the 'true value in money' of tangible personal property is the proper allocation of the purchase price of an actual, recent sale of the property in an arm's length transaction." (emphasis added)

If, in fact, the determination of the proper allocation was not appropriate, why did Appellant present appraiser Jerry Fletcher, who concocted an allocation based on “the Fletcher method,” which had no support in appraisal text, case law or anything else? If the proper allocation was not an issue, why did the Appellant present Mr. Rippe to try and do an allocation “that attempted to validate the sale” after the fact (Appellant’s Supplement Vol. II p.323, T.p.226)) by utilizing a capitalization rate more appropriate for venture capital than for real estate (Appellant’s Supplement Vol. II, P.398, T.pp.90-92)?

The parties are free to make any allocation they want to for their own personal tax reasons, but neither the BTA nor this Court is required to adopt any allocation without first analyzing the propriety of such allocation, where, as here, the parties allocated nearly half of the purchase price to a non-existent, non-real estate category that, if accepted, would allow the taxpayer to avoid paying proper real estate taxes and conveyance fees, surely the trier of fact is not obligated to blindly accept such allocation.

We agree with the Appellant’s stated proposition of law No. 1 (although his assignment of error is misplaced), but no error was committed by the BTA because it, in fact, followed the dictates set forth in such proposition of law.

Appellant’s Second Assignment of Error:

The Board of Tax Appeals erred to the prejudice of the Appellant taxpayer by ignoring the sale price of the real property and relying upon Appellee’s appraisal which ignored the contemporaneous sale of the subject real property, contrary to established precedent. (Decision and Order of BTA entered April 28, 2006.)

Appellant’s Proposition of Law No. 2

Where there is a sale of real property recent to the tax lien date in an arm’s length transaction, the best evidence of “true value in money” is the proper

allocation of the lump sum purchase price between the real property and the personal property sold in this transaction, and not an appraisal ignoring the contemporaneous sale.

The BTA in fact did not rely on any appraisal. Instead it relied on the sales price, but found the Appellant's artificial allocation improper. In Worthington City Schools Board of Education v. Franklin Cty. Bd. of Revision BTA 2004-M-1211 (1-27-06) the BTA did not accept the owner's allocation because of a failure of proof. The BTA said (p. 8):

We have, however, rejected the theory opined by the property owners' appraiser when valuing self-storage units. Martin v. Franklin Cty. Bd. of Revision (Feb. 10, 1988), BTA No. 1987-J-655, unreported (rejecting property owner's argument that \$80,000 of his \$500,000 purchase price should have been allocated to the purchase of a storage business; the board concluded that the sale price of \$500,000 controlled). Like apartment or office buildings, consideration of the income earned from storage units and car washes is a valid method of valuing the realty and improvements thereon. The property owners have not brought forth sufficient evidence that a business separate from the realty and improvements was included in the purchase price. See Dublin Senior Community L.P. v. Franklin Cty. Bd. of Revision (1997), 80 Ohio St.3d 455, 687 N.E.2d 426.

In Jefferson Area Local School District Board of Education v. Ashtabula Cty. Bd. of Revision 2005-V-946 (5-5-2006) the BTA held that the allocations by the owner's CPA of \$200,000 to real estate from a purchase price of \$1,500,000 did not constitute evidence of the value of the real estate, because the allocation was simply made for the owner's convenience for what the CPA said were "accounting purposes and for depreciation purposes."

In the instant case, the buyer had no experience in buying self-storage facilities and made an arbitrary allocation for his own business purposes. The owner made his own calculation of what the "brick and sticks" would cost and subtracted it from the sale price. However, his own appraiser calculated the value of the "brick and sticks" much higher. In fact, his own appraiser's report would have had a "brick and sticks" cost appraisal of approximately the same as the sale

price had he not made a deduction for economic obsolescence, despite evidence in the record (and confirmed by the Amicus Brief of the Self Storage Association) that the facility was operating at or above market.

The BTA was asked to accept an allocation of goodwill by Appellant when none of the Appellant's witnesses could even agree what it was or how much should be allocated. All of the following numbers were advanced:

\$620,000	(Fletcher Method -Appellant's Supplement Vol. I, p. 141)
\$650,760	(Fletcher Method - Appellant's Supplement, Vol. I, p.143)
\$752,916	(CPA Method - Appellant's supplement Vol. I, p. 56)
\$870,000	(Fletcher Method - Appellant's Supplement, Vol .I, p.142)
\$950,000	(Ollman Method - Appellant's Supplement, Vol. I, p.286,T.p 82).

Assuming the Court accepts the theory that there is a severable, portable "business value," which of the five inconsistent suggested values should the BTA have adopted?⁵

When the witnesses offer a bewildering series of assumptions, definitions and competing values, the BTA clearly is free to reject the witnesses and to determine what weight and credibility, if any, should be accorded to the witnesses and evidence presented. Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision (1975), 44 Ohio St.2d 13, 336 N.E.2d 433, Witt v. Hamilton Cty. Bd. of Revision (1991), 61 Ohio St.3d 155, 573 N.E.2d 661.

As noted above, we agree with the statement in Appellant's proposition of law #2. The BTA did precisely this. However, the Appellant's Second Assignment of Error incorrectly states

⁵ Appellant in his brief incorrectly states (p. 30) Mr. Fletcher was aware of transactions in which the real estate and business had been separately sold. In fact, he references only one example of a tenant lists that was offered for sale but apparently not purchased. Mr. Fletcher clearly had no market evidence of any such sales. The absence of any market support in his report is further proof that real severable sales do not exist. If they did, he would have included them in his sales comparison approach and not have had to invent the "Fletcher Method".

what the BTA did. The BTA did not rely on Appellee's appraisal. Instead, the BTA adopted the sales price. The Board said "we thus conclude that the record supports a value of the subject property, based on an arms-length sale of \$1,925,000. Berea and Lakota, supra." (BTA Decision and Order, p. 12)

The Board did find that Appellee's appraisal "corroborates St. Bernard's purchase price." (p. 12) While the Board declined to give any weight to the Appellant's appraisal, the Appellant's appraisal with appropriate adjustments (before the application of "the Fletcher Method") as well corroborated the purchase price.

The Appellant (Appellant's Brief, p. 21) states that the case law "require(s) the taxing authorities to accept as the true value in money the parties' agreement." (emphasis added) As noted above, what if the parties' agreement said that only \$1 (or worse, nothing) was real estate? Would the taxing authorities be required to accept a patently false allocation merely because that is what the agreement called for? Of course not.

Appellant's Third Assignment of Error:

The Board of Tax Appeals erred to the prejudice of the Appellant taxpayer by failing to separate the business factors and the real property factors in the sale of the subject property, contrary to established precedent. (Decision and Order of BTA entered April 28, 2006.)

Appellant's Proposition of Law No. 3

When real property is being valued for taxation purposes, the business factors and the real property factors must be separated.

- a. The Ohio Constitution and the statutes of the State of Ohio authorize taxation of real property based upon the fair market value of the land and the improvements thereon
- b. The Appellant taxpayer met its burden of properly valuing the real property by separating the real property factors and the business factors.

- i. The Contract to Purchase and the Management Agreement.
 - ii. The Certified Public Accountant and Business Analyst.
 - iii. The MAI Appraiser
- c. By adopting a sales tax on revenues from self storage facilities, the Ohio Legislature recognizes that the business income of a self storage facility is taxed as sales of goods and services, while the land and improvements are taxed as real estate.

Obviously, the principal point of contention in this case is whether any severable or portable business value exists in a self-storage facility whose income is generated solely and exclusively from the rent paid for the real property. The use of imprecise terms such as “business factors” is not particularly helpful in analyzing this issue. In fact, the dispute on this issue arises in part because of the lack of artful language. For example, Mr. Fletcher uses the terms goodwill, business value, going concern interchangeably and without a firm comprehension or definition of these terms (Appellant’s Supplement Vol. II, p. 358 , T. P.370)

The fundamental tenet of appraising income-producing property (such as the subject) is the application of the income approach. This approach requires an analysis of market income from which is subtracted market expenses to arrive at an NOI. These market expenses clearly include what might be called “business factors.” For example, management fees, salary, payroll expenses, and similarly related items are always deducted.

The Appellant’s implied assertion is that every time a human being exerts some influence on a piece of real property to produce income, some business value is present. Management is a “business factor” that must be separated from the real estate, which both appraisers did. (Mr. Fletcher did it twice to arrive at business value.) However, this is not the equivalent of saying that there exists a separate, severable “business value.” Implied in Appellant’s approach is that the only thing that is real property is vacant land and vacant buildings (although even vacant

buildings require some business acumen and management to build them).

This Court has always dealt with income producing properties where “business factors” have been deducted as part of the expenses. What this Court has required is that “business value” garnered on a property from items other than rent should be excluded. For example, in congregate care cases or assisted living facilities, income is generated from rent, as well as for other services that could be provided independent of the real estate. For example, income derived from the sale of meals, the providing of medical care, the providing of beauty products and services are in addition to the rent on the building. Rather, this additional income is produced in the building. See, e.g. Dublin, supra.

R.C. 5715.01(A) reads in part as follows:

(A) The tax commissioner shall direct and supervise the assessment for taxation of all real property. The commissioner shall adopt, prescribe, and promulgate rules for the determination of true value and taxable value of real property by uniform rule for such values and for the determination of the current agricultural use value of land devoted exclusively to agricultural use. The uniform rules shall prescribe methods of determining the true value and taxable value of real property The rules shall provide that in determining the true value of lands or improvements thereon for tax purposes, all facts and circumstances relating to the value of the property, its availability for the purposes for which it is constructed or being used, its obsolete character, if any, the income capacity of the property, if any, and any other factor that tends to prove its true value, shall be used. (emphasis added)

In this case, there is no income produced from anything other than the rent of the real estate. Whatever business exists is interchangeable with the real estate. The “business” is the real estate. The BTA found the business is “inextricably intertwined” with the real estate. This inextricably intertwined argument, as the BTA noted has been accepted by Ohio courts and other jurisdictions with a similar definition of real property (BTA Decision and Order, p.10)

Dr. Norman Miller does not state that there can never be a separate business value or goodwill.

In certain situations (e.g., a franchise restaurant) such might exist. Businesses that are not locationally dependent (doctors, lawyers, other professionals) may have a value to their business because their business is portable and not dependent on the land. However, a self-storage facility is not portable. The suggestion that a list of short-term transient tenants has any value, let alone \$950,000 is absurd on its face.

Dr. Miller explained the concept of the land residual theory as follows: (Appellant's Supplement, Vol. II, p. 400, Tpp. 98-100):

Q: Well, assume that the owner of St. Bernard Self-Storage decides to sell the site, sell the real estate. If he sells the real estate to Mr. Jones, after he sells the real estate to Mr. Jones is there anything left at the site that he could sell to somebody else ...

THE WITNESS: Just the point of my land residual article written in 1995, whenever it was there is absolutely no entrepreneurial profit that is passed on to the second owner. Developers make entrepreneurial profit all the time. But you capture that entrepreneurial value, and the question is where does it go. It goes to the land because it comes in the form of rent. Because you have something that produced more rental income, it's necessary to - you know, in the first place, to produce an asset and you get this entrepreneurial value.

When you pass it along you don't say well, it only cost me a million-and-a-half to build it and it's worth 2 million to build it. I'm going to give it to you for a million-and-a-half and you can have the benefits of getting an entrepreneurial value.

I'm not going to give it to somebody if I don't have to. I'm going to pass it at fair market value. I'm going to capture the whole thing.

What are they paying for? They are paying for the income stream of that property. That's, in fact, what is deriving value.

So where do we assign that entrepreneurial profit? It is, in fact, now embedded in the real estate, and in a competitive market those entrepreneurial profits get narrower and narrower when someone needed something really innovative.

In a competitive market they have to pay enough to - they have to pay the market value and there's no windfall passed on, so there is no business value, there is also no entrepreneurial value passed on to the second owner.

All income producing properties have expenses related to what loosely could be called business factors. The Appraisal of Real Estate, 12th edition (Chicago: The Appraisal

Institute, 2001) states as follows:

Variable expenses are operating expenses that generally vary with the level of occupancy or the extent of services provided, though most variable expenses have some minimal fixed component regardless of occupancy. Specific expense items of this type may vary greatly from year to year, but similar types of property often reflect a reasonably consistent pattern of variable expenses in relation to gross income. Because fewer services are provided to the tenants of freestanding retail and industrial properties, these properties usually have a much lower ratio of expenses to gross income than apartment and office buildings do. (p. 487) (emphasis added)

Clearly, the income approach recognizes that services will be provided to the tenants by management. Fewer services will obviously be provided to a self-storage facility than to an office building, but both have services provided by management that are excluded "business factors."

Expenses include such things as the following as set forth in The Appraisal of Real Estate, supra (p.514):

- Management charges
- Leasing fees
- General payroll
- Cleaning
- Maintenance and repair of structure
- Grounds and parking area maintenance
- Miscellaneous - e.g. security, supplies, rubbish removal, and exterminating

Expenses that include management related factors have always been excluded. Both experts excluded them in the present case. The difference is that the owner's appraiser, after excluding these expenses in his original income approach, then went on to exclude them again as a separate "business value" by means of the Fletcher Method. In effect, Mr. Fletcher double-counted the "business factors" to create a separate business value that reduced the real property value in half.

The BTA followed the Court's directive in Higbee Co. v. Bd. of Revision 107 Ohio St.3d 325, 839 N.E.2d 385 Ohio, 2006 and Dublin, supra in that the BTA did not include any "business value" in its determination because from a factual standpoint no probative or convincing evidence was offered to establish that such existed. In Dublin, supra, the Court said generally "we tax real estate." In fact, in Ohio, what is taxed is "real property." The BTA properly deducted any management expenses and services necessary to maintain the income producing quality of the real estate. What the BTA did not do was to double-count management related expenses to create a separate "business value." The BTA did not accept the "Fletcher Method" which by Mr. Fletcher's own admission, has not been accepted by anyone else to cut the real estate value in half.

The BTA, from a factual standpoint, did not find Appellant's witness credible, in part because he adopted novel, unacceptable methods in the appraisal community to create a separate "business value" that did not exist.

This Court is not a "super BTA." Thus, when the BTA does not find the witness credible or his methodology credible, this Court should not reverse such factual findings. The argument that a severable business value exists in a small, non-labor intensive property such as a self-storage facility strains credibility. But even hypothetically suggesting that such a thing existed the Appellant failed to prove his point.

In his brief (p. 24) the Appellant misstates the position of the Appraisal Institute in The Appraisal of Real Estate, supra. The text (recognizing the controversy within the industry) sets forth arguments for and against the argument for a severable business value (The Appellant only quotes the arguments for). The text states (p. 643) "the Uniform Standard of Professional

Appraisal Practice still requires that the appraiser include a separate valuation when the valuation of a non-realty item or contribution of such items is significant to the overall value. (See, Standards Rule 1-4(g)). (emphasis added)

Even if such overall items could be proved (which in this case the BTA said they were not) the appraisal industry only requires their removal if it is “significant” to the total value. Here, it only allegedly becomes significant based on the untested, unaccepted, novel methods referred to as the “Fletcher method.”

The arguments against are set forth as follows:

Arguments against the existence of residual intangibles often point to the lack of universal acceptance of the various theories, especially in the courts. This is particularly true in the analysis of regional shopping malls. Another argument frequently advanced is that the theoretical increment labeled as intangible is instead a location premium awarded by the market, which therefore belongs with the real estate. A final argument against the existence of a residual intangible (and CEP) is that there can be none unless it can be sold or transferred to another location and is recognized as a separate item in the negotiations.... For these reasons business enterprise value remains one of the most important and controversial types confronting appraisers.

The Appraisal of Real Estate, supra (p.644)

There is no general agreement even within the appraisal industry about the existence of business value, the proper definition of such or the proper methodology to measure such a thing, even if it hypothetically did exist.

In the present case, the BTA reviewed the factual presentation of Appellant’s witnesses who strained to prove not only that business value existed, but that it accounted for about half of the total purchase price. The BTA properly rejected Appellant’s witnesses and methodology, as not probative or credible.

The fact that the purchase agreement separates out half the value for business value is not

controlling. What the Appellant arbitrarily chooses to allocate for his personal financial or federal income tax purposes is not controlling on the BTA. If, in fact, the Appellant had allocated 99% of the purchase price to goodwill and 1% to real estate, clearly such an allocation would not be controlling or have to be accepted.

The owner could have argued that without the application of some management or “business” acumen, the property is worth nothing or even a negative value, as the building would have to be demolished to make the vacant land available for use. This really is the thrust of Appellant’s argument. Without the application of the owner’s skill, the real property is simply land and empty buildings.

In this case, the owner had never managed, purchased, sold or constructed a self-storage facility before. Despite this, he decided what he thought it might cost him to build the facility and to purchase the land and deducted that from the purchase price he actually paid. For personal tax reasons he allocated the purchase price to fit his needs. The Appellant now argues that this Court must accept this arbitrary, speculative allocation.

The only support for this is the described “Fletcher Method” and the testimony of Mr. Rippe, the CPA. Mr. Rippe testified he had never appraised a self-storage facility before. He testified that he was hired after the sale to “validate the purchase price.” His analysis was reviewed and criticized by Dr. Miller for being unrealistic (Appellee Auditor’s Exhibit E), not the least of which was Mr. Rippe’s adoption of a capitalization rate appropriate for extremely risky venture capital as opposed to a reasonable capitalization rate adopted by the other experts for a fairly secure risk-free real estate investment.

The Appellant’s final claim under this assignment of error is that because a sales tax is

imposed on the users of self-storage facilities, the owner of said facility is subject to double taxation.

Mr. Fletcher argued, as did Messrs. Ollman and Rippe that because a sales tax on the storage of personal property is levied on the price paid by the customer for the use of the facility, a double tax is levied on the owner.

R.C. 5741.02 levies a tax on the "storage, use, or other consumption in this state of tangible personal property or services." By stipulation, the parties agreed that the sales tax and real estate tax are different types of tax levied on different things. (see Statement of Facts, supra, p.12) When the type of taxes are different there is no double taxation. See e.g. Cincinnati Bell v. City of Cincinnati (1998), 81 Ohio St.3d 599.

The argument of unconstitutional double taxation is without merit. Even the argument that the sales tax indirectly affected the rental rate is misplaced as the testimony was that occupancy remained the same or increased after the tax was imposed. (Appellant's Supplement Vol. II, p. 299 T. p.131, Supplement Vol. II, p.437, T.p.245). Despite all this, Mr. Fletcher divided the total of the real estate taxes paid plus the sales tax and divides it by the sales tax to arrive at a ratio he applies to the total value. This calculation arrived at a business value of \$650,760 (remember he has already stated the business value elsewhere as \$620,000, \$870,000 as well as Mr. Rippe's belief that it was \$752,916 and Mr. Ollman's belief that it was \$950,000).

Appellant in footnote 14, p. 34 of his brief also argues without citation that the new commercial activity tax (CAT) bolsters his argument. The so-called CAT tax, in fact, belies his argument. The tax is levied pursuant to *R.C. 5751.02*. It is, in fact, a gross receipts tax levied on "each person with taxable gross receipts...The tax imposed under this section is in addition to any

other taxes or fees imposed under the revised code.” (emphasis added) By enacting such tax, the Legislature did not mean to abolish the definition of all real property (including office buildings) simply because it levies a gross receipt tax on the income produced by the rental of the real estate. the statute specifically states that it is an additional tax and does not replace other taxes.

Footnote 5 of the BTA’s decision is equally applicable to the imposition of the sales tax and the CAT tax. The BTA stated “ St. Bernard argues that it has an independent business because (the statute) ... places sales tax on all transactions by which tangible personal property is or is to be stored.” We find this argument to be without merit. The General Assembly’s decision to tax an income stream does not invalidate the conclusion that a person is paying to utilize physical space.

If the Legislature wanted to change the definition of real property, or exempt certain kinds of property from its application, it could have done so. The Legislature’s deliberate failure to make any such change indicates that real property (including self-storage facilities) remain subject to real property taxation.

Appellant’s Fourth Assignment of Error:

The Board of Tax Appeals erred to the prejudice of the Appellant taxpayer by failing to require the Appellee to rebut the sale price of the subject real property in its recent arm’s length sale, which is the best evidence of true value, contrary to established precedent. (Decision and Order of BTA entered April 28, 2006.)

Appellant’s Proposition of Law No. 4

Once the taxpayer has presented competent, reliable, and probative evidence of the true value of the real property by the sale price in a recent arm’s length transaction specifying the value of the real property, other parties asserting a different value have the burden to rebut the taxpayer’s evidence

by proving with competent, reliable, and probative evidence that the sale price is not the best evidence of true value.

The Appellant's fourth assignment of error is largely a misplaced attack on the competence of the Auditor's appraiser, Mr. Doug Thoreson (Appellant's Supplement, Vol. II, 379, T. pp. 13-14) and the Auditor's other expert, Dr. Norman Miller, Chair of the Real Estate Department at the University of Cincinnati, as well as attempting to belittle Dr. Miller's correct analysis of the lack of a separate, portable business value at this will no self-storage facility.

Appellant in his brief (p. 36) mischaracterizes Mr. Thoreson's expertise. Mr. Thoreson has been appraising property for fourteen years and worked as a general contractor for twenty years before that. He has extensive experience including previously appraising self-storage facilities. (Appellant's Supplement, Vol. II, p.379, T.pp.13-15) Indeed, as mentioned above, had Mr. Fletcher not wrongly assumed all the buildings were five years old and had not applied an economic obsolescence (despite the fact that the facility was at or above market levels), Mr. Fletcher's value would have been nearly identical to Mr. Thoreson's. Both values (before the unwarranted deduction under "the Fletcher Method") would have closely approximated the sale price.

The BTA said Dr. Miller "persuasively described how the subject property has no intangible business value independent of the real property." (BTA Decision and Order, p. 11)

The BTA correctly stated that Ohio taxes real property (not just real estate):

As previously stated, Ohio defines real property to include "all rights and privileges belonging or appertaining thereto." *R.C. 5701.02*. This includes something more than just the land and physical improvements. "Real property includes all interests, benefits, and rights inherent in the ownership of physical real estate. *** The total range of ownership interests in real property is called the bundle of rights. The bundle of rights contains all the interests in real property, including the right to use the real estate, sell it, lease it, enter it, and give it away

***.” The Appraisal of Real Estate, at 8. Therefore, the issue in any situation in which an owner claims that intangible personal property, such as business value, should be deducted is: to determine whether the value appertains to the real property, and is thus transferable with the real property, or whether it is detached from real property and can either be transferred independently or remain with the seller. Other Ohio courts agree. See Harvard Refuse, Inc. v. Cuyahoga Cty. Bd. of Revision (Feb. 5, 1987), Cuyahoga App. Nos. 51634 through 51677, unreported (holding that “the alleged intangible personal property had no value separate from the real property unless it could be sold separately”).

Although St. Bernard argues that the self-storage business is carried out independently of the real estate, and is thus transferable, we find no support for this in the record. St. Bernard’s business is to lease space. This clearly appertains to the real property and would be transferred to anyone who purchases the facility. Martin, supra. We recently reiterated this position in Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision (Jan. 27, 2006), BTA No. 2004-M-1211, unreported, holding, “like apartment or office buildings, consideration of the income earned from storage units and car washes is a valid method of valuing the realty and improvements thereon. The property owners have not brought forth sufficient evidence that a business separate from the realty and improvements was included in the purchase price. See Dublin Senior Community, supra,(at 7.) (BTA Decision and Order, pp. 10-11)

As the Court is aware from this case and others, there is a fairly recent development in the appraisal field to attempt to separate from the value of commercial property an intangible asset that is variously referred to as capitalized economic profit, goodwill, business enterprise value – or simply business value. No universally accepted terminology has been adopted and no universally accepted methodology has been developed to even measure such an intangible, assuming such a separate, quantifiable thing exists.

In Merle Hay Mall v. City of Des Moines Board of Review, et al. 564 N.W.2d 419 the Supreme Court of Iowa rejected the adoption of the business enterprise value theory. It said:

There is another reason to reject the mall’s business enterprise value theory. Iowa Code Section 441.21(2) requires that any valuation methods used must be “uniform and recognized appraisal methods.” The business enterprise value theory is not a generally recognized appraisal method.

It is undisputed that this method was designed in the late 1980s by a group of shopping mall owners in cooperation with real estate appraisers and real estate professors in a group called "SCAN" (shopping center assessment network). The need for such a project, according to some evidence, was exacerbated by a dramatic rise in the sale prices of shopping malls.

The boards of review argue that this methodology is inconsistent with Iowa's statutory scheme because it strips labor, capital, and entrepreneurial components from the mall's value. It thus removes virtually all components of value except the value of the land and buildings. If this were consistent with the statutory scheme, they argue, the legislature would simply have provided that the sole means of valuation would be the cost method. We believe there is merit in this argument.

Further, the business enterprise value concept seems to be used almost exclusively in tax assessments cases; it is not used in all mall appraisals. Significantly, one appraiser who had used the theory several times in tax assessment cases testified that he had never used it when a mall requested an appraisal for the purpose of obtaining a mortgage loan. Apparently, no assessor in Iowa applies this theory, and there is no uniformly accepted methodology to do so. (emphasis added)

The Iowa Court correctly traces the inception of this theory as one developed essentially by the aptly named lobby group SCAN whose primary purpose was to lower real estate tax assessments. The Court pointed out that such an approach is used almost exclusively in tax assessment cases. Investors and bankers do not rely on such a thing. As pointed out above in Dr. Miller's article "establishing even a small proportion of total value as attributable to "business value" could imply the potential for billions of dollars of property tax appeal cases."

A theory becomes suspect when it is invented by a biased group that seeks to profit from the theory. It becomes further suspect when the theory is not universally applied, even by the ones advocating the theory. It becomes further suspect when the theory lacks universally accepted definition of terms or a universally accepted methodology of measurement.

In a series of Wisconsin cases, cited by the Iowa Court, the Court relied on the

“inextricably intertwined” test to reject a separate business value intangible. In the instant case, both Dr. Miller and the Auditor’s appraiser, Mr. Thoreson, demonstrated that any perceived “business value” was “inextricably intertwined” with the real estate.

In State of Wisconsin ex rel. N/S Associates v. Board of Review, 164 Wis. 2d 31, 473 N.W.2d 554 (Wis. App. 1991), the Wisconsin Court of Appeals reviewed an assessment of a shopping mall. The assessor relied on the comparable sales approach. Like the present case, the owner in N/S Associates argued that the fact the replacement cost approach yielded a much lower assessment than the values set by the assessors proved that the mall had considerable intangible value. The owner assigned this intangible value to business enterprise value. The Court rejected this business enterprise value theory, relying on two rationales: (1) the fact that the comparable sales approach yielded a much higher assessment is explained by the location of the mall; and (2) the leasing of space to tenants and related activities is a transferrable value that is inextricably intertwined with the land and ‘all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto’ Id. at 563 (quoting Wis. Stat § 70.03) (emphasis added)

In Waste Management v. Kenosha County Board of Review, 177 Wis. 2d 257, 501 N.W.2d 883 (Wis. App. 1993) aff’d, 184 Wis. 2d 541, 516 N.W.2d 695 (Wis. 1994), the Court used the same rationale to reject the business value theory of an owner of a landfill.

The courts have focused as well on statutory definitions in their states to determine the value of the property. This centers on the issue of what is taxed - - real estate or real property.

R.C. 5701.02 defines real property as follows:

(A) “Real property,” “realty,” and “land” include land itself, whether laid out in town lots or otherwise, all growing crops, including deciduous and

evergreen trees, plants, and shrubs, with all things contained therein, and, unless otherwise specified in this section or section 5701.03 of the Revised Code, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto. "Real property" does not include a manufactured home as defined in division (C)(4) of section 3781.06 of the Revised Code or a mobile home travel trailer, or park trailer, each as defined in section 4501.01 of the Revised Code, that it not a manufactured or mobile home building as defined in division (B)(2) of this section. (emphasis added)

R.C. 5713.03 reads in part as follows:

5713.03 Valuation of real estate

The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the true value of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon and the current agricultural use value of land valued for tax purposes in accordance with section 5713.31 of the Revised Code, in every district, according to the rules prescribed by this chapter and section 5715.01 of the Revised Code, and in accordance with the uniform rules and methods of valuing and assessing real property as adopted, prescribed, and promulgated by the tax commissioner. He shall determine the taxable value of all real property by reducing its true or current agricultural use value by the percentage ordered by the commissioner.

Here, as elsewhere, the code appears to refer to real property and real estate interchangeably. However, it is clear in reading these statutes in pari materia that what is subject to tax is all the rights or as *R.C. 5701.02* puts it "all rights and privileges belonging or appertaining" to the property.

The fact that the tax is levied on the property with no personal responsibility imposed on the owner (as the taxes follow the land, not the owner) is a further indication that what is subject to taxation is real property, which includes all the rights attached thereto - - i.e. the fee simple, not just the leased fee interest of an individual occupier.

In Alliance Towers v. Stark Cty. Bd. of Revision, (1988), 38 Ohio St.3d 16, 526 N.E.2d 1350 the Supreme Court said for "real property tax purposes, the fee simple interest is to be

valued as if unencumbered by lesser estates, including leasehold interests.” (emphasis added)

This is the vast majority view of all states.

The Dictionary of Real Estate Appraisal (Chicago - American Institute of Real Estate Appraisers, 1984) provides the commonly accepted definitions of real estate and real property as follows:

“**real property.** All interests, benefits, and rights inherent in the ownership of physical real estate.”

“**real estate.** Physical land and appurtenances affixed to the land, e.g., structures.”

Real estate is generally thought of as the “bricks and mortar.” Real property is generally referred to as “the bundle of sticks.” It is clear in this that we are to value more than the bricks and mortar to determine what is subject to real property taxation

If, in fact, Ohio wanted its tax to apply only to the bricks and mortar, or only the real estate, it could have limited the method of valuation to only the cost approach. Instead, the Legislature directed County Auditors to rely on sales of the property, as well as the sales comparison approach and the income approach.

The County Auditor is to make a determination of taxable value based on “the best sources of information available” (*R.C. 5713.03*). This language is similar to that in Iowa which provides for the assessor to consider “all other factors which could assist in determining the fair and reasonable market value of the property.” If the Legislature wanted assessors to rely solely on the cost approach, it could have statutorily provided for such.

In State of Wisconsin, supra, the Wisconsin Court dealt with the “business value” argument as one of first impression. In addition to the argument of inextricably intertwined, the

Court focused on the value as a function of its location. This is similar to Dr. Miller's argument in favor of the land residual technique. In addition, the Court focused on whether the alleged intangible was, in fact, portable or capable of sale independent of the property. The Court said the following:

Assessable real property in Wisconsin "include[s] not only the land itself but all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto." Section 70.03, Stats. Additionally, the property's value for taxation purposes is affected by, *inter alia*, "its advantage or disadvantage of location." Section 70.32(a), Stats. Thus a "brand spanking new" Southridge mall is worth more located where it is in the Village of Greendale than it would be if it were located on the frozen arctic tundra, irrespective of the cost of construction. The significance of "advantage or disadvantage of location" as an element of value in Wisconsin is a major reason why, absent circumstances to the contrary, value is best fixed at what the property would bring in an arm's-length sale. See sec. 70.32(a) ("Real property shall be valued by the assessor . . . at the full value which could ordinarily be obtained therefor at private sale."); *cf. State ex rel. Oshkosh County Club v. Petrick*, 172 Wis. 82, 84, 178 N.W. 251, 252 (1920) (valuation of club facility had to take into account that the property "could not be sold as a golf course" but, rather, as farm land). Thus in order for a property's cost of reproduction to be a cap on value, the reproduction must be "an equally desirable substitute property with like utility." *Assessment Manual* at 7-14. Certainly, an arctic-based "brand spanking new" Southridge-type mall would not be "an equally desirable substitute" for the one in the Village of Greendale. The key of the analysis is whether the value is appended to the property, and is thus transferrable with the property, or whether it is, in effect, independent of the property so that the value either stays with the seller or dissipates upon sale. See *Oshkosh Country Club*, 172 Wis. at 84, 178 N.W. at 252 (A non-transferable use may not be considered as an element of value.). This proposition is at least tacitly recognized by two of the three out-of-state cases on which N/S Associates relies, *Heritage Cablevision v. Board of Review*, 457 N.W.2d 594 (Iowa 1990) and *Madonna v. County of San Luis Obispo*, 39 Cal. App. 3d 57, 113 Cal Rptr. 916 (1974). (emphasis added)

Even the Appraisal Institute recognizes the controversy surrounding this topic.

The Appraisal of Real Estate, 12th edition (Chicago, The Appraisal Institute, 2001) states of following (p. 644):

Arguments against the existence of residual intangibles often point to the

lack of universal acceptance of the various theories, especially in the courts. This is particularly true in the analysis of regional shopping malls. Another argument frequently advanced is that the theoretical increment labeled as intangible is instead a location premium awarded by the market, which therefore belongs with the real estate. A final argument against the existence of a residual intangible (and CEP) is that there can be none unless it can be sold or transferred to another location and is recognized as a separate item in the negotiations. (emphasis added)

Most appraisal clients want to know the market value of the total assets of the business. Allocation of that value among component parts is often not requested or desired. Thus, appraisers who make such allocations are imposing that requirement on themselves. USPAP, among other authorities, mandates that appraisers analyze the effect that non-realty components have on value. Most state appraiser laws incorporate these standards by reference. For these reasons business enterprise value remains one of the most important and controversial topics confronting appraisers. (emphasis added)

The Appraisal Institute recognizes the controversy surrounding this topic and recognizes that most courts have rejected it. The market (which appraisers are supposed to reflect) has also rejected the theory.

Controversial appraisal subjects about which there is great debate about terminology and methodology belong in the classroom and in learned treatises. They do not belong in the courtroom until such time as there is a consensus about the theory. At this time, no consensus exists and the courts have properly excluded the theory.

These tests emerge as concerns for the courts:

- Is the "intangible" severable?
- Is the intangible capable of independent sale?
- Is the intangible transferrable as a separate item?
- Is the intangible inextricably intertwined with the real estate?

In Merle Hay Mall, supra, the Court in analyzing State of Wisconsin, supra, said:

Southridge mall's *raison d'être* - - namely, the leasing of space to tenants and related activities such as trash disposal, baby stroller rentals, etc. - - is a transferrable value that is inextricably intertwined with the land and "all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto," sec. 70.03, Stats., just as the transferrable value of a farm - - the growing of crops - - is inextricably intertwined with the property from which the farm operates. In light of Wisconsin's pre-eminent focus on what property will bring in an arm's-length sale as the basis of value, tax assessment under section 70.32(1), Stat., may include as a component of value the property's transferrable income-producing capacity that is reflected by a recent sale. Since there was substantial evidence before the Board of Review that it was not possible to separate Southridge mall's non-transferrable income-producing capacity from the elements of real estate that are set out in section 70.03 (the land and "all buildings and improvements thereon, and all fixtures and rights and privileges appertaining thereto"), NS Associates assignment of error in this regard fails.

Thus, for example, an expert in shopping center management, leasing, consulting, and appraisal called by N/S Associates testified that he had never seen a purchaser of a large shopping mall distinguish between the real estate and the going-concern component of the property because it "is very difficult to break out all of the various elements of income to segregate real estate from the business value." He added that although "[t]here may be some brilliant guy out there" who was capable of separately valuing the business and real estate components of a regional shopping mall, he did not know how to do it. Another appraisal expert called by N/S Associates testified that attempting to divide value "between real estate and the business value is almost an impossibility up to this particular point" although "[a] tremendous amount of research is being done on this especially by our research division of the American Institute of Real Estate Appraisers."

Minnesota has also rejected the theory. In Equitable Life Assurance Society of the United States v. County of Hennepin 1995 WL 702, 527 (Minn Tax 1995) the Court rejected the business value theory in a regional mall.

Utah has rejected the theory. In Beaver County v. Witel 307 Utah Adv. Report 97, 995 P 29 602 the Court rejected the theory because the Legislature did not provide for separate treatment. The Court held that any value enhancement caused by an intangible element was subject to taxation.

The BTA has rejected the theory of a separate intangible business value in hotels when it

found the methodology was speculative. See, e.g. Kettering City School Bd. of Ed. v. Montgomery Cty. Bd. of Revision 2002-G-1922 (October 3, 2003) Equistar Cleveland Company v. Cuyahoga Bd. of Revision 2002-J-2430 et al. (August 6, 2004)

In Bd. of Ed. of South Western Schools v. Franklin Cty. Bd. of Revision 01-V-318 (August 2, 2002) the Board rejected the theory that golf cart rentals were a separate business conducted on a golf course. The Board found it was a necessary part of the operation and the income was properly included in the performing income analysis of the property.

In George Martin v. Franklin Cty. Bd. of Revision 87-J-655, 1988 Ohio Tax Lexis 208 (February 10, 1988) the Board rejected a claim that a purchase of a self-storage unit included a business value which should have been excluded. The BTA found the total sale price to be the value.

There is no dispute that there are intangible elements that add to the value of real estate. However, this is not to say that these are separate intangible assets that should receive a different classification and be exempt from taxation.

In Los Angeles SMSA v. Board of Equalization 14 Cal Rptr.2d 522 (Cal. App.2d Dist. 1992), the Court said:

Intangible values that cannot be separately taxed as property may be reflected in the valuation of taxable property. Thus, in determining the value of property, assessing authorities may take into consideration earnings derived therefrom, which may depend upon the possession of intangible rights and privileges that are not themselves regarded as a separate class of taxable property.

Assuming the market demonstrates such an above market factor, such would not be applicable in ad valorem tax cases in Ohio (and in nearly every other state) because it is required that values be based on market rents assuming good management. Therefore, any pro forma

income approach would already factor out any “added value” in arriving at a value for tax purposes.

In Exide Corporation d/b/a Schuylkill Metals v. Margaret Salfrank, Assessor, Holt County, Missouri State Tax Commission, App. Nos. 97-6050 through 97-60502 (March 3, 1999) the Commission adopted the “inextricably intertwined” test. In determining whether a separate intangible asset exists, the question is “as simple as asking whether the disputed value is appended to the property and thus transferable with the property, or is it independent of the property so that it either stays with the seller or dissipates upon sale. The ability of a property to operate according to its intended purpose does not create business value. The ability to function is a characteristic of the property’s ownership.”

This is, in fact, another way of recognizing the highest and best use. If the highest and best use of this property is a self-storage unit, the income produced from the rental of self-storage units is a function of the property’s highest and best use, not a separate intangible asset.

In our case, St. Bernard Self-Storage cannot practically or reasonably sell the customer list and keep the property, nor can it sell the property and keep the customer list. No third party would buy a list of transient customers who would not move more than 1-2 miles from the present location. Such a list obviously has no value. To suggest such a list would sell for \$950,000 is not credible. A simple neighborhood mailing to the property’s customer base could obviously be achieved at a comparatively modest price.

The argument of Appellants is akin to an office building owner arguing that tenants and leases in place not only make the building more valuable than a vacant building, but that this added value is non-taxable business value. This is precisely the argument here; i.e. that because

the owner operates the property at its highest and best use, the income received from the rent of real property paid by the tenants (customers) is non-taxable. This Court has never accepted such an argument. To do so would value an interest less than the fee simple. The simplistic method of measuring business value by only utilizing a cost approach, ignores the difficulty of measuring depreciation properly (as is obvious in Mr. Fletcher's report) and ignores the profit motive. If a property could only be sold for what it cost to build it, no entrepreneur or developer would waste his time building a property. The following exchange takes place (Appellant's Supplement, Vol.II, p.395,T.pp 78-80)

BY MR. SCHEVE:

Q: Hypothetically, Dr. Miller, if you found a property that someone purchased for \$1,740,000. and you hired an appraiser that said the cost to replicate that facility was \$1,120,000. would that indicate to you that there is some business value present in that facility?

A: Not at all.

Q: Why not?

A: Well, it happens all the time. We'd get no development in the United States whatsoever if you couldn't beat the cost. If you can't create something which is worth more than the cost to create, you're not going to get new development.

As you look around the world, look around the United States, most of the time the United States you might see profit margins that might run from 10 to 20 percent on a new development.

Sometimes you see home runs, sometimes people have great ideas and they hit home runs, and they build something that cost 2 million and it's worth 4 million.

And of course, somebody comes along and replicates that and competes and bids up the land value, and over time those profit margins are driven down in a competitive market.

But it happens all the time. We wouldn't have any development at all if you couldn't beat the cost to create.

So it's not surprising, it certainly doesn't indicate the value to me because the value is based on what the typical investor would pay for a property, not what it cost to create.

If the market truly reflected a separate business value that was not locationally dependent,

there would be some evidence of it. In this case, there was absolutely no evidence that the market reflected the arguments espoused by the Appellant.

As The Appraisal of Real Estate, *supra* states, there are divergent methods of estimating business enterprise value and no single technique is universally accepted. The Uniform Standards of Professional Appraisal Practice (USPAP) only require a separate valuation of some realty items when the items are significant to the overall value and can be measured in a meaningful way (see Standards Rule 1-4(g)). The traditional job of the appraiser is to reflect market behavior, not to construct his own theory “despite market behavior to the contrary.” The duty of the appraiser is to report a value based on the market, not in spite of it.

Appraising for fee simple purposes assumes competent management and market rates. Once the appraiser has made these assumptions and makes the appropriate deduction for management fees and franchise fees, any additional deduction would be improper.

In our case the name “St. Bernard Self-Storage” has no valuable recognition or loyalty. This site is the only self-storage unit in St. Bernard and no one would travel to St. Bernard from other sides of the city to store materials there because of the name. Nor would anyone in St. Bernard travel to the opposite side of the city to store materials because the site might be named St. Bernard. As Dr. Miller pointed out, “counting rooftops” in the given area is what drives the market for self-storage facilities. (Appellant’s Supplement, Vol. II, p.396 ,T.p.84)

Management expertise and customer service is common to any commercial property. To achieve a market rate of return these are necessary components. They are simply a reflection of market competition. Those competitors that do not offer proper service and management will disappear from the market. Clearly, every commercial property has a “business component” but

it is not a quantifiable, severable asset, or “business value.”

Every commercial property has a workforce in place. Some have more extensive and skilled work forces for a particular type of business. In the instant case, the work force in place (however pleasant and efficient they might be) is neither extensive nor highly skilled. As turnover rates for unskilled workers are generally significantly higher than for skilled workers, there can be no separate quantifiable value for a workplace in place that reflects the necessary market needs of the particular property.

As Dr. Miller pointed out, assuming any “excess profits” existed because of the above-market abilities of a particular owner, these would be short-lived as the market would be forced to become more competitive. In addition, in performing a market value appraisal, any above-market rent would be eliminated in a stabilized pro forma approach.

The above discussion of various court cases and texts indicate a lack of uniformity in terminology and methodology. Without such uniformity and acceptance in the industry or by the courts, appraisal reports suggesting huge reductions for business value should not properly be considered as evidence.

Ohio Rule of Evidence, Rule 702, Testimony of Experts, reads in part as follows:

- (C) The witness’ testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
 - (1) The theory upon which the procedure test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;...(Emphasis added)

While the BTA did not give any weight to the Appellant’s expert witnesses, it should have in fact struck their testimony pursuant to the above rule.

The Appraisal of Real Estate, supra makes it clear that the issue of business value is unsettled and highly controversial. The majority of Courts that have looked at the issue have rejected it in either theory or methodology, or as “too speculative”.

The BTA in The Bentz Foundation v. Franklin Cty. Bd. of Revision 99-M-200 (July 7, 2000) reviewed valuation techniques adopted in other courts and rejected an approach that had never met with approval. In the instant case, the BTA is presented with approaches that even the witness admits are novel (the Fletcher Method) and without any support in the appraisal community.

IV. CONCLUSION

The BTA correctly decided this case. It set the value based on an admitted arms-length sale. See Berea, Lakota School District, supra.

The BTA correctly found that the Appellants had failed to offer credible proof of the arbitrary allocation it made in the sales contract. This Court may not disturb factual findings of the BTA when it determines witnesses are not credible.

The BTA correctly adopted the “inextricably intertwined” test utilized by the other states with similar real property definitions which have analyzed the so-called “business value” issue presented in this case.

In this case, the only income received was from the rent of the real property. There was no credible evidence that any separate, severable, or portable “business value” existed. The evidence showed that the “business” and the real estate were the same; they were “inextricably intertwined.”

The “parade of horrors” that the Amicus brief makes light of, will in fact come true if

this Court finds in favor of the Appellant. If the Court finds that any property owner can simply allocate half the purchase price of a commercial property to goodwill or "business value" when none exists, surely every self storage facility will appeal their taxes, as will every parking lot, every office building, and every other type of property that can claim its management skills created a "business value."

As Dr. Miller stated (Appellant Supplement Vol. II, p.394, T.p. 74):

A: Well, we've seen a lot of this kind of argument being made for hotels. This is the first time I've ever seen it for self-storage, but I suspect if you would see it for self-storage, you're going to see it for everything.

The affirmance of the BTA's Decision will not lead to the destruction of the self storage industry, as the Amicus brief hyperbolically suggests. (Amicus brief, p.17) The evidence indicates that the industry is expanding.

If the Court fails to affirm the BTA decision the real result will be a massive increase in property tax appeals and a huge diminution in the property tax base that will threaten the system itself and the school systems which rely on real property taxes. The adverse effects of the adoption of the Appellant's argument cannot be overstated.

The BTA correctly found the value of the real property to be the purchase price. We respectfully urge the Court to affirm the findings of the BTA.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Merit Brief of Appellee Hamilton County Auditor Dusty Rhodes" was served by ordinary U.S. Mail, postage prepaid, this 7 day of January, 2007 upon the following:

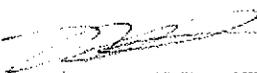
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In Defense of the Land Residual Theory and the Absence of a Business Value Component for Retail Property

Norman G. Miller, Steven T. Jones, and Stephen E. Roulac

Introduction

Classic economic theory suggests that the value of land as a factor of production depends on the ability of the land to produce revenues in excess of the required payments to all other factors of production. Payments to land are viewed as the residual productivity remaining after all other mobile factors of production have been compensated at their fair market values.¹ Developers often use the land residual theory to determine the maximum potential value of a site after subtracting all other non-land costs from the total projected property value.

Recent papers by Fisher and Kinnard (1990) and by Fisher and Lentz (1990) argue strongly that retail property valuations should include three major components: land, improvements and business value. Dissecting total property value into two or three components requires a theory and corresponding methodology that establish the appropriate allocation of value to each component. The land residual value revisionists' arguments, which will be discussed fully in this paper, imply the following three conclusions: First, the value of a potential retail site is based on either the second most productive use of land in a given area, given that an operational shopping center has already been developed, or an adjacent site that was just not "lucky" enough to be selected for development. Second, adjacent parcels are viewed as true substitutes, even with an operational shopping center nearby. Third, any added site value beyond the construction cost of the improve-

ments and the cost of substitute sites is ascribed to entrepreneurial value for business decisions such as design, tenant mix and management.

The crux of the debate between the land residual theory and the business value component argument lies in deciding which factor of production should receive the excess productivity, if any, inherent in the operation and ownership of real estate. The land residual theory suggests that such excess productivity should run with the land as an immobile factor of production, whereas Fisher and Kinnard (1990) and Fisher and Lentz (1990) argue that it should be considered business value.

Clearly, the business value component argument is enormously attractive to property owners facing significant property tax burdens on land and improvements. Establishing even a small proportion of total value as attributable to "business value" could imply the potential for billions of dollars of property tax appeal cases.

In this paper, we attempt to explain why after entrepreneurial profits are captured, excess productivity becomes logically attached to the land, despite

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1. The beginnings of classical rent theory from the early 1880s are associated with Ricardo and von Thunen, who were concerned with agricultural rents and transportation costs to a centralized market. Ricardo (1891) recognized differences in productivity inherent in location, while von Thunen (1966) added the cost factor of transporting goods to the market for exchange. The rental price of land became a function of both productivity and transportation costs.

the strong temptation to assign such value elsewhere. We argue that all land valuation includes an option value based on the potential increase in value if conversion to new uses is possible in the future. We further argue that the total value of retail property in a given geographical area is relatively constant at any given point in time (or at least proportional to the purchasing power in the area). Nevertheless, we note that increasing the value of a particular area relative to other areas is certainly possible in a world of expanding market access and strong merchandizing.

Defining the relevant competitive market geographically will certainly change over the next decade, to the point that the relevant market becomes the nation and eventually the world. But for now assume a simplified illustration of a market model where significant consumer access is required and transportation costs are non-trivial. Within a primary geographically defined market, any increase in retail dollar market share tied to a specific property at one location comes at the expense of other sites; the total values of other properties within the competitive area are in fact lessened as a result of a decreased option value on each competitively similar site.² From a property tax administrator's point of view, the total property tax collected is simply redistributed when development occurs. The current and future value will be higher for one or more parcels, and lower for others, each time a new development occurs. We should note here that this statement is true for a given level of retail sales potential. Changes in demographic factors such as population, income, consumer spending proclivities, and so on, will affect the total property values in an

area. However, for any given combination of all these parameters, new retail development will simply lead to a redistribution of the area's total real estate value.

We also argue that, regardless of one's beliefs about the long-term persistence of entrepreneurial value,³ there is in fact little reason to "adjust" for such value in determining the real estate value of a shopping center.⁴ Indeed, some degree of monopoly attributes may run with a property and a specific business use.⁵ Finally, we concur with Karvel and Patchin (1992) in making the logically consistent observation that, in a world where "business value" adjustments are considered correct, assessments of negative business value are inevitable. Thus, if the increase in value created by unusually effective management and/or entrepreneurship is "business value" that must be subtracted from total value to find a "true real estate value," then any *decrease* in value caused by *ineffective management* decisions is "negative business value" that *must be added back* to the total value to find the property value. Such assessments would, of course, lead to higher tax burdens on the affected land and improvements than would otherwise exist.

To clarify the context of our arguments for the continued applicability of the land residual theory to the case of shopping centers, as well as other property types,⁶ we divide our discussion into four sections. The next section briefly outlines the "traditional" or "classical" land residual views of Ricardo and von Thunen. Section three provides an overview of the "business value" arguments and discusses some of the work relating these arguments to shopping centers. In the fourth section, we support our

2. Increased productivity will result in a net increase in the sum of all area property values. It is also possible to imagine an increase in the sum of all property values within a defined region, when the region is geographically surrounded by additional market potential. In this case, it is somewhat arbitrary to define a precise geographic area as a submarket, and to presume that no leakage of the purchasing power occurs in either direction. With market leakage, total property values and taxes collected may actually go up in a given submarket after a new development occurs.

In the context of the new information technology and myriad potential retail marketing and distribution methods often involving non-store shopping discussed by Roulac (1994), retailers at the regional, national, or even the world level compete for a given share of purchasing power. With such a global view, the decrease in the option value in adjoining land sites would be less observable, since the impact of one increasingly successful retail land use is dissipated over such a much larger and less observable geographic area.

3. Clearly, recent papers on this subject are correct in pointing out that entrepreneurial value can be created through the necessary combination of creativity, intelligence, diligence, and perhaps serendipity. Superior design, aesthetics and tenant mix decisions are part of the entrepreneurial contribution to development value. Such value enhancing attributes are likely to be captured by the original owners of a development. It is our argument that such entrepreneurial values must ultimately do one of two things: disappear (that is, fail to persist over the long run) as a result of competitive responses, or be captured by their creators.
4. This argument builds upon the work of George R. Karvel and Peter J. Patchin (1992).
5. Monopoly attributes in a particular property create value superior to that of similar proximate properties. Among those attributes that create singular value for a given site are access, views, soils, permitted land use, and the like.
6. The arguments made here are not exclusively appropriate to shopping centers, but apply to all real estate property types in general.

argument that the land residual theory is more appropriate than the notion of business value in the case of shopping centers. Section five provides a summary with conclusions.

The Traditional Land Residual Theory

The traditional view of land valuation has been based on the notion (originally developed in an agricultural context) that payments to land represent "a residual, equal to the excess of revenues from the sale of goods produced on the land over remunerations to non-land factors used in production."⁷ Thus, each factor of production, including land, will be paid an appropriate competitive price.

The arguments for this notion of land value can be summarized in the following simple model. First, the value of the land, V , is a function, f of the amount of rent, r , that can be charged per period of time, t :

$$V = f(r). \quad (1)$$

Next, the rent that can be charged per unit of land per unit of time can be seen as the "residual" value of net site productivity, P , per unit of land, l , per period of time, t , less transportation costs, TC , over distance to the market, d :

$$R_{it} = P_{it} - TC(d). \quad (2)$$

Transportation costs are an increasing function of distance, where distance might be measured to one or more economic market centers. Site productivity depends on gross sales, which are affected by merchandizing efforts, the cost of goods sold, operating costs, and the "normal" or "expected" level of profit. Sales are partially dependent on the total sum of all the distances to all the potential customers in the area.⁸ Sales are also dependent on the distances from all potential customers to competitors. At any given point in time, sales within a competitive area are deemed to be fixed, although defining the relevant competitive area will clearly be more difficult in the 21st century.⁹ As one location becomes more productive in terms of sales per unit of space per unit of time, it does so to the detriment of one or more other sites. Such changes in productivity affect the amount of rent that can be charged, which in turn affects the value of the land.¹⁰

In addition, however, we should recognize that the value of land is not limited to the value of its current use. Further, the total value of land includes an "option component" reflecting the value of the option to convert the land to a different use in the future. This option is best seen as an American option with an infinite life, and with an exercise price equal to the cost of conversion. Thus, with all

7. See Mills (1972), p. 40. Classic economic theory suggests that the residual value of land is dependent on site productivity and transportation costs. The beginnings of classical rent theory are associated with Ricardo and von Thunen, whose views are explained in a succinct manner by Mills (1972) and are briefly summarized below. Ricardo (1891) recognized differences in productivity inherent in location as a result of weather or soil fertility. Mills describes Ricardo's notion as the idea "that land rent is a residual, equal to the excess of revenues from the sale of goods produced on the land over remunerations to non-land factors used in production," (p. 40) and then explains Ricardo's argument as follows.

Given parcels of land with varying degrees of productivity, potential users of the land will begin with the land best suited for that purpose and work their way down until demand is met. Prices will be just enough to cover the non-land costs of production on the lowest grade land in use, rent for that land is therefore theoretically zero. Higher grade parcels of land will command positive rents equal to the value of their "excess productivity" over the land in use. Wicksteed (1955) and Wicksell (1934-35) subsequently discussed the links between the "residual" theory and the neoclassical marginal productivity theory.

Von Thunen (1966) added the cost factor of transporting goods to the market for exchange, which makes the theory far more relevant to the case of urban economics. Here, the key issue in valuing land is not "fertility" in the agricultural sense, but rather overall productivity or utility of any type. The rental price of land became a function of the productivity of a given site and the cost of transporting goods to the market. One could have argued instead that the price of land was merely an exogenous factor in the price of any goods produced on the land, but such an argument would ignore the competitive market for substitutable land. In such a market, land rents will be driven toward the market-clearing price.

Roulac (1994) has more recently argued that electronic shopping trends are in some cases eliminating the need for a trip to the mall, creating a situation where transportation costs are driven towards zero, and consumer access becomes less important than before. Such an effect flattens out the slope of the bid rent or value function described below. For such retailing modes that are essentially warehouse centers, access to efficient distribution would be a dominant factor in the site value determination, as opposed to consumer access.

8. One could view the sum of all the distances to all potential customers in a gravity model framework. Gravity models can weigh multiple and potentially competing attractions in a framework that sums travel distances or times from any location of interest.
9. The sales of any particular retail outlet will be affected by both agglomerative economies and competitive effects. For any particular outlet, the location decision will depend in part upon an effort to optimize the trade-off between the two.
10. Increased productivity of land due to technological differences affecting most land uses would allow greater rent at all distances away from the market centers. These types of changes in productivity are assumed to be relatively stable over time.

other things equal, land that can be converted to other uses has a greater option value. Clearly, the option value also varies positively with the probability and magnitude of upside use opportunities, and varies negatively with such constraints on these opportunities as regulation, building codes, and so forth.¹¹ Equation 1 can be broken into two components, where r is broken down into the expected current use rental stream, cr , and potential future rent from new uses, fr .¹²

$$V = \frac{\text{Current Use Value}}{f(cr)} + \frac{\text{Future Use Value}}{f(fr)} \quad (3)$$

The Business Value Argument

Realty versus Personalty and Intangibles

It is an accepted appraisal principle that the value assigned to an appraised property should relate solely to the value of the real estate itself, and should exclude the value of personal property or intangible property. This principle has led to the argument that segregating the "business value" of various properties from the total value of such properties is necessary to find the correct value of the real property itself. Otherwise, according to this argument, property assessments for tax purposes may overstate true real estate values and lead to excessive taxes on those properties. As Fisher and Kinnard (1990) argue:

The tangible personal property and intangible components must be separated from the real property component of an operating property. In many instances the separation and measurement of the values of individual components of operating properties is admittedly difficult. Nevertheless, that difficulty does not constitute an excuse for ignoring the issue. It must be ad-

ressed directly and in a straightforward fashion. The business enterprise valuation approach is one way of doing so.

Karvel and Patchin (1992) also address the business value issue, and state, "An appraiser's obligation is clear. To the extent that business or going-concern value exists, it should be recognized as a value separate and distinct from the value of the real property with which it is associated." They go on to cite a recent state court decision that succinctly sums up the appraisal problem; "The key is whether the (income) value is appended to the property, and is thus transferable with the property, or whether it is, in effect, independent of the property so that the (income) value either stays with the seller or dissipates upon sale."¹³

It should be noted that the argument for separating business value obviously exists when an appraisal includes a going-concern value as part of a total appraisal, but such going-concern value should be based on the net expected profitability of the business entity given that a competitive rent is already paid.¹⁴ There is no reason to expect any business value component would be passed on to the owner of the real estate, beyond the competitive rent that is paid.

The Development Cost Argument as It Relates to Shopping Centers

One argument advanced by business value proponents for the separation of value into land, improvements and business value is that the real estate (land and improvements) value should be equal to the cost of developing a similar structure on nearby land. This argument is flawed in at least two or three ways. It fails to recognize the interdependency of similar land uses in terms of dividing or capturing

11. For further development of the relationship between call options and land values see Geltner, Riddiough and Strajmanovic (1995), which builds upon the classical work of Titman (1985) and the more recent work of Capozza and Li (1994).
12. The function, f , may be different with respect to discount rates for the current use value and future option value based on perceived risk. This function essentially requires a discount rate based on the expected riskiness of the returns from time 0 to the time that conversion may occur, along with periodic estimates of the returns from the current use period. The future use value also requires return and risk estimates. Clearly, the potential conversion dates must be consistent between both value components, and part of the uncertainty which affects the discount rates used is the potential conversion date.
13. JMB Group Trust IV v. Board of Review of the Village of Greendale et al., Wisconsin Court of Appeals, District 1, July 23, 1992, No. 90-2546, p. 17.
14. In the case where an assignable long-term lease is below the competitive "market" rent level, there will be a temporary windfall benefit to the business owner, which could positively affect the value of the business, to the detriment of the land value. This effect is similar to entrepreneurial values in that they should be captured by those parties creating or locking into the "value." In the long run, competitive rents are presumed in this analysis.

shares of a fixed total market at a given point in time. First, the existence of an operational shopping center will lower the option value on adjacent land, thus lowering the total value of the adjacent site. Therefore, the two parcels would not be equivalent substitutes with similar potential for productivity. Second, due to the obvious reduction in uncertainty for a fully operational site as opposed to raw land, the nearby land requires a much higher discount rate for any similar expected productivity, thus leading to a lower land value (although similar productivity levels are unlikely once a new shopping center further dilutes the market). Thus, the two sites are not similar substitutes, even if physically adjacent and identical in all respects, whenever one site is already operational. Third, albeit a minor point, the pragmatics of a new competitive retail venture in the same vicinity are questionable. Major investments in traffic management might be required, and strong political opposition is probable.

Hotels and Shopping Centers

The hotel is perhaps the most frequent property type for which the existence of a business value component is argued. Rushmore (1987) has stated:

The business component of a hotel's income stream accounts for the fact that a lodging facility is a labor-intensive, retail-type activity that depends upon customer acceptance and highly specialized management skills. In contrast to an apartment or office building where tenants sign leases for one or more years, a hotel experiences a complete turnover of patronage every two to four days. . . . Another facet of business value is the benefit that accrues from association with a recognized hotel company through either a franchise or management contract affiliation. Chain hotels generally out-perform independents and the added value created by increased profits is exclusively business-related.

Both Fisher and Kinnard (1990) and Fisher and Lentz (1990) cite the above statement and argue that the same logic should apply to retail shopping centers. However, when one dissects the logic, there are certain presumptions necessary to create a separate business value component for a hotel

property appraisal. These presumptions include: (1) that excess profits might persist for some types of hotels, (2) that such excess profits on hotel-related business are not completely captured by the business owners, but rather are paid to the land owner, and/or (3) that some hotel operators can pay more in rent than others, and an owner is simply lucky to happen to have negotiated a deal with such an operator. Each of these points will be dealt with in turn.

For excess profits to persist in the long run is similar to the notion of an entrepreneurial value not captured by the originator of such value. In competitive markets, any advantages, be they related to reputation, technological advantages, marketing techniques, or others, are captured to the extent possible through the separate business entity value, when such entities are transferred. Excess profits are dissipated by higher business entity values. The early 1980s leveraged buy-out frenzy of corporate America certainly demonstrated how the market attempts to discover and capture such excess profits.

If some hotels (such as parent-owned chains) are successful in developing a more successful hotel operation formula, with temporary excess profits due to entrepreneurial abilities, they will attempt to capture some of the present value of this excess in the form of franchise fees or royalties. The hotel investor should be able to receive a risk-adjusted return related to the potential hotel chain-related profits priced in such a manner that it considers the life cycle and needs of the parent hotel chain.¹⁵ There is no reason to presume that any excess profits, be they temporary or not, will be paid in the form of excess market rent for the use at a site. It is only logical to assume that all business owners will pay the minimum rent necessary to capture a site (outbid other less profitable users) and no more.

Some hotel operators may pay more rent than others. A hotel chain in a growth mode, possibly with some competitive advantages, may decide to pay more than other hotels presuming they have sufficient working capital. If they are extremely unusual (perhaps new to the industry) it might turn out to be a "lucky" deal for the owner of the real property, relative to most other more dominant

15. For example, a newer chain gains many benefits from discounting the franchise fees or royalty fees simply to gain faster growth and greater market share in the future. An older mature chain is less likely to want to make such trade-offs, and will attempt to more fully capture all chain-related economies or advantages.

tenant types. But, over the long run, other new hotel operators will seek out and likely acquire these same competitive advantages, which, if they result in greater productivity with respect to the use of a site, will result in the ability to pay more rent. When the marginal hotel (or any user of land) owner has the ability to pay more rent, this higher rent will eventually become the market rent necessary to secure the right to use the site. All such users of land will then have to be at least as productive to bid on the site, and the higher rent will no longer be attributable to luck but market competition. Hotels that cannot pay the new, higher market rents simply will not survive in the long run.

We do not disagree with the belief expressed by Fisher and Kinnard (1990) and Fisher and Lentz (1990) that analyzing the issue of value separation with respect to hotels can be instructive to those attempting to determine the extent (if any) to which business value arguments should be applied to shopping centers. Rather, it appears that the hotel valuation issue provides an illuminating insight into why their means of differentiating between management or business value and property value are flawed. "Hotels, such as the Marriott, saw that their real expertise was in hotel management. They could profit by managing hotels and renting the property on a master lease from investors. To the extent that the Marriott, or any other manager, could make more profits than others, after paying market rents, they have pulled a business value from the income off of the property."¹⁶ However, this excess profitability to the manager, which is a result of outperforming other managers in revenue generation and/or cost efficiencies, need not be reflected in a competitor-driven market-based rent. That is, there is no reason to suspect that the excess profitability encourages a business manager to pay above-market rents. This, in turn, means that there is no need to adjust the value of the land for any business value.

Empirical Testing for Business Value

The argument for the existence of business enterprise value has not been limited to theoretical justifications. Fisher and Lentz (1990) provide an empirical test seeking to establish an estimate of the business

value component of a shopping center in which they regress the log of total rents per square foot on three series of independent variables. Each of these series includes a dummy variable indicating whether the lease in question is a renewal. Fisher and Lentz find a positive relationship between the "renewal" dummy variable and rent levels, and interpret this relationship as being attributable to business value.

However, as Karvel and Patchin (1992) point out, there are other possible explanations for such a "renewal premium." They argue, "It is just as likely that renewed leases for successful businesses represent the market rate and initial leases are offered at a discount to encourage new enterprises to locate in a particular mall."

This argument seems sensible for several reasons. First, moving has both direct and indirect costs associated with it, and one would be hard-pressed to argue that such costs result only from the loss of "business value." There are various transactions costs associated with negotiating a lease and moving to a new location. Tenants are highly motivated to stay in a place where they have familiar patterns of working with customers, suppliers and employees. There are also direct costs associated with moving. Finally, there is the opportunity cost of lost business, certainly during the move and possibly afterwards, depending on the wisdom of the relocation choice.

One might argue that such lost business represents only the disappearance of "excess" store profitability attributable to the entrepreneurial and management skill of the owners of the mall with which the store currently has a lease. However, there are problems with that argument as well. For instance, it would be difficult to classify the loss of business during a move as the loss of "excess" profits. It could, instead, reflect the loss of quite ordinary profits associated with running the store. (In fact, during the course of the move, one ordinarily would expect not only the temporary disappearance of profits, but also an outright loss based on the continuation of at least some fixed operating expenses.)

Also, potential loss of business after a move might reflect relative disadvantages of location *per se*, rather than differential managerial abilities. The value of location itself is as certainly a part of real

16. Anonymous reviewer comment on an earlier draft.

estate value as is the value of bricks and mortar or management approach. Some lost business might also be expected due to the fact that the clientele that was built up over a period of time in the previous location cannot be replaced without considerable time, effort and expense. And, we are still faced with the existence of transactions costs and direct moving costs.

Thus, whether one thinks of the apparent gap between renewals and new tenants as the equilibrium differential necessary to provide an incentive to prospective new tenants, or simply as taking advantage of the costs of moving and the value of existing relationships to an existing tenant, there are clearly non-business value-related reasons for the gap to exist. In the absence of a business value component, we would expect that in equilibrium the size of this gap should equal the present value of direct and indirect costs of relocation. There are actually two equilibrium rent levels in the market at all times—one for existing tenants and one for prospective new tenants.¹⁷

In a parallel context, one might consider the residential leasing market. The offer of "one month's free rent" or "three months reduced rent" is a relatively common incentive. However, this incentive is provided far more frequently to new tenants than to existing tenants considering renewal. Particularly in the case of the majority of renters, who do not operate any retail business out of their homes, it seems probable that such differential policies have little to do with any "business enterprise value" associated with remaining in a particular apartment complex. Rather, these policies reflect the fact that moving involves both direct dollar costs and opportunity costs (in this case time rather than sales).

The Case for the Land Residual Theory

The Development Option

As outlined above, all land prices should include an option value based on the potential increase in value

if conversion to new uses is possible in the future. For instance, a potential buyer of a parcel of land will almost certainly be willing to pay more for a parcel of land that is, or is deemed likely to become, zoned for the purpose the buyer desires. And, ceteris paribus, the value of the land to the potential buyer increases as the odds of a favorable zoning decision improve. The reason is that the land in question holds a value beyond that implied by its present use, with the additional value representing the value of the conversion option.

If these options are properly priced, then the total value of retail property within a given market area will be relatively constant at any given point in time. So, to the extent that some property location captures a larger market share of the retail dollar, or gains an early foothold, the value of other properties within the competitive area will fall.¹⁸

Thus, to argue that the "true real estate value" of a completed and successful shopping center site is no more than that of a similar undeveloped nearby parcel, plus the "bricks and mortar" value of improvements, ignores the fact that the retail potential of alternative sites has been lessened by any given development, and that those sites are therefore worth less if placed into the same land use. To the extent that retail land use produces the greatest productivity per unit of space in the area in question, the alternative land parcels will actually become worth less than before.

An example of this can be seen in the case of developers fighting to be the first into a new market area. If, for instance, a given area comes to be seen as a prime location for a shopping mall, developers will "race" to put together a complete package of financing, permits, etc. Once one developer has won this race, the other project may well be called off as the other developer (or his/her prospective sources of financing) faces the reality that, while the area had the potential to provide a lucrative market for one shopping center, it cannot possibly hope to support two. At this point, the value of the second

17. In an academic context, this might be compared to the often-observed difference between the salaries of current and prospective faculty members having roughly equal track records. The various costs and risks associated with making a move from an existing "comfortable" situation require that, in order to lure new faculty members, a school must offer such prospects a somewhat greater salary than is required to keep equally desirable scholars on board.

18. Again we recognize that relevant geographic areas will expand greatly as we enter a technologically advanced retail age, and that it will become more difficult to associate increased productivity for one site with decreased productivity at another site. Nevertheless, there is only so much productivity and spending power in the nation or world at one point in time, and with an excess capacity of retail systems, gains in one business must come from declines in another business.

erty taxes on the real estate will be inadvertently biased upward, and that a center's business value ought to be subtracted from its overall value in assessing taxable real estate value.

We believe otherwise. We question the assumption that the observed discrepancy between lease renewals and new leases in retail shopping malls can be explained only by the presence of a business value in these malls. We argue instead that the various costs of moving and the value of existing business relationships create an incentive for existing tenants to stay where they are. This incentive to stay allows malls to charge more for renewals, but creates the need for malls wanting new tenants to provide offsetting inducements for relocation.

We argue further that the total value of retail property (or potential retail property) in a given market area should be relatively constant at a given point in time, although we note that the appropriate geographic area of competition is rapidly expanding because of both electronic marketing and global travellers. As long as economic productivity expands and corresponding future retail demand increases, all land legally permitted to address retail uses will contain an option value, based on the potential for development for future uses. To the extent that development occurs, the option value of surrounding land within the same market area, which would otherwise be best suited to that same use, is reduced. Also, to the extent that a new shopping mall takes business away from an existing mall, the value of the existing mall falls. Thus, land values would be redistributed; total land value within a given relevant geographic market need not change unless economic productivity in general has changed.

We are, in the final analysis, unconvinced that there is any need to adjust the real estate value assessments of retail shopping malls for their "entrepreneurial values." And, we hasten to remind owners that a business value concept, applied across the board, would of necessity include the possibility of negative business values. Assessors might well be inclined to argue that in many cases poor business judgment has rendered a property's market *below* the level implied by its pure real estate value, and to adjust appraisals accordingly. In an overbuilt market like that of the 1990s, owners would be well advised to leave entrepreneurial values alone.

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OHIO BOARD OF TAX APPEALS

Jefferson Area Local School District)
Board of Education,)
)
Appellant,)
)
vs.)
)
Ashtabula County Board of Revision, the)
Ashtabula County Auditor, and)
JP Molding Services, Inc.,)
)
Appellees.)

CASE NO. 2005-V-946

(REAL PROPERTY TAX)

DECISION AND ORDER

APPEARANCES:

- For Appellant BOE - Britton, Smith, Peters & Kalail, Co., LPA
Karrie M. Kalail
4700 Rockside Road
Suite 540
Cleveland, OH 44131-6814

- For the County Appellees - Thomas R. Sartini
Ashtabula County Prosecuting Attorney
25 West Jefferson Street
Jefferson, OH 44047-1092

- For the Appellee Property Owner - (no appearance)
JP Molding Services, Inc.
P.O. Box 30
Dorset, OH 44032

Entered May 5, 2006

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

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the Jefferson Area Local School District Board of Education (“BOE”) from a decision of the Ashtabula County Board of Revision (“BOR”).

The record before us consists of the notice of appeal and the statutory transcript ("S.T.") certified by the Ashtabula County Auditor ("auditor"). No party appeared at the hearing scheduled before this board.

The subject property consists of 13.350 acres improved with a one-story commercial structure, built in 1957, and a garage.¹ The subject is located in the Dorset Township/Jefferson Schools taxing district, Ashtabula County, Ohio. The subject parcel has been assigned permanent parcel number 16-016-10-047-00.

The values of the subject parcel for 2004, as originally assigned by the auditor, are as follows:

Parcel 16-016-10-047-00	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$26,700	\$9,350
BLDG	\$42,400	\$14,840
TOTAL	\$69,100	\$24,190

After the BOE filed a complaint against the valuation of the subject property based upon a recent sale of the property for \$200,000, the BOR determined the true and taxable values of the subject property for tax year 2004 should remain unchanged from the auditor's original valuation.

The BOE requests that the subject property's total true valuation be increased to \$200,000 based on the sale of the subject property on February 18, 2005 to appellee JP Molding Services, Inc. ("JP").

At hearing before the BOR, the BOE presented a copy of a conveyance fee statement evidencing that the subject property was sold from Mr. and Mrs. Drnek

¹ It appears that there are also two mobile homes used as offices, which are not valued on the property record card. S.T. Ex. C.

to JP for \$200,000 on February 18, 2005. S.T. at Ex. B. Mr. Richard Mole, CPA, appeared and testified before the BOR on behalf of Mr. and Mrs. Drnek, the subject's former owners, about the sale of the property. S.T. at Ex. D.

We begin our review of the evidence by noting that a party who asserts a right to an increase or decrease in the value of real property has the burden to prove its right to the value asserted. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336; *Crow v. Cuyahoga Cty. Bd. of Revision* (1990), 50 Ohio St.3d 55; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318. Consequently, it is incumbent upon an appellant challenging the decision of the board of revision to come forward and offer evidence that demonstrates its right to the value sought. *Cleveland Bd. of Edn.*, supra; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493.

It is not enough, however, to simply come forward with some evidence of value. Neither is it sufficient to grant the requested increase or decrease merely because no evidence is adduced in contradiction to the claim. *Western Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340. In short, there is a burden of persuasion that rests with the appellant to convince this board that the appellant is entitled to the value which it seeks. *Cincinnati School Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325. Once the appellant presents competent and probative evidence of value, other parties asserting a different value then have the corresponding burden of providing evidence that rebuts appellant's evidence of value. *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d

493. Accordingly, this board must proceed to examine the available record and to determine value based upon the evidence before it. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120; *Clark v. Glander* (1949), 151 Ohio St. 229. In so doing, we will determine the weight and credibility to be accorded to the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

Because the parties have elected to waive hearing before this board, it is particularly important for this board to review the existing record consistent with the Supreme Court's decision in *Black v. Cuyahoga Cty. Bd. of Revision* (1985), 16 Ohio St.3d 11:

"The requirements of R.C. 5717.05, as interpreted by *Cleveland [v. Bd. of Revision]* (1953), 96 Ohio App. 483], establish that the common pleas court has a duty on appeal to independently weigh and evaluate the evidence properly before it. The court is then required to make an independent determination concerning the valuation of the property at issue. The court's review of the evidence should be thorough and comprehensive, and should ensure that its formal determination is more than a mere rubber stamping of the board of revision's determination. ***." *Id.* at 13-14.

See, also, *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13, 15, 1996-Ohio-432 ("We find that the BTA in this case is required to meet the standard enunciated in *Black*. Thus, if the only evidence before the BTA is the statutory transcript from the board of revision, the BTA must make its own independent judgment based on its weighing of the evidence contained in that transcript.").

Before the BOR, the BOE presented evidence of a sale involving the subject property roughly fourteen months after tax lien date. Based on our review of the record below, there is no evidence to demonstrate that the sale of the property was not arm's length in nature.

This board has previously held that a copy of a real property conveyance fee statement, not otherwise controverted, is competent and probative evidence of value in an arm's-length sale. See, e.g., *Bounds v. Butler Cty. Bd. of Revision* (Aug. 7, 1992), BTA No. 1990-M-838, unreported; *Clearview Bd. of Edn. v. Lorain Cty. Bd. of Revision* (May 1, 1998), BTA No. 1996-M-1192, unreported; *Princeton City School District v. Butler Cty. Bd. of Revision* (May 8, 1992), BTA No. 1990-C-820, unreported (holding that once a deed or conveyance fee statement is introduced into evidence, the opposing party must introduce sufficient evidence to overcome the presumption that arises that the sales price is the true value of the property).

The Ohio Supreme Court has consistently held that when property has been the subject of a recent arm's-length sale between a willing buyer and a willing seller, the sale price of the property shall be the true value for taxation purposes. *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 271-272, 2005-Ohio-4979; *Zazworsky v. Licking Cty. Bd. of Revision* (1991), 61 Ohio St.3d 604; *Hilliard City School Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1990), 53 Ohio St.3d 57; *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129, at the syllabus; *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410.

We can find nothing in the record that would lead us to otherwise conclude that the February 18, 2005 sale was not arm's length. In *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Ohio St.3d 23, the court defined an arm's-length sale to be one that "encompasses bidding and negotiation in the open market between a ready, willing and able buyer, and a ready, willing and able seller, both being mentally competent, and neither acting under coercion." In short, the court found an arm's-length sale to be characterized by these elements: "it is voluntary, i.e., without compulsion or duress; it generally takes place in an open market; and the parties act in their own self interest." *Id.* at 25.

Before the BOR, Mr. Mole, CPA of the subject's former owner, testified that JP purchased the entire business located on the subject property for \$1,500,000, and that he (Mr. Mole) allocated \$200,000 of the purchase price to the sale of the real property. Mr. Mole further testified that the \$200,000 allocation of the sale price of the business "was acceptable to both parties." S.T. Ex. D. Mr. Mole also presented a copy of an appraisal report, with an "as of" date of November 6, 2004, prepared by Mr. Raymond J. Sammartino of Sammartino Appraisal Services for KeyBank.² S.T. Ex. B. In the report the appraiser opines to a value of \$164,000, which was offered by Mr. Mole as an alternative to the sale price of \$200,000.

When asked why he didn't utilize the appraised value as determined by Mr. Sammartino for purposes of his allocation, Mr. Mole testified:

² Mr. Mole testified that KeyBank "needed it [the appraisal] in order to finance JP Molding." S.T. Ex. D, explanation added.

“Because basically we’re allocating for accounting purposes and for depreciation purposes 1.5 million dollars.” S.T. Ex. D.

In reviewing the record before us, it is clear that the BOE satisfied its burden of establishing the presumption when it presented the conveyance fee statement to the BOR. The sale carried with it the rebuttable presumption that the sale is arm’s length. The burden then shifted to JP to rebut the presumption, which it failed to do. Therefore, because of the presumption afforded to the arm’s-length sale of the subject, it is unnecessary for this board to consider any other evidence that the subject’s valuation should be anything other than the sale price.

Even if we were to consider the appraisal report offered by Mr. Mole, we would find that it does not constitute competent and probative evidence of value. We have previously observed that an appraisal represents only one particular moment in time. *Meyer v. Shelby Cty. Bd. of Revision* (Feb. 9, 1996), BTA No. 1994-K-1040, unreported. In a leading treatise in the area of real estate valuation, *The Appraisal of Real Estate* (12th Ed. 2001), it is stated:

“The date of the value estimate must be specified because the forces that influence real property value are constantly changing. Although conditions observed at the time of the appraisal may persist for a considerable time after that date, an estimate of value is considered valid only for the exact date specified. Market value is generally seen as a reflection of market participants’ perceptions of future economic conditions. These perceptions are based on market evidence at a specific point in time. Value influences reflect economic conditions at a particular time, and sudden changes in business and real estate markets can dramatically influence value ***.” *Id.* at 53, 54.

The Supreme Court referenced the board's citation of a similar passage from *The Appraisal of Real Estate* (10th Ed. 1992) in *Freshwater v. Belmont Cty. Bd. of Revision* (1997), 80 Ohio St.3d 26, 29. The court then held:

“R.C. 5715.19(D) requires that the determination of a complaint filed for a particular tax year ‘shall relate back to the date when the lien for taxes *** for the current year attached.’ R.C. 323.11 provides that the lien for real estate taxes is the first day of January. Likewise, R.C. 5715.01, which authorizes the Tax Commissioner to direct and supervise the assessment for taxation of all real property, provides that ‘the commissioner shall neither adopt nor enforce any rule that requires true value for any tax year to be any value other than the true value in money on the tax lien date of such tax year ***.’ Thus, the first day of January of the tax year in question is the crucial valuation date for tax assessment purposes. *Olmsted Falls Village Assn. v. Cuyahoga Cty. Bd. of Revision* (1996), 75 Ohio St.3d 552, ***.

“The essence of an assessment is that it fixes the value based upon facts as they exist at a certain point in time. Becker’s [the appraiser] approach to valuation was not based upon the facts as they existed as of January 1, 1994, the tax lien date. Becker’s appraisals were based upon facts as they existed on December 30, 1991 and April 5, 1996, the dates of his appraisals. Evidence of the valuation as of these two dates is not evidence of the valuation as of January 1, 1994. The real estate market may rise, fall, or stay constant between any two dates, and the assumption that a change in valuation between two given dates is constant and uniform, without proof, may properly be rejected by the finder of fact. The BTA may accept all, part, or none of the testimony presented to it by an expert. *Witt Co. v. Hamilton Cty. Bd. of Revision* (1991), 61 Ohio St.3d 155 ***. In this case, the BTA chose not to accept Becker’s valuation, and we agree.” *Id.* at 29-30.

Mr. Sammartino did not testify either before the BOR or before this board, so there is no testimony regarding value as of the tax lien date. The written appraisal report expresses a value for the property for other than the tax lien date.

Therefore, absent the arm's-length sale before us, the appraisal could not be construed as evidence upon which to conclude value as of tax lien date.

Beyond the appraisal report, Mr. Mole fails to provide any evidence to suggest that the sale is too remote from tax lien date to be considered competent and probative evidence of value.³

Further, Mr. Mole testified that the previous owners acquired the subject for \$90,000 in 1996 and subsequently made improvements to the subject totaling "[a]t least a couple hundred thousand dollars." S.T. Ex.D.

We therefore hold that JP failed to rebut the presumption against it. The BOE met its assigned burden of persuasion as to the value of the property. The subject property was sold in an arm's-length sale on February 18, 2005, for an amount which we find, based on the uncontroverted evidence presented, to accurately reflect the true value thereof. *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, supra.

Upon consideration of the existing record and the applicable law, the Board of Tax Appeals finds and determines from the preponderance of the evidence the value of the subject property as of January 1, 2004 to be:

<u>Parcel 16-016-10-047-00</u>	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 26,700	\$ 9,350*
BLDG	\$173,300	\$60,650*
TOTAL	\$200,000	\$70,000
*rounded		

³ As we review the hearing transcript from below it appears that at least one of the members of the BOR was concerned about the remoteness of the sale. S.T. Ex. D. However, there is no evidence in the record below to suggest that there was any change in the market or the subject property between tax lien date and the time of sale that would rebut the sales price as being the best evidence of value.

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

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OHIO BOARD OF TAX APPEALS

Worthington City Schools)
Board of Education,)
Appellant,)
vs.)
Franklin County Board of Revision, the)
Franklin County Auditor and)
Ward & Werner, Inc., ct al.¹,)
Appellees.)

CASE NO. 2004-M-1211
(REAL PROPERTY TAX)
DECISION AND ORDER

APPEARANCES:

For the Appellant - Board of Education	Rich, Crites & Dittmer, LLC Mark H. Gillis 300 East Broad Street, Suite 300 Columbus, Ohio 43215
For the County - Appellees	Ron O'Brien Franklin County Prosecuting Attorney Paul A. Stickel Assistant Prosecuting Attorney 373 S. High Street, 20 th Floor Columbus, Ohio 43215
For the Appellee - Property Owners	Martin Hughes & Associates Jackie Lynn Hager 150 East Wilson Bridge Road, Suite 300 Columbus, Ohio 43085

Entered January 27, 2006

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

¹ Ownership of the subject property is titled in the names of Ward & Werner Inc., undivided 1/3 interest, Randall C. Ward, undivided 1/3 interest, and Anthony D. Werner and Cheryl L. Werner, undivided 1/3 interest.

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal filed by appellant, Worthington City Schools Board of Education ("BOE"), on November 4, 2004 from a decision, mailed October 20, 2004, of the Franklin County Board of Revision ("BOR").

The subject property is located in the city of Columbus, Worthington City Schools taxing district of Franklin County, Ohio, and is further identified as parcel no. 610-204659. The Franklin County Auditor found the true and taxable values of the subject property for tax year 2003 to be as follows:

Parcel No. 610-204659

	True Value	Taxable Value
Land	\$ 333,100	\$ 116,590
Building	\$ 207,000	\$ 72,450
Total	\$ 540,100	\$ 189,040

Upon consideration of the complaint filed by the BOE and the testimony and other evidence presented at the hearing before that body, the BOR increased the true and taxable values of the subject property for tax year 2003 as follows:

Parcel No. 610-204659

	True Value	Taxable Value
Land	\$ 333,100	\$ 116,590
Building	\$ 331,900	\$ 116,170
Total	\$ 665,000	\$ 232,760

Through its notice of appeal, the BOE claims that the BOR's values should be increased to reflect a sale of the subject property taking place on or about July 31, 2003, which would have the effect of increasing the value of the subject property from \$665,000 to the sale price of \$1,200,000.

The matter was submitted to the Board of Tax Appeals pursuant to R.C. 5717.01 upon the notice of appeal, the statutory transcript certified by the Franklin County Auditor as secretary of the BOR, and the testimony and other evidence submitted at the hearing before this board. At the hearing before the BOR, the BOE presented documents reflecting the transfer of the property, the general warranty deed and the conveyance fee statement. The property owner presented the testimony of Mr. James L. Murr, a certified real estate appraiser, as well as the testimony of Mr. Tony Werner and Mr. Randy Ward. Mr. Werner and Mr. Ward have individual ownership interests in the subject property and are the principal shareholders of Ward & Werner, Inc., a third titled owner. At the hearing before this board, the BOE introduced the settlement statements from the property sale. The property owner presented the testimony of Mr. Ward and introduced the real estate purchase contract.

The subject property contains approximately 3.308 acres and fronts on Smokey Row Road in Franklin County. The property is improved with an eight-bay, self-serve car wash and 81 self-storage units divided among three buildings. The car wash and storage units were constructed in 1989.

The current owners purchased the subject property on or about July 31, 2003 for a purchase price of \$1,200,000. According to testimony presented both before the BOR and before this board, the subject property had not been listed for sale. The current owners approached the prior owner regarding their interest in purchasing the car wash. The prior owner established a price and the sale resulted.

According to the testimony presented, the prior owner's sale price was firm and supported by the property's historical financial reports. H.R., at 11.

The BOE claims that the subject property should be valued for tax purposes at the sales price. As the proponent of change, the BOE has the burden to prove the right to the value it asserts. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336; *Crow v. Cuyahoga Cty. Bd. of Revision* (1990), 50 Ohio St.3d 55; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318. It is incumbent upon an appellant challenging the decision of a board of revision to come forward and offer evidence which demonstrates its right to the value sought. *Cleveland Bd. of Edn.*, supra; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493. Once an appellant has presented competent and probative evidence of true value, other parties asserting a different value then have a corresponding burden of providing rebuttal to the appellant's evidence. *Springfield Local Bd. of Edn.*, supra; *Mentor Exempted Village Bd. of Edn.*, supra.

The BOE contends that the property was subject to a valid, recent arm's-length sale when the current owners purchased the property in July 2003. As such, the BOE claims that the price received was the best evidence of the value of the subject property as of January 1, 2003. The BOE's claim is supported by *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979. In that case, the Ohio Supreme Court reaffirmed its earlier holdings

finding a recent arm's-length sale is the best evidence of the "true value in money" for ad valorem tax purposes.

"An arm's-length sale is characterized by these elements: it is voluntary, i.e., without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest." *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Ohio St.3d 23, 25. Both before the BOR and before this board, the owners have brought forth testimony intending to support a finding that their purchase did not meet the elements that characterize an arm's-length sale. The owners essentially claim that the sale price was not indicative of value because the property was not subject to an "open market" sale and because the owners purchased two on-going businesses located within the property and, therefore, purchased not only realty and personalty, but also a "going concern" which must be evaluated separately from the realty involved.

This board has carefully considered the testimony presented both before the BOR and before this board. Based upon that testimony, we conclude that the sale of the property is a valid indicator of value.

In *Pingue v. Franklin County Bd. of Revision* (1999), 87 Ohio St. 3d 62, the Ohio Supreme Court held:

"R.C. 5713.03 requires that the auditor, when determining the true value of any tract, lot, or parcel of real estate, shall consider the sale price as the true value for taxation purposes if the property has been the subject of an arm's-length sale between a willing seller and a willing buyer within a reasonable length of time, either

before or after the tax lien date. Furthermore, this court has repeatedly held that an actual, recent sale of property in an arm's-length transaction is the best evidence of its 'true value in money.' *Columbus Bd. of Edn. v. Fountain Square Assoc., Ltd.* (1984), 9 Ohio St. 3d 218, 219, ***; *Consol. Aluminum Corp. v. Monroe Cty. Bd. of Revision* (1981), 66 Ohio St. 2d 410, 414, *** *Conalco v. Monroe Cty. Bd. of Revision* (1977), 50 Ohio St. 2d 129, *** There is a rebuttable presumption that an arm's-length sale transaction reflects the true value of property. *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St. 3d 325, 327, ***." *Id.* at 64. (Parallel citations omitted.)

According to *Pingue*, when considering the value of a particular property for ad valorem tax purposes after a recent sale of that property, the first determination to be made is whether the sale itself meets the indicies of an arm's-length sale. We begin with a presumption that a sale does meet these indicies. *Cincinnati School Dist. Bd. of Edn.*, *supra*.

The property owners claim that the property was not exposed to the open market, and thus, the resulting sale does not reflect true value. The owners also claim that they had little negotiating power in the exchange. However, this board has previously concluded that neither lack of negotiating power nor lack of market exposure equates, in every case, to an invalid sale for valuation purposes. For example, in *Bd. of Edn. of the Plain Local Schools v. Franklin Cty. Bd. of Revision* (June 9, 1995), BTA No. 1994-S-361, unreported, a property owner purchased a property that was not then on the market. Like the present owners in the current matter, the property owner had approached the prior owner and accepted a non-

negotiable selling price. The property owner argued that the property was not "on the open market" and thus its sale did not qualify as an arm's-length sale. This board concluded otherwise, finding that the lack of advertisement and exposure on the open market may have influenced the price paid for the subject property, but those factors did not necessitate a finding that the subject sale was not arm's length in nature. See, also, *Dublin City Sch. Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (May 5, 1995), BTA No. 1993-T-1107, unreported, affirmed (Mar. 6, 1996), Franklin App. No. 95APH06-718, unreported.

In the present appeal, Mr. Randall Ward testified at the hearing before this board. During his testimony, he acknowledged that the sales price of \$1,200,000 was substantiated by the income the property produced. The record does not reflect, therefore, a lack of negotiating ability, only a reflection that the sales price garnered was supported by the property purchased. Therefore, we find that the circumstances surrounding the sale reflected an arm's-length transaction.

The current property owners have not demonstrated that their purchase did not meet the indicies of an arm's-length sale. Therefore, we will not consider the testimony of the certified real estate appraiser, who testified that it was his opinion that the subject property was worth \$665,000 as of tax lien date. We will, however, comment upon the method used to appraise the subject property. The appraiser opined that the amount paid for the subject property included not only value for the realty and equipment purchased, but also a "going concern" value, i.e., value paid for

the business conducted within the land and buildings purchased. The board has recognized in the past that a sale price may include value for an ongoing business. *Bd. of Edn. of the Groveport Madison Local School Dist. v. Franklin Cty. Bd. of Revision* (June 30, 2000), BTA No. 1998-N-701, unreported. We have, however, rejected the theory opined by the property owners' appraiser when valuing self-storage units. *Martin v. Franklin Cty. Bd. of Revision* (Feb. 10, 1988), BTA No. 1987-J-655, unreported (rejecting property owner's argument that \$80,000 of his \$500,000 purchase price should have been allocated to the purchase of a storage business; the board concluded that the sale price of \$500,000 controlled). Like apartment or office buildings, consideration of the income earned from storage units and car washes is a valid method of valuing the realty and improvements thereon. The property owners have not brought forth sufficient evidence that a business separate from the realty and improvements was included in the purchase price. See *Dublin Senior Community L. P. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455.

We do recognize that personalty purchased as a part of a real estate transaction may be excluded from the sale price for ad valorem tax purposes. *Bd. of Edn. of the Kettering-Moraine City School Dist. v. Montgomery Cty. Bd. of Revision* (Sept. 1, 2000), Montgomery App. No. 18223, unreported; *Streetsboro City School Dist. Bd. of Edn. v. Portage Cty. Bd. of Revision* (Nov. 10, 2005), BTA No. 2004-K-600, unreported. The record contains sufficient evidence that \$114,000 worth of

personalty was purchased through the July 31, 2003 sale. The BOE concedes by way of brief that a reduction in this amount is proper. Therefore, and upon consideration of the existing record and the applicable law, the Board of Tax Appeals finds and determines that the value of the subject property as of January 1, 2003 was:

Parcel No. 610-204659

	True Value	Taxable Value
Land	\$ 333,100	\$ 116,590
Building	\$ 752,900	\$ 263,510
Total	\$ 1,086,000	\$ 380,100

It is the order of the Board of Tax Appeals that the Auditor of Franklin County list and assess the subject real property in conformity with this decision and order. It is further ordered that this value be carried forward in accordance with the law.

ohiosearchkeybta

OHIO BOARD OF TAX APPEALS

Equistar Cleveland Co., LLC,)	CASE NOS. 2002-J-2430; 2002-J-2598
)	2002-J-2599; 2002-J-2600
Appellant/Appellee,)	
)	(REAL PROPERTY TAX)
vs.)	
)	DECISION AND ORDER
Cuyahoga County Board of Revision,)	
and Cuyahoga County Auditor,)	
)	
Appellees,)	
)	
and)	
)	
Berea Board of Education,)	
)	
Appellant/Appellee.)	

APPEARANCES:

For the Property Owner	- Todd W. Sleggs & Associates Todd W. Sleggs 820 West Superior Avenue Suite 410 Cleveland, Ohio 44113
For the Board of Revision	- William D. Mason Cuyahoga County Prosecuting Attorney Timothy J. Kollin Assistant Prosecuting Attorney Courts Tower, 8 th Floor 1200 Ontario Street Cleveland Ohio 44113
For the Board of Education	- Kadish, Hinkel & Weibel Kevin M. Hinkel 1717 East Ninth Street Suite #2112 Cleveland, Ohio 44114

Entered August 6, 2004

Ms. Jackson, Ms. Margulies, and Mr. Eberhart concur.

The Board of Tax Appeals is considering this matter pursuant to notices of appeal filed by the Berea Board of Education ("BOE") and Equistar Cleveland Co., LLC ("Property Owner"). The BOE and the property owner have appealed from a decision of the Cuyahoga County Board of Revision ("BOR") that determined the value of the subject real property for tax year 2000. The property is located in Middleburg Heights and is identified on the auditor's records as parcel 373-03-007.

The value determined by the Cuyahoga County Auditor and the BOR is as follows:

	TRUE VALUE	TAXABLE VALUE
Land	\$ 2,067,510	\$ 723,630
Building	\$ 8,030,370	\$2,810,530
Total	\$10,097,880	\$3,534,160

In its notice of appeal the property owner has alleged that the correct value is as follows:

	TRUE VALUE	TAXABLE VALUE
Land	\$ 2,067,520	\$ 723,630
Building	\$ 4,770,830	\$1,669,790
Total	\$ 6,838,350	\$2,393,420

In its notice of appeal the BOE has alleged that the correct value is as follows:

	TRUE VALUE	TAXABLE VALUE
Land	\$ 2,067,510	\$ 723,630
Building	\$ 9,232,490	\$3,231,370
Total	\$11,300,000	\$3,955,000

These appeals have been refiled subsequent to the dismissal of *Berea Bd. of Ed. v. Cuyahoga Cty. Bd. of Revision* (Oct. 25, 2002), BTA No. 2002-J-270, et seq., unreported, upon the authority of *Cleveland Elec. Illum. Co. v. Lake Cty. Bd. of Revision*, 96 Ohio St.3d 165, 2002-Ohio-4033. The matter has been submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcripts certified by the BOR, the evidence adduced at the hearing conducted herein, and the legal argument submitted by counsel.

The subject property is a 237-room, five-story Radisson hotel constructed in 1975 on 6.9 acres at 72130 Engle Road, Middleburg Heights, Ohio. The property owner purchased the hotel on February 16, 1996 for \$9,100,000. However, given the age of the transaction and significant changes in market conditions, the owner has alleged that the purchase price is not indicative of the property's value. Accordingly, the owner submitted the testimony and appraisal report of Eric E. Belfrage, an MAI appraiser, who concluded that the value of the realty portion of the hotel was \$8,100,000 on tax lien date.

Mr. Belfrage derived his valuation conclusion using the market and income approaches to value. His market approach analyzed nine hotel sales that occurred between 1998 and 2001 in Ohio, Kentucky, and Michigan. He focussed upon the price per unit and the room revenue multiplier since this is the data relied upon by market participants.¹ Due to the income-producing nature of the property, its investment appeal is a function of the revenue per available room ("RevPar")

generated.² After applying a RevPar adjustment³ to the price per room indication of the comparable hotel sales, a range from \$31,358 to \$58,123 was indicated. He opined that market conditions suggested the mid-to-lower range, which persuaded him to settle upon a unit price of \$48,000. He next multiplied the subject's 237 rooms times \$48,000. Although that calculation produces a figure of \$11,376,000, Mr. Belfrage inexplicably determined the product to be \$10,665,000, which he rounded to \$10,700,000. The room revenue multiplier indicated a range from 1.7 to 3.1. Although the text of his report states at page 68 that he used a multiplier of 2.5, he actually multiplied room sales of \$4,385,784 times 2.4, producing a value of \$10,525,882, which he rounded to \$10,500,000. He selected the middle of the sales range, concluding to a value of \$10,600,000 via the market approach.

Mr. Belfrage's income approach began by determining the room revenue for the property for the year 2000. He calculated the total room revenue as follows:

<u>Rooms</u>	x	<u>Days of the Year</u>	=	<u>Room Nights Available ("RNA")</u>
237		365		86,505
<u>RNA</u>	x	<u>Projected Occupancy</u>	=	<u>Room Nights Sold ("RNS")</u>
86,505		65%		56,228
<u>RNS</u>	x	<u>Average Daily Rate</u>	=	<u>Room Sales</u>
56,228		\$78		\$4,385,784

¹ The room income divided into the sale price produces the room revenue multiplier.

² RevPar is calculated by multiplying the subject's 237 rooms times 365 days producing 86,505 room nights available. Mr. Belfrage projected room revenue at \$4,385,784. Dividing the projected room revenue by 86,505 room nights available produces RevPar of \$50.70 for the subject.

³ Mr. Belfrage's comparison of the subject's RevPar to the comparable properties' RevPar indicated the adjustment needed.

Mr. Belfrage estimated the net operating income by examining the subject's operating expenses from 1997 through 2001 and by studying trends in the full service hotel industry. His pro forma operating statement concluded total revenue to be \$7,195,386 and total expenses to be \$5,912,294, resulting in net operating income of \$1,283,092.

He determined a capitalization rate using the direct capitalization method and the band of investment method. The direct capitalization method scrutinized the capitalization rates of nine hotel sales the rates for which ranged between 11.0% and 13.4%. Given the subject's age, location and condition, he opined that a mid-range conclusion of 11.5% to 12.5% appeared reasonable.

His band of investment analysis considered current equity requirements for existing stabilized hospitality property. The equity requirements ranged from a low of 11% to 12% to a high of 18% to 20%. He settled upon a 14% equity rate for the subject. Using these estimates his band of investment calculation is illustrated by the following:

<u>Position</u>	<u>Percentage</u>	x	<u>Rate</u>	=	<u>Product</u>
Mortgage	65%		.11098		.072
Equity	35%		.14		.049
Total					.121

He rounded the .121 total to 12%.

He also examined capitalization rates reflected by sales data maintained by Integra Realty Resources for hotel property and data maintained by two national real estate reporting agencies. The rates from these three sources

were 10.6%, 10.22%, and 11.2%. He opined that a capitalization rate between 11.75% and 12.25% appeared appropriate. Including the tax additur of 1.83 indicated a capitalization rate between 13.58% and 14.08%. He settled upon a capitalization rate between 13.5% and 14%.

The final step in the direct capitalization method was to divide the net operating income of \$1,283,092 by the overall capitalization rate of 13.5% producing a value of \$9,504,385, which he rounded to \$9,500,000. He also divided the net operating income by 14%, producing a value of \$9,164,943, which he rounded to \$9,200,000.

Mr. Belfrage considered the sales comparison approach supportive of the two indications from the income capitalization approach, which fell within a relatively narrow range. He concluded that the value of the property as of January 1, 2000 was \$9,500,000. From this amount he deducted \$500,000 as the value of the furniture, fixtures, and equipment. He also deducted \$900,000 as the business value of the hotel. This produced a final conclusion of value of \$8,100,000 for the real estate portion of the property.

The BOE submitted the testimony of Roger D. Ritley, an MAI appraiser. Mr. Ritley did not perform an independent appraisal. The purpose of his testimony was simply to review the owner's evidence. He examined the property's financial data and opined that no business enterprise value existed at the property as of tax lien date. He felt this conclusion was borne out when comparing Mr. Belfrage's estimated market value of \$9,500,000 with appellant's

capital investment of \$12,600,000. The \$12,600,000 included the \$9,100,000 acquisition price including furniture, fixtures, and equipment plus \$3,500,000 in subsequent renovation costs.⁴ Mr. Ritley opined that to assert that the property's market value decreased millions of dollars below the capital cost in such a short period of time, and that a portion of the market value is business enterprise value, is inconsistent with standard appraisal methodology for this class of property.

This board has held that business enterprise should not be included in a value determination. *WEC 99C-12 LLC v. Montgomery Cty. Bd. of Revision* (May 14, 2004), BTA No. 2002-T-1905, unreported. Property should not be valued on the basis of its "use" as of tax lien date because the Supreme Court has held the value of the real property for tax purposes must be determined in accordance with its "value in exchange." In *Meijer, Inc. v. Montgomery Cty. Bd. of Revision* (1996), 75 Ohio St.3d 181, 185, the Supreme Court stated:

“[U]se value as defined in *The Appraisal of Real Estate* (American Institute of Real Estate Appraisers, 9 Ed. 1987) 20, is:

“[T]he value a specific property has for a specific use. Use value focuses on the contributory value of real estate to the enterprise of which it is a part, without regard to its highest and best use of the monetary amount that might be realized upon its sale.’ (Emphasis deleted.)

“In *State ex rel Park Invest. Co. v. Bd. of Tax Appeals* (1972), 32 Ohio St.2d 28, 33 * * * we stated that ‘[s]ince the current use method of evaluation excludes, among other factors, location and speculative value

⁴ The \$3,500,000 renovation figure is disputed by Equistar in its brief. Equistar maintains that the actual cost was “between \$1,110,000 and \$1,500,000...” (Appellant’s brief at 7.)

which comprise market value, such current use method cannot be made the basis for valuation of real property for tax assessment purposes * * *.' The BTA was aware of the prohibition against accepting a value-in-use appraisal, stating, 'value in use' is an unconstitutional form of valuing real property in this state."

In Kettering City Schools v. Montgomery Cty. Bd. of Revision

(Oct. 23, 2003), BTA No. 2002-G-1922, unreported, Mr. Belfrage submitted an analysis which also sought to have the business enterprise component deducted from the value of a hotel property. In rejecting that proposal, we stated at 16:

"In determining BEV in the present case, Mr. Belfrage calculated the percentage of revenue attributable to the business value by determining what percentage of reservations were made through the Holiday Inn electronic reservation system, factoring in franchise costs, and then determining what percentage of overall revenue was attributable to the electronic reservation system. Although divergent methods of estimating BEV exist, and no single technique is universally accepted, we are not convinced that the method utilized by Mr. Belfrage is a reliable measuring device. We find it a very speculative means of quantifying BEV at best. Accordingly, we cannot adopt the appraisal amount estimated in the report."

In the current appeal Mr. Belfrage derived the business enterprise value by estimating that 24 percent, or \$1,052,000, of the property's room revenue of \$4,385,785 was generated by the chain affiliation, including central reservations and global systems. From the 24 percent he deducted the 8 percent appellant paid in franchise costs. That left 16 percent of the room revenue remaining as business revenue, which equals \$701,725. He calculated the net operating income ratio to

be 17.8 percent of the business revenue, or \$124,907. Capitalizing \$124,907 at 13.75 percent produced a business value of \$908,415, which he rounded to \$900,000.

As in *Kettering City Schools*, Mr. Belfrage's calculation of business enterprise value remains speculative. Nevertheless, Mr. Belfrage has proposed to deduct the business enterprise value after the property's value has been calculated by conventional methods of valuation. In *Hotel Statler v. Cuyahoga Cty. Bd. of Revision* (1997), 79 Ohio St.3d 299, the court held that additional expense deductions made after the income has been capitalized are improper. In *Chippewa Place Development Co. v. Cuyahoga Cty. Bd. of Revision* (Sept. 24, 1993), BTA No. 1999-P-245, unreported, this board held that real estate must be valued separately without regard to the business activities conducted within. Accordingly, the board finds Mr. Belfrage's deduction taken for the property's business enterprise value after the value had been determined by capitalizing the property's net income was improper.

In addition to the business enterprise value deduction, Mr. Belfrage's appraisal contains other factors that render his conclusion questionable. Mr. Belfrage conceded that he appraised the Holiday Inn located at Cleveland Hopkins airport at the time of its sale on August 16, 1998. He declined to consider this as a comparable sale in his sales comparison approach despite its proximity to the subject. Instead he chose to use the sale of the Holiday Inn in Independence, Ohio, a sale that occurred August 18, 1998. Of the nine comparable sales used in

the sales approach, only one is in Cuyahoga County. Only the information relevant to six of the sales was verified. He only physically inspected three of the properties. One of the sale comparables is located in a resort area in Michigan. Mr. Belfrage conceded that this hotel has the unique characteristic of being in demand on a seasonal basis, unlike the subject. The second comparable sale included \$3,500,000 of renovations completed in 1998 and is nearly half the size of the subject property with only 148 rooms. The third comparable sale is eighteen stories high, located on the Ohio River, and includes a rotating restaurant on the top floor that generates approximately \$2,000,000 in sales per year. One year prior to the sale \$11,000,000 in renovations were made to this property. The sixth comparable, located in Columbus, Ohio, was renovated prior to sale. He conceded that he did not know the percentage of occupancy attributable to the franchise name for this property. It had a 25% difference in room rate than the subject property. The seventh comparable sale included \$5,500,000 for renovations. Although Mr. Belfrage focussed on the business enterprise value in his determination for the subject, he conceded that he only knew the percentage of occupancy attributable to the hotel affiliations for sales two, five, and nine. He gave no consideration to the size of the component within each of the comparable sale properties attributable to the franchise affiliation.

The Appraisal of Real Estate (American Institute of Real Estate Appraiser, Twelfth Ed. 2001) provides:

“To ensure the reliability of value conclusions derived by applying the sales comparison approach, the appraiser must verify the market data obtained and fully understand the behavioral characteristics of the buyers and sellers involved in property transactions.”
Id. at 420.

Mr. Belfrage did not verify much of the market data surrounding the comparable sales and did not demonstrate an understanding of the behavioral characteristics of the buyers and sellers involved in the transactions.

Mr. Belfrage's income capitalization approach appears to focus upon the incorrect year. Although the tax year at issue is 2000, he used the Hotel & Motel Management Franchising-Fees Guide dated 2002, which utilizes 2001 data. Mr. Belfrage's management fees and reserves for replacement chart shown on page 80 of his report are for the first quarter of 2002. His selection of a capitalization rate appears to be result oriented since the published data suggests a rate range between 10.6% and 11.2%. Despite this data Mr. Belfrage used a rate range between 11.75% and 12.25%. Had Mr. Belfrage chosen the rate range suggested by the national data his conclusion of value would equal the auditor's 2000 value of \$10,097,600. For the reasons stated the board finds Mr. Belfrage's conclusion of value unreliable.

Where this board rejects the evidence before it as not being competent and probative or credible, and there is no other evidence from which we can independently determine value, we may approve the board of revision's valuation. *Corporate Exchange Bldgs. IV & V, L.P. v. Franklin Cty. Bd. of*

Revision (1998), 82 Ohio St.3d 297; *Simmons v. Cuyahoga Cty. Bd. of Revision* (1998), 81 Ohio St.3d 47; *Luken*, supra. Therefore the board finds and determines that the value of the subject property as of January 1, 2000 is as follows:

	TRUE VALUE	TAXABLE VALUE
Land	\$ 2,067,510	\$ 723,630
Building	\$ 8,030,370	\$2,810,530
Total	\$10,097,880	\$3,534,160

The Cuyahoga County Auditor is ordered to cause his records to reflect the value determined herein for the subject real property and to assess the same in accordance therewith as provided by law.

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OHIO BOARD OF TAX APPEALS

Kettering City Schools)
Board of Education,)
)
Appellant,)
)
vs.)
)
Montgomery County Board of)
Revision, Montgomery County)
Auditor, and Lance Shaner Hotel)
Limited Partnership,)
)
Appellees.)

CASE NO. 2002-G-1922
(REAL PROPERTY TAX)
DECISION AND ORDER

APPEARANCES:

For the Appellant - Rich, Crites & Wesp
Mark Gillis
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Columbus, Ohio 43215

For the County Appellees - Mathias H. Heck, Jr.
Montgomery County Prosecuting Attorney
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For the Appellee - Carlisle, Patchen & Murphy
Lance Shaner Hotel R. Brian Newcomb
Limited Partnership 366 East Broad Street
Columbus, Ohio 43215

Entered October 3, 2003

Ms. Jackson, Ms. Margulies, and Mr. Eberhart concur.

This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal filed by the above-named appellant from a decision of the Montgomery County Board of Revision ("BOR"). The BOR determined the taxable value of the subject property for tax year 2000.

The subject property is located in the Moraine/Kettering taxing district, Montgomery County, Ohio, and appears on the auditor's records as parcel number J44-41-5-84.

The Montgomery County Auditor and the BOR found the true and taxable values of the subject property for tax year 2000 to be as follows:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
Land	\$ 531,860	\$ 186,150
Building	<u>\$ 3,194,290</u>	<u>\$ 1,118,000</u>
Total	\$ 3,726,150	\$ 1,304,150

Whereas, the appellant contends in its notice of appeal that the correct values for the subject property should be as follows:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
Land	\$ 763,200	\$ 267,120
Building	<u>\$ 4,584,400</u>	<u>\$ 1,604,540</u>
Total	\$ 5,347,600	\$ 1,871,660

The matter is now considered by the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the BOR, the testimony and evidence submitted at the hearing before this board, and the briefs of counsel.¹ Counsel for the county appellees notified this board that the county would not be appearing.

At the outset, we acknowledge the affirmative burden which exists in an appeal to this board from a decision of a county board of revision finding value. In its decisions in *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio

¹ The present matter was previously before this board in BTA No. 2001-G-870. The case was fully litigated and briefed before it was dismissed on jurisdictional grounds on October 30, 2002. The parties have agreed to submit the matter on the record previously established in BTA No. 2001-G-870.

St.3d 336, and *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493, the Ohio Supreme Court made it clear that in an appeal filed pursuant to R.C. 5717.01, there exists no presumption that the values found by a board of revision are correct. Nevertheless, an appellant has the burden of presenting evidence in support of the value which it has asserted. Once competent and probative evidence of value has been presented, then the other parties to the appeal have the burden of providing evidence which rebuts that of the appellant. *Springfield Local Bd. of Edn.*, supra; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318, 319. While this board may ultimately find that a property has the same value as that previously determined by a county board of revision, either because the evidence supports such a conclusion or because the appellant has failed to prove otherwise, such a conclusion will be the result of an independent, de novo determination which is predicated upon the preponderance of the evidence. See *National Church Residence v. Licking Cty. Bd. of Revision* (1995), 73 Ohio St.3d 397.

In assessing property at its taxable value, a county auditor must first determine the property's true value. In this regard, R.C. 5713.03 provides in part:

"The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the true value of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon ***. In determining the true value of any tract, lot, or parcel of real estate under this section, if such tract, lot, or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor shall consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes."

See, also, *Conalco v. Monroe Cty. Bd. of Revision* (1977), 50 Ohio St.2d 129.

However, while the sale price may be the "best evidence" of the true value of the property, it is not the only evidence to be considered. Where factors exist which indicate the sale price does not reflect the true value, other evidence such as appraisals should be reviewed. *Ratner v. Stark Cty. Bd. of Revision* (1986), 23 Ohio St.3d 59.

The Kettering City Schools Board of Education ("BOE") contends that the sale price of the subject property represents the fair market value of the property. The property sold for \$5,347,608 on February 18, 2000. The BOE relies on the deed and conveyance fee statement contained in the statutory transcript in support of its contention.

The appellee property owner, Lance Shaner Hotel Limited Partnership, argues that the sale was the result of a 1031 exchange and therefore, the sales price is not representative of the fair market value of the subject property. Mr. Peter K. Hulburt, vice-president and corporate counsel for an entity he referred to as the Shaner Operating Corp., provided testimony regarding the transaction.

The Shaner Group Investors was composed of two entities, Shaner Operating Corp. and AEW, a large pension administration fund in Boston. (R. 13) The partnership agreement gave AEW a veto right on purchasing and renovating hotels. AEW also had the right to veto any franchising or changing of flags (switching the hotel franchise from one name to another).

Shaner Operating Corp. and AEW ("Partnership") purchased a Holiday Inn in San Antonio, Texas, from Columbia Sussex Corp. in October 1996 for \$11,600,000. The hotel was the closest facility to the San Antonio Airport. AEW

approved the purchase. At the same time, the partnership was developing a relationship with the Marriott corporation. The partnership wanted to change the Holiday Inn into a Marriott franchise. The hotel remained a Holiday Inn through 1998. During the same period, the partnership was approved by the Marriott corporation to become a franchisee. The partnership successfully terminated its franchise agreement with Holiday Inn, and entered into an agreement with Marriott.

The preliminary cost to renovate the hotel into a Marriott facility was estimated at 8 million dollars. However, after further negotiations, the renovation cost rose to 12 million dollars. AEW got "cold feet" and would not approve any additional money for the renovation. The hotel was already out of commission, with the facility stripped to the bare walls.

Mr. Hulburt testified that this left the Shaner Operating Corp. in a very difficult position. It did not want to break up the partnership with AEW because they owned other hotels together. Also, the litigation would be lengthy and costly. On the other hand, they had worked very hard to prove to the Marriott corporation that they could develop and successfully run a Marriott franchise. The solution was to find a buyer for the property that was already approved as a Marriott franchise. Negotiations began with Columbia Sussex Corp.

In order to achieve a deal with Columbia Sussex Corp., the Shaner Operating Corp. put \$6,000,000 into a new limited partnership separate from the one with AEW. AEW was aware of, and approved of, this solution. This new entity was the appellee, Lance Shaner Hotel Limited Partnership ("Lance Shaner Hotel"). Columbia Sussex Corp. agreed to take over the San Antonio property and convert it

into a Marriott if Lance Shaner Hotel agreed to purchase two of its Holiday Inns. The parties agreed that the value of the San Antonio hotel was \$14,000,000.

Lance Shaner Hotel agreed to purchase a Holiday Inn located in Toledo, Ohio and one in Dayton, Ohio. The purchase price was allocated between the two hotels for a total price of \$14,000,000. The "Agreement of Purchase and Sale" provided the following on page three:

"C. Notwithstanding anything in this Agreement to the contrary, the parties acknowledge that the closings under this Agreement and the San Antonio Contract are intended to be a swap of real property to qualify under Section 1031 of the Internal Revenue Code of 1986 as amended, and the regulations promulgated thereunder. Accordingly, the purchase and sale of the properties under this Agreement are contingent in all respects upon the Closing and sale of the San Antonio Contract and the transfer of the real property thereunder and in no event shall a Closing occur on one of the foregoing agreements unless there is a Closing on all of the foregoing agreements. Such closings shall be deemed to take place simultaneously and the amount of prorations due under this Agreement shall be netted against the amount of prorations due under the San Antonio Contract."

Ultimately, the Toledo hotel was switched with a Holiday Inn located in Charleston, West Virginia. The purchase agreement was modified to reflect the change. Mr. Hulburt testified that the allocation of the purchase price was decided by Columbia Sussex Corp.

The first issue this board must resolve is whether the sale between Lance Shaner Hotel and Columbia Sussex Corp. was arm's length.

The Supreme Court of Ohio discussed what constitutes the best evidence of true value for real estate purposes in *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 412:

"The best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so. Paragraph two of the syllabus in *In Re Estate of Sears* (1961), 172 Ohio St., 443, 178 N.E. (2d), 240. This, without question, will usually determine the monetary value of the property. However, such information is not usually available, and thus an appraisal becomes necessary. It is in this appraisal that the various methods of evaluation, such as income yield or reproduction cost, come into action. Yet, no matter what method of evaluation is used, the ultimate result of such an appraisal must be to determine the amount which such property should bring if sold on the open market."

However, as previously noted, other factors can affect the use of the property's sale price as evidence of its true value. *Zazworsky v. Licking Cty. Bd. of Revision* (1991), 61 Ohio St.3d 604. It is a strong presumption that the sale price equates to the true value of property, but the presumption can be rebutted when the evidence indicates otherwise.

The board acknowledges that a like-kind exchange can produce motivational factors which may affect the validity of equating sales price with fair market value. However, the board also recognizes that the fact a property was acquired as part of a like-kind exchange is not sufficient in itself to establish such divergence between sales price and true value. *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (June 30, 1994), BTA No. 1992-R-1133, unreported; *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (May 10, 1996), BTA No. 1994-R-719, unreported.

In *Lakeside Ave. L.P. v. Cuyahoga Cty. Bd. of Revision* (1996), 75 Ohio St.3d 540, the Supreme Court of Ohio set forth the standard to constitute economic

duress in determining whether a sale of property was an arm's-length transaction and the best evidence of true value. In *Lakeside*, a transportation company, Triton Transport Services, Inc. ("Triton"), was leasing property located across the street from its main shipping facility. The property was used as a parking and storage lot. Approximately two years later Triton entered into an agreement with Santa Fe Railroad ("Santa Fe") to manage an "IMX ramp" for Santa Fe on the leased property. Subsequent to the agreement, the owner of the leased property notified Triton that it intended to develop the property and terminate Triton's lease. The owner also offered to sell the property to Triton. Triton considered the sale price to be exorbitant but it bought the property to keep the Santa Fe business. The court discussed the different standards utilized by the Board of Tax Appeals and the Court of Appeals for Franklin County, and determined the following:

"Today, we resolve this ongoing conflict between the BTA and the Court of Appeals for Franklin County by specifically recognizing that compelling business circumstances of the type at issue in this case are clearly sufficient to establish that a recent sale of property was neither arm's-length in nature nor representative of true value.

"The property was not offered for sale on the open market. *** Failure to purchase the property would have resulted in the loss of a significant portion of Triton's business, which in turn, would have resulted in Triton's bankruptcy.

The record clearly establishes that Lakeside never had any real choice but to purchase the property in question."

In the present case there is no evidence in the record to prove that both parties to the sales transaction were not acting in their own best interests. It is clear from the facts surrounding this transaction that Columbia Sussex Corporation structured the deal and price for tax purposes. Lance Shaner Hotel was motivated by its desire to remain in the good graces of the Marriott corporation. Further, Lance Shaner Hotel's contention that it was compelled to purchase the property, and therefore it was not an arm's-length sale, we also find to be without merit. In considering the impact of duress on an arm's-length sale of real property, the Tenth District Court of Appeals held in *Columbus Bd. of Edn. v. Grange Mutual Cas. Co.* (Jan. 28, 1992), Franklin App. No. 90AP-317, unreported, that a sale is an arm's-length transaction where a buyer is economically compelled to buy the property. In determining whether a sale was the result of compulsion or duress, the court found that the "subject motives" of the buyer and seller must be examined. See, also, *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Sept. 29, 1992), Franklin App. No. 92AP-281, unreported; *McCall v. Franklin Cty. Bd. of Revision* (Oct. 16, 1998), BTA No. 1997-P-122, unreported (distinguishing the Supreme Court's decision in *Lakeside*, supra); *South-Western City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision* (July 20, 2001) BTA No. 1999-T-1808, unreported (rejecting duress despite claims of higher rents and need to retain "good will" at current location).

Certain subjective motivations were present in the instant case. However, we find they do not rise to the level necessary to constitute compulsion. Consequently, this board finds that Lance Shaner Hotel was a ready, willing, and able purchaser. Furthermore, the motivation behind selling and purchasing the properties

satisfied both parties' self-interest; therefore, the fact that the sale was a 1031 exchange does not mean the sale was not arm's length.

Although the sale of the subject property as a 1031 exchange did not disqualify it as arm's length, we find that the circumstances cast a doubt that the sales price accurately reflects the fair market value of the property. The agreement between Lance Shaner Hotel and Columbia Sussex Corp. was based on Lance Shaner Hotel agreeing to purchase two Holiday Inns to effect the 1031 exchange. Mr. Hulburt testified that the allocation of the purchase price was determined by Columbia Sussex Corp. There is no evidence in the record that the allocation was based on the fair market value of the property. The sales price assigned to the two properties could have been motivated by a variety of reasons. Therefore, we find the sales price may not reflect the fair market value of the property.

The appellee property owner Lance Shaner Hotel also presented the appraisal report and testimony of Eric E. Belfrage, MAI, CRE, ISHC. Mr. Belfrage is the managing director of Integra, Lorms & Belfrage, a real estate valuation consulting firm. He testified that he appraised the property as a going concern which includes the total assets of the business. He concluded the real estate had a value of \$4,250,000 and other assets totaled \$1,150,000 for a total value of \$5,400,000.

The subject property contains approximately 4.78 acres and is improved with a 4-story full service masonry hotel. It contains 180 rooms composed of 107 doubles, 23 suites, and 50 king rooms. It was built in 1969 and contains a gross building area of approximately 130,051 square feet.

Mr. Belfrage considered all three approaches to value. He determined that the cost approach was not applicable because of the age of the hotel. He utilized the sales comparison approach and income approach and arrived at a correlated value for the property. He also considered information he reviewed concerning the U.S. lodging industry, state and local trends, and the supply and demand of the national travel industry.

In his sales comparison approach Mr. Belfrage selected 5 improved sales as most comparable and as best indicators of value for the subject property.

Name/Address	Sale Date	Total Rooms	Year Built	Sale Price	Price/Unit
Clarion Hotel Covington, Kentucky	November 2000	236	1972	\$12,000,000	\$50,847
Quality Inn Central Norwood, Ohio	May 2001	148	1969	\$3,900,000	\$26,351
Holiday Inn Akron, Ohio	November 1998	166	1974	\$7,100,000	\$42,771
Holiday Inn Airport Columbus, Ohio	January 2001	236	1974	\$8,151,000	\$34,538
Clarion Hotel Columbus, Ohio	February 2001	231	1975	\$5,650,000	\$24,458

He explained that hotel buyers are regional and will look at an asset within a large geographic area.

In comparing the 5 sales to the subject property, Mr. Belfrage made adjustments based on revenue per available room (RevPar), since that is a major factor in a hotel asset. The subject property has a RevPar of \$37.74. When the percentage adjustment for RevPar was applied to the 5 comparables, the range was a low of \$33,051 to a high of \$38,922 per unit. Considering the number of rooms contained in

the subject property, 180, he determined a value of \$30,000 per room. This resulted in a value of \$5,400,000 for the subject property.

Mr. Belfrage also applied a room revenue multiplier in a mid range of 2.0 to 2.8. Using a multiplier of 2.2 times stabilized room gross as used in the direct capitalization approach, room sales of \$2,479,518, previously determined, were multiplied by 2.2 resulting in a value of \$5,454,940 rounded to \$5,500,000.

Therefore, the indicated value using his sales comparison approach was \$5,400,000 to \$5,500,000. These figures represent a "going concern" value including business assets and real estate. (Appraisal report p. 93)

In his income capitalization approach, using the conclusions from the market analysis report, he opined the subject property should generate 51 percent occupancy at a \$74.00 average daily rate. This resulted in a room revenue on a stabilized basis of about \$2,479,000 for year 2000.²

Next, using historical operating statements from 1998 through October 2001, and a study of full service hotels around Ohio, Kentucky and Indiana, he determined that the bulk of net operating income is generated by room revenues. Food and beverage, telephone, movie rental, guest laundry, and vending revenue were also considered. The pro forma reflecting all the figures is located on page 85 of the appraisal report.

Income is derived from the room charges, food and beverage, telephone, and other for a total revenue value of \$3,484,468. Related expenses totaled \$1,361,053. Unallocated expenses such as energy, marketing, franchise fees, repair

² The actual room revenue from 1998 through 2000 was 1.93 million to 2.27 million.

and maintenance, administrative and general expenses, total \$1,099,627. Management fee is listed as \$104,534. The fixed expenses include insurance, taxes, other, and reserves in the amount of \$186,706. Adding up all the expenses results in a total expense of \$2,751,920, which leaves a net operating income of \$732,548. This excludes real estate taxes.

The capitalization rate was derived from the sales in the market approach, a band of investment set forth on page 87 of the report, and national studies published by Real Estate Research, Price-Waterhouse-Coopers, and Integra Realty Resources. They indicated a range from 10.2 to 11.2 percent, which he considered a bit low. He concluded that a capitalization rate of 11½ to 12 percent range should be applied to the net operating income. To that he added the tax additur of 1.74 percent which was determined in the tax analysis portion of the report. That indicated an overall rate of 13.24 to 13.74 percent. Applying that to the net operating income resulted in a value between \$5,300,000 and \$5,500,000.

Relying primarily on the income approach, supported by the market approach, Mr. Belfrage arrived at a fair market value of \$5,400,000 for the subject property as of January 1, 2000, as a going concern. He then allocated the values as follows:

Furniture, Fixtures & Equipment	475,000	9%
Business & Other Intangibles	675,000	12%
Real Estate	<u>4,250,000</u>	<u>79%</u>
Total	\$ 5,400,000	100%

The appellee Lance Shaner Hotel has presented, in part, competent, probative evidence of value in the appraisal report prepared by Mr. Belfrage. Mr.

Belfrage did a study of the hotel industry and incorporated the information into his valuation analysis. However, we are not persuaded that the "business enterprise value" attributed to the property is correct.

We begin by acknowledging that the concept of "business enterprise value" ("BEV") is highly controversial. *The Appraisal of Real Estate* (12th Ed. 2001) discusses BEV and the arguments for and against this component of valuation.³ BEV is defined as the present worth of an entrepreneur's economic (pure) profit expectation. *The Appraisal of Real Estate* also provides:

"As awareness spread that BEV could be part of the total assets of a business, arguments emerged supporting its existence in nearly all property types, including leased properties such as regional malls. Frequently such claims were not adequately supported or developed. They were also countered by other claims that questioned the extent of its applicability, suggesting that it was just a misallocated increment attributable to entrepreneurial incentive or a situs advantage or location premium.

* * *

"For these reasons business enterprise value remains one of the most important and controversial topics confronting appraisers." *Id.* at 641, 642, and 644.

The Appraisal of Real Estate states that hotels were among the first property types for which BEV was analyzed. Franchise costs was listed as an example.

This board has previously recognized the concept of business enterprise value. See *Carriage Court Grove City Ltd. Part. v. Franklin Cty. Bd. of Revision* (July

³ The Appraisal of Real Estate states that more recently BEV has become known as capitalized economic profit ("CEP"). However, for purposes of continuity with Mr. Belfrage's appraisal report, the references to CEP contained in *The Appraisal of Real Estate* will be substituted and replaced by BEV in this decision.

26, 2002), BTA Nos. 2001-M-236 and 237, unreported; *ARV Assisted Living, Inc. v. Hamilton Cty. Bd. of Revision* (Nov. 9, 2000), BTA No. 1998-A-168, unreported; *Health Care & Retirement Corp. v. Franklin Cty. Bd. of Revision* (Sept. 25, 1998) BTA No. 1997-K-127, unreported; *Dublin Senior Community L.P. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455; and *Chippewa Place Development Co. v. Cuyahoga Cty. Bd. of Revision* (Sept. 24, 1993), BTA No. 199-P-245, unreported. All of the above-referenced cases involved congregate care or assisted-living facilities. Not only did the facilities provide housing and common areas for the residents, but numerous personal services were provided so that the business was very closely tied to the real estate.

In *Dublin Senior Community*, supra, the court stated:

“The property being valued is a congregate care center that comprises a combination of real estate and business activities. Dublin charges for such services as food and housekeeping; these are business activities. It also charges rental for the apartments; that is a real estate activity. Each activity has separate expenses. In a valuation of only the real estate, the two activities must be kept separate. The separation of the income and expenses is important not only when determining net income, but also when considering a comparison of the sale prices of comparable facilities. ***.”

In *Chippewa Place Development Co.*, we stated that the real estate must be valued separately without regard to the business activities conducted within; otherwise there is the risk of violating the mandate of *Dinner Bell Meats, Inc. v. Cuyahoga Cty. Bd. of Revision* (1984), 12 Ohio St.3d. 270, that ‘value in exchange,’ not ‘value in use,’ be determined. The services provided by a congregate care facility

are not comparable to the services provided by a hotel. Therefore, the above-cited cases are clearly distinguishable from the present case.

In determining BEV in the present case, Mr. Belfrage calculated the percentage of revenue attributable to the business value by determining what percentage of reservations were made through the Holiday Inn electronic reservation system, factoring in franchise costs, and then determining what percentage of overall revenue was attributable to the electronic reservation system. Although divergent methods of estimating BEV exist, and no single technique is universally accepted, we are not convinced that the method utilized by Mr. Belfrage is a reliable measuring device. We find it a very speculative means of quantifying BEV at best. Accordingly, we cannot adopt the appraisal amount estimated in the report.

Mr. Belfrage allocated \$4,250,00 to the real estate and \$475,000 to furniture, fixtures, and equipment (FF&E). Subtracting the FF&E from his real estate value results in a value of \$3,775,000. The county auditor and BOR determined a value of \$3,726,150. Although this board does not find Mr. Belfrage's appraisal competent and probative with respect to the BEV component, elimination of the component supports the value determined by the BOR. Since the real estate value determined by Mr. Belfrage is in part derived from his use of his BEV, we cannot adopt his final conclusion of value. However, it is in line with the BOR's determination. Therefore, we affirm the BOR's determination of value for the subject property. See *Simmons v. Cuyahoga Cty. Bd. of Revision* (1998), 81 Ohio St.3d 47.

Giving consideration to the record, statutes and case law, it is the decision and order of the Board of Tax Appeals that the value of the subject property as of January 1, 2000 was as follows:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
Land	\$ 531,860	\$ 186,150
Building	<u>\$ 3,194,290</u>	<u>\$ 1,118,000</u>
Total	\$ 3,726,150	\$ 1,304,150

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Source: Legal > States Legal - U.S. > Ohio > Cases > **OH Cases, Administrative Decisions & Attorney General Opinions, Combined**

Terms: **golf and course*w/25 tax and board of revision** (Edit Search)

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2002 Ohio Tax LEXIS 1410, *

Board of Education of the South-Western City School District, Appellant, vs. Franklin County **Board of Revision**, the Franklin County Auditor, and National **Golf** Operating Partnership, LP, Appellees.

CASE NO. 01-V-318 (REAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

2002 Ohio Tax LEXIS 1410

August 2, 2002

[*1]

APPEARANCES:

For the Appellant BOE - Jeffrey A. Rich, Mark H. Gillis, Rich, Crites & Wesp LLC, Columbus, OH.

For the Appellee Property Owner - Wayne Petkovic, Attorney at Law, Delaware, OH.

For the County Appellees - Ron O'Brien, Franklin County Prosecuting Attorney, By: Paul Stickel, Assistant Prosecuting Attorney, Columbus, OH.

OPINION:

DECISION AND ORDER

Mr. Johnson, Ms. Jackson, and Ms. Margulies concur.

This cause is considered by the Board of Tax Appeals upon a notice of appeal filed by appellant Board of Education of the South-Western City School District ("BOE") from the final determination of the Franklin County **Board of Revision** ("BOR"). The BOR determined the taxable value of the subject property for **tax** year 1999.

The subject real property is a private **golf** club, consisting of 165.22 acres, improved with an eighteen-hole **golf course**, clubhouse/pro shop, maintenance buildings, and a paved parking area. The subject property is located in the City of Columbus, South-Western City School taxing district, Franklin County, Ohio, and appears on the Franklin County Auditor's ("auditor") records as permanent parcel number 230-2148.

The value of the subject, as determined by the auditor **[*2]** for tax year 1999, and ultimately retained by the BOR, is as follows:

	TRUE VALUE	TAXABLE VALUE
LAND	\$ 493,800	\$ 172,830
BUILDING	\$ 1,651,200	\$ 577,920
TOTAL	\$ 2,145,000	\$ 750,750

A056

The property owner, National **Golf** Operating Partnership ("NGOP"), filed a complaint against the valuation of the subject parcel for tax year 1999 with the BOR, requesting the subject's true value be reduced to \$ 1,700,000. n1 The BOE filed a counter-complaint requesting the subject's true value be increased to \$ 3,000,000. n2 After conducting a hearing, the BOR left the auditor's values unchanged.

n1 At hearing before the BOR, counsel for NGOP indicated that he would not be calling any witnesses and that it was the property owner's position that the auditor's valuation of the subject property (\$ 2,145,000) was correct. (S.T. hearing tape)

n2 Amended from \$ 2,900,000 at hearing before the BOR. (S.T. hearing tape)

In its notice of appeal the BOE maintains that the BOR has undervalued the property. Appellant contends that the subject property value should be increased as follows:

	TRUE VALUE	TAXABLE VALUE
LAND	\$ 690,600	\$ 241,710
BUILDING	\$ 2,309,400	\$ 808,290
TOTAL	\$ 3,000,000	\$ 1,050,000

[*3]

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the BOR ("S.T."), the evidence provided to this board at hearing ("R."), and the brief of the BOE. n3 The county appellees did not participate at the hearing before this board.

n3 Neither appellee has submitted a brief to this board.

Initially, this board notes the decisions in *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 68 Ohio St.3d 336, 1997-Ohio-498 and *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision*, 68 Ohio St.3d 493, 1994-Ohio-501, wherein the Supreme Court of Ohio 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.

It is not enough, however, to simply come forward with some evidence of value. Neither is it sufficient to grant the requested increase [*4] or decrease merely because no evidence is adduced in contradiction to the claim. *Western Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340. In short, there is a burden of persuasion that rests with the appellant to convince this board that the appellant is entitled to the value that it seeks. *Cincinnati School Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 78 Ohio St.3d 325, 1997-Ohio-212. Accordingly, this board must proceed to examine the available record and to determine value based upon the evidence before it. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120; *Clark v. Glander* (1949), 151 Ohio St. 229. In so doing, we will determine the weight and credibility to be accorded the evidence presented. *Cardinal Fed. S.*

A057

& *L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

Pursuant to Section 2, Article XII, Ohio Constitution, land and improvements are to be taxed according to value:

"Land and improvements thereon shall be taxed by uniform rule *according to value * * **." (Emphasis added.)

R.C. 5713.03 further mandates that each separate tract be valued according to its "true value":

"The county auditor, [*5] from the best sources of information available, shall determine, as nearly as practicable, *the true value* of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon * * *." (Emphasis added.)

In State ex rel. Park Investment Co. v. Bd. of Tax Appeals (1964), 175 Ohio St. 410, the Supreme Court addressed the manner by which the value of real estate is to be ascertained:

"The best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so. Paragraph two of the syllabus in *In Re Estate of Sears* [(1961)], 172 Ohio St. 443, 178 N.E. (2d), 240. This, without question, will usually determine the monetary value of the property. However, such information is not usually available, and thus an appraisal becomes necessary. It is in this appraisal that the various methods of evaluation, such as income yield or reproduction cost, come into action. Yet no matter what method of evaluation is used, the ultimate result of such an appraisal must be to determine the amount [*6] which such property should bring if sold on the open market." *Id.* at 412.

See, also, *Zazworsky v. Licking Cty. Bd. of Revision* (1991), 61 Ohio St.3d 604; *Hilliard City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1990), 53 Ohio St.3d 57. Where parties rely upon appraisers' opinions of value, this board may accept all, part, or none of those appraisers' opinions. *American Steel & Wire Co. v. Bd. of Revision* (1942), 139 Ohio St. 388; *Witt Co. v. Hamilton Cty. Bd. of Revision* (1991), 62 Ohio St.3d 155; *Fawn Lake Apts. v. Cuyahoga Cty. Bd. of Revision*, 85 Ohio St.3d 609, 1999-Ohio-323.

Before the BOR, the BOE presented a "preliminary appraisal" of the subject property, authored by Mr. Brian W. Barnes, MAI, CRA. (S.T. Exh. 1) Before this board, the BOE has submitted the full narrative appraisal of Mr. Barnes, in which he opines to a fair market value of the subject real property of \$ 2,730,000. NGOP elected not to present any evidence before the BOR or this board.

Mr. Barnes found the highest and best use of the subject property to be as improved with a **golf** course and related improvements. (Exh. 1 at 27-28, R. at 15) Mr. Barnes utilized the cost, [*7] sales, and income approaches to value to arrive at his final opinion of value for the subject.

A058

Mr. Barnes' cost approach is a combination of vacant land sales comparables and cost-to-develop comparables of "similar or better" **golf** course facilities. (Exh. 1 at 30-44) Additionally, Mr. Barnes prepared a cost analysis utilizing data from the *Marshall Valuation Service*. (Exh. 1 at 41) Portions of the subject property are located within flood hazard areas on the Federal Emergency Management Agency Insurance Rate Map. (Exh. 1, at page following 22) In utilizing four vacant land sales, described as being "affected by flood plain conditions" in the subject's area, Mr. Barnes settled on a vacant land value of \$ 2,750 per acre for the subject. (Exh. 1 at 40) Mr. Barnes utilized six **golf** course developments to come up with a range of \$ 165,000 to \$ 389,000 per hole to construct. This range was narrowed to \$ 175,000 to \$ 200,000 per hole given the appraiser's opinion concerning which of the comparables were similar to the subject. Mr. Barnes then utilized the *Marshall Valuation Service* to estimate the cost per hole at \$ 117,750. He calculated the construction of the clubhouse less depreciation, [*8] to arrive at a total improvement value of \$ 2,821,903 plus the vacant land value of \$ 450,000, concluding at \$ 3,272,000 (rounded) for the subject via the cost approach.

During cross-examination, counsel for NGOP questioned Mr. Barnes' use of vacant land comparables (specifically comparable # 1 and # 2, Exh. 1 at 31 through 34), suggesting that they were not in a similar flood hazard area as the subject and were prime for commercial and residential development. Mr. Barnes indicated that vacant land sale 1 was "essentially all floodway or flood hazard areas" and that sale 2 was not in a flood hazard area. (R. at 41-42) Further, Mr. Barnes was unable to agree with counsel's statements that the land sale comparables were being developed into uses higher than that of the subject property. (R. at 41-45) NGOP did not introduce any evidence to support its inferences made during cross-examination.

Mr. Barnes' market value or sales approach consisted of the comparison of five sales of public **golf courses**, between 1996 and 2001, to the subject. (Exh. 1 at 44 to 63) Mr. Barnes adjusted 3% per year between the sale date and **tax** lien date. He opined that: sales comparables 1 and 2 were slightly [*9] superior to the subject, that sales 4 and 5 were inferior, and that sale 3 was likely a distress sale and not considered. Barnes further considered the sales prices of the comparables by calculating the price per hole, price per round, and a greens-fee multiplier analysis, which is calculated by taking the price per round and dividing it by the average greens fee. Under the price per hole comparison, he developed a range of \$ 175,000 to \$ 200,000 per hole after reviewing the price per hole values of the five comparables, for a course value in the range of \$ 3,150,000 to \$ 3,600,000. In looking at price per round, Mr. Barnes valued the subject at \$ 3,375,000, assuming that 27,000 annual rounds would be played at \$ 125.00 per round based upon the comparables' price per round figures. With the greens-fee multiplier, Barnes used \$ 38.00 per round played from NGOP's operating statement for 1999, multiplied by 27,000 annual rounds, multiplied by 3.0 and 3.25 (greens fee multipliers extracted from the comparables) to arrive at a value range of \$ 3,078,000 to \$ 3,335,000. Mr. Barnes concluded to a range of \$ 3,100,000 to \$ 3,300,000 by means of his market analysis.

NGOP questioned Mr. Barnes [*10] about the comparability of Hickory Hills **Golf Club** ("Hickory") to the subject, given his acknowledgement that Hickory's membership fee was approximately \$ 6,000 (Exh.1 at 27), whereas the subject's membership fee was in the range of \$ 2,000 to \$ 2,500 (R. at 39). We question the relevance of this distinction, given Barnes' use of Hickory was limited to the subject market's demand for **golf** clubs in his highest and best use analysis.

NGOP questioned the inclusion of personal property (i.e., **golf** carts, liquor licenses, and pro shop inventories) in the stated sales prices of Barnes' comparables. (R. at 37 through 38) We see no infirmity in Barnes' inclusion of personalty in comparables, given his final opinion of value for the land and improvements is made after deducting the personalty. (Exh 1 at 72)

A059

NGOP questioned the character of the development surrounding Mr. Barnes' comparable sales, versus the development surrounding the subject, implying that the comparables were superior to the subject. Nevertheless, NGOP failed to offer any evidence of differences between developments surrounding the subject versus those of Barnes' comparables, or how any differences would affect the subject's [*11] value.

NGOP questioned Mr. Barnes' data concerning greens fees for the subject and its comparables in his sales comparison analysis. After counsel attempted to compare the greens fees stated in the report to current fees at the time of hearing before this board, Mr. Barnes testified that there has been a change in the market between 1999 and fees stated in a local golfing publication for the spring of 2002. (Appellees Exh. A) Mr. Barnes testified that rates have reduced over time because of an "overbuilding" of **golf** courses in the area. (R. at 64)

Mr. Barnes' income analysis estimated the subject's earnings potential in 1999, assuming the facility was open to the public. (Exh. 1 at 64 to 71) Barnes selected five **golf courses** that he deemed to be "most competitive" to the subject and concluded that the \$ 38 per round and \$ 13.50 per cart charged for the subject were reasonable for **tax** year 1999. Mr. Barnes developed a pro-forma income and expense sheet based on the above fees, and assumed 27,000 rounds per year to arrive at a net operating income of \$ 573,085 for the subject in 1999. The expenses in the pro-forma are identical to NGOP's actual expenses for 1999. n4 Mr. Barnes used [*12] a band of investment analysis to arrive at a capitalization rate of 13.0% to 13.5%. Mr. Barnes concluded to a value range of \$ 3,400,000 to \$ 3,500,000 under the income approach. Additionally, he has provided a tax additor of 2.14% to replace the inclusion of the subject's property taxes as an expense. After removing the subject's 1999 tax liability from the pro-forma, Barnes concluded to a value range of \$ 3,357,000 to \$ 3,250,000 with the use of the tax additor.

n4 Barnes eliminated the income attributable to the subject's private club status, i.e., membership dues, and replaced them with greens fees income, leaving the remaining revenues, costs, and expenses unchanged from the owner's 1999 figures. (R. at 32)

Counsel for NGOP questioned Mr. Barnes' inclusion of revenues from items attributable to personalty (i.e., food and beverage sales, cart rentals) in his pro-forma. (R. at 73 through 78) Mr. Barnes responded that the subject **golf club** is a special use property and that **golf** cart rentals, pro shop sales, and the like are "part of the ongoing operation of a **golf** course to accommodate it" and therefore, properly included in the pro-forma. (R. at 74) X

Mr. Barnes' final reconciliation [*13] of value for the subject property on January 1, 1999 is \$ 3,250,000, less personal property of \$ 520,000, n5 resulting in his final opinion of \$ 2,730,000 for the subject realty and improvements. (Exh. 1 at 72)

n5 As extracted from the owner's 1999 operating statement.

NGOP elected not to present any evidence of value before the BOR or before this board. Instead, counsel for NGOP relied solely upon cross-examination of Mr. Barnes to rebut the BOE's alleged value for the subject. Once the appellant BOE presented competent and probative evidence of value, it was incumbent upon appellee to overcome said evidence. See *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision*, supra.

It is this board's statutory duty to find taxable value. R.C. 5717.03. As such, we must determine the market value of the subject property. Based upon the foregoing, we find that appellant has offered sufficient, competent, and probative evidence of the subject's value for

A060

the tax year in question based on the appraisal report of Mr. Barnes.

Accordingly, we find and determine that the true and taxable value of the subject real property for tax year 1999 is:

	TRUE VALUE	TAXABLE VALUE
LAND	\$ 450,000	\$ 157,500
BUILDING	\$ 2,280,000	\$ 798,000
TOTAL	\$ 2,730,000	\$ 955,500

[*14]

It is the decision and order of the Board of Tax Appeals that the Franklin County Auditor shall list and assess the subject property in conformity with this decision and carry the same values forward in accordance with applicable law.

Source: Legal > States Legal - U.S. > Ohio > Cases > OH Cases, Administrative Decisions & Attorney General Opinions, Combined 

Terms: golf and course*w/25 tax and board of revision (Edit Search)

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Terms: self storage and allocation (Edit Search)

1988 Ohio Tax LEXIS 208, *

George Martin, et al., Appellants, vs. Franklin County Board of Revision, et al., Appellees.

CASE NO. 87-J-655 (REAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

1988 Ohio Tax LEXIS 208

February 10, 1988

[*1]

APPEARANCES

For the Appellant - Jay Meena, Esq., Attorney at Law, 2310 Indianola Ave., Columbus, Ohio 43202

For the Appellee Hilliard Board of Education - Teaford, Rich, Belskis Coffman and Wheeler,
By: Gary Dicker, Esq., 20 East Broad Street, Columbus, Ohio 43215

OPINION:
DECISION AND ORDER

This cause and matter came on to be considered by the Board of Tax Appeals, upon a notice of appeal filed herein under the date of July 9, 1987, from a decision of the Franklin County Board of Revision dated June 15, 1987.

The subject real property is located in the Hilliard taxing district and appears on the auditor's records as parcel number 560-191404, and 560-154611.

The value determined by the Franklin County Auditor for tax year 1986 is as follows:

Parcel 191404

	True Value	Taxable Value
Land	\$11,660	\$4,080
Building	\$253,730	\$88,810
Total	\$265,390	\$92,890

Parcel 154611

	True Value	Taxable Value
Land	\$15,750	\$5,510
Building	0	0
Total	\$15,750	\$5,510

The value determined by the Franklin County Board of Revision for tax year 1986 is as follows:

Parcel 191404

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	True Value	Taxable Value
Land	\$31,500	\$11,020
Building	\$420,500	\$147,170
Total	\$452,000	\$158,190

[*2]

Parcel 154611

	True Value	Taxable Value
Land	\$48,000	\$16,800
Building	0	0
Total	\$48,000	\$16,800

The appellant has alleged in the notice of appeal that the correct value for the combined parcels for tax year 1986 is as follows:

	True Value	Taxable Value
Land	\$25,000	\$8,750
Building	\$256,142	\$89,650
Total	\$281,142	\$98,400

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified by the county board of revision, and the testimony and evidence adduced at the evidentiary hearing held herein.

To support their conclusion of value the appellants submitted the testimony of George M. Martin, one of the purchasers of the subject property, and the appraisal report of Kenneth E. Wilson, Jr., an independent fee appraiser. Mr. Wilson's appraisal report had been submitted to the Board of Revision and was included as part of the statutory transcript certified to this Board by the Franklin County Board of Revision.

Mr. Martin testified that he purchased the property on April 20, 1986 for \$500,000. (Exhibit One) He indicated, however, that in this instance the sale [*3] price is not indicative of the property's true value. When he purchased the property, it was his understanding that the purchase price included the value of the property in addition to the value of the storage business being conducted on the property. The fact that the purchase contract (Exhibit One), the conveyance fee statement (Exhibit A), and the General Warranty Deed (Exhibit B) are silent regarding this arrangement was due to an oversight on his part. He would not have purchased the property at the price paid without the business being included. He further testified that had a proper **allocation** been made, of the \$500,000 purchase price, \$420,000 should have been allocated to the real property, and \$80,000 should have been allocated as the purchase price for the business.

Mr. Wilson concluded that the subject property had a true value of \$524,000 as of June 24, 1986. He was of the opinion that the purchase price of \$500,000 paid by the appellant on April 20, 1986 was not reflective of true value. He noted that there was no real estate commission included in the sale, and the seller had not actively marketed the property.

The property consists of five one story concrete [*4] block storage buildings containing approximately 26,600 square feet of gross building area. The property also includes a metal

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pole barn containing approximately 2,100 square feet. The buildings contain 126 covered storage units, as well as some open storage area. There are no utilities servicing the site.

Mr. Wilson analyzed the property utilizing the cost, income, and market approaches to value. The market approach yielded a value of \$520,000, the income approach a value of \$524,000, and the cost approach a value of \$420,000. He opined that the market and income approaches both reflected operating **self-storage** properties. He gave most weight to the income analysis as it reflected the current income capabilities of storage facilities. He thereby concluded that the subject property had a value of \$524,000 as an operating entity.

In *Columbus Bd. Edn. v. Fountain Square Assoc., Ltd.* (1984), 9 Ohio St. 3d 218 the Ohio Supreme Court stated at page 219:

"Appraisals based upon factors other than sales price are appropriate for use in determining value only when no arm's length sale has taken place . . . , or where it is shown that the sales price is not reflective of true [*5] value . . ."

In addition this Board should and has considered the administrative record (statutory transcript) which the county board of revision is required to file with this Board, giving that record whatever weight this Board deems appropriate, even though additional evidence may be and in this case was accepted. *Black v. Bd. of Revision* (1985), 16 Ohio St. 3d 11. Furthermore, this Board is mindful of the fact that it is not required to adopt the valuation fixed by any expert or witness and is vested with wide discretion in determining the weight to be given to evidence and the credibility of witnesses which come before this Board. *Cardinal Federal S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St. 2d 13.

Giving consideration to the totality of the evidence the Board of Tax Appeals finds and determines that the value of the subject property as of January 1, 1986 is as follows:

Parcel 191404

	True Value	Taxable Value
Land	\$31,500	\$11,025
Building	\$420,500	\$147,175
Total	\$452,000	\$158,200

Parcel 154611

	True Value	Taxable Value
Land	\$48,000	\$16,800
Building	0	0
Total	\$48,000	\$16,800

the [*6] value of the combined parcels for tax year 1986 is:

	True Value	Taxable Value
Land	\$79,500	\$27,825
Building	\$420,500	\$147,175
Total	\$500,000	\$175,000

It is Ordered that the Auditor of Franklin County shall cause his records to reflect the values hereinabove determined with respect to the subject property and to assess the same in

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accordance therewith as provided by law.

It is Further Ordered that a certified copy of this decision and order be sent to the Auditor of Franklin County and to each of the parties hereto by and through their respective counsel.

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The second issue raised by Complainant is a constitutional issue alleging a denial of due process and equal protection in failing to apply Section 138.060(1) to counties other than first class, charter counties. We cannot address constitutional questions. However, we note that the increased value by Respondent is alleged to be a result of Complainant's decision to convert personal property into fixtures.

FINDINGS OF FACT

1. The property under appeal contains 154.4 acres lying along the east side of Highway 111 and along Cannon Hollow Road west of Forest City, Missouri. It contains 10.9 acres on which a lead smelter sits; 11.5 acres containing a hazardous waste landfill; and 6.1 acres of cleared land around the bermed and sloped area of the landfill. The remaining 125.9 acres are peripheral land, which is partially timbered, and partially in grass.

Highest and Best Use

2. The highest and best use of the property is as a secondary lead recovery facility. As such, the property is a unique or special use property. There is a market for such facilities.

Income Approach Not Reliable

3. The income approach is not a reliable indicator of value for a unique, owner-occupied facility.

The Market Approach Not Reliable

4. The market approach is not a reliable indicator of value for the subject property. Although five secondary lead recovery plants have recently sold, two of those sales involved Schuylkill's attempt to find a buyer for its property after losing a major supplier. A third sale is outside the United States, and may be subject to economic factors which we are not capable of determining. Finally, insufficient evidence exists to determine the proper adjustment for quality and value of the business component, if any, making all five sales unreliable.

The market approach using sales of more common manufacturing facilities is also inappropriate. The only possible similarity between a manufacturing facility and a lead recovery plant is size.

The Cost Approach is Most Reliable

5. The cost approach is the most reliable indicator of value for this property because it does not consider non-taxable property such as goodwill and any intangible going concern value which may exist and which is attributable to a saleable business asset based upon reputation.

Inclusion of Assemblage Value and Transmissible Value is Proper

6. Going concern value which is the result of assemblage is tangible and taxable. The value of permits, professional services, and labor to create the assemblage is taxable as part of the assemblage. Likewise, when the business necessarily follows the real estate, transmissible value is created and constitutes taxable real estate even when intertwined with a business.

Permit to Operate Hazardous Waste Landfill

7. A permit has been issued by the EPA, through DNR, which allows the operation of a hazardous waste

landfill on the Schuylkill property. The permit does not allow dumping of waste not generated by the Schuylkill plant. The permit is not transferrable. Subsequent purchasers must file for their own permit. There is no evidence which suggests that subsequent purchasers would have any difficulty in obtaining such a permit.

The permit to operate the hazardous waste landfill does not add an untaxable, intangible value to the real property. The permit has no value separate and apart from the real property.

Background of Ownership

8. The property under appeal is variously described as "a secondary lead recovery plant" or a "resource recycling plant." It was originally owned by Schuylkill Holdings, Inc. and was sold, together with a 176,000 square foot sister plant in Louisiana, to Exide in 1995. Schuylkill sold the plants because they had lost their major supplier and were concerned about their future. Schuylkill initiated the process of locating a buyer.

Exide entered into an agreement to buy both facilities. The terms of the agreement were \$2,000,000 cash; \$31,000,000 in stock transfers and a \$3,700,000 contingent note based upon future lead prices. The requirement of the contingent note has been satisfied. Under this agreement, the total purchase price was \$36,700,000 with \$22,000,000 allocated to good will, leaving a balance of \$14,700,000. No other intangible value was identified.

The Plant Operation

9. The plant receives ten tractor trailer loads, or approximately 10,000 used batteries each day for recycling. The batteries are loaded onto conveyor belts and travel to a machine which breaks the batteries, causing the lead and sulfuric acid to separate. The lead is smelted into bars or blocks and shipped to another location for use in new batteries. The sulfuric acid is sold to an organization in St. Joseph. The plastic casings are washed, granulated and extruded into pellets which are bulk packed and shipped to another Exide facility where new covers and cases are manufactured. Two large scrubbers in the bag house filtrate the air in the plant to avoid acid rain.

Furnace slag, scrubber sludge and water treatment sludge are removed to the landfill. Under EPA and DNR regulations, all waste and storm water that falls on or is created by the facility must go through a water treatment plant.

The plant is centrally located to both receive used batteries and to ship recycled materials.

The Landfill

10. The hazardous waste landfill, located on a hill above the plant, is well designed with double synthetic lines and a leachate collection system. The State of Missouri, Department of Natural Resources, has granted a "hazardous waste management facility permit" to Schuylkill allowing Schuylkill to receive lead-acid batteries and other lead-bearing wastes at its Cannon Hollow Plant and that plant is permitted to store hazardous wastes in containers and to dispose of those wastes in the landfill area.

The State of Missouri, Department of Natural Resources, has also certified Schuylkill's Cannon Hollow Plant as a "certified resource recovery facility" and has issued an operating permit allowing the Cannon Hollow Plant to release processed wastewater and storm water into Cannon creek.

The Office Building

11. The 10.9 acres of plant area are improved with an 8,108.4 square foot office building built in 1978. (See Ex. R-1, p. 35). This building has 16-foot ceilings. The building has brick exterior walls on the northeast and southwest sides and concrete block walls on the northwest and southeast sides. It has a tar coated built up roof, a concrete foundation and a steel frame. Attached to the southeast corner of the office building is a 130.2 square foot "air handling room" with 9-foot ceilings. Attached to the northeast corner of the office building is a 446.5 square addition with 10-foot ceilings.

The office building has four private offices, a nurses area, a receptionist area, an open office area, a large lounge, conference room, two lab areas, scale room, laundry room, clothes storage area, boot storage room, locker and shower area, locker and wash area, two ladies' rooms and a men's restroom.

Most of the interior is finished with paneled walls or painted plywood. Ceilings are tiled with recessed fluorescent lighting. Flooring is vinyl or ceramic tile.

The scales room is equipped with a Fairbanks Scale, Model No. G-700027 with a 50 ton capacity. The scale pit has a two piece platform that measures 81.0 feet by 10.0 feet.

The building is 20 years old and has a remaining economic life of 25 years. Incurable depreciation is 44.4%. The building has a depreciated value of \$279,000.

The Battery Recycling Building

11. The 10.9 acres is further improved with a 83,168.6 square foot battery recycling building which serves the storage, processing and handling operations of the plant. (See diagram Ex. R-1, p. 45). Most of this building area was constructed in 1977 with storage and dock entry areas added in 1991. The building is composed of sections designated according to their use. The breakdown of those sections is defined at p. 42 of Ex. R-1.

The building area has steel frame construction with metal siding and a metal roof. The southwest portion containing the storage and dock entry areas has a concrete wall foundation with a height of 5.0 feet and an eave height for this area of 28 feet. The middle portion of the smelting-casting area has an average height of 25 feet. This area serves the tower portion of the smelting hoods, the east part of the smelter, the reagent area, the stabilization slag product area, the filter press area, and the recycling areas. All have an average height of 18.5 feet. There is a 4.3 foot concrete foundation wall along the smelting area, a 9 foot concrete foundation wall along the reagent building and 5 foot concrete foundation wall along the stabilization slag to battery recycling areas.

In the southeast corner of the smelting/casting area is a three-story office/storage area that has a utility room on the third floor. It measures 24.8 feet by 15.8 feet for an area per floor of 391.8 square feet or 1,175.4 square feet for all three floors combined. It has concrete block walls and is served by two Janitorial Central Air Units.

In the central part of this building is the basement or lower level serving the smelting hoods below floor level. This area measures 57 feet by 18 feet with a depth of 8 feet and an area of 1,076 square feet.

There is an open canopy on the west side of the battery plate storage and mix room areas. It has a length of 49 feet and a width of 17 feet for an area of 833 square feet.

In the mix room portion of this building are four partitioned concrete block areas that are used for the storage of sodium hydroxide, sodium nitrate, calcium, and sulfur flakes.

In the northwest corner there is a small attachment that measures 12 feet by 16 feet with a height of 10 feet for an area of 192 square feet. This portion has masonry construction.

The building is served by two 14 foot wide overhead doors serving the smelting area, two overhead doors which are 9 foot wide at load level in the dock area, a 16.5 foot wide overhead door in the wash bay area, and a 32 foot wide double sliding door serving the containment area. The weighted effective age of this building is 15 years with a remaining economic life of 20 years. Incurable depreciation is 42.9%. The depreciated value of this building is \$1,234,000.

Bag and Scrubber Building

12. The bag and scrubber building is a steel frame building that has various heights and is divided into three portions with a total building area of 7,788.6 square feet. (See diagram Ex. R-1, p. 53). The initial building was built in 1978. The scrubber area was built in 1990.

The scrubber portion in the northwest corner measures 41.4 feet by 19.8 feet and 29.4 feet by 41.2 feet with an area of 2,031 square feet. The building has a height of 16 feet and has a 12 foot overhead door on the north side.

The southwest portion of the building measures 73 feet by 25.4 feet and has an area of 1,854.2 square feet. This area has an eave height of 20 feet with a 1.5 foot concrete foundation wall.

The remaining portion in the southeast corner measures 42.8 feet by 91.2 feet with an area of 3,903.4 square feet. It has an eave height of 49 feet. It has a concrete wall foundation height of 2 feet and is served by two overhead doors with a width of 12 feet. Along the southeast corner is a utility room that measures 6 feet by 4 feet with an area of 24 square feet and a height of 6 feet.

The building is fully insulated. The building has an effective age of 15 years with a 20 year remaining economic life. The loss due to incurable depreciation is 42.9%. The building has a depreciated value of \$100,000.

Storage Building

13. The storage building was originally built as the battery crusher building, but is now used for storage. It measures 53.6 feet by 60.0 feet; 15.5 feet by 61.5 feet; 75.8 feet by 23.6 feet

and 55.0 feet by 92.8 feet with a building area of 11,062.1 square feet. It has an estimated eave height of 20 feet. (See diagram at Ex. R-1, p. 60).

The building is a steel frame structure with metal siding and roof on a concrete foundation. It has a 5 foot lower concrete wall along the long west portion with a lower wall along the south to southeast side with a height of 6.3 feet. Along the north to northeast portion is a lower concrete wall with a height of 6 feet. The building has a 14 foot overhead door on the northwest side with a 36 foot wide double sliding door on the southeast corner.

The building has overhangs on the west and northern portions. The overhang on the west portion measures 100 feet by 14 feet with an area of 1,400 square feet. This area is the site of the 50 foot by 10

foot scales platform that has an estimated capacity of 50 tons and is equipped with a digital readout. The overhang along the northern portion measures 92.8 feet by 11 feet covering 1,020.8 square feet. This area has six storage bins separated by a concrete wall with a thickness of 12 inches and a height of 6 feet.

On the southeast side of this buildings is a basin for acid that measures 24.8 feet by 17 feet covering an area of 421 square feet. It has a concrete wall with a height of 6 feet and a thickness of 12 inches.

This building is primarily in poor condition. The sides and roof are rusting with some holes noted in both the sides and ceiling. The concrete floor in this building is also in poor condition and badly deteriorated.

This building has an accelerated economic age of 30 years with a 5 year remaining life. Incurable deterioration is 85.7%. The depreciated value of this building is \$33,000.

Water Treatment Building

14. The water treatment building measures 77 feet by 54.3 feet contain 4,181.1 square feet on the north portion and 51.8 feet by 27 feet containing 1,398.6 square feet on the south part. (See diagram at Ex. R-1, p. 65).

The building has a combined area of 5,579.7 square feet and an eave height of 27 feet. The north portion is a steel frame building with metal siding and roof that was built in 1991. It has a lower concrete wall with a height of 4 feet. The south part has a concrete lower wall with a height of 5 feet with a concrete block exterior wall above and was built in 1983. The north part of this building has metal walkways serving the tank area. These walkways measure 39 feet by 6 feet by 33 feet by 4 feet, and 26 feet by 4 feet with a combined area of 470 square feet. This building is insulated and is in good condition with some minor rusting noted.

The weighted average age for this building is 10 years with 25 years of remaining economic life. Incurable depreciation is 28.6%. The depreciated value of this building is \$80,000.

Water Treatment Basin

15. The water treatment basin is located adjacent to the west side of the water treatment building. It measures 55 feet by 55 feet, less an area in the southwest corner measuring 27.5 feet by 8 feet. It has a total area of 2,805 square feet. It has concrete walls with a depth of 8 feet and a thickness of 12 inches. There is a concrete wall divider in the middle of the tank with a height of 5 feet and a length of 27.5 feet. This basin has 1,760 square feet of wall area with a depth of 8 feet and 235 square feet of all area with a depth of 5.8 feet for a combined wall area of 1,995 square feet. (See diagram at Ex. R-1, p.71).

The basin is in fair condition with an effective age of 10 years and a remaining economic life of 10 years. Accrued depreciation is 50%. The depreciated value of this improvement is \$13,000.

Settlement Basin

16. The settlement basin measures 71.8 feet by 49.8 feet with a size of 3,575.6 square feet. It has a depth of 10 feet with the walls having a thickness of 10 inches. The structure has a wall area of 2,432 square feet. The south side of this basin is in the hillside. The basin appears to be in good working condition. (See diagram at Ex. R-1, p. 75).

The basin has an effective age of 10 years and a remaining economic life of 10 years indicating a 50% depreciation. The depreciated value of this improvement is \$15,000.

Shop Maintenance Building

17. The shop maintenance building is an "ell" shaped building that was reported to have been built in 1977. It measures 148.9 feet by 40 feet on the north portion and 40 feet by 40 feet on the south part with a combined area of 7,556 square feet. It is mostly a steel frame building with metal siding and roof. An area with the length of 385 feet in the northwest corner has concrete block exterior walls. (See diagram at Ex. R-1, p. 79).

The building has an eave height of 20 feet. It has a lower concrete wall along a portion of the southwest corner with a height of 6 feet and a wall along the central portion with a height of 2 feet.

The interior of this building is divided into three areas. The ceiling and the walls are insulated and each area is heated by ceiling suspended gas furnaces. In addition, there is a mezzanine in the northwest corner that measures 38.5 feet by 16 feet with an area of 616 square feet. It has a concrete block wall and is used mostly for parts storage.

The building has had some minor repair to the exterior siding and appears to be in fair condition. The building is estimated to be in mid-life indicating depreciation of 50%. The depreciated value of this building is \$87,000.

Miscellaneous Storage Building

18. The miscellaneous storage building measures 6.7 feet by 6 feet with an average height of 7.5 feet and a size of 40.2 square feet. It has mostly concrete block walls with plywood on the front. The building is in fair condition. The building is estimated to be in mid-life indicating 50% depreciation. The depreciated value of the building is \$260.

Petroleum Oil and Lubrication Shed

19. This is a small building that measures 12 feet by 10 feet with an average height of 7.5 feet and an area of 120 square feet. It is a concrete block building with a metal roof. The building is in fair condition. The building is estimated to be in mid-life indicating 50% depreciation. The depreciated value of the improvement is \$860.

Small Tin Shed

20. The small tin shed is a frame building that measures 15.5 feet by 8.5 feet with a height of 8 feet and an area of 124 square feet. It has tin on the roof and sides and is in fair condition. This building is estimated to be in mid-life indicating 50% depreciation. The depreciated value of the improvement is \$370.

Walkway Building

21. The walkway extends from the office to the battery recycling building area. It has a length of 72.5 feet with a width of 7.5 feet and an average height of 8.5 feet. The structure has an area of 543.8 square feet. The building is built from square metal tubing with metal covering the roof and sides. The building has a concrete floor and is lighted. It is equipped with a decontamination blower at the upper end.

The structure is in good condition. However, this type of improvement rarely contributes to value proportionately with its cost new. Therefore, its loss in value is 50%. The depreciated value of this improvement is \$2,000.

Pump Building for Runoff Water

22. The pump building is a steel pole building that measures 25.3 feet by 16.9 feet with an average height of 18 feet and an area of 455.4 square feet. It has a concrete floor with metal sides and roof. The building is in good condition.

The building is considered to be in mid-life indicating a 50% depreciation. The depreciated value of this improvement is \$1,500.

Rainwater Collection Basin

23. The rainwater collection basin measures 343 feet by 47 feet with a depth of 7.8 feet covering an area of 16,121 square feet. A portion of this basin extending to the creek to the north measures 18 feet by 12 feet with an area of 216 square feet. The basin has concrete walls with a thickness of 8 inches and a depth of 7.8 feet. It has a concrete floor and a reported capacity of 2 million gallons. The basin covers a combined area of 16,337 square feet with a wall area of 6,427.2 square feet. The east end of this basin is a cat walk that has a length of 35 feet. The basin is in good condition.

The basin has an effective age of 5 years with a remaining economic life of 15 years indicating accrued depreciation of 25%. The depreciated value of this improvement is \$135,000.

Small Pump Shed Building

24. The small pump shed building is a small frame building that measures 10.1 feet by 8 feet with an average height of 6.5 feet and an area of 82.8 square feet. It has wood exterior siding and a shingle roof. This building is considered moveable and is not valued for the purpose of this decision.

Barn

25. The barn is older and measures 40 feet by 24.1 feet with an average height of 11 feet and an area of 964 feet. It has vertical board siding and a tin roof and is in fair condition. The effective age of this building is 45 years with a remaining 15 year economic life. The indicated accrued depreciation is 75%. The depreciated value of this improvement is \$2,200.

Stabilization Pond Area

26. The stabilization pond area measures 168 feet by 66 feet. It consists of three cells that have all a width of 50 feet. The first cell from the south has a length of 110 feet with the second cell having a length of 30 feet and the third north cell having a length of 20 feet. There is a berm around the outer edge and dividing these structures that measures 12 feet wide at the base and 4 foot wide along the upper side. These basins have a maximum depth of 5 feet. The water comes into Cell No. 1 through a 6 foot PVC line and flows through a septic system before entering this cell. Later water can flow in Cell No. 2 and then finally exits the system by the 10 inch discharge pipe into Cannon Creek in Cell No. 3. The basins all have Claymax LC Liner installed in the basin area. The stabilization area was built approximately six to seven years ago and is in good condition.

The stabilization area has an effective age of 5 years with a remaining economic life of 15 years. The indicated depreciation is 20%. The depreciated value of this improvement is \$9,500.

Storm Water Lines

27. The storm water on the Exide property is collected by approximately 3,595 feet of line that extends around the battery recycling building, and runs along the front of the shop. This line transports the storm water to the storm water detention basin. The water is then pumped back to the water treatment area by a line with a length of 1,336 feet and later pumped back to the creek with a line of 1,580 linear feet.

The storm lines have an effective age of 5 years with a remaining economic life of 15 years. The accrued depreciation is 25%. The depreciated value of these lines is \$98,000.

Site Improvements

28. The site improvements consist of various retaining walls in the vicinity of buildings, walkways, lighting, concrete area and chain link fencing.

There is a 299 foot retaining wall in the vicinity of the office. It has an average height of 5 feet and is 1,495 square feet. There is a retaining wall by the water treatment building that is 19.8 feet by 3.4 feet high and 8 inches thick, or 67.3 square feet. There is a retaining wall at the northeast corner of the smelter building that is 18.8 feet by 5.2 feet by 8 inches, 43 feet by 7 feet by 12 inches, and 34 feet by 4 feet by 6 inches. These contain 534.8 square feet. There is a 208.1 feet by 7.5 feet by 10 inch retaining wall south of the outside storage area, south of the storage building and three divider walls that are 19.3 feet long and four divider walls that are 17 feet long. They contain 2,505 square feet. The total area of walls is 4,602.1 square feet.

There is a walkway around the office building that is 1,409.2 square feet.

There is a security light on a 25 foot pole at the water detention area and three security lights on 25 foot wooden poles at the parking lot by the main building.

There is 249,273 square feet of paving in the area of the buildings which consists of 186,955 square feet of concrete and 62,318 square feet of asphalt.

There are 2,400 lineal feet of 6 foot high chain link fencing including the two electrically operated gates. The two gates are 29.5 feet and 24 feet respectively leaving 2,346.5 feet of fencing. This fencing has three strands of barbed wire. The fencing is around the employee parking area and the entry to the plant.

Site improvements rarely contribute to value in the same proportion as their cost. Therefore, the loss in value due to accrued depreciation is 66.7%. The depreciated value of these site improvements is \$325,000.

Machinery and Equipment

29. The plant contains several items of machinery and equipment that are built on special foundations within the building and are not carried on the personal property list of the Holt County Assessor's Office. This includes tanks which are outside the buildings and on the site, equipment within the smelter building that are attached to the floors and have special foundations with attached piping; the systems within the battery crusher area; the slag building; the pollution control building; the water pollution

building; the hammermill area; and other additional equipment. This equipment in some instances has been specially made and in all instances specifically configured to accommodate the lead and plastic recycling process. Each of these units are described, then cost in place estimated, and depreciation estimated. The depreciated value of this machinery and equipment is \$2,320,000, as described below.

Outside Tanks

30. The depreciated value of the outside tanks, including the chemical storage tank, the hydrated lime tank, the Butler lime tank, the propane tank, the tank in the smelter building area and the liquid oxygen tank is \$133,000. The tanks are in the early part of their life and a loss in value due to accrued depreciation of 33.3% is reasonable.

Smelter Area Equipment

31. The depreciated value of \$289,000 is assigned to the equipment in the smelter building, which includes: five smelter hoods, 5 one-half ton overhead cranes, five one-ton chain hoists, one 60 foot cross beam support with chain hoist; the 40 foot conveyor; two roller conveyors; a pipe constructed roller conveyor on an expanded metal deck in the slag storage area, a one-ton hoist on a 24 foot I-beam; a horizontal steel tank, a cast iron briqueter, a vertical steel tank, and a tank on the northwest corner of the smelter area.

The smelter area equipment has an effective age of 20 years with a remaining economic life of 30 years, indicating accrued depreciation of 40%.

Battery Area Equipment

32. The depreciated value of \$64,000 is assigned to equipment in the battery crusher area, which includes: two conveyors, a separator, a conveyor to separator, and a blast furnace system.

The equipment in this area has heavy use. It is estimated to be in mid-life, indicating accrued depreciation of 50%.

Slag Area Equipment

33. A depreciated value of \$23,000 is assigned to equipment in the slag building, which includes: 2 metal bins, 6 foot in diameter and 12 foot high, scaffolding around the tank, a screw conveyor, and a blast furnace expansion tank.

This equipment is in mid-life indicating 50% accrued depreciation.

Pollution Control/Bag House Equipment

34. The bag house was constructed in 1978 and the scrubbers were added in 1990.

This building has two sides with 12 cones and 2 large fans. The scrubber area contains an 18 foot tank with an 8.5 foot diameter, a steel storage tank that has an 8 foot diameter and 16 foot height, a steel water tank that has an 8 foot diameter and 7.5 foot height and a 30 foot long screw auger with a 2 foot diameter. There are also two steel tanks. One is 10 foot in diameter and 12 foot high while the other is 10 foot in diameter and 18 feet high.

The equipment has an effective age of 15 years with a 20 year remaining economic life, indicating depreciation of 42.86%. The depreciated value of the bag house and scrubbing equipment is \$1,583,000.

Water Filtration Building Equipment

35. The interior of the water filtration building contains three tanks that are 13 feet in diameter and 19 feet high. There is a concrete tank with an 11 foot diameter and 9 foot height and 3 inch wall thickness. The stainless steel rectangular tank is 22 feet by 6 feet with a depth of 4 feet. There are two hydraulic control rooms that are 23.2 feet by 5 feet. The building also contains four steel tanks; two are 5 foot in diameter and 10 foot high. The other tanks are 11 foot in diameter and 10 foot high and 19 foot in diameter and 13 foot high. The steel scaffolding around the tanks is 39 feet by 6 feet, 33 feet by 4 feet and 26 feet by 4 feet. The plant can handle 100 gallons per minute.

The effective age of this equipment is 15 years with a remaining economic life of 35 years, indicating accrued depreciation of 30%. The depreciated value of this equipment is \$110,000.

Hammermill Area Equipment

36. A depreciated value of \$99,000 was assigned to the equipment located in the hammermill area, which includes: the hammermill, a 30 foot conveyor, a 14 foot conveyor, three lime tanks, two 15 foot cross conveyors, two 18 foot conveyors, and a large steel storage tank.

The equipment is considered to be in mid-life, indicating accrued depreciation of 50%.

Additional Equipment

37. Depreciated value of equipment not listed in one of the above categories is \$19,000. That equipment consists of a five-ton crane in the mechanical shop with a 76 foot long manual chain hoist crainway, a 39 foot conveyor in the dewatering area, an 8 foot by 12 foot metal tank, a 9 foot by 5 foot concrete tank, and a 5 foot by 6 foot steel tank.

All equipment is estimated to be in mid-life, indicating an accrued depreciation of 50%.

Personal Property

38. Complainant has failed to declare any personal property.

Land

39. Schuylkill owns 154.4 acres of land. That land is divided into 10.9 acres of plant area, 4.5 acres of operating hazardous waste landfill, 4.5 acres of planned hazardous waste landfill area, 2.5 acres of closed landfill, 6.1 acres of landfill peripheral area, and 125.9 acres of other peripheral land.

Plant Area

40. Industrial sites in the St. Joseph area are selling for \$25,000 per acre. The indicated value of Schuylkill's 10.9 acres is \$272,500.

Operating Landfill

41. Recent sales of non-hazardous waste landfills indicated a value of \$38,000, \$52,000 and \$76,500 per acre. Of these, only the last two were operational with lines and leachate systems. These two sales support a value of \$65,000 per acre for Schuylkill's 4.5 acre operating landfill, or \$292,000.

Planned Landfill

42. A proposed landfill sold for \$38,000 per acre. A second sale, containing 173 acres for a planned expansion of a land fill sold for \$54,000 per acre. These sales indicate a value for Schuylkill's 4.5 acre planned landfill of \$40,000 per acre, or \$180,000.

Closed Landfill

43. Schuylkill has closed a landfill containing 2.5 acres. Closed landfills are selling for \$165 per acre to \$200 per acre. This indicates a value of \$180 per acre for Schuylkill's closed landfill, or \$450.

Landfill Peripheral

44. The subject property has 6.1 acres of landfill peripheral. Support land for landfills have a contributory value of \$2,000 to \$2,500 per acre. This supports a value of \$2,000 per acre for Schuylkill's peripheral landfill land, or \$12,200.

Other Peripheral Land

45. The subject property has 125.9 acres of peripheral land which is not a part of the plant area or the landfill area. The property is rough and rolling timbered land. In 1994, Schuylkill purchased a 175 acre tract adjoining the plant from the Gordon Estate for \$530 per acre. A similar tract was also sold by the Gordon Estate in 1994 for \$580 per acre. Finally, a similarly sized tract consisting of timbered land and open grassland was purchased in 1998 for a value of \$510 per acre. The price was apportioned at \$400 per acre for the timbered land and \$820 per acre for the open grassland.

These three sales indicate a value for Schuylkill's peripheral land of \$550 per acre or, \$69,245.

The record is not complete on how much, if any, of this land is the same land designated as agricultural. Therefore, we find that this entire 125.9 acres is the agricultural land contemplated by the original assessment. As indicated above, the agricultural land is valued at \$19,073 with an assessed value of \$2,290.

No New Construction

46. No new construction or property improvements have occurred between January of 1997 and January of 1998 which would warrant a higher value for the property for tax year 1998.

Shaner Appraisal Not Credible Evidence of Value

47. The appraisal presented by Shaner is not a credible indicator of value, and will be given no weight.

LAW

Jurisdiction

The Commission has jurisdiction to hear this appeal and correct any assessment which is shown to be unlawful, unfair, arbitrary or capricious. (See Footnote 1) The Commission does not have jurisdiction to hear constitutional claims.

Market Value

Property must be assessed based upon its true value in money which is defined as the price a property would bring when offered for sale by one willing to sell but who is not compelled to do so and purchased by one who is willing to purchase but is not compelled to do so. It is the fair market value of the subject property on the valuation date. (See Footnote 2)

The term "market value" means "the highest price estimated in terms of money which a property will bring if exposed for sale in the open market allowing a reasonable time to find a purchaser who buys with knowledge of all the uses to which it is adapted and for which it is capable of being used." It is "the price at which a willing seller would sell and a willing buyer would buy, neither under abnormal pressure.○ And it is "the price expected if a reasonable time is allowed to find a purchaser and if both seller and prospective buyer are fully informed." (See Footnote 3)

The most likely sales price for the property in an open market, arms-length transaction on January 1, 1997, is the only acceptable foundation for an opinion of value in this case.

Burden of Proof

In order to prevail, one of the parties must present substantial and persuasive evidence supporting the value they propose. Substantial evidence is evidence favoring facts which are such that reasonable men may differ as to whether it establishes them, and from which this hearing officer can reasonably decide an appeal on the factual issues. (See Footnote 4) Persuasive evidence is evidence that has sufficient weight and probative value to convince the trier of fact. (See Footnote 5) A party does not meet his burden of proof if evidence on any essential element of his case leaves the Commission "in the nebulous twilight of speculation, conjecture or surmise." (See Footnote 6)

Expert Opinions

The rules governing expert testimony are well settled. The testimony of an expert is to be considered like any other testimony, is to be tried by the same test, and receives just so much weight and credit as the trier of fact may deem it entitled to when viewed in connection with all other circumstances. The hearing officer, as the trier of fact, has the authority to weigh the evidence and is not bound by the opinions of experts who testify on the issue of reasonable value, but may believe all or none of the expert's testimony and may accept it in part or reject it in part. (See Footnote 7)

Going-Concern Value

In Missouri, intangible personal property is not subject to property taxation. Intangible property has no physical substance but, rather is a right of action such as easements, goodwill or trade secrets and may be evidenced by documents which have no intrinsic value, such as stocks, bonds, notes, judgments or franchises. (See Footnote 8)

In Simon Property Group, L.P. v. Boley, 51 P&D 474, we held that some properties have both a "market value" and a "going concern value." The later is value enhanced by, among other things, the intangible value of an operating business enterprise.

"Going concern" has both a tangible and intangible component. That portion of the going concern value which is the result of assemblage is tangible and taxable; while the portion of going concern value which is attributable to a saleable business asset based upon reputation rather than physical assets is intangible and not taxable. (See Footnote 9)

The test for isolating intangible business value is as simple as asking whether the disputed value is appended to the property and, thus transferrable with the property or is it independent of the property so that it either stays with the seller or dissipates upon sale. (See Footnote 10)

Similar to assemblage value, the concept that one buying the real estate necessarily gets the business is called "transmissible value." Courts have long held that transmissible value constitutes taxable real estate, even when intertwined with a business. (See Footnote 11)

One commentator suggests the following inquiry:

What is the business that is claimed to be part of the property?

Is the owner of this business the same as the owner of the real estate?

Can the business be transferred to another location separately from the real estate where it is being carried on?

Can the real estate be transferred without the business?

How does the net income stream to the owner of the business differ from the fair rental value of the real estate?

Alternatively, the presence of intangibles may be determined using the following test:

1. The intangible asset must be identifiable; i.e., legally recognized;
2. It must be capable of private ownership;
3. It must be marketable; i.e., capable of being financed and/or sold separate and apart from the tangible property; and
4. Practically, it must possess value; i.e., have the potential to earn income, or its existence is of no consequence. (See Footnote 12)

Fixtures

Characterization of an item as a fixture, something otherwise personal but attached to realty under such circumstances as to become part of it, depends upon the finding of three elements: annexation to the realty, adaptation to the use to which the realty is devoted, and intent of the annexor that the object become a permanent accession to the freehold. Missouri cases are uniform in requiring that each of these elements be present in some degree, however, slight, before an item may be considered a fixture. (See Footnote 13)

Constructive Annexation/Integrated Industrial Plant

The doctrine of constructive annexation recognizes that a particular article, not physically attached to the land, may be so adapted to the use to which the land is put that it may be considered an integral part of the land and constructively annexed thereto. Since its development, the doctrine has ordinarily been applied to only three types of objects: (i) machinery placed in an industrial establishment for permanent use and necessary to the operation of the plant (sometimes referred to as "the integrated industrial plant rule"); (ii) items that are essential to the use of what is clearly a fixture and cannot readily be used independently elsewhere; and (iii) items normally physically attached to the realty that are severed for a temporary purpose such as cleaning or repair. The integrated industrial plant rule is usually applied only to industrial plants using a substantial amount of machinery and tools, some of which are essential to the plant's operation even though not bolted to the floor or otherwise physically attached. (See Footnote 14)

DISCUSSION AND CONCLUSIONS OF LAW

Shaner's Appraisal is Not Reliable

The testimony of an expert is to be considered like any other testimony, is to be tried by the same test, and receives just so much weight and credit as the hearing officer deems it entitled to when viewed in connection with other circumstances. In a Tax Commission appeal, the Commission - not the appraiser - is the ultimate expert and the final determiner of market value. It is the appraiser's job to act as a conduit, supplying a sufficient quantity and quality of facts to allow the hearing officer to find that the appraiser's opinion of value is supported by relevant facts.

1. Summary Not Adequate.

Shaner prepared a "summary" appraisal report. That report consisted of three pages of identifying comments (C-1; p. 4, 8, 9); three pages of site maps (C-1, p. 11, 12, 13); 20 pictures of the appealed property (C-1, p. 3, 4, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23); two pages of area overview (C-1, p. 24, 25); less than half a page of highest and best use analysis (C-1, p. 26); and less than three pages containing a sales approach to value (C-1, p. 27, 28, 29).

Shaner insisted that his appraisal was adequate because it complied with USPAP. We disagree. We are not controlled by USPAP. Our guidelines are set out in 12 CSR 30-3.065. While we do not require strict adherence, in that approaches may be excluded if a reasonable explanation is made, we do require that appraisals present enough information to allow us to analyze, verify, and reach a conclusion about the appraiser's opinion of value. Anything less invalidates our statutory mandate to investigate and determine market value of appeals before us.

2. Inappropriate Comparables.

Within his appraisal report, Shaner tells us that he selected fourteen sales of manufacturing buildings to use as comparables. His selection was based solely of square footage. No adjustments were made to any of the comparables to account for areas of significant differences. The comparables indicated a range of unadjusted values between \$1.05 per square foot to \$8.33 per square foot. The average of the unadjusted square foot values was \$5.65 per square foot. Shaner pointed out the some of the problems with the subject property, including "the almost non-existent market for contaminated properties" and concluded that a \$5.00 per square foot value was reasonable. This value also assumes that "the land improvements do contribute, although minimally, to the current operation." Consequently, the 127,706 square feet of buildings equate to a value of \$640,000.

Although it is simple for us to replicate Shaner's thought processes, his analysis is absolutely

meaningless. By his own account, the subject property is an industrial facility used for the reclamation of battery components and the recycling and disposal of a portion of those hazardous components. There are no alternative uses that could reasonably be expected to provide a higher present value than the current use.(C-1, p. 26). Further, the property is a "limited-market property" with few potential buyers (C-1, p. 29), the facilities are geared for secondary lead recovery and designed for that very unique use. (tr. 18).

Given all of this, Shaner did not attempt to find other special use facilities and did not attempt to create any adjustments to recognize these very significant differences. His opinion was that the only possible purchasers of this facility would be more traditional manufacturing concerns. In proposing such an opinion, Shaner completely ignored the fact that this property - as a secondary lead recovery plant - has recently sold to Exide. He also ignored the fact that four other lead recovery plants had recently sold for continued use as lead recovery plants. Finally, he failed to recognize that there were no sales of lead recovery plants which were converted into more run-of-the-mill manufacturing concerns. These facts suggest that marketability goes beyond mere manufacturing concerns.

3. Misguided Assumption.

Shaner justified his conclusion that this property had no stand alone value by assuming that Exide bought the business - not the real property (Tr. 19). He concluded this in spite of the fact that he knew that Schuylkill had lost its major supplier of batteries and was concerned about its future, which triggered its search for a buyer (Tr. 36). If Schuylkill did not have the resource supply to continue operation, we question what business Exide actually bought.

4. Inconsistencies.

We are also baffled by Shaner's shifting position on contamination. Everything within his appraisal report suggests that the property is contaminated. This would be a reasonable conclusion considering the fact that the facility processes lead and stores waste products in a hazardous waste landfill. It is also supported by the fact that Shaner was required to wear a respirator while inspecting the facility. In his pre-filed direct testimony he stated , at least as to the income approach, "this type of property does not appeal to investors due to the location of the property, the current use, and the known liability associated with the contamination on the site" (Ex. C-2, Q14). He also stated that some of the buildings were licensed as containment facilities with hazardous materials being permitted to be place on the floors. (Ex. C-2, Q19).

However, in his oral testimony, he repeatedly denied that contamination played a part in his valuation decision (Tr. 16, 25, 39, 40). He went so far as to say that he did not know of any contamination problems (Tr. 15, 20) and denying that there was any contamination (Tr. p. 35). He finally conceded that his reference to contamination meant the landfill but that the existence of a contaminated landfill did not impact his opinion of value.

5. Failure to Value All Property.

Equally as disturbing is the fact that Shaner did not value all the property under appeal. One parcel, including a catch basin, was completely omitted. The value of a hazardous waste landfill was never explored, there is no mention of site improvements, and no value was placed upon the machinery and equipment which were fixtures within the facility. Lastly, although he testified that he valued the land, there is no evidence in his appraisal that any land value was extracted.

All of these omissions, coupled with his premise that land (sic) improvements contribute only minimally to the "current operation" (C-2, p. 29) compels us to find that Shaner was valuing less than all of the property we are looking at today.

6. Conclusion.

For all the foregoing reasons, we find that Shaner did not present credible evidence of value for this facility and his testimony and appraisal report is entitled to no weight.

Shaner's Appraisal Report Not Uncontroverted

The Tax Commission cannot base its findings upon personal opinion unsupported by competent evidence in the record. Further, we cannot arbitrarily ignore competent, substantial and undisputed testimony by a party which is not shown by the record to have been impeached or disbelieved by the Commission. (See Footnote 15) Counsel for Complainant argues that Shaner's appraisal report went virtually uncontested and, consequently it must stand as providing the correct value for the subject property.

We disagree. While it is true that the particulars about Shaner's proposed comparable sales were not explored, they were certainly controverted. Those sales were controverted on the basis that they did not evidence the highest and best use of the property. Counsel for Respondent questioned Shaner repeatedly about why he did not utilize sales of lead recovery facilities. Similarly, Respondent's appraiser asserted that run-of-the-mill manufacturing buildings do not represent the highest and best use of the property.

Consequently, we do not find Shaner's testimony to be undisputed. The degree of competence and substance within his appraisal was discussed at greater length above.

The Landfill Value Issue

Respondent's appraiser located sales of closed landfills, operating landfills, and proposed landfills on which to base his opinion of value. Complainant argues that the various portions of their landfill do not have differing values. Specifically, there is dirt and waste in the closed landfill and dirt and waste in the operating landfill. They assert that all dirt and waste is of equal value.

The key to resolving this argument does not turn on dirt and waste but on whether the landfill is still capable of accepting more dirt and waste. As the market demonstrates, landfills which are still capable of accepting fill have significantly more value than landfills which are closed.

Nor are we persuaded by counsel's argument that because operational landfills have a greater market value, there must be some intangible business value involved. The ability of a property to function according to its intended purpose does not create a business value. The ability to function is a characteristic of the property - not a characteristic of the property's ownership.

Hazardous Waste Permit Issue

In Missouri, a person who claims that the assessor has erroneously valued an intangible has the burden of identifying *and valuing* that intangible. Absent such a showing, we will not presume that such an intangible impacts value.

The EPA/DNR permit to operate a hazardous waste landfill and a resource recovery facility is an

intangible. However, it adds no value to the subject property and taxation of the property does not place a tax on the permit. The permit has no value without the land. It is not capable of being financed and/or sold separate from the tangible property and it has no ability to earn income.

Complainant seeks to argue that the landfill has no value without the permit. As demonstrated above, this is not the test for intangible value. However, even if it were the test, it would have little bearing on our determination of value. The evidence clearly demonstrated that the land qualified for a permit and that the Department of Natural Resources was willing to approve such a permit. The fact that a new purchaser may have to reapply for the permit does not diminish the value of the landfill.

Machinery/Equipment Labor Force Issue

Shaner's failure to consider the value of the fixtures seems to argue that the fixtures have no value. Obviously, if we were persuaded by his argument that only manufacturing concerns would purchase this property, then we might agree. However, we do not accept this argument.

The fixtures are part of an integrated industrial plant and are the proper subject of valuation and taxation.

Next, Complainant's counsel argues that these fixtures should be valued as if they were personal property. In other words, how much would they sell for if they were pulled out of the plant. She takes exception with Respondent's calculation of permitting, engineering and labor required to install the fixtures within the plant and on outside sites. She asserts that including these "labor" values is taxation of an intangible.

The fact that building permits, engineering plans and labor are necessary to install a portion of the plant is not an unusual phenomena and it is not "value in use" as alleged by Complainant's counsel. All construction - whether a single family residence or an industrial plant - requires labor, permits and professional services. It is a part of the construction of the plant and it is taxable. While Davis' fixture valuation may constitute "value in place", as suggested by Complainant's counsel, no credible evidence was presented that suggested that value in place and value in exchange are not the same in this instance.

Issue of Reliability of Davis Appraisal

The Davis appraisal report contains numerous typographical, grammatical and mathematical errors. Consequently, counsel for Complainant argues that the appraisal is entitled to no weight.

Again, we disagree. While we do not condone mistakes in appraisal reports, in this instance, those mistakes did not affect the ultimate opinion of value. As counsel for Complainant agrees, "It is true as Mr. Davis asserts, that many of the math errors are insignificant and do not effect his final conclusions due to rounding."

Davis Cost Approach Reliable Indicator of Value

The testimony of an expert is to be considered like any other testimony, is to be tried by the same test, and receives just so much weight and credit as the hearing officer deems it entitled to when viewed in connection with other circumstances.

After reviewing the totality of the evidence, the methodology which best represents the value of the subject property, and which best neutralizes any possibility of valuing intangible assets, is the Davis cost approach. That cost approach, with an adjustment to represent the classification and grading of

agricultural land, indicates a value of the commercial property of \$5,492,840 (assessed value \$1,757,710).

ORDER

The assessed valuation for the subject properties for tax year 1997 and 1998, as determined by the Assessor and approved by the Board of Equalization, are SET ASIDE. The Clerk is hereby ORDERED to place the following values on the tax books for tax years 1997 and 1998:

Commercial market value \$5,492,840 (assessed value \$1,757,710)

Agricultural market value \$19,973 (assessed value \$2,290)

A party may file with the Commission an application for review of a hearing officer decision within thirty (30) days of the mailing of such decision. The application shall contain specific detailed grounds upon which it is claimed the decision is erroneous. *Failure to state specific facts or law upon which the appeal is based will result in summary denial.*

If an application for review of a hearing officer decision is made to the Commission, any protested taxes presently in an escrow account in accordance with this appeal shall be held pending the final decision of the Commission. If no application for review is received by the Commission within thirty (30) days, this decision and order is deemed final and the Collector of Holt County as well as the collectors of all affected political subdivisions therein, shall disburse the protested taxes presently in an escrow account in accord with the decision on the underlying assessment in this appeal. If any protested taxes have been disbursed pursuant to Section 139.031(8), RSMo, either party may apply to the circuit court having jurisdiction of the cause for disposition of the protested taxes held by the taxing authority.

Any Finding of Fact which is a Conclusion of Law or Decision shall be so deemed. Any Decision which is a Finding of Fact or Conclusion of Law shall be so deemed.

SO ORDERED March 3, 1999.

STATE TAX COMMISSION OF MISSOURI

Luann Johnson

Hearing Officer

FOOTNOTES

1. Article X, Section 14, Missouri Constitution of 1945; Sections 138.430, 138.460(2), RSMo 1994.
2. Section 137.115, RSMo 1994; St. Joe Minerals Corp. v. State Tax Commission, 854 S.W.2d 526, 529 (Mo. App. 1993); Missouri Baptist Children's Home v. State Tax Commission, 867 S.W.2d 510, 512 (Mo. banc 1993); Hermel, Inc. v. State Tax Commission, 564 S.W.2d 888, 897 (Mo. banc 1978).
3. Appraisal Terminology and Handbook, 45h Edition, American Institute of Real Estate Appraisers, p. 121.
4. Cupples-Hesse Corporation v. State Tax Commission, 329 S.W.2d 696, 702 (Mo. 1959).

5. Brooks v. General Motors Assembly Division, 527 S.W.2d 50, 53 (Mo. App. 1975).
6. Rossman v. G.F.C. Corp. of Missouri, 596 S.W.2d 469, 472 (Mo. app. 1980).
7. Beardsley v. Beardsley, 819 S.W.2d 400, 403 (Mo. App. 1991); Curnow v. Sloan, 625 S.W.2d 605, 607 (Mo. banc 1981); Scanlon v. Kansas City, 28 S.W.2d 84, 95 (Mo. banc 1930).
8. Webster's Third New International Dictionary, unabridged, 1976.
9. Boise Cascade Corporation v. Department of Revenue, 12 Or. Tax 263 (1991).
10. State ex rel. N/S Associates v. Board of Review of the Village of Greendale, 473 N.W.2d 554 (Wis. App. 1991).
11. Public Service Company of New Hampshire v. Hew Hampton, 137 A.2d 591 (N.H. 1957).
12. *Entrepreneurial Profit Revisited*, Gaylord A. Wood, Journal of Property Tax Management, Summer 1994.
13. Sears Roebuck & Co. v. Seven Palms Motor Inn, 530 S.W.2d 695 (Mo. banc 1975).
14. Sears, supra.
15. Koplar v. State Tax Commission, 321 S.W.2d 686.

ORDER

DENYING IN PART AND GRANTING IN PART

APPLICATION FOR REVIEW

OF HEARING OFFICER DECISION

AND

MODIFYING HEARING OFFICER DECISION

On March 3, 1999, Hearing Officer, Luann Johnson, entered her Decision and Order (Decision) setting aside the assessments by the Holt County Board of Equalization and finding value for the subject properties.

Complainant filed its Application for Review of the Decision.

Respondent timely filed her Response to Application for Review.

Complainant's Grounds for Review

The grounds stated in the Application for Review were:

1. The Hearing Officer erred in using an incorrect basis for value.
2. The Hearing Officer erred in the findings of fact to which she applied the law.
3. The Hearing Officer erred in that the Decision was against the weight of the evidence.

Commission Response to General Grounds for Review

The Commission's review of the Decision is upon the record and will ordinarily be limited to whether the findings, conclusions and decision of the Hearing Officer are supported by substantial and persuasive evidence and is not arbitrary, capricious or contrary to law. *Hermel, Inc. v. STC*, 564 S.W.2d 888 (Mo. 1978); *Black v. Lombardi*, 970 S.W.2d 378 (Mo. App. E.D. 1998); *Holt v. Clarke*, 965 S.W.2d 241 (Mo. App. W.D. 1998); *Smith v. Morton*, 890 S.W.2d 403 (Mo. App. E.D. 1995). The Commission will review the Decision to determine whether facts found by the Hearing Officer are supported by substantial evidence upon the whole record and whether a reasonable mind could have conscientiously reached the same result based on a review of the entire record. *Phelps v. Metropolitan St. Louis Sewer Dist.*, 598 S.W.2d 163 (Mo. App. E.D. 1980).

The Hearing Officer is not bound by any single formula, rule or method in determining true value in money, but is free to consider all pertinent facts and estimates and give them such weight as reasonably they may be deemed entitled. The relative weight to be accorded any relevant factor in a particular case is for the Hearing Officer to decide. *St. Louis County v. Security Bonhomme, Inc.*, 558 S.W.2d 655, 659 (Mo. banc 1977); *St. Louis County v. STC*, 515 S.W.2d 446, 450 (Mo. 1974); *Chicago, Burlington & Quincy Railroad Company v. STC*, 436 S.W.2d 650 (Mo. 1968).

The Hearing Officer as the trier of fact may consider the testimony of an expert witness and give it as much weight and credit as she may deem it entitled to when viewed in connection with all other circumstances. The Hearing Officer is not bound by the opinions of experts who testify on the issue of reasonable value, but may believe all or none of the expert's testimony and accept it in part or reject it in part. *Beardsley v. Beardsley*, 819 S.W.2d 400, 403 (Mo. App. 1991); *Curnow v. Sloan*, 625 S.W.2d 605, 607 (Mo. banc 1981).

The Commission will not lightly interfere with the Hearing Officer's Decision and substitute its judgment on the credibility of witnesses and weight to be given the evidence for that of the Hearing Officer as the trier of fact. *Black v. Lombardi*, 970 S.W.2d 378 (Mo. App. E.D. 1998); *Lowe v. Lombardi*, 957 S.W.2d 808 (Mo. App. W.D. 1997); *Forms World, Inc. v. Labor and Industrial Relations Com'n*, 935 S.W.2d 680 (Mo. App. W.D. 1996); *Evangelical Retirement Homes v. STC*, 669 S.W.2d 548 (Mo. 1984); *Pulitzer Pub. Co. v. Labor and Indus. Relations Commission*, 596 S.W.2d 413 (Mo. 1980); *St. Louis County v. STC*, 562 S.W.2d 334 (Mo. 1978); *St. Louis County v. STC*, 406 S.W.2d 644 (Mo. 1966).

A review of the record in the present appeals provides support for the determination made by the Hearing Officer as to the true value in money for the subject properties, subject to modifications noted below for Specific Grounds 1H and 1I. Quite simply, Complainant's expert failed to persuade the trier of fact. Respondent's expert persuaded the trier of fact as to the appropriate use of his cost approach. While reasonable minds might differ on the Hearing Officer's Findings, a reasonable mind could have conscientiously reached the result which the Hearing Officer reached on the issue of value. There is competent and substantial evidence to establish a sufficient foundation for the determination of value,

with modifications noted below for Specific Grounds 1H and 1I. The Commission finds no basis to support a determination that the Hearing Officer acted in an arbitrary or capricious manner or abused her discretion as the trier of fact and concluder of law in this appeal.

The Commission finds the Hearing Officer did not err in her basis for value; the Hearing Officer did not err in the findings of fact to which she applied the law, with the exception of the modifications noted below for Specific Grounds 1H and 1I; and the Hearing Officer's Decision was not against the weight of the evidence. The Complainant's points are not well taken, subject to modifications noted below for Specific Grounds 1H and 1I.

Commission Response to Specific Grounds for Review

Complainant set forth in support of its three general grounds for review eight areas of alleged error on the part of the Hearing Officer. Upon review of these specific grounds, the Commission finds the points raised by Complainant are generally not well taken, to support a reversal of the Decision. The Commission will briefly address each of the specific grounds, identifying them by the number assigned in Complainant's Application for Review.

Specific Ground 1. Complainant asserts the approach utilized by the Hearing Officer was not a recognized approach to value. Complainant's point is not well taken. The Hearing Officer relied upon the cost approach developed by Respondent's appraiser. Complainant's attempt to characterize it as the *Davis Approach* misconstrues that the approach of appraiser Davis relied upon is the cost approach which has been recognized by the Commission as a proper approach to value to be presented in an appraisal report.

Specific Ground 1A. Complainant asserts deficiencies in the Davis Income Approach. This ground is irrelevant, since the Hearing Officer placed no reliance on this approach and in fact found the income approach to not be reliable. *Decision, p. 3, Finding of Fact 3.* Complainant's point is not well taken.

Specific Ground 1B. Complainant asserts deficiencies in the Davis Sales Approach. This ground is irrelevant, since the Hearing Officer placed no reliance on this approach and in fact found the market or sales comparison approach to not be reliable. *Decision, p. 3, Finding of Fact 4.* Complainant's point is not well taken.

Specific Ground 1C. Complainant asserts deficiencies in the Davis Cost Approach in that the appraiser utilized different rates of depreciation to the bone structure and the remainder of the office building. Complainant asserts the use of the term bone structure and remainder is not proper. Complainant's argument on this point is not well founded. A review of the cross-examination on this point (*Tr. 89, Line 25 - Tr. 95, Line 3*) clearly shows the appraiser was addressing *curable* and *incurable* depreciation. Complainant's point is not well taken.

Specific Ground 1D. Complainant asserts various math errors in the Respondent's appraisal relating to the cost approach. Upon review of the illustrations given by Complainant, the Commission finds Complainant is in error. For example, Complainant points out an alleged math error on page 37 of Exhibit R-1 relating to cost for the vinyl tile. Complainant asserts the correct figure should have been \$3,058.44 instead of \$3,038.44. Complainant either over looked or elected to disregard the correction made on the appraiser's errata sheet, where the correct amount of \$3,058.44 was supplied. Complainant asserts an error on page 38 with the use of a square footage amount of 6,554.91. However, the errata sheet, correct this figure to 8,554.9 which calculates to the correct figure given in the appraisal. Likewise Complainant assertion as to an incorrect calculation of the subtotal of \$367,104.78 is not correct in light

of the corrected data shown on the errata sheet, which was utilized by the Hearing Officer. Complainant's point is not well taken.

Specific Ground 1E. Complainant points out an error in the Decision, p. 8 where the Hearing Officer finds an area of the Battery Recycling Building to be 1,076, instead of 1,026. The appraiser corrected the figure on the errata sheet and determined it resulted in no change in value. Therefore, while technically, the Hearing Officer's Finding of Fact should have read 1,026, instead of 1,076, this error had no impact upon the final opinion of value. Complainant's point is not well taken.

Specific Ground 1F. Complainant asserts an error by the Hearing Officer and appraiser relative to the total building area. In point of fact, the appraiser assigns an area for the floor structure and the roof structure of 7,812.56 square feet. He then utilizes an interior area of 7,788.6 square feet. The Hearing Officer did not err in using the interior area set forth in Respondent's appraisal. The Commission finds no conflict on this point when the entirety of Respondent's appraisal on this improvement is considered. *Exhibit R-1, pp. 52-57.* Complainant's point is not well taken.

Specific Ground 1G. Complainant's next point is on the same order as the point raised in 1E. The alleged error was corrected by the appraiser on the errata sheet. The Hearing Officer's failure to pick up the correct figure with a difference of only 27.8 square feet is not a error which supports a reversal of the Decision. Furthermore, the appraiser's evidence was that this correct resulted in no change relative to the final opinion of value. Complainant's point is not well taken.

Specific Ground 1H. Complainant asserts the Reconstructed Cost New Less Depreciation for the Rainwater Collection Basin should be \$72,000, not the \$135,000 determined by the Hearing Officer. The appraiser made this correction on the errata sheet and it does have an impact on value. The Hearing Officer erred in this regard. The correct value assigned to the Basin should have been found to have been \$72,000. A modification for this point is appropriate and will be so made.

Specific Ground 1I. Complainant asserts the indicated depreciation should be 25% ($5/20 = 25\%$) on the Stabilization Pond Area. Complainant is correct on this point. The Hearing Officer erred in this regard. The correct value assigned to the Pond Area should have been found to have been \$8,950. A modification for this point is appropriate and will be so made.

Specific Ground 1J. Complainant argues that adjustments should be made to remove the engineering, permitting, systems and personnel costs which Respondent's appraiser added to personal property items considered to be part of the real estate. The Commission does not find the Hearing Officer erred in this regard. The appraisal report of Respondent and the testimony of Respondent's appraiser provide a basis upon which the Hearing Officer could conclude as she did on this point. The Commission is not persuaded that the characterizations made by Complainant in this argument are consistent with a full reading of the evidence. Complainant's point is not well taken.

Specific Ground 1K. Complainant argues the Hearing Officer erred in her finding the complainant had failed to declare any personal property. *Decision, p. 20, Finding of Fact 38.* Standing on its own, this Finding by the Hearing Officer would appear to be in error. However, a reading of the full decision and the evidence, leads a reasonable mind to the conclusion, the Hearing Officer had reference to various items of machinery and equipment which were part of the subject property which had not been declared as personal property and were accordingly determined to be fixtures for purpose of valuation. The Hearing Officer sufficiently addressed this matter in her Decision. *Decision, pp. 26-27.* Complainant's point is not well taken.

Specific Ground 1L. Complainant contends the Hearing Officer erred relative to valuation of the land value for a specific use. The Commission has reviewed the discussion put forth by the Hearing Officer. *Decision, pp. 32-33.* The Commission is not persuaded by Complainant's argument. In short, Complainant's argument appears to overstate and mischaracterize the decision of the Hearing Officer on this point. The Commission does not find the Hearing Officer valued the subject property for a specific use. Complainant's point is not well taken.

Specific Ground 2. Complainant contends the Hearing Officer erred in accepting the appraiser's opinion of adding a factor on machinery and equipment for permitting and engineering. A review of Complainant's argument, the appraisal and testimony in this regard, leads the Commission to the conclusion the Hearing Officer did not err. The appraiser relied upon cost derived from a demolition plant in the Joplin, Missouri area. The Hearing Officer found this to be persuasive. The evidence provides a basis for the finding of the Hearing Officer.

Complainant's point is not well taken.

Specific Ground 3. Complainant contends the Findings of Fact are only Findings of Opinion of Respondent's appraiser. The Hearing Officer did not err in finding an expert's opinion persuasive on a given point and adopting it as a finding of fact. *See, Commission Response to General Grounds for Review, supra.* Complainant's point is not well taken.

Specific Ground 4. Complainant contends the appraisal performed by Respondent's appraiser was not based on generally accepted appraisal practices or theories. The Hearing Officer placed reliance on the cost approach developed by Respondent's appraiser. The cost approach is an accepted approach to value. The Hearing Officer did not err in finding Respondent's cost approach as persuasive. *See, Commission Response to General Grounds for Review, supra.* Complainant's point is not well taken.

Specific Ground 5. Complainant asserts the Hearing Officer's conclusion of value must be incorrect since it relies on Respondent's appraisal which contained two approaches to value which the Hearing Officer found to be unreliable. The Hearing Officer did not err in relying on the cost approach to value. The Hearing Officer found the income and market approaches to be unreliable. This does not mean that she could not find the cost data and information to be reliable. *See, Commission Response to General Grounds for Review, supra.* Complainant's point is not well taken.

Specific Ground 6. Complainant argues that Respondent's appraisal is seriously suspect based upon the presenting of an Errata Sheet to correct typing, math and spelling errors in the appraisal report. The Commission is not persuaded that correcting of such mistakes provides a basis for the Hearing Officer to totally disregard the appraisal report. A review of the appraisal and the errata sheet shows that the appraiser did what any good appraiser would and should do when finding math or typing mistakes. In a 317 page appraisal report it is reasonable to assume that some such mistakes may occur. Complainant's further argument focusing on the allegation of the appraiser to explain the difference between real estate and real property, is without merit. Complainant's point is not well taken.

Specific Ground 7. Complainant next challenges the land valuations made by Respondent's appraiser and the utilization of these values by the Hearing Officer. The record provides support for the Hearing Officer's determination with regard land values. *See, Commission Response to General Grounds for Review, supra.* Complainant's point is not well taken.

Specific Ground 8. Complainant finally attacks the sales comparables utilized by Respondent's appraiser. Since the Hearing Officer did not rely upon this information and in fact found the sales

comparison approach to not be reliable. The point raised by Complainant is irrelevant. *See, Commission Response to General Grounds for Review, supra.* Complainant's point is not well taken.

Modification of Finding of Facts

Finding of Fact 23 is modified by striking the figure \$135,000 and inserting in lieu thereof the figure \$72,000.

Finding of Fact 26 is modified by striking the figure \$9,500 and inserting in lieu thereof the figure \$8,950.

These modifications result in a decrease in the Commercial Market Value of \$63,550 from that determined by the Hearing Officer. $\$135,000 - \$72,000 = \$63,000$. $\$9,500 - \$8,950 = \$550$. $\$63,000 + \$550 = \$63,550$. $\$5,492,840 - \$63,550 = \$5,429,290$.

In all other respects, the Decision is affirmed.

Commission Order

The Commission upon review of the record and Decision in this appeal, finds no grounds upon which the Decision of the Hearing Officer should be reversed and the value asserted by Complainant be entered as the value for the subject property. The Decision is affirmed in all points except for the modifications shown above. Accordingly, the Decision is modified on page 35 by striking the following: "\$5,492,840 (assessed value \$1,757,710)" and inserting in lieu thereof the following: "\$5,419,290 (assessed value \$1,737,370)."

Judicial review of this Order may be had in the manner provided in Sections 138.470 and 536.100 to 536.140, RSMo within thirty days of the date of the mailing of this Order.

SO ORDERED June 28, 1999.

STATE TAX COMMISSION OF MISSOURI

Van E. Donley, Chairman

Bruce E. Davis, Commissioner

EXIDE CORPORATION d/b/a)
SCHUYLKILL METALS,)
Complainant,)
)
v.) Appeals Number 97-60500 through 97-60502
)
MARGARET SALFRANK, ASSESSOR,)
HOLT COUNTY, MISSOURI,)
)
Respondent.)

DECISION AND ORDER

SUMMARY

On November 17, 1998, a hearing was held in the Holt County Courthouse before Luann Johnson, Hearing Officer. Counsel Edward E. Embree and Linda Terrill represented complainant, Exide Corporation, doing business as Schuylkill Metals (Schuylkill). Respondent, Margaret Salfrank (Salfrank), appeared in person and through her counsel, Dale K. Miller.

Bernie Shaner (Shaner) acted as appraiser for Schuylkill. William D. Davis, Jr. (Davis) appeared as appraiser for Salfrank.

The issue in these appeals is the true value in money of Schuylkill's real property. The combined commercial value of these three parcels was originally determined by the assessor to be \$4,550,000 (assessed value \$1,456,000). The Board of Equalization approved that value. Complainant appealed asserting a value of \$640,000 (assessed value \$204,800). Respondent's appraiser asserted a reconciled value of \$6,000,000 (assessed value \$1,920,000).

These parcels also include land which has been classified and graded as agricultural land. The agricultural land has a value of \$19,973 (assessed value \$2,290).

HOLDING: Respondent's cost approach is the most reliable indicator of value for the subject property. The decision of the Board of Equalization is SET ASIDE. The true value in money for the commercial property on January 1, 1997, was \$5,492,840 (assessed value \$1,757,710). The true value in money for the agricultural property was \$19,973 (assessed value \$2,290).

MOTION TO EXCLUDE

Prior to and after hearing, Complainant moved to exclude the evidence presented by Davis and Salfrank on the basis that that evidence was a business valuation rather than a real property valuation. That motion is denied.

ISSUES

The first issue in this appeal is the true value in money of Schuylkill's secondary lead smelting plant on January 1, 1997, and January 1, 1998.

Historical and Statutory Notes

Pre-1953 H 1 Amendments: RS 2730

Cross References

- Corporation, definitions, 1701.01
- Corporations, definitions for franchise tax purposes, 5733.04
- Fee charged against corporation, person defined, 5733.01
- Healthy start program, expenditure of funds, 5111.013
- Medical assistance, county determinations of eligibility, 5111.012
- Singular and plural, gender, tense, 1.43
- Tax levy by municipal port authority within county port authority, 4582.401

Library References

- Taxation \Leftrightarrow 59.
- WESTLAW Topic No. 371.
- C.I.S. Taxation \S 59, 105.
- OHur 3d: 86, Taxation \S 1, 406
- Am Jur 2d: 71, State and Local Taxation \S 1, 2

Notes of Decisions and Opinions

Entities included in definition 1
Entities subject to tax 2

1. Entities included in definition

The word "person" as used in the taxing laws (since the act of May 11, 1878) is held to include firms, companies, associations and corporations. *Fearon Lumber & Veneer Co. v. Robinson* (Lawrence 1913) 24 Ohio C.D. 460, 18 Ohio C.C.(N.S.) 146, 1 Ohio App. 209.

2. Entities subject to tax

Where taxpayer seeks by mandamus to compel tax commissioner to make a personal property tax assessment against department of liquor control of state, he is seeking to have state tax itself, and as neither this section nor GC 5366 (RC 5711.01) defining "taxpayers" and "persons" include the state, and the state is nowhere else expressly included as being subject to assessment, a demurrer to petition for failure to state a cause of action

will be sustained. *State ex rel. Williams v. Glander* (Franklin 1946) 69 N.E.2d 228, 46 Ohio Law Abs. 630, affirmed 148 Ohio St. 188, 74 N.E.2d 82, 35 O.O. 192, certiorari denied 68 S.Ct. 157, 332 U.S. 817, 92 L.Ed. 394.

Tribal members who live and work in Indian country are presumed to be beyond the jurisdiction of states to tax, unless Congress has explicitly directed otherwise, and the phrase "Indian country" is broadly defined at 18 USC 1151 to encompass formal and informal reservations and dependent Indian communities, as well as Indian allotments, whether these are restricted or held in trust by the federal government; while exemptions from tax laws should as a rule be clearly expressed, the tradition of Indian sovereignty requires reversal of this rule when a state attempts to assert tax jurisdiction over an Indian tribe or tribal members living and working on land set aside for them. *Oklahoma Tax Com'n v. Sac and Fox Nation* (U.S.Okla. 1993) 113 S.Ct. 1985, 508 U.S. 114, 124 L.Ed.2d 30, rehearing denied 113 S.Ct. 3066, 509 U.S. 933, 125 L.Ed.2d 748, on remand 7 F.3d 925.

5701.02 Definitions relating to real property

As used in Title LVII of the Revised Code:

(A) "Real property," "realty," and "land" include land itself, whether laid out in town lots or otherwise, all growing crops, including deciduous and evergreen trees, plants, and shrubs, with all things contained therein, and, unless otherwise specified in this section or section 5701.03 of the Revised Code, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto. "Real property" does not include a manufactured home as defined in division (C)(4) of section 3781.06 of the Revised Code or a mobile home, travel trailer, or park trailer, each as defined in section 4501.01 of the Revised Code, that is not a manufactured or mobile home building as defined in division (B)(2) of this section.

(B)(1) "Building" means a permanent fabrication or construction, attached or affixed to land, consisting of foundations, walls, columns, girders, beams, floors, and a roof, or some combination of these elemental parts, that is intended as a habitation or shelter for people or animals or a shelter for tangible personal property, and that has structural integrity independent of the tangible personal property, if any, it is designed to shelter. "Building" includes a manufactured or mobile home building as defined in division (B)(2) of this section.

(2) "Manufactured or mobile home building" means a mobile home as defined in division (O) of section 4501.01 of the Revised Code or a manufactured home as defined in division (C)(4) of section 3781.06 of the Revised Code, if the home meets both of the following conditions:

An appraisal more accurately reflects the value of a medical office building by incorporating more of the risks gauged by a potential investor on the tax lien date, where a project was not yet completed, including using a ten per cent vacancy rate, and factoring in economic obsolescence. *Lake Ambulatory Care Center v Cuyahoga County Bd of Revision*, BTA 93-X-851 (1-13-95).

A residential home valuation is entitled to reduction where testimony from the owner-appraiser reveals (1) neighboring properties are commercial, and include a funeral home and a gas station; (2) the home on the subject property has not been remodeled for thirty to thirty-five years; (3) the carpet is at least twenty years old; (4) the exterior trim is chipped and peeling; (5) two of the bedroom ceilings have stains from roof leaks; (6) there is no shower in the home; (7) the furnace is twenty-five years old; (8) there is no central air conditioning; (9) there is a carport, but no garage; (10) there is no wood-burning fireplace; and (11) a remodeled home located two doors down the street recently sold for \$10,000 less than the value which the owner-appraiser asserts for his property. *Dick v Franklin County Bd of Revision*, BTA 93-N-308 (1-3-95).

Appellants do not come forward with sufficient evidence for the claimed value of the subject property where the testimony and exhibits relating to the deteriorating condition of the residence are offered by the taxpayer, but no evidence is offered establishing the effect of the deterioration upon the value of the subject property. *Sanker v Cuyahoga County Bd of Revision*, BTA 93-S-903 (10-12-94).

The county board of revision properly rejects an appraiser's valuation where (1) the original appraisal is prepared fifteen months after the tax lien date; (2) the land sales used in the sales comparison approach, while commercial, are not industrial parcels, and there is no evidence to indicate adjustments made to reflect the difference; (3) the utilization of a 24.11 per cent capitalization rate is excessive and wholly unsupported by any sales in the subject parcel's vicinity; (4) none of the information in the sales comparison approach is verified with any of the buyers and sellers involved, nor are interiors of the sites inspected; and (5) the subject property's characterization as remote is incorrect where, although not in a heavy commercial or industrial area, the parcel is within six miles of a city of 30,000 which constitutes one-fourth of the county's population. *Biofit Engineered Seating, Ltd v Wood County Bd of Revision*, BTA 93-A-1059 (9-23-94).

For a two-acre property located on the northwest corner of Superior Avenue and West 3rd Street in downtown Cleveland, the highest and best use is for development rather than its current use as a surface parking lot; since sale of very comparable properties subject to the same market forces are available, it is not necessary to determine the nature of development or timing. *Cleveland Bd of Ed v Cuyahoga County Bd of Revision*, BTA 92-H-630, 92-H-631, 92-H-632 (6-17-94), affirmed by 73 Ohio St.3d 715 (1995).

A property owner's appraisal is the more accurate indicator of property's value where (1) the property owner's appraiser bases his appraisal upon personal inspection of the subject property and a market analysis, focusing on the fact that this project was built primarily to provide tax credits which accrue to the developer, while the county appraiser never visited the property; (2) the county appraiser did not account for the property being subject to federal tax credits, and (3) the county appraiser's mass appraisal technique makes no allowance for unique factors. *Bethel Park Apartments v Clermont County Bd of Revision*, BTA 92-J-980 (6-10-94).

The direct capitalization method is the best indicator of the true value for tax purposes of hotel property of a unique nature. *Webb Corp v Lucas County Bd of Revision*, BTA 92-K-1438 (6-3-94), affirmed by 72 Ohio St.3d 36 (1995).

If an appraiser relies upon the income approach to valuation, the economic rental value of the property instead of the contract rental value, may be used. The choice of one over the other depends upon which is most reflective of the property's time value in money; rental income is only one of many factors to be taken into consideration in valuing real property. *Bradley v Hamilton County Bd of Revision*, BTA 80-B-189 (1983).

3. Description of real property

Although a description of real property is defective both on the tax duplicate and in an advertisement of the sale of property for delinquent taxes, in that the number of feet is incorrect, where the lines so described go to definite points which control, and the description does not mislead either the owner or purchaser, a trial court has jurisdiction over the tax sale of the property. *Groesbeck v. Mayer (Hamilton 1923)* 20 Ohio App. 267, 153 N.E. 140, 1 Ohio Law Abs. 550.

VALUATION AND CLASSIFICATION

5713.03 Valuation of real estate

The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the true value of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon and the current agricultural use value of land valued for tax purposes in accordance with section 5713.31 of the Revised Code, in every district, according to the rules prescribed by this chapter and section 5715.01 of the Revised Code, and in accordance with the uniform rules and methods of valuing and assessing real property as adopted, prescribed, and promulgated by the tax commissioner. He shall determine the taxable value of all real property by reducing its true or current agricultural use value by the percentage ordered by the commissioner. In determining the true value of any tract, lot, or parcel of real estate under this section, if such tract, lot, or parcel has been the

subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor shall consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes. However, the sale price in an arm's length transaction between a willing seller and a willing buyer shall not be considered the true value of the property sold if subsequent to the sale:

(A) The tract, lot, or parcel of real estate loses value due to some casualty;

(B) An improvement is added to the property. Nothing in this section or section 5713.01 of the Revised Code and no rule adopted under section 5715.01 of the Revised Code shall require the county auditor to change the true value in money of any property in any year except a year in which the tax commissioner is required to determine under section 5715.24 of the Revised Code whether the property has been assessed as required by law.

The county auditor shall adopt and use a real property record approved by the commissioner for each tract, lot, or parcel of real property, setting forth the true and taxable value of land and, in the case of land valued in accordance with section 5713.31 of the Revised Code, its current agricultural use value, the number of acres of arable land, permanent pasture land, woodland, and wasteland in each tract, lot, or parcel. He shall record pertinent information and the true and taxable value of each building, structure, or improvement to land, which value shall be included as a separate part of the total value of each tract, lot, or parcel of real property.

(1983 H 260, eff. 9-27-83; 1977 H 1; 1976 H 920; 1974 S 423; 131 H 337; 128 v 410; 127 v 65; 1953 H 1; GC 5554)

Historical and Statutory Notes

Pre-1953 H 1 Amendments: 107 v 33; RS 2790

Cross References

Assessment of real property, uniform rules and procedure, county board of revision, 5715.01

Manufactured or mobile homes, taxes, 4503.06

Ohio Administrative Code References

Department of tax equalization, valuation and assessment of real property, OAC Ch 5705-3

Use of prescribed agricultural use value of land tables by county auditor, OAC 5705-5-05

Library References

Taxation \hookrightarrow 348, 348.1.
WESTLAW Topic No. 371.
C.J.S. Taxation § 411.

Olur 3d: 87, Taxation § 588, 590, 592, 593, 594, 614
Am Jur 2d: 71, State and Local Taxation § 202; 72, State and Local Taxation § 759 to 772

Solid mineral royalty as real or personal property for tax purposes, 68 ALR2d 728, 734

Judicial notice as to assessed valuations, 42 ALR3d 1439

Real estate taxation of condominiums, 71 ALR3d 952

Sale price of real property as evidence in determining value for tax assessment purposes, 89 ALR3d 1126

Validity, construction, and effect of state statutes affording preferential property tax treatment to land used for agricultural purposes, 98 ALR3d 916

Requirement of full-value real property taxation assessments, 42 ALR4th 676

Law Review and Journal Commentaries

Cash Equivalency In Ohio—Ratner J Update, Ted B. Clevenger, 21 Ohio Tax Rev 6 (January/February 1988).

The Impact and Desirability of Taxing Unmined Coal Interests in The Same Manner as Other Real Property,

Stephen James Vasek, Jr., 1 J Min L. & Pol'y 221 (1985-86).

Notes of Decisions and Opinions

Ed. Note: Casenotes with the citation "BTA" are decisions of the Ohio Board of Tax Appeals. Copies of these decisions may be purchased by telephoning the Publisher at (800)362-4500 extension 5586, or obtained on WESTLAW in the OHTX-ADMIN data base.

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Appraisal methods

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Section

- 5715.37 Tax commissioner may appear in court actions relating to valuations
 5715.38 Proceedings to remedy improper administration
 5715.39 Remittance of illegally assessed taxes and penalties; correction of errors

MISCELLANEOUS PROVISIONS

- 5715.40 Department of taxation may assign duties to auditors
 5715.41 Right of assessment official to examine public record; exception; exhibition of authority
 5715.42 Notice to tax commissioner of property subject to taxation
 5715.43 Notice to prosecuting attorney of violation of laws
 5715.44 Prosecuting attorney is legal adviser in matters of taxation
 5715.441 Recoupment charge; powers and duties of tax officials

PROHIBITIONS

- 5715.45 Prohibition against failure to perform duties imposed by law
 5715.46 Prohibition against neglect of duty or fraudulent assessment
 5715.47 Prohibition against false listing or valuation—Repealed
 5715.48 Prohibition against fraudulent valuation
 5715.49 Prohibition against divulging information; exceptions
 5715.50 Prohibition against employee's divulging information; exceptions
 5715.51 Prohibition against political activity by certain officials
 5715.61 Appeals to board of tax appeals—Repealed

PENALTIES

- 5715.99 Penalties

Uncodified Law

1999 H 283, § 149, eff. 6-30-99, amended 1998 H 694, § 3, to read:

The amendment by Sub. H.B. 694 of the 122nd General Assembly of sections 5715.13 and 5715.19 of the Revised Code is remedial legislation and applies to any complaint that was timely filed under either of those sections respecting valuations for tax year 1994, 1995, 1996, or 1997, and to complaints filed for tax years 1998 and thereafter. Notwithstanding division (A)(2) of sec-

tion 5715.19 of the Revised Code, any person authorized by this act to file a complaint under section 5715.13 or 5715.19 of the Revised Code that timely filed a complaint for tax year 1994, 1995, 1996, or 1997 may file a complaint under those sections, as amended by this act, on or before March 31, 2000, respecting valuations for tax year 1994, 1995, 1996, 1997, or 1998, and the board of revision shall proceed to hear the complaint as otherwise provided under Chapter 5715. of the Revised Code.

Cross References

Certificate of reduction in taxes, appeal from denial, 323.154
 Real estate assessment fund, expenditures from, 325.31

Tax on manufactured homes; certificate of reduction in taxes, appeal from denial, 4503.067

GENERAL PROVISIONS

5715.01 Tax commissioner to direct and supervise assessment of real property; procedures; county board of revision to hear complaints; rules of commissioner

The tax commissioner shall direct and supervise the assessment for taxation of all real property. The commissioner shall adopt, prescribe, and promulgate rules for the determination of true value and taxable value of real property by uniform rule for such values and for the determination of the current agricultural use value of land devoted exclusively to agricultural use. The uniform rules shall prescribe methods of determining the true value and taxable value of real property and shall also prescribe the method for determining the current agricultural use value of land devoted exclusively to agricultural use, which method shall reflect standard and modern appraisal techniques, that take into consideration: the productivity of the soil under normal management practices; the average price patterns of the crops and products produced to determine the income potential to be capitalized; market value of the land for agricultural use; and other pertinent factors. The rules shall provide that in determining the true value of lands or improvements thereon for tax purposes, all facts and circumstances relating to the value of the property, its availability for the purposes for which it is constructed

or being used, its obsolete character, if any, the income capacity of the property, if any, and any other factor that tends to prove its true value shall be used. The taxable value shall be that per cent of true value in money, or current agricultural use value in the case of land valued in accordance with section 5713.31 of the Revised Code, the commissioner by rule establishes, but it shall not exceed thirty-five per cent. The uniform rules shall also prescribe methods of making the appraisals set forth in section 5713.03 of the Revised Code. The taxable value of each tract, lot, or parcel of real property and improvements thereon, determined in accordance with the uniform rules and methods prescribed thereby, shall be the taxable value of the tract, lot, or parcel for all purposes of sections 5713.01 to 5713.26, 5715.01 to 5715.51, and 5717.01 to 5717.06 of the Revised Code. County auditors shall, under the direction and supervision of the commissioner, be the chief assessing officers of their respective counties, and shall list and value the real property within their respective counties for taxation in accordance with this section and sections 5713.03 and 5713.31 of the Revised Code and with such rules of the commissioner. There shall also be a board in each county, known as the county board of revision, which shall hear complaints and revise assessments of real property for taxation.

The commissioner shall neither adopt nor enforce any rule that requires true value for any tax year to be any value other than the true value in money on the tax lien date of such tax year or that requires taxable value to be obtained in any way other than by reducing the true value, or in the case of land valued in accordance with section 5713.31 of the Revised Code, its current agricultural use value, by a specified, uniform percentage.

(1983 H 260, eff. 9-27-83; 1980 H 736; 1977 H 634; 1976 H 920; 1974 S 423; 1972 S 455; 1969 S 199; 131 v H 337; 128 v 410; 127 v 65; 1953 H 1; GC 5579)

Historical and Statutory Notes

Pre-1953 H 1 Amendments: 123 v 779; 114 v 764; 111 v 486; 106 v 247, § 2; 103 v 786, § 1; 100 v 84, § 10

Cross References

County auditor shall be real estate assessor, assessment procedure, employment and compensation of employees, 5713.01

Duties of assessor, 5713.02
Powers and duties of board of tax appeals, 5703.02
Valuation of real estate, 5713.03

Ohio Administrative Code References

Application of rules, OAC 5705-3-13
Equalization procedures, OAC 5705-3-02
Land qualified to be valued at its current agricultural use land value, OAC Ch 5705-5
Procedure after reappraisal or update, OAC 5705-3-12

Procedure prior to actual appraisal, classification of property, coding of records, land valuation, OAC 5705-3-04, 5705-3-06, 5705-3-07
Review of appraisal, OAC 5705-3-09
Taxable value defined, OAC 5705-3-01
Valuation and assessment of real property, OAC Ch 5705-3

Library References

Taxation \approx 319, 346, 451-492.
WESTLAW Topic No. 371.
C.J.S. Social Security and Public Welfare § 199-201.
C.J.S. Taxation § 376, 410, 512-524, 526-538, 540-546.
OJur 3d: 86, Taxation § 148, 151; 87, Taxation § 588 to 590, 606, 616
Am Jur 2d: 72, State and Local Taxation § 720

Validity, construction, and effect of state statutes affording preferential property tax treatment to land used for agricultural purposes, 98 ALR3d 916.
Requirement of full-value real property taxation assessments, 42 ALR4th 676

Baldwin's Ohio Township Law, Text 16.1.

Notes of Decisions and Opinions

In general 2
Constitutional issues 1
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1. Constitutional issues
Real property, whether commercial, residential, or vacant, must be assessed on the basis of same uniform percentage of actual value. *Black v. Board of Revision of Cuyahoga County* (Ohio 1985) 36 Ohio St.3d 11, 475 N.E.2d 1264, 16 O.B.R. 363.
That portion of 1972 S 455, eff. 6-28-72, making provision for the current use method of evaluation is invalid.

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From
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obligations to vehicle owners under warranty repair programs, and, thus, the manufacturer liable for use tax; the manufacturer paid the costs for the parts and services, and the owners not the consumers. *Gen. Motors Corp. v. Wilkins* (Ohio, 04-28-2004) 102 Ohio St.3d 33, 806 N.E.2d 517, 2004-Ohio-1869. Taxation ⇨ 3663

pharmaceutical company which manufactured samples of prescription drugs sent to field representatives for free distribution to Ohio physicians was "seller" liable for use tax on finished drug samples which it brought into and used in Ohio. *Cyanamid Co. v. Tracy* (Ohio, 02-07-1996) 74 Ohio St.3d 468, 659 N.E.2d 1263, 1996-Ohio-133. Reconsideration denied 75 Ohio St.3d 1413, 661 N.E.2d 760. Taxation ⇨ 3670

corporation engaged in the design, manufacture, assembly, and sale of motor vehicles, as well as associated parts and accessories, was properly assessed for use taxes on expenses connected to warranty repairs performed by its dealers on the corporation's vehicles, despite the corporation's assertion that it was not the "consumer" of the parts and services provided. A consumer is one who purchases tangible personal property or has received a service, other consumption, or benefit in this state, the parts and services provided under the warranty program were clearly purchased, used or received in Ohio, and the corporation received the benefit of the repair services, in that its dealers performed the services on the corporation's behalf in order to fulfill the corporation's warranty obligations to vehicle owners. *General Motors Corp v Tracy*, BTA 97-T-168, 97-T-169, 2002 WL 31298109 (10-4-02).

Direct use in manufacturing, mining or processing, exemptions

Automobile manufacturer realized a benefit from repair services provided by its dealers to fulfill manufacturer's obligations under warranty and repair programs, and that benefit was subject to use tax because the dealers had no warranty or repair-program obligation to the customers, and the manufacturer received a benefit because the parts and services used it to fulfill its warranty or repair-program obligations to its customers. *Gen. Motors Corp. v. Wilkins* (Ohio, 04-28-2004) 102 Ohio St.3d 33, 806 N.E.2d 517, 2004-Ohio-1869. Taxation ⇨ 3660

Others, exemptions

Excise-tax and use-tax statutes which assume that the sale or use of motor vehicles is the sale of personal property prevail as exceptions to the broadly enacted general definition of "personal property" to exclude motor vehicles registered by their owners. *Gen. Motors Corp. v. Wilkins* (Ohio, 04-28-2004) 102 Ohio St.3d 33, 806 N.E.2d 517, 2004-Ohio-1869. Taxation ⇨ 3650

Under amended definition of "seller" for purposes of use tax, advertising company which provided magazines containing advertisements for its products which were distributed free of charge, and which register tapes with advertisements for its

clients published on reverse side, provided communications media, and thus was not seller of items and did not have to collect use tax on transactions occurring after effective date of amendment. *TV Fanfare Publications, Inc. v. Tracy* (Ohio, 11-10-1999) 87 Ohio St.3d 165, 718 N.E.2d 433, 1999-Ohio-311. Taxation ⇨ 3650

That taxpayer was able to convince tax agent to cancel portion of use tax assessment attributable to cost of free samples other than cost of materials did not estop state from thereafter assessing use tax based upon fully absorbed cost of free samples. *NDM Acquisition Corp. v. Tracy* (Ohio, 07-24-1996) 76 Ohio St.3d 83, 666 N.E.2d 1080, 1996-Ohio-49. Estoppel ⇨ 622(2)

Tax Commissioner was not required to promulgate formal rule before assessing use tax against fully absorbed cost of free samples, absent any evidence that Commissioner previously had policy of not taxing fully absorbed cost or that enabling statute required promulgation of rule. *NDM Acquisition Corp. v. Tracy* (Ohio, 07-24-1996) 76 Ohio St.3d 83, 666 N.E.2d 1080, 1996-Ohio-49. Taxation ⇨ 3674

9. Nexus

An out-of-state seller of automobile warranties to Ohio residents, by registering with the secretary of state as a foreign corporation, had a "substantial nexus with the state," as defined by RC 5741.01(1)(7), for purposes of being assessed for use taxes. Insofar as the argument that RC 5741.01(1)(7) was unconstitutional, violating the Due Process Clause of the Fourteenth Amendment, and the Commerce Clause, of the United States Constitution, the Board of Tax Appeals lacked the jurisdiction to address this issue, the board being without authority to rule on claims of a constitutional nature, such determination being properly reserved for courts created by Section 1, Article IV, of the Ohio Constitution. *Automotive Warranty Corp of America v Zaino*, BTA 2000-V-920, 2002 WL 31873591 (12-20-02).

5741.011 Sham transactions—Repealed

(2003 H 95, eff. 6-26-03; 2001 H 405, eff. 12-13-01)

LEVY AND COLLECTION

5741.02 Levy of tax; rate; exemptions

(A)(1) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided. The tax shall be collected as provided in section 5739.025 of the Revised Code, provided that on and after July 1, 2003, and on or before June 30, 2005, the rate of the tax shall be six per cent. On and after July 1, 2005, the rate of the tax shall be five and one-half per cent.

(2) In the case of the lease or rental, with a fixed term of more than thirty days or an indefinite term with a minimum period of more than thirty days, of any motor vehicles designed by the manufacturer to carry a load of not more than one ton, watercraft, outboard motor, or aircraft, or of any tangible personal property, other than motor vehicles designed by

10. "Price," construed

"Price" of free samples that manufacturer gave to potential customers, against which use tax was assessed, included not only cost of materials contained in samples, but also internal labor and overhead costs. *NDM Acquisition Corp. v. Tracy* (Ohio, 07-24-1996) 76 Ohio St.3d 83, 666 N.E.2d 1080, 1996-Ohio-49. Taxation ⇨ 3677

"Produced cost" of personal property against which use tax is assessed includes labor and overhead charges, despite contention by pharmaceutical company that use tax should be imposed only against cost of raw materials and packaging of prescription drug samples prepared for free distribution to Ohio physicians. *Am. Cyanamid Co. v. Tracy* (Ohio, 02-07-1996) 74 Ohio St.3d 468, 659 N.E.2d 1263, 1996-Ohio-133, reconsideration denied 75 Ohio St.3d 1413, 661 N.E.2d 760. Taxation ⇨ 3677

Where the record contains insufficient evidence to show that the purchaser of a motor vehicle assumed \$2,600 in debt from the seller, the tax commissioner's determination that the purchaser's use tax liability should be redetermined based on a purchase price of \$3,100, rather than \$500 as claimed by the purchaser, will be overturned. *Scheimann v Zaino*, BTA 2002-P-708, 2003 WL 21214257 (5-23-03).

13. Motor vehicle repairs

A corporation engaged in the design, manufacture, assembly, and sale of motor vehicles, as well as associated parts and accessories, was properly assessed for use taxes on expenses connected to warranty repairs performed on the corporation's vehicles, as the corporation had purchased the repairs performed and had exercised sufficient rights or powers incidental to the ownership of repair parts to subject its purchases of such parts to the use tax. Further, the corporation realized the benefit of the repair services under RC 5741.01(N) in that motor vehicle dealers performed the repairs on the corporation's behalf in order for the corporation to comply with the requirements of its warranty obligations. *General Motors Corp v Tracy*, BTA 97-T-168, 97-T-169, 2002 WL 31298109 (10-4-02).

tion, to be used by the lessee or rented by the seller at the time the lease or seller on the basis of the total amount to agreement. If the total amount of the that are not calculated at the time the and collected by the seller at the time case of an open-end lease or rental, the total amount to be paid during the initial renewal period as it comes due. As meaning as in section 4501.01 of the nit attached to the watercraft.

ection, in the case of a transaction, the rental of tangible personal property, the is or rentals.

onsuming in this state tangible personal vice provided, shall be liable for the tax, x has been paid to this state; provided, ty for the tax if the tax has been paid to revised Code or prepaid by the seller in

onsumption in this state of the following to the storage, use, or consumption or services purchased under the following

e is subject to the excise tax imposed by ded said tax has been paid;

n, tangible personal property or services, sale not subject to the tax imposed by

onsumption of or benefit from which this f the United States, laws of the United on shall not exempt from the application or consumption of tangible personal but that has come to rest in this state, g on interstate commerce that is stopped to another is exempt from the excise tax sed Code;

this state by a nonresident tourist or nonresident of this state, if the property ide this state and is not required to be

d, upon which taxes have been paid to the tax paid to such other jurisdiction. tion and imposed pursuant to section e exceeds the amount paid to another the tax imposed by this section and any suant to section 5741.021, 5741.022, or pective rates of such taxes.

jurisdiction" means the total amount of de, purchase, or use of tangible personal d to another state or political subdivision yment of such tax does not entitle the

used mobile home, as defined by section ary 1, 2000;

(7) Drugs that are or are intended to be distributed free of charge to a practitioner licensed to prescribe, dispense, and administer drugs to a human being in the course of a professional practice and that by law may be dispensed only by or upon the order of such a practitioner;

(8) Computer equipment and related software leased from a lessor located outside this state and initially received in this state on behalf of the consumer by a third party that will retain possession of such property for not more than ninety days and that will, within that ninety-day period, deliver such property to the consumer at a location outside this state. Division (C)(8) of this section does not provide exemption from taxation for any otherwise taxable charges associated with such property while it is in this state or for any subsequent storage, use, or consumption of such property in this state by or on behalf of the consumer.

(9) Cigarettes that have a wholesale value of three hundred dollars or less used, stored, or consumed, but not for resale, in any month.

(D) The tax applies to the storage, use, or other consumption in this state of tangible personal property or services, the acquisition of which at the time of sale was excepted under division (E) of section 5739.01 of the Revised Code from the tax imposed by section 5739.02 of the Revised Code, but which has subsequently been temporarily or permanently stored, used, or otherwise consumed in a taxable manner.

(E)(1)(a) If any transaction is claimed to be exempt under division (E) of section 5739.01 of the Revised Code or under section 5739.02 of the Revised Code, with the exception of divisions (B)(1) to (11) or (28) of section 5739.02 of the Revised Code, the consumer shall provide to the seller, and the seller shall obtain from the consumer, a certificate specifying the reason that the transaction is not subject to the tax. The certificate shall be in such form, and shall be provided either in a hard copy form or electronic form, as the tax commissioner prescribes.

(b) A seller that obtains a fully completed exemption certificate from a consumer is relieved of liability for collecting and remitting tax on any sale covered by that certificate. If it is determined the exemption was improperly claimed, the consumer shall be liable for any tax due on that sale under this chapter. Relief under this division from liability does not apply to any of the following:

(i) A seller that fraudulently fails to collect tax;

(ii) A seller that solicits consumers to participate in the unlawful claim of an exemption;

(iii) A seller that accepts an exemption certificate from a consumer that claims an exemption based on who purchases or who sells property or a service, when the subject of the transaction sought to be covered by the exemption certificate is actually received by the consumer at a location operated by the seller in this state, and this state has posted to its web site an exemption certificate form that clearly and affirmatively indicates that the claimed exemption is not available in this state;

(iv) A seller that accepts an exemption certificate from a consumer who claims a multiple points of use exemption under division (B) of section 5739.033 of the Revised Code, if the item purchased is tangible personal property, other than prewritten computer software.

(2) The seller shall maintain records, including exemption certificates, of all sales on which a consumer has claimed an exemption, and provide them to the tax commissioner on request.

(3) If no certificate is provided or obtained within ninety days after the date on which the transaction is consummated, it shall be presumed that the tax applies. Failure to have so provided or obtained a certificate shall not preclude a seller, within one hundred twenty days after the tax commissioner gives written notice of intent to levy an assessment, from either establishing that the transaction is not subject to the tax, or obtaining, in good faith, a fully completed exemption certificate.

(4) If a transaction is claimed to be exempt under division (B)(13) of section 5739.02 of the Revised Code, the contractor shall obtain certification of the claimed exemption from the contractee. This certification shall be in addition to an exemption certificate provided by the contractor to the seller. A contractee that provides a certification under this division shall be deemed to be the consumer of all items purchased by the contractor under the claim of exemption, if it is subsequently determined that the exemption is not properly claimed. The certification shall be in such form as the tax commissioner prescribes.

(F) A seller who files a petition for reassessment contesting the assessment of tax on transactions for which the seller obtained no valid exemption certificates, and for which the seller failed to establish that the transactions were not subject to the tax during the one-hundred-twenty-day period allowed under division (E) of this section, may present to the tax commissioner additional evidence to prove that the transactions were exempt. The seller shall file such evidence within ninety days of the receipt by the seller of the notice of assessment, except that, upon application and for reasonable cause, the tax commissioner may extend the period for submitting such evidence thirty days.

(G) For the purpose of the proper administration of sections 5741.01 to 5741.22 of the Revised Code, and to prevent the evasion of the tax hereby levied, it shall be presumed that any use, storage, or other consumption of tangible personal property in this state is subject to the tax until the contrary is established.

(H) The tax collected by the seller from the consumer under this chapter is not part of the price, but is a tax collection for the benefit of the state, and of counties levying an additional use tax pursuant to section 5741.021 or 5741.023 of the Revised Code and of transit authorities levying an additional use tax pursuant to section 5741.022 of the Revised Code. Except for the discount authorized under section 5741.12 of the Revised Code and the effects of any rounding pursuant to section 5703.055 of the Revised Code, no person other than the state or such a county or transit authority shall derive any benefit from the collection of such tax.

(2005 H 66, eff. 6-30-05; 2003 S 37, eff. 10-21-03; 2003 H 95, eff. 9-26-03; 2003 S 47, § 3, eff. 7-1-03; 2003 S 47, § 1, eff. 6-12-03; 2002 S 143, eff. 7-1-03; 2000 H 612, § 3, eff. 7-1-01; 2000 H 612, § 1, eff. 9-29-00; 1999 H 283, eff. 7-1-01; 1999 H 163, eff. 3-31-99; 1998 S 142, eff. 3-30-99; 1991 H 298, eff. 8-1-91; 1986 H 583; 1981 H 694; 1974 S 544; 1971 H 439; 132 v S 350; 129 v 1164; 128 v 421; 1953 H 1; GC 5546-26)

Historical and Statutory Notes

Ed. Note: Comparison of these amendments [2005 H 66, eff. 6-30-05 and 2003 S 47, § 1 and 3, eff. 6-12-03 and 7-1-03, respectively] in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable so that they are required by that section to be harmonized to give effect to each amendment. In recognition of this rule of construction, changes made by 2005 H 66, eff. 6-30-05, 2003 S 47, § 1, eff. 6-12-03, and 2003 S 47, § 3, eff. 7-1-03, have been incorporated in the above amendment. See *Baldwin's Ohio Legislative Service Annotated*, 2005, page 5/L-1733, and 2003, page 5/L-222, or the OH-LEGIS or OH-LEGIS-OLD database on Westlaw, for original versions of these Acts.

Ed. Note: 2005 H 66 Effective Date Provision:

SECTION 612.69.12. The amendments by this act to section 5741.02 of the Revised Code provide for or are essential to implementation of a tax levy. Therefore, under Ohio Constitution, Article II, Section 1d, the amendments are not subject to the referendum and go into immediate effect when this act becomes law. However, the amendment to division (E) of the section goes into effect January 1, 2006.

Amendment Note: 2005 H 66 inserted "and one-half" at the end of division (A)(1); added division (C)(9); and rewrote division (E). Prior to amendment, division (E) read:

"(E)(1) If any transaction is claimed to be exempt under division (E) of section 5739.01 of the Revised Code or under section 5739.02 of the Revised Code, with the exception of divisions (B)(1) to (11) or (28) of section 5739.02 of the Revised Code, the consumer shall provide to the seller, and the seller shall obtain from the consum-

er, a certificate specifying the reason that the transaction is not subject to the tax. The certificate shall be provided either in a hard copy form or electronic form, as prescribed by the tax commissioner. If the transaction is claimed to be exempt under division (B)(13) of section 5739.02 of the Revised Code, the exemption certificate shall be provided by both the contractor and contractee. Such contractee shall be deemed to be the consumer of all items purchased under the claim of exemption, if it is subsequently determined that the exemption is not properly claimed. The certificate shall be in such form as the tax commissioner by rule prescribes. The seller shall maintain records, including exemption certificates, of all sales on which a consumer has claimed an exemption, and provide them to the tax commissioner on request.

"(2) If no certificate is provided or obtained within the period for filing the return for the period in which the transaction is consummated, it shall be presumed that the tax applies. The failure to have so provided or obtained a certificate shall not preclude a seller or consumer from establishing, within one hundred twenty days of the giving of notice by the commissioner of intention to levy an assessment, that the transaction is not subject to the tax."

Amendment Note: 2003 S 37 made nonsubstantive changes.

Amendment Note: 2003 H 95 redesignated former division (A) as division (A)(1), substituted "as provided" for "pursuant to the schedules" following "The tax shall be collected" in division (A)(1), added ", provided that on and after July 1, 2003, and on or before June 30, 2005, the rate of the tax

USE TAX; STORAGE TAX

shall be six per cent. On and after July 1, the rate of the tax shall be five per cent." to division (A)(1), added divisions (A)(2) to (4), and added division (H).

Cause of action for over-collection of tax: 5740.09

Schedules for collection of taxes, 5739.02

ALR Library

2000 ALR 5th 6, Cable Television Equipment Services as Subject to Sales or Use Tax
71 ALR 5th 671, Sufficient Nexus to Require Foreign Entity to Collect Sales, or Use Tax—Postal Auto Transit Cases.

Encyclopedias

OH Jur. 3d Automobiles & Other Vehicles Application for Certificate—Payment of Payment of Sales or Use Tax
OH Jur. 3d Leases of Personal Property Applicable Laws.
OH Jur. 3d Taxation § 9, Excise Taxes.
OH Jur. 3d Taxation § 270, Generally.
OH Jur. 3d Taxation § 277, Things Assumed Preparing Printed Matter.
OH Jur. 3d Taxation § 299, Generally.
OH Jur. 3d Taxation § 302, Generally.
OH Jur. 3d Taxation § 304, Interaction and Sales Tax Provisions.
OH Jur. 3d Taxation § 305, Generally.
OH Jur. 3d Taxation § 313, Packaging and Equipment.
OH Jur. 3d Taxation § 323, Generally.
OH Jur. 3d Taxation § 324, Taxation by or of the State.

Law Re

A New Line for an Old Tax: Ohio's Individuals, Douglas Oliver. (Ed. note: line in the State income tax form Ohioans to report use tax on out-of-State

Ed. Note: Casenotes with their Appeals. Copies of these decisions (800)362-4500 extension 5586.

Motor vehicle repairs 15

I. Constitutional issues

Taxpayer's handling of "exam books" were given to out-of-state teachers to pay book sales, constituted "taxable event" of dormant commerce clause, where received orders for books in state, estab-

the same manner as provided in section 5751.02. The tax commissioner may, by authority, separately or together, to make a plan. The tax commissioner shall approve amendments of division (A) of this section. If the registration shall be included in the return (A)(1) of this section, and the group shall file the group with the next tax return it files.

Every person is jointly and severally liable for the tax imposed thereon. The tax commissioner may, for purposes of registration and remittance to assessment under section 5751.09 of the

as provided in divisions (E)(2) to (10) of section 5751.02, one per cent of the value of their ownership interest, solely through related interests, by common ownership together with the common owners, shall be included. They are not members of a consolidated elected group under Title 11 of the Revised Code. The tax on sales, and pay taxes under this chapter as a

taxable gross receipts between its members. The tax commissioner a registration fee equal to the amount of the tax on each person in the group. No additional fee shall be paid by the group once the group has remitted a fee. The fee shall be timely paid before the later of the date of the 15, 2005. The fee shall be collected and reported under section 5751.04 of the Revised Code.

If the registration shall be included in the return (A) of this section, and the group must file the next quarterly tax return it files with the

jointly and severally liable for the tax imposed thereon. The tax commissioner may require one of the following of registration and remittance of the tax, as provided under section 5751.09 of the Revised

the value of property the person transfers shall be reported on the return after the person receives the property

Every person or a combined taxpayer, the taxpayer shall be jointly and severally liable for the tax on the property that any of the taxpayer's members own, as provided under section 5751.09 of the Revised Code.

(B) Property brought into this state within one year after it is received outside this state by a person or group described in division (A)(1) or (2) of this section shall not be included as taxable gross receipts as required under those divisions if the tax commissioner ascertains that the property's receipt outside this state by the person or group followed by its transfer into this state within one year was not intended in whole or in part to avoid in whole or in part the tax imposed under this chapter.

(C) The tax commissioner may adopt rules necessary to administer this section. (2005 H 66, eff. 6-30-05)

5751.02 Commercial activity tax

(A) For the purpose of funding the needs of this state and its local governments beginning with the tax period that commences July 1, 2005, and continuing for every tax period thereafter, there is hereby levied a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state. The tax imposed under this section is not a transactional tax and is not subject to Public Law No. 86-272, 73 Stat. 555. The tax imposed under this section is in addition to any other taxes or fees imposed under the Revised Code. The tax levied under this section is imposed on the person receiving the gross receipts and is not a tax imposed directly on a purchaser. The tax imposed by this section is an annual privilege tax for the calendar year that, in the case of calendar year taxpayers, is the annual tax period and, in the case of calendar quarter taxpayers, contains all quarterly tax periods in the calendar year. A taxpayer is subject to the annual privilege tax for doing business during any portion of such calendar year.

(B) The tax imposed by this section is a tax on the taxpayer and, shall not be billed or invoiced to another person. Even if the tax or any portion thereof is billed or invoiced and separately stated, such amounts remain part of the price for purposes of the sales and use taxes levied under Chapters 5739, and 5741, of the Revised Code. Nothing in division (B) of this section prohibits a person from including in the price charged for a good or service an amount sufficient to recover the tax imposed by this section.

(2005 H 66, eff. 6-30-05)

Historical and Statutory Notes

Ed. Note: Former RC 5751.02 repealed by 1981 H 694, eff. 11-15-81; 1977 H 415, § 1, § 7.

5751.03 Amount of tax

(A) Except as provided in divisions (B) and (D) of this section and in sections 5751.031 and 5751.032 of the Revised Code, the tax levied under this section for each tax period shall be the product of two and six-tenths mills per dollar times the remainder of the taxpayer's taxable gross receipts for the tax period after subtracting the exclusion amount provided for in division (C) of this section.

(B) Notwithstanding division (C) of this section, the tax on the first one million dollars in taxable gross receipts each calendar year shall be one hundred fifty dollars. For calendar year 2006, the tax imposed under this division shall be paid not later than May 10, 2006, by both calendar year taxpayers and calendar quarter taxpayers. For calendar year 2007 and thereafter, the tax imposed under this division shall be paid with the fourth-quarter tax return or annual tax return for the prior calendar year by both calendar year taxpayers and calendar quarter taxpayers.

(C)(1) Each calendar quarter taxpayer may exclude the first two hundred fifty thousand dollars of taxable gross receipts for a calendar quarter and may carry forward and apply any unused exclusion amount to the three subsequent calendar quarters. Each calendar year taxpayer may exclude the first one million dollars of taxable gross receipts for a calendar year.

afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require:

(2) The subject matter of the statement is one of the following:

(a) A fact that is of consequence to the determination of the action other than the credibility of a witness;

(b) A fact that may be shown by extrinsic evidence under Evid. R. 608(A), 609, 616(A), 616(B) or 706;

(c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence.

(C) **Prior inconsistent conduct.** During examination of a witness, conduct of the witness inconsistent with the witness's testimony may be shown to impeach. If offered for the sole purpose of impeaching the witness's testimony, extrinsic evidence of the prior inconsistent conduct is admissible under the same circumstances as provided for prior inconsistent statements by Evid. R. 613(B)(2).

(Amended, eff 7-1-98)

RULE 614. Calling and Interrogation of Witnesses by Court

(A) **Calling by court.** The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(B) **Interrogation by court.** The court may interrogate witnesses, in an impartial manner, whether called by itself or by a party.

(C) **Objections.** Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

RULE 615. Separation and Exclusion of Witnesses

(A) Except as provided in division (B) of this rule, at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. An order directing the 'exclusion' or 'separation' of witnesses or the like, in general terms without specification of other or additional limitations, is effective only to require the exclusion of witnesses from the hearing during the testimony of other witnesses.

(B) This rule does not authorize exclusion of any of the following persons from the hearing:

- (1) a party who is a natural person;
- (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney;
- (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause;

(4) in a criminal proceeding, a victim of the charged offense to the extent that the victim's presence is authorized by statute enacted by the General Assembly. As used in this rule, "victim" has the same meaning as in the provisions of the Ohio Constitution providing rights for victims of crimes.

(Amended, eff 7-1-01; 7-1-03)

RULE 616. Methods of Impeachment

In addition to other methods, a witness may be impeached by any of the following methods:

(A) **Bias.** Bias, prejudice, interest, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.

(B) **Sensory or mental defect.** A defect of capacity, ability, or opportunity to observe, remember, or relate may be shown to impeach the witness either by examination of the witness or by extrinsic evidence.

(C) **Specific contradiction.** Facts contradicting a witness's testimony may be shown for the purpose of impeaching the witness's testimony. If offered for the sole purpose of impeaching a witness's testimony, extrinsic evidence of contradiction is inadmissible unless the evidence is one of the following:

(1) Permitted by Evid. R. 608(A), 609, 613, 616(A), 616(B), or 706;

(2) Permitted by the common law of impeachment and not in conflict with the Rules of Evidence

(Effective 7-1-91; amended, eff 7-1-98)

**ARTICLE VII
OPINIONS AND EXPERT
TESTIMONY**

RULE 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue.

RULE 702. Testimony by Experts

A witness may testify as an expert if all of the following apply:

(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness is qualified by scientific, technical, or other specialized knowledge, skill, experience, training, or education. To the extent that the testimony is based on the result of a procedure, the testimony is relevant only if the procedure is generally accepted in the field.

(1) The testimony is based on scientific, technical, or other specialized knowledge, skill, experience, training, or education that is not generally known by laypersons.

(2) The testimony is based on a procedure that is generally accepted in the field.

(3) The procedure was conducted in accordance with the standards of the field.

(Amended, eff 7-1-98)

RULE 703. Experts

The facts or data which an expert is permitted to testify about are those perceived by or known to the expert at the hearing.

RULE 704.

Testimony in the form of an expert opinion or inference is admissible if the testimony is based on sufficient facts or data and the expert is qualified to testify on those facts or data and to give an opinion or inference thereon unless the testimony is excluded by the rules of evidence.

RULE 705. Underlying Experiments

The expert may testify to the results of the experiment and give an opinion or inference thereon unless the testimony is excluded by the rules of evidence.

RULE 706. Impeachment

Statements concerning the qualifications, performance, or bias of an expert witness may be introduced for impeachment if they are relevant and material to the issues in the case.

(A) Relied upon as the basis of the expert's testimony;

(B) Established by the testimony of another expert witness or by other evidence.

If admitted for impeachment, the testimony may be read into evidence.

(Effective 7-1-98)

ARTICLE VIII

RULE 801. Definitions

The following definitions apply:

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Impeachment

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EXPERT

Opinion by Lay

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(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

(Amended, eff 7-1-94)

RULE 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing.

RULE 704. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.

RULE 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give his reasons therefore after disclosure of the underlying facts or data. The disclosure may be in response to a hypothetical question or otherwise.

RULE 706. Learned Treatises for Impeachment

Statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art are admissible for impeachment if the publication is either of the following:

(A) Relied upon by an expert witness in reaching an opinion;

(B) Established as reliable authority (1) by the testimony or admission of the witness, (2) by other expert testimony, or (3) by judicial notice.

If admitted for impeachment, the statements may be read into evidence but shall not be received as exhibits.

(Effective 7-1-98)

**ARTICLE VIII
HEARSAY**

RULE 801. Definitions

The following definitions apply under this article:

(A) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(B) **Declarant.** A "declarant" is a person who makes a statement.

(C) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(D) **Statements which are not hearsay.** A statement is not hearsay if:

(1) **Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with his testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving him, if the circumstances demonstrate the reliability of the prior identification.

(2) **Admission by party-opponent.** The statement is offered against a party and is (a) his own statement in either his individual or a representative capacity, or (b) a statement of which he has manifested his adoption or belief in its truth, or (c) a statement by a person authorized by him to make a statement concerning the subject, or (d) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

RULE 802. Hearsay Rule

Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.

RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, unless circumstances indicate lack of trustworthiness.