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BEDFORD BOARD OF EDUCATION

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LAW AND ARGUMENT

The Appellee, Bedford Board of Education has filed a brief in this appeal. This reply brief of the Appellant, First Interstate Hawthorne Ltd., responds to the issues and arguments raised by the Appellee, Bedford Board of Education (hereinafter Appellee or Board of Education) in their brief. This brief (with the exception of citations to the supplement) is the exact same reply brief filed by the Appellant in Case Number 05-2311 currently pending before the Court and consolidated for purposes of oral argument with this appeal.

The Appellee, like the Board of Tax Appeals, sidesteps the issue in this case: what is the fair market value of parcel 795-06-022. The Appellee attempts to convince this Court, as it did the Board of Tax Appeals, that the parcel cannot be valued separate from the shopping center of which it is a part. However, the value of the entire shopping center is not at issue in this appeal. And, whether the subject property is valued as part of that shopping center (which no party, not even the Appellee or Board of Tax Appeals have attempted to do) or separately, a value still has to be assigned to parcel number 795-06-022. The County Auditor, Board of Revision, and Appellant each valued the property for what it is, retail space and land. Supp. at pages 1-29.

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

acres of land, these are the objective parameters that define the valuation issue in this case. The County Auditor and the Appellant utilized the income approach to value the property. Supp. at pages 11, and 27-28. The County Auditor also considered the cost approach. Supp. at pages 25-26. And, the Cuyahoga County Board of Revision considered the relevant unit of value to be \$29.50 per square foot. Supp. at page 29.

In several sections of their brief the Appellee criticize the Appellant for failing to rebut the evidence submitted by the Appellee at the hearing before the Board of Tax Appeals. The Appellant submits that there was nothing to rebut. The Appellee's evidence consisted of an opinion by a real estate appraiser that was unsubstantiated, never reduced to writing, and not supported by market information. Supp. at pages 37-38, and 39 (Transcript at pages 24-25, and 29). Mr. Nash never performed a highest best use analysis to determine whether the property would be worth more if valued as part of a larger shopping center. Supp. at page 39 (Transcript at page 29). As a result, the Board of Tax Appeals adopted an appraiser's opinion of highest and best use who did not perform a highest and best use analysis. See Supp. at page 39 (Transcript at page 29). Mr. Nash never determined whether his opinion of the highest and best use of the property met the four criteria for highest and best use. See The Appraisal of Real Estate, Twelfth Edition, at page 307. Mr. Nash did not prepare an appraisal or express an opinion of value for the property. Supp. at pages 37 and 38 (Transcript at pages 24-25).

At page 1 in their brief the Appellee states that the issue in this case is "whether the Ohio Board of Tax Appeals ("BTA") was required to affirm a decision of a Board of Revision when it had been established that there was no evidence supporting the same." This characterization of the appeal is not correct. The issue is whether the Board of Tax Appeals decision and order is

reasonable and lawful. The Appellant submits that the Board of Tax Appeals decision is unreasonable because there is no evidence in the record to support the decision. Secondly, the Board of Tax Appeals decision is unlawful because the Board of Tax Appeals has failed to carry out the statutory mandate contained in Revised Code Section 5717.03.

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

In his testimony before the Ohio Board of Tax Appeals the Appellee's appraiser, Timothy C. Nash, acknowledged that there was no market data before the Board of Tax Appeals to support his findings and conclusions with respect to the highest and best use of the property and the relevant economic unit. Supp. at pages 35, 37-38, 39 (Transcript at pages 13-14, 24-25, 29). As a result, the Board of Tax Appeals decision and order in this case is based on nothing more than Mr. Nash's unsubstantiated opinion. He did not prepare a report, he did not supply the Board of Tax Appeals with any market data to support his findings, and the Board of Tax Appeals decision and order based upon his testimony is unreasonable. There is nothing in the record and this appeal for this Court to review to determine whether the Board of Tax Appeals factual findings in this case are reasonable. There is simply no evidence (objective market data) in the record to support the Board of Tax Appeals decision in this case.

What is in the record in this case is the Cuyahoga County Auditor's analysis which clearly, contrary to the claims of the Appellee, identifies the retail area and land assessed by the County Auditor in this case. See Supp. at pages 22-28. The property valued by the Appellant in its materials before the Board of Revision is the exact same property valued by the Cuyahoga County Auditor in his record card. See Supp. at pages 7, 10, and 17-19. The Appellee's claim at page 13 in their brief that the County Auditor valued something else ignores the actual evidence

contained in the record in this case, the Appellee cites no evidence in support of their claim to the contrary. Moreover, there is nothing in the record to support the Appellee's allegation at the top of page 26 in their brief that the County Auditor allocated a value to the subject property after valuing it as part of a larger property. In fact, the evidence in this case points to just the opposite. See Supp. at pages 22-28. The other evidence in the record in this case is the Board of Revision's oral hearing worksheet and journal entry which appear as Exhibit "E" in the Transcript on Appeal. Supp. at page 29. Based upon the Board of Revision's review of the Appellant's evidence, which is Exhibit "C" from the Transcript on Appeal, containing income and expense information and capitalization rates valuing the property between \$1,083,371.66 to \$1,265,280.59 based on the 2001 and 2002 information, the Board of Revision valued the property at a fair market value of \$1,500,000. Supp. at pages 11 and 29. There has been no evidence in the form of opinion or otherwise to contradict this valuation evidence. The Appellee submitted no appraisal or valuation evidence before the Ohio Board of Tax Appeals for the Appellant to rebut. Mr. Nash did not appraise the property nor did he prepare an analysis of highest and best use and economic unit in support of this "opinion" before the Board of Tax Appeals.

The Appellee's assertion at page 11 in their brief that "the BTA did not find that 795-06-022 could not be valued..." is not correct. The Board of Tax Appeals clearly held that the parcel could not be valued "other than as a single economic unit." See Board of Tax Appeals decision and order at pages 6-7. At some point in the real property assessment process parcel 795-06-022 has to be valued. The Board of Tax Appeals completely misses this point. The hypocrisy in this case is that the Board of Tax Appeals found that they could not value the property separate from

the shopping center of which it is a part and then affirmed a valuation of the parcel by the County Auditor that valued the parcel separate from the rest of the shopping center. As a result the Board of Tax Appeals decision is internally inconsistent and thereby unreasonable. See Ridgeview Center, Inc. v. Lorain Cty. Bd. of Revision (1987), 42 Ohio St. 3d 30 (Board of Tax Appeals decision that was internally inconsistent reversed and remanded).

The Appellant submits that the income approach best captures the value of the real property and the Board of Revision's decision reflects the disparity between the actual income and expense information for the property and the Cuyahoga County Auditor's projections in the record cards. The Board of Tax Appeals decision and order rejecting this evidence in favor of the unsubstantiated opinion of an appraiser is unreasonable. The Appellant submits that it affirmatively appears from the record that the Board of Tax Appeals adopted an appraiser's opinion of highest and best use and economic unit where the appraiser did not perform a highest and best use analysis or collect and submit data in support of his opinion. Supp. at pages 37-39 (Transcript at pages 24-25 and 29).

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

The Appellee in their brief in this appeal, as they did before the Board of Tax Appeals, argue that the Board of Tax Appeals can act as a Court of appeals and as a fact finder. The arguments espoused by the Appellee at pages 15 and 16 in their brief are incompatible with the arguments made beginning at page 16 in their brief. In the first sentence at page 15 in their brief the Appellee characterizes the issue before this Court as "whether the BTA was required to affirm the decision of the Board of Revision..." Then at page 16 the Appellee acknowledges that "the BTA is not the administrative equivalent of a court of appeals." It makes a difference to litigants

whether the body they are before is a fact finder or a reviewing court. The cases cited by the Appellant in their original brief at pages 9-10 in this case show that Board of Tax Appeal has moved from fact finder to a reviewing court and this trend has made it difficult for parties to know how to prepare and present a case before the Board of Tax Appeals. The Appellant submits that the statute, Revised Code 5717.03 as interpreted by this Court controls and that the Board of Tax Appeals is required to render an independent determination of value in each appeal, not act as a reviewing court. See Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision (1988), 37 Ohio St. 3d 16, 25 (The BTA or the court of common pleas is to hear the case denovo); Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision (1996), 76 Ohio St. 3d 13, 17 (The BTA's failure to find value based upon its own independent analysis of the evidence is unreasonable and unlawful.); Black v. Bd. of Revision (1985), 16 Ohio St. 3d 11, 13 (the court is required to make an independent determination concerning the valuation of the property at issue); Park Ridge Co. v. Franklin Cty. Bd. of Revision (1987), 29 Ohio St. 3d 12, 14 (The provisions of R.C. 5717.05 require the common pleas court to consider the administrative record from the board of revision.). In this appeal the Board of Tax Appeals failed to render an independent determination of the taxable value of the Appellant's property based on the evidence in the record in the appeal.

The Appellee at page 31 at their brief attempts to reduce the Appellant's case to the fact that the Board of Education did not present evidence of value from its appraiser to support its appeal to the Board of Tax Appeals. This is not correct. The Appellant's appeal is that the Board of Tax Appeals should not rely on the unsubstantiated opinion of an expert in overturning a Board of Revision decision. When no evidence is submitted on appeal to the Board of Tax Appeals, the Board of Tax Appeals does not sit as a court of appeals in reviewing the evidence

before the Board of Revision. The Board of Tax Appeals is required to render an independent determination of value. The Board of Tax Appeals did not do that in this case. As a result, the Board of Tax Appeals decision is unlawful. The Board of Tax Appeals failed to carry out the statutory mandate contained in Revised Code 5717.03.

CONCLUSION

For the foregoing reasons, the Appellant First Interstate Hawthorne Ltd. Partnership respectfully requests that this Court reverse the decision and order of the Ohio Board of Tax Appeals and remand the case to the Ohio Board of Tax Appeals with instructions to find the fair market value or true value in money of the subject real property to be \$1,500,000 as of January 1, 2003, for a corresponding taxable value, utilizing a 35% common level of assessment of \$525,000.

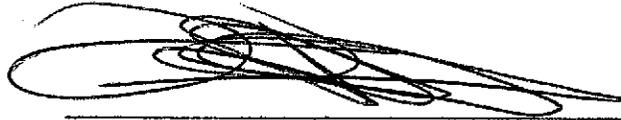
~~Respectfully submitted,~~

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief of Appellant was mailed via regular U.S. mail postage prepaid, the 17th day of January 2007 to the following: Thomas A. Kondzer, Kolick and Kondzer, 24500 Center Ridge Road, Suite 175, Westlake, Ohio 44145-5697, Attorney for the Appellee Bedford Board of Education, Timothy J. Kollin, Assistant County Prosecutor, Justice Center, 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, Attorney for the Appellees Cuyahoga County Board of Revision and Cuyahoga County Auditor, and Marc Dann, Ohio Attorney General, State Office Tower, 17th Floor, 30 East Broad Street, Columbus, Ohio 43215-3428, Attorney for the Appellee Tax Commissioner of the State of Ohio.



Todd W. Sleggs (0040921)

OHIO BOARD OF TAX APPEALS

Bedford Board of Education,)	CASE NOS. 2004-V-1310
)	2004-V-1311
Appellant,)	
)	(REAL PROPERTY TAX)
vs.)	
)	DECISION AND ORDER
Cuyahoga County Board of Revision,)	
the Cuyahoga County Auditor, and)	
First Interstate Hawthorne Limited)	
Partnership,)	
)	
Appellees.)	

APPEARANCES:

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- For the County Appellees - William D. Mason
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Entered **AUG 11 2006**

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

This cause and matter came on to be considered by the Board of Tax Appeals upon two notices of appeal filed herein by the Bedford School District Board of Education ("BOE"), from a decision of the Cuyahoga County Board of Revision

("BOR"). In said decision, the BOR determined the taxable value of the subject property for tax year 2003.

The matter was submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcript ("S.T.") certified to this board by the BOR, the evidence and testimony presented at a hearing ("H.R.") before this board, and the briefs submitted by counsel to the BOE and counsel to the appellee property owner.

The subject real property is located in the Oakwood taxing district, specifically parcel number 795-06-022, and consists of in-line retail store space, a portion of a parking lot, and several strips of land that are all part of a larger shopping complex.

This board previously addressed the subject property's valuation for tax year 2002 in *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Nov. 10, 2005), BTA Nos. 2005-A-287, 288, unreported, currently pending on appeal, Ohio Supreme Ct. No. 2005-2311, (the "2002" appeal). The facts of the 2002 appeal are identical to the facts before us today.

The values of the parcel, as originally determined by the auditor for tax year 2003, are as follows:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
Parcel 795-06-022		
LAND	\$1,611,700	\$ 564,100
BLDG	\$1,448,300	\$ 506,900
TOTAL	\$3,060,000	\$1,071,000

After consideration of a complaint filed by the property owner, the BOR reduced the subject's values as follows:

Parcel 795-06-022	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 750,000	\$262,500
BLDG	\$ 750,000	\$262,500
TOTAL	\$1,500,000	\$525,000

On appeal, the BOE contends that the BOR's decision to reduce the value of the subject property is not supported by competent, probative evidence of value. Conversely, it is the property owner's position that the BOR's value should be retained, based upon the information it submitted to the BOR.

Initially, this board notes the decisions in *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336, 337, and *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493, 495, wherein the Supreme Court held that an appealing party has the burden of coming forward with evidence in support of the value which it has claimed. Once competent and probative evidence of true value has been presented, the opposing parties then have a corresponding burden of providing evidence which rebuts appellant's evidence of value. *Id.*; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318, 319. Thus, the burden is upon the appealing party, the board of education, to establish, through the presentation of competent and probative evidence, a different value than that found by the board of revision. See *Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325; *Bd. of Edn. of the Columbus City School Dist. v. Franklin Cty. Bd. of Revision* (Nov. 28, 1997), BTA No. 1996-S-93, unreported.

When determining value, it has long been held by the Supreme Court that "the best evidence of 'true value in money' of real property is an actual, recent sale of

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

The BOE argues that the BOR improperly relied upon the information offered by appellee property owner. In consideration of the BOE's position, we must review what transpired at the BOR.¹

Specifically, before the BOR, the property owner presented an "opinion of value" that suggested the value of the subject, as of January 1, 2003, was \$1,500,000. Counsel requested that the value be based upon the BOR's previous decision to set the subject's value at \$1,500,000 based upon the evidence and testimony presented in the 2002 case before the BOR. Attached to its complaint is a copy of the BOR's 2002 decision letter. Counsel for the property owner argued that all the facts necessary for the BOR to reduce the value to \$1,500,000 were the same, and that the BOR hearing for the 2002 case was conducted in early 2004 and contained relevant information relating to the

¹ As we have noted on prior occasions, the audio tape supplied is of poor quality.

subject's valuation for 2003. Unlike in the 2002 case, the representative of the property owner was unable to appear and verify the information taken from the owner's records in the instant appeal.² Provided within the owner's written opinion submitted by counsel were income and expense statements for the property that show the decline in income at the property as vacancy has increased. Also attached are a rent roll and a summary of the store tenants with the square footage and percentage of center space each tenant occupies. "The valuation set forth in the complaint is based on the historic income and expense information for the property, the vacancy at the property, and the prospect for a turnaround at the center." S.T. at Ex. D.

After considering the foregoing, the BOR decreased the subject's market value to \$1,500,000. The hand-written notation on the BOR's worksheet indicates: "BOR hearing for 2002-\$1,500,000 K-Mart (vac), 2003-same decision 2002."

In our 2002 decision, we held:

"[T]here was no evidence in the record to support the BOR's valuation of the subject. *** There is nothing to which we can point as the basis for its ultimate determination, and without an understanding of the basis for its action, we cannot rely upon its conclusions. See *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564. Thus based upon the foregoing concerns we will rely upon the county auditor's valuation of the subject, as set forth in the property record cards included in the statutory transcript." *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, supra, at 10.

² Counsel for the property owner requested that the BOR listen to the audio tape from the 2002 case. S.T., audio tape. Likewise, in its merit brief, the property owner asks this board to review the BOR audio tape from 2002. Appellee's brief at 2-3. Our review of the record from below in the instant appeal fails to disclose any agreement of the parties or notice from the BOR regarding taking any administrative notice of the record from the 2002 case. Furthermore, at no point in the proceedings before this board have the parties requested us to take any administrative notice of the record in the 2002 case.

Given the BOR's reliance upon its previous decision to determine value for 2003, we necessarily reach the same conclusion today. We find that the evidence before the BOR was insufficient to support the decrease in value assigned to the subject property.

As was the case in the 2002 appeal, the BOE offered the testimony of Timothy C. Nash, MAI before this board. As an expert real estate appraiser, Mr. Nash testified that he considered the subject property part of a single economic unit made up of the entire shopping complex. H.R. at 14. Mr. Nash testified that although in theory it would be possible to place a value on a portion of the whole economic unit, the subject should be valued in conjunction with the entire economic unit. H.R. at 23. The property owner similarly provided the testimony of Paul D. Provencher, an expert real estate appraiser, who testified that the subject property could be appraised and valued separately from the remainder of the shopping center. H.R. at 39. Neither appraiser offered an opinion of value for the subject property.

The BOE argues that the property owner is collaterally estopped from re-litigating the issue of the subject's highest and best use as a single economic unit. As we read our 2002 decision, we held that the property owner failed to meet its burden of proof and further concluded that the BOR did not have competent and probative evidence to support its decision to reduce value. We further concluded that:

"Based on the configuration of the subject parcel and Mr. Nash's representations on how much a shopping center is traditionally viewed in the market, we agree that it would logically follow that

the highest and best use of the subject property is as a single economic unit.” *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, supra, at 9-10.

The test for determining whether the relitigation amounts to collateral estoppel was stated by the Supreme Court in *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36, 41:

“In *Thomson v. Wing* (1994), 70 Ohio St.3d 176, 183 ***, we stated that collateral estoppel was applicable when the fact or issue ‘(1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom collateral estoppel is asserted was a party in privity with a party to the prior action.’ ****” (Citations omitted.)

The court has previously held that a finding of value for a prior tax year is clearly not res judicata as to a subsequent tax year. *Id.*, *Freshwater v. Belmont Cty. Bd. of Revision* (1997), 80 Ohio St.3d 26. Furthermore, the 2002 case is currently pending before the Supreme Court and has yet to receive a final determination. See *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 382 (“A valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action. ****”) Therefore, we hereby decline to apply the doctrine of collateral estoppel in the present situation.³

Furthermore, the property owner argues in its brief that its filing of the complaint against the valuation of the subject property for tax year 2003 was an effort to

³ While we were not persuaded that the subject property could have been valued as a portion of an economic unit in the 2002 case, we are unable to speculate whether it could not be done, based on the record before us.

invoke the so-called "carry-forward" provisions of R.C. 5715.19(D), citing *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St.3d 305, in an effort to have the BOR apply its 2002 decision to tax year 2003.

R.C. 5715.19(D) provides in pertinent part:

"If a complaint filed under this section for the current year is not determined by the board of revision within the time prescribed for such determination, the complaint and any proceedings in relation thereto shall be continued by the board as a valid complaint for any ensuing year until such complaint is finally determined by the board or upon appeal from a decision of the board. In such case, the original complaint shall continue in effect without further filing by the original taxpayer ***."

In *Columbus Bd. of Edn.* the property owner challenged the valuation of its property for tax year 1993 and appealed the BOR's determination to this board. In August of 1996, we determined value for 1993 and ordered the auditor to list and assess the property in conformity with our order. The auditor assessed the property for tax years 1993, 1994, and 1995 consistent with our order; however, the auditor's 1996 value represented a different value after a triennial update. The property owner sent a letter to the BOR, on February 5, 1997, requesting this board's order be applied to 1996. The BOR treated the letter as a continuing complaint for 1993, conducted a hearing, and ultimately determined the subject's value for 1996, utilizing our 1993 valuation determination with a 5% increase factor. On appeal, this board held that the BOR did not have jurisdiction to decide the subject's 1996 valuation. The Supreme Court reversed our decision, holding that the BOR did have authority to decide the continuing 1993 complaint under R.C. 5715.19(D):

“According to R.C. 5715.19(D), the complaint for 1993 continued as a valid complaint into tax year 1996, when the BTA finally determined the 1993 complaint. According to this statute, the original, 1993 complaint ‘shall continue in effect without further filing by the original taxpayer, his assignee, or any other person or entity authorized to file a complaint under this section’ *** We interpret R.C. 5715.19(D) to mean that the 1993 complaint continued to be valid for tax year 1996 and that *** [the property owner] was not required to file a fresh complaint for that year. *Of course, a fresh complaint filed by *** [the property owner] or the BOE would have halted the automatic carryover of the value determined in the 1993 complaint.* *** Thus, the BOR had jurisdiction over this complaint for tax year 1996 without further filing by *** [the property owner].” Citations omitted, explanations and emphasis added.

The property owner filed a complaint against the valuation of the subject property for 2003. Said “fresh complaint” halted any carryover status the 2002 complaint may have had. See, also, *Cleveland Mun. School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 105 Ohio St.3d 404, 2005-Ohio-2285.

Accordingly, based upon the preponderance of the evidence before this board, the value of the subject real property for tax year 2003 shall be as follows:

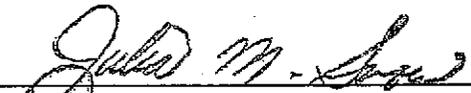
Parcel 795-06-022	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$1,611,700	\$ 564,100
BLDG	\$1,448,300	\$ 506,900
TOTAL	\$3,060,000	\$1,071,000

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

Mr. Dunlap dissenting.

I disagree with the foregoing decision and order and, for the reasons I expressed in *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, supra, I respectfully dissent.

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



Julia M. Snow, Board Secretary

or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue. Appeals from the redetermination by the director of development under division (B) of section 5709.64 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the redetermination is required by law to be given. Appeals from a decision of the tax commissioner concerning an application for a property tax exemption may be taken to the board of tax appeals by a school district that filed a statement concerning such application under division (C) of section 5715.27 of the Revised Code. Appeals from a redetermination by the director of job and family services under section 5733.42 of the Revised Code may be taken by the person to which the notice of the redetermination is required by law to be given under that section.

Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the director of development if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner or redetermination by the director has been given as provided in section 5703.37, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of such appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of such appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner or director to the taxpayer, enterprise, or other person of the final determination or redetermination complained of, and shall also specify the errors therein complained of, but failure to attach a copy of such notice and incorporate it by reference in the notice of appeal does not invalidate the appeal.

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

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

(As amended by S.B. 174, Laws 1973; H.B. 920, Laws 1976; H.B. 634, Laws 1977; H.B. 351, Laws 1981; H.B. 260, Laws 1983; S.B. 124, Laws 1985; H.B. 321, Laws 1985; S.B. 49, Laws 1994; H.B. 612, and S.B. 287, Laws 2000; S.B. 200, Laws 2002, effective September 6, 2002.)

§ 135-150

Sec. 5717.03. Decisions of the board of tax appeals, certification effect.—(A) A decision of the board of tax appeals on an appeal filed with it pursuant to section 5717.01, 5717.011, or 5717.02 of the Revised Code shall be entered of record on the journal together with the date when the order is filed with the secretary for journalization.

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

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

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

journal shall be certified by the board by certified mail to all persons who were parties to the appeal before the board, the person in whose name the property is listed or sought to be listed, if the decision determines the valuation or liability of property for taxation and if such person is not a party to the appeal, the taxpayer or other person to whom notice of the tax assessment, valuation, determination, finding, computation, or order, or correction or redetermination thereof, by the tax commissioner was by law required to be given, the director of budget and management, if the revenues affected by such decision would accrue primarily to the state treasury, and the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue:

(D) In the case of an appeal from a municipal board of appeal created under section 718.11 of the Revised Code, the order of the board of tax appeals and the date of the entry thereof upon the board's journal shall be certified by the board by certified mail to all persons who were parties to the appeal before the board.

(E) In the case of all other appeals or applications filed with and determined by the board, the board's order and the date when the order was filed by the secretary for journalization shall be certified by the board by certified mail to the person who is a party to such appeal or application, to such persons as the law requires, and to such other persons as the board deems proper.

(F) The orders of the board may affirm, reverse, vacate, modify, or remand the tax assessments, valuations, determinations, findings, computations, or orders complained of in the appeals determined by the board, and the board's decision shall become final and conclusive for the current year, unless reversed, vacated, or modified as provided in section 5717.04 of the Revised Code. When an order of the board becomes final the tax commissioner and all officers to whom such decision has been certified shall make the changes in their tax lists or other records which the decision requires.

(G) If the board finds that issues not raised on the appeal are important to a determination of a controversy, the board may remand the cause for an administrative determination, and the issuance of a new tax assessment, valuation, determination, finding, computation, or order, unless the parties stipulate to the determination of such other issues without remand. An order remanding the cause is a final order. If the order relates to any issue other than a municipal income tax matter appealed under sections 718.11 and 5717.011 of the Revised Code, the order may be appealed to the court of appeals in Franklin county. If the order relates to a municipal income tax matter appealed under sections 718.11 and 5717.011 of the Revised Code, the order may be appealed to the court of appeals for the county in which the municipal corporation in which the dispute arose is primarily situated.

(As amended by H.B. 920, Laws 1976; H.B. 634, Laws 1977; H.B. 260, Laws 1983; H.B. 95, Laws 2003, effective January 1, 2004.)

§ 135-200

Sec. 5717.04. Appeal from decision of board of tax appeals to supreme court; parties who may appeal; certification.—The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin County.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of budget and management, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required

1 properties, there may be little
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value are worked into the test of financial
 feasibility for redevelopment of the land.

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

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

Testing Criteria in Highest and Best Use Analysis

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

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

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

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

highest and best use of land as
 though vacant. Among all reasonable
 alternative uses, the one that yields the
 highest present and future payments
 are made for labor, capital, and enterprise
 in optimal coordination.
 highest and best use of property as
 improved. The use of property as
 improved that will maximize its value