

IN THE SUPREME COURT OF OHIO

Board of Education of the Columbus City Schools,

Case No. 06-1429

Appellee,

v.

Franklin County Board of Revision, Franklin County Auditor and Tax Commissioner of the State of Ohio,

Appellees.

Appeal from the Ohio Board of Tax Appeals
Case No. 2005-A-381

and

2100 Maple Canyon Plaza, LLC,

Appellant.

MERIT BRIEF OF APPELLEE BOARD OF EDUCATION OF THE COLUMBUS CITY SCHOOL DISTRICT

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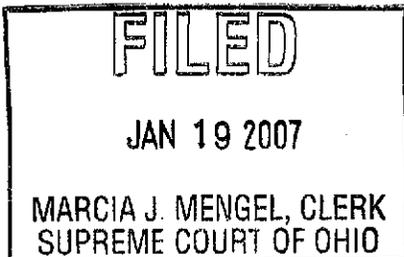


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STATEMENT OF THE CASE AND FACTS

Appellant, 2100 Maple Canyon, LLC (Maple Canyon), purchased the property involved in this appeal on June 25, 2003, for the sum of \$2,900,000. The property was originally built in 1998 as a Rite-Aid Pharmacy and is now used by CVS as a pharmacy. In January, 2002, CVS acquired the use the property from Rite-Aid by assuming the lease on the property which Rite-Aid had originally entered into with the prior owner of the property (Appellant's Supp. 16; which states that "CVS assumed this lease as of 01/13/2002 from Rite Aid"). With minor modifications to the store, CVS turned the Rite-Aid store into a CVS store (see property record card, Appellant's Supp., p. 10). Appellant Maple Canyon then sold the property to Ted and Maria's Plaza in July, 2004, for the sum of \$4,200,000 (see Lorms' appraisal, Supp., p. 33).

The Appellee Board of Education filed a complaint against the property for tax year 2003, based on the price of \$2,900,000 which was paid for the property by Maple Canyon. The complaint sought to increase the true value of the property to the sale price of \$2,900,000 from the Auditor's original value of \$1,760,000. The BTA accepted the sale price of the property as the true value of the property for tax year 2003, and Appellant filed an appeal with this Court.

While Appellant devotes much of its brief to a discussion of the Rite-Aid and then CVS lease on the property, the lease was never submitted into evidence so that the actual terms of the lease could be examined by Appellee and the BTA. Appellant's attorney presented the Board of Revision with only an "Abstract" of the lease prepared by the tenant, CVS, and with an "affidavit" of someone involved with CVS (Supp. p. 15). Neither the owner nor the tenant ever testified before the Board of Revision and hearing before the BTA was waived. Appellant's appraiser, Robin Lorms, also

devoted much space in his appraisal report to a discussion of the terms and conditions of the actual lease, but he too did not include a copy of the lease in his appraisal.

The appellant in this appeal is 2100 Maple Canyon Plaza, LLC. However, at the time the appeal was filed with this Court, 2100 Maple Canyon Plaza no longer owned the property, having sold it in June, 2004. The taxes which are at issue in this appeal are the sole responsibility and liability of the current owner of the property, Ted and Maria's Plaza. Consequently, Appellant 2100 Maple Canyon had no standing to file and prosecute this appeal because it had no legal interest in the property or in any of the real property taxes which have to be paid as a result of the board of revision complaint filed by the Appellee Board of Education.

LAW AND ARGUMENT

Reply to Appellant's Proposition of Law No. I:

THE LISTING OF THE ADDRESS OF THE PROPERTY OWNER ON A BOARD OF REVISION COMPLAINT FORM DOES NOT RUN TO THE CORE OF PROCEDURAL EFFICIENCY.

THE ADDRESS OF THE PROPERTY OWNER TO BE LISTED ON A BOARD OF REVISION COMPLAINT FORM IS THE ADDRESS OF THE OWNER AT THE TIME THE COMPLAINT IS FILED WITH THE BOARD OF REVISION.

The board of revision complaint form (DTE Form 1) contains a line for a complainant to list the "Owner of Property" and "Street Address, City, State, Zip Code" (Line 1). On the complaint involved in this appeal, the Appellee Board of Education wrote "2100 Maple Canyon Plaza, LLC" as the owner of the property and "CVS 05436-01, One CVS Drive, Woonsocket, RI." as the address of the property owner (Line 1 of the complaint). This is the address of the tenant, CVS. The number in the address, 05436-01, is CVS's store number for this property (see CVS Abstract, Supp., p. 15).

In its merit brief, Appellant Maple Canyon claims that the address listed on the complaint form by the Board of Education "is not the address of the property owner" (p. 2) and for this reason the complaint "was defective" and should have been dismissed as a "jurisdictional" matter (brief, p. 3). Appellant claims that the "correct" address which should have been listed on the complaint by the Board of Education was "the tax mailing address" of Maple Canyon as such was listed on the conveyance fee form and deed filed and recorded by Maple Canyon in June, 2003. The tax mailing address on the deed and conveyance fee form was "3127 LaBalme Trail, Fort Wayne, Indiana" (see Supp., p. 2 and 5).

There is no merit to any of Appellant's claims with respect to the address which was set forth on the complaint form. First, the listing of the property owner's address on a board of revision

complaint form by a board of education is not a jurisdictional requirement. In fact, the owner's address on Line 1 of the complaint form has no legal significance with respect to any procedures which are conducted by a board of revision, and superfluous information cannot affect the "core of procedural efficiency" of a board of revision proceeding. Second, the Board of Education attached to its complaint a copy of the deed and conveyance fee form, which contain the very information Appellant refers to (the tax mailing address of LaBalme Trail, Fort Wayne, Indiana). Consequently, if that information was relevant in any manner, it was provided to the Auditor as part of the complaint. Third, Appellant's claim that the "correct" address given on the complaint form must be the "tax mailing address" which is set forth on a deed and conveyance fee form is not, itself, correct. If the "tax mailing address" of a property owner is the correct address to put on a board of revision complaint form (and this is not at all clear from the statutes), then it is the tax mailing address at the time the complaint is filed, and not a prior address which may no longer be effective. Appellant has failed to prove that the "tax mailing address" of Maple Canyon which was originally listed on the conveyance fee form and the deed was, in fact, the tax mailing address of the property owner at the time the complaint was filed by the Board of Education.

1. Appellant Failed To Prove That The Claimed Tax Mailing Address Was The Correct Tax Mailing Address Of The Property Owner.

Appellant claims that address of 2100 Maple Canyon which should have been listed on the complaint form was the "tax mailing address" of Maple Canyon as set forth on the conveyance fee form and deed filed and recorded in June, 2003. This claim overlooks the possibility that a property owner could have changed the tax mailing address of the property after the deed was recorded. R.C. 323.13 allows a property owner to change a tax mailing address: it states that "[a] change in the

mailing address of any tax bill shall be made in writing to the county treasurer,” and in Franklin County a property owner can change the tax mailing address on the County Auditor’s website.

The Appellee Board of Education attached to its BTA brief evidence showing that Maple Canyon had changed its tax mailing address in February, 2004, to the CVS address which was set forth on the Board of Education’s complaint form. This evidence was a “Maintenance History” of the property’s tax mailing address provided by the Franklin County Treasurer’s office. The Board of Education’s complaint was filed after the change in address was made by the property owner and the complaint set forth the correct tax mailing address of record at the time the complaint was filed.

In its Decision, however, the BTA rejected this evidence because it was not presented at a hearing (the parties had waived hearing at the BTA). However, the BTA held the following as to Appellant’s claim concerning the address which should have been set forth on the complaint form: “Although we cannot consider the information provided by the BOE outside the hearing, there is nothing in the record to establish what the correct address for the property owner was at the time the complaint was filed.” This is clearly the correct holding on this issue. If Appellant is going to claim that the “address” which must be set forth on a board of revision complaint form is the “tax mailing address” of the property owner, then the correct “tax mailing address” is the address of record “at the time the complaint was filed” by Board of Education, as the BTA held in the above quotation. Appellant did not prove what the “tax mailing address” of Appellant was “at the time the complaint was filed.” Consequently, Appellant failed to prove that the Board of Education used an incorrect address on its complaint.

2. The Listing Of A Property Owner's Address On A Board Of Revision Complaint Form By A Board Of Education Does Not Run To The Core Of Procedural Efficiency.

The BOR complaint form asks for the "Street Address, City, State, Zip Code" of the "owner of the property." This information is requested immediately below the line which states that "Notices will be sent only to those named below." It is unclear to Appellee why a property owner would claim that the Board of Education would have specific information on the address of any one of the tens of thousands of persons and entities which own property in the School District, or how any board of education in general would know where notices to a property owner should be sent. There is no statute which requires a board of education to conduct an investigation into the address of an owner of property against which a complaint is filed.

Indeed, the statutes make it clear that the listing of the address of the property owner on the complaint form is neither a jurisdiction matter nor a matter of relevance to any procedure to be conducted by a board of revision. When a complaint is filed by a board of education, the county auditor is initially required by law to give notice to the property owner at the tax mailing address which appears on the county auditor's tax list. Subsequent notices of the BOR hearing date and a copy of the BOR's decision must be sent to either the tax mailing address or to the address which is given on the owner's counter-complaint as the address to which notices should be sent. None of this has anything to do with an address which might be set forth on a complaint filed by someone other than the owner.

R.C. 5715.19(B) requires notice of the filing of a complaint to be given to the property owner. This provision reads, in part, as follows:

“(B) Within thirty days after the last date such complaints may be filed, the auditor shall give notice of each complaint in which the stated amount of overvaluation, undervaluation, discriminatory valuation, illegal valuation, or incorrect determination is at least seventeen thousand five hundred dollars to each property owner whose property is the subject of the complaint, if the complaint was not filed by the owner or the owner’s spouse, and to each board of education whose school district may be affected by the complaint.”

R.C. 5715.12 also governs the mailing of notices to property owners in a board of revision case and it reads, in part, as follows:

“The county board of revision shall not increase any valuation without giving notice to the person in whose name the property affected thereby is listed and affording him an opportunity to be heard. *** such notice shall be served by delivering a copy thereof to the person interested, by leaving a copy at the usual place of residence or business of such person, or by sending the same by registered letter mailed to the address of such person. ***. Notices served in accordance with this section shall be sufficient.”

R.C. 5715.19(C) also requires notice of the date and time of the BOR hearing to be given to the parties by certified mail. This provision reads in part as follows:

“(C) Each board of revision shall notify any complainant and also the property owner, if the property owner’s address is known, when a complaint is filed by one other than the property owner, by certified mail, not less than ten days prior to the hearing, of the time and place the same will be heard.”

While none of these provisions describe the specific “address” to which notices must be sent, it must be presumed that these notices must be sent to either the “tax mailing address” of the

property owner or to the address set forth on a property owner's counter-complaint as the address to which notices must be sent. This presumption is based on the fact that the tax mailing address is the only address which the county auditor possesses for all of the properties in his or her county.

The "tax mailing" address of the property owner is maintained by the county auditor on the auditor's real property "tax list" under R.C. 319.20. This section reads in part as follows:

*** [T]he county auditor shall transfer any land or town lot or part thereof *** charged with taxes on the tax list, from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent, or otherwise. ***. The auditor shall endorse on the deed or other evidences of title presented to the auditor that the proper transfer of the real estate described in the deed has been made in the auditor's office ***. The address of the grantee, or any one of the grantees, set forth in the deed or other evidences of title shall be entered by the auditor on the transfer sheets and on the general tax list of real property prepared pursuant to section 319.28 of the Revised Code" (emphasis added)

All of Ohio's statutory deed forms require the "tax mailing address" of the grantee to be set forth on the deed, to which the emphasized portion of R.C. 319.20 refers to (see R.C. 5302.05; R.C. 5302.07; R.C. 5302.09; R.C. 5302.11; R.C. 5302.17; and R.C.5302.22). R.C. 323.13 then provides that "[a] change in the mailing address of any tax bill shall be made in writing to the county treasurer."

It is clear that there is nothing in the notice provisions, cited above, which authorizes the county auditor or the board of revision to send notice to an address which might be set forth on a complaint which is filed by someone other than the owner, such as a board of education. Neither do these provisions allow the auditor to assume that the address of the property owner which is set

forth on a complaint filed by someone other than the owner is the correct address to which the auditor must send notices.

As all of these provisions make clear, it is the duty of the auditor or board of revision to give the required notices to the property owner and that duty arises after the complaint has been filed. Consequently, a failure on the part of the auditor or board to give proper notice cannot affect the jurisdictional validity of the complaint itself. Jurisdiction attaches the moment the complaint is filed and acts required to be taken after the filing of a complaint have no consequences in terms of jurisdiction. A county auditor or board of revision obviously cannot void a complaint filed by a board of education simply by failing to give the required notices to a property owner.

Finally, Appellant was not even entitled to receive notice of the BOR hearing date and the BOR decision because it sold the property to Ted & Marias Plaza, LLC, in June, 2004. R.C. 5715.12 states that “[t]he county board of revision shall not increase any valuation without giving notice to the person in whose name the property affected thereby is listed and affording him an opportunity to be heard” (emphasis added). R.C. 5715.20(A) states the following as to mailing of a copy of the BOR decision and as to who can appeal from the decision of the BOR:

“Whenever a county board of revision renders a decision on a complaint filed under section 5715.19 of the Revised Code, it shall certify its action by certified mail to the person in whose name the property is listed *** and to the complainant if the complainant is not the person in whose name the property is listed or sought to be listed. A person’s time to file an appeal under section 5717.01 of the Revised Code commences with the mailing of notice of the decision to that person as provided in this section” (emphasis added).

Both of these provisions require notice to be given to the “person in whose the name the property is listed.” The property involved in this appeal was not “listed” in the name of 2100 Maple Canyon at the time of the BOR hearing or the BOR decision (see Appellant’s Supp., p. 8 - the BOR hearing dates were February 17, 2005, March 9, 2005, and the BOR decision was rendered on March 16, 2005). Consequently, Maple Canyon was not even entitled to appeal to the BTA. Under R.C. 5715.20(A) an appeal may be taken by only those persons required to be mailed a copy of the BOR decision “as provided in this section.” Only the property owner - “the person in whose name the property is listed” - is entitled to notice of the hearing and BOR decision and only that person can appeal to the BTA, and 2100 Maple Canyon was not the property owner at the time it filed an appeal with the BTA. Because 2100 Maple Canyon could not appeal to the BTA under R.C. 5715.20, it could not subsequently appeal to this Court under R.C. 5717.04.

Reply to Appellant’s Proposition of Law No. II:

R.C. 5713.03 REQUIRES THE SALE PRICE OF REAL PROPERTY TO BE CONSIDERED TO BE THE TRUE VALUE OF THE PROPERTY FOR TAX PURPOSES, AND AN APPRAISAL OF THE PROPERTY CANNOT BE USED TO CONTRADICT THE REQUIREMENTS OF THE STATUTE.

The BTA accepted the sale price of the property as its true value in money for real property tax purposes pursuant to R.C. 5713.03. This section states that when the property has recently sold in an arm’s-length sale, “the [county] auditor shall consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes.” Appellant does not contest that there was a recent arm’s-length sale of the property. However, Appellant attempts to prevent the use of the sale price of the property as the true value of the property by relying on the opinion of an appraiser, Robin Lorms, who testified that the sale price did not reflect what he considered to be the “market value” of the

property. The short answer to Appellant's argument is that the opinion of its appraiser as to what the "market value" of the property might be is irrelevant because R.C. 5713.03 states that the actual "sale price" of the property is its "true value in money" for real property tax purposes.

1. Appellant's Claim That Market Rent Was Different Than Contract Rent Due To Functional Obsolescence Has No Legal Significance.

Appellant's claim that the sale price does not reflect the "market value" of its property is based solely on the personal opinion of its appraiser that the "rental rate" under the existing lease on the property (the contract rent) "does not necessarily reflect market rent" for the property (Lorms' report, Supp., p. 33). This argument was recently rejected by this Court in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005 Ohio 4979, 834 N.E.2d 782, and *Lakota Local Sch. Dist. Bd. of Educ. v. Butler County Bd. of Revision*, 108 Ohio St. 3d 310, 2006 Ohio 1059, 843 N.E.2d 757. In *Berea City School Dist.*, supra, for instance, an appraiser claimed that the sale price of a property did not reflect its true value because the appraiser claimed that the "economic or market rent" for the property was more than the actual or "contract" rent on the property. In the present appeal, Lorms claimed that the contract rent exceeded the market rent for the property, which makes no difference in principle. This Court's response to these claims was the following:

"Accordingly, because the property at issue in this case had been recently sold in an arm's-length transaction for \$2,600,000, the law requires that sale price to be the true value of that property for the tax year 1997. [P13]

Consequently, *Wynwood Apts.* and similar cases addressing whether market rent or actual rent should be used in a property appraisal do not apply to situations in which the property has been recently sold

in an arm's-length transaction. Indeed, as this court has often observed, '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 the true value'" [P15].

In what will surely become the common practice in these types of cases, Appellant attempts to come up with a theory which will "take this case outside the scope of *Berea City School Dist.*" (Appellant's merit brief, p. 7). Appellant's theory is based on the claim of its appraiser, Robin Lorms, that the 5-year old building involved in this appeal lost over 50 percent of its value the moment it was opened its doors because of "functional obsolescence" in both the "size" and "design" of the building (Lorms' report, Supp., p. 83). According to Lorms, "[f]reestanding drugstores have significant functional obsolescence in both size and design." This purported instant loss in value caused the rents being charged under the original lease on the property to exceed what Lorms claims would be "market rents" for the property after the purported loss in value.

2. Lorms' Second Generation Users Theory

According to Appellant's appraiser, Lorms, the property was built to the specifications of Rite-Aid and the rent under the original lease was based on the original construction costs of the property (this is what Lorms calls a "build-to-suit lease," which appears to be a term coined by the appraiser and which has no legal meaning or significance). According to Lorms, "the rental rate [under the original lease] is an amortization of development costs" of the property (Supp., p. 33); and is based on "the cost to build-out" the property and the "improvement build-out costs," and is "an amortization of building improvements over the lease term" (Supp., p. 89). According to Lorms, however, once the property had lost over one-half its value the moment it opened its doors, the

“market rent” for the property would be substantially less than “contract rent” based on the actual construction costs of the property.

Lorms bases his claim of “functional obsolescence” on two factors. First, the purported loss in value due to functional obsolescence in the “size” of the property is due “to the fact that few retailers are capable of occupying a space of this size” and, second, “[t]he obsolescence in design is due to the fact that tenants which are interested in occupying this design/prototype, i.e. Walgreens, CVS, Rite Aid, and Eckerds most often have an existing store located nearby or would prefer to construct a store specific to their own design even though only slightly different” (Lorms’ report, p. 59; Supp., p. 89). These quotations set forth what Lorms’ has previously called the “second generation” users theory of valuing free-standing drug stores (such as Rite-Aid, Walgreens, and CVS stores) and other types of retail properties (such as big-box retail stores used by Wal-Mart, Kmart, Target, Meijer, and so forth). Lorms’ second-generation users theory has two components:

(A) No Demand From Other First Generation Users - According to Lorms, those entities which build and occupy “free-standing drug stores” (these are first generation users of the property, such as Rite-Aid, CVS, and Walgreens) will not acquire, use, or occupy each others’ properties. As the above quotations indicate, Lorms claims that a CVS, for instance, would not buy or lease a “Walgreens, Rite Aid, and Eckerds” store because CVS “would prefer to construct a store specific to [its] own design even though only slightly different” than a Rite-Aid store. As this quotation shows, Lorms acknowledges that a CVS store and a Rite-Aid store are “only slightly different” from each other, and the most logical buyer of a Rite-Aid store would obviously be Walgreens or CVS because the stores are “only slightly different” from each other. If CVS is a prudent business entity, then it should prefer to acquire an existing Rite-Aid store in a good location and which could be

operated on a profitable basis with minor modifications, than acquire the land, demolish an existing building, and construct a new building. These actions often require zoning and planning commission approval, have attendant and significant risks and delays, and cost more than acquiring an existing property. Yet by claiming that a CVS will not buy or lease a Rite-Aid store, Lorms can artificially reduce the demand for these types of properties and artificially limit the market for the properties.

(B) Second Generation Users - Lorms then claims that the only users of a Rite-Aid or CVS store would be small “retailers” who are not “capable of occupying a space of this size,” and who would, therefore, pay prices and rents which are substantially less than the construction costs of the property and the rents which are being paid under the original leases. These are what Lorms calls second-generation users and “mom and pop type retailers” which “pay rents which are much lower than those that would make new construction financially feasible” (Supp., p. 59). These second generation users buy and rent abandoned and vacated first-generation stores.

By claiming that the market value of the subject property must be based on sales and leases of abandoned and vacated properties, Lorms totally disregards the fact that CVS acquired this property from Rite-Aid and was willing to pay the exact same price (in terms of rent) that Rite-Aid paid for the property based on its actual construction costs. Rite-Aid abandoned and vacated all of its stores in Central Ohio in 2001 because many of its stores could not operate at a profit. CVS then acquired a number of these stores which were in good locations and could be operated at a profit, such as the property involved in this appeal. This shows that the rent being charged to Rite-Aid and CVS under the existing lease was “market rent” or “economic rent” for the property because CVS was clearly willing to pay that rent. The rest of the Rite-Aid stores which were not acquired by other first-generation users, such as CVS, were then dumped on the market for purchase or lease by

Lorms' "mom and pop retailers." The issue is which market is the relevant market to be used to value the property: either the market in which one first-generation retailer acquires the property of another such retailer, or the market in which "mom and pop retailers" acquire abandoned and vacated properties which no other first-generation retailer would consider acquiring. The correct market is clearly the first one; Lorms uses the second one.

Consequently, Lorms values the subject property using the sales and leases of the abandoned and vacated Rite-Aid stores which no other first generation user was interested in acquiring. On page 56 of his appraisal report (Supp., p. 86), Lorms uses the sales and asking prices of four of the abandoned and vacated Rite-Aid stores and one abandoned and vacated CVS store to value the subject property using a market approach (CVS also abandoned and vacated several stores which it could not operate at a profit). In his income approach, Lorms uses rents being paid or asking rents on seven abandoned and vacated Rite-Aid stores and three abandoned and vacated CVS stores to value the subject property (Lorms' report, pp. 60 and 61; Supp., pp. 90 and 91).

The vacated stores were abandoned because they were in poor locations and were unprofitable. This is why no other first generation user, such as CVS or Walgreens, for instance, were interested in acquiring these properties. On the other hand, the property involved in this appeal is in a good location and is apparently profitable because it acquired by another first-generation user (CVS) and is still being used by that first-generation tenant. To suggest, as Lorms does, that the abandoned and vacated stores are comparable to the subject CVS store is nonsense. At the very least, Lorms has not proven that the abandoned and vacated stores are comparable to the subject property in an economic sense.

Furthermore, Lorms' claim that no other first-generation user would be interested in the subject property is obviously contradicted by the actual facts of this case. The subject property was a Rite-Aid store to begin with, and was acquired by CVS in 2002. CVS was obviously willing to pay the rent which was based on the actual construction costs of the property because the store was in a good location, was in good condition, and was capable of being operated on a profitable basis. This makes nonsense out of Lorms' claim that no other first generation user is willing to pay a price or rent which is based on the original construction costs of a free-standing drug store because that is precisely what CVS did in this case. It proves, in fact, that the property is not subject to any "functional obsolescence," despite all of the claims that Lorms makes to the contrary. The subject property is being used by a first-generation user who was willing to pay rent based on the actual construction costs of the property and, consequently, the property has suffered no loss in value of any kind or to any extent, whether due to "functional obsolescence" or otherwise.

For these reasons, Appellant's claim that the sale of a property which was subject to a "build-to-suit lease" must be excluded from R.C. 5713.03 has no merit to it. While the subject property was built to the specifications of Rite-Aid, CVS was willing to pay the same price for the property (in terms of rent) that Rite-Aid paid for it. Consequently, the fact that the property had what Lorms calls a "build-to-suit lease" on it at the time of sale is utterly irrelevant in deciding whether the sale price of the property must be taken to be the true value of the property under R.C. 5713.03. Appellant's attempt to exclude the sale from the application of R.C. 5713.03 for this reason cannot succeed.

3. Appellant's Claim That The Sale Price Exceeded The Replacement Cost Of The Property Has No Merit.

Appellant also claims that the sale price cannot legally be used to value the property under R.C. 5713.03 because the sale price of the property, \$2,900,000, exceeds Lorms' opinion of "the replacement cost new of the property" (for what its worth, Lorms' opinion of the replacement cost of the property was \$1,714,810 - see Supp., p. 82). There is no provision in R.C. 5713.03 which states that the sale price must be used as the true value of the property, except when some appraiser testified that the sale price exceeds his own estimate of the "replacement cost new" of the property. Appellant's claim is again simply irrelevant.

There is no credible evidence in this appeal to show that Lorms' estimate of the "replacement cost new of the property" is correct. While Lorms claims that the replacement cost was only \$1,714,810, he acknowledges that the sale price of \$2,900,000 was based on the actual construction costs of the property. He also notes in his appraisal report (p. 56; Supp., p. 86) that CVS rejected an offer to purchase one of its abandoned stores for "2.67 million" because that offer was substantially less than "the book value" of the property "based on development costs" of the property (as noted above, Lorms acknowledges that a Rite-Aid store and a CVS store are substantially the same properties so the cost of both should be equivalent). These facts suggest that the actual construction costs of the property were more than what Lorms estimated. Furthermore, neither Appellant nor Lorms ever produced the actual construction costs of the property.

Second, Appellant's claim is not consistent with the fact that CVS was willing to pay the same price that Rite-Aid originally paid for the property (in terms of rent), which was based on the

actual construction costs of the property. This proves that the property was worth more than Lorms' estimate of the replacement cost new of the property even if his estimate of the same was correct.

4. The True Value Of Real Property For Tax Purposes Can Be Based On A Sale of The Property Even Though The Property Is Subject To A Lease.

Finally, Appellant claims that the sale price of property subject to a lease cannot be used as the true value of the property under R.C. 5713.03, because the sale is not a sale of the "unencumbered fee simple" interest in the property (merit brief, p. 12). R.C. 5713.03 does not except from its provisions the sale of a property subject to a lease. Indeed, the General Assembly must have contemplated that R.C. 5713.03 would apply to properties subject to a lease because much commercial property which sells in this State is subject to a lease. For instance, office buildings sell with leases in place; shopping centers sell with leases in place; apartment buildings sell with leases in place; retail stores and warehouses sell with leases in place; and free-standing drug stores, such as the subject property, sell with leases in place. Appellant's claim is also inconsistent with this Court's holdings in *Berea City School Dist.* and *Lakota Local Sch. Dist.*, both supra, in that both properties in those cases were subject to leases at the time of sale. In both cases, this Court refused to allow the opinion of some appraiser as to whether market rent and contract rent were, or were not, the same at the time of sale, to exempt the sale from the mandate of R.C. 5713.03.

Appellant demands "uniformity of taxation" (merit brief, p. 13). However, that "uniformity can never achieved when this or that appraiser is allowed to overturn an arm's-length sale merely by claiming that, in his or her opinion, contract rent is different than market rent for the property at the time of sale. The General Assembly was entitled to conclude that this type of claim is inherently unreliable when compared to the price actually paid for property in a recent arm's-length sale of the

property. An attempt by the General Assembly to provide some clarity and finality to the endless litigation over the true value of real property is a valid public purpose.

CONCLUSION

For these reasons stated herein, this Court is respectfully requested to affirm the decision of the Ohio Board of Tax Appeals.

Respectfully submitted,



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CERTIFICATION OF SERVICE

I hereby certify that a true and complete copy of the foregoing brief was served upon Todd Sleggs, 820 West Superior Avenue, Suite 400, Cleveland, Ohio, 44113, and upon Paul Stickel, 373 South High Street, 20th Floor, Columbus, Ohio, 43220, and upon Marc Dann, Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio, 43215, by regular U.S. Mail, postage prepaid, this 19th day of January, 2007.



Mark H. Gillis

ORC Ann. 319.20 (2006)

§ 319.20. Transfer of title to name of grantee; apportionment of taxes upon partial conveyance or acquisition by state

After complying with sections 319.202 [319.20.2], 315.251 [315.25.1], and 319.203 [319.20.3] of the Revised Code, and on application and presentation of title, with the affidavits required by law, or the proper order of a court, bearing the last known address of the grantee, or of any one of the grantees named in the title, and a reference to the volume and page of the recording of the next preceding recorded instrument by or through which the grantor claims title, the county auditor shall transfer any land or town lot or part thereof, minerals therein, or mineral rights thereto, charged with taxes on the tax list, from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent, or otherwise. If by reason of the conveyance or otherwise, a part only of a tract or lot, minerals therein, or mineral rights thereto, as charged in the tax list, is to be transferred, the auditor shall determine the tax value of the part of a tract or lot of real estate, minerals therein, or mineral rights thereto, so transferred, and the value of the remaining part compared with the value of the whole.

Whenever a part only of a tract or lot of real estate has been transferred by the auditor and the tract or lot bears unpaid taxes, penalties, interest, or special assessments, the unpaid taxes, penalties, interest, or special assessments shall immediately be apportioned, upon demand or request by the transferee or remaining owner, in the following manner:

(A) The auditor shall allocate to the part so transferred, and to the remaining part, amounts of any current or delinquent taxes, interest, or penalties that have accrued against the parcel as a whole, proportionate to their respective values.

(B) The lien of taxes, penalties, interest, and special assessments, as levied against the original tract, shall extend to the part so transferred and the part remaining only to the extent of the amounts so allocated to the respective parts.

This section does not change the total amount of taxes, special assessments, or other charges as originally levied, or the total amount of the balance due. The auditor shall certify such apportionments to the county treasurer.

Whenever the state acquires an entire parcel or a part only of a parcel of real property in fee simple, the county auditor, upon application of the grantor or property owner or the state, which application shall contain a description of the property as it appears on the tax list and the date of transfer of ownership, shall prepare an estimate of the taxes that are a lien on the property, but have not been determined, assessed, and levied for the year in which the property was acquired. The county auditor shall thereupon apportion the estimated taxes proportionately between the grantor and the state for the period of the lien year that each had or shall have had ownership or possession of the property, whichever is earlier. The county treasurer shall accept payment from the state for estimated taxes at the time that the real property is acquired. If the state has paid in full in the year in which the property is acquired that proportion of the estimated taxes that the tax commissioner determines are not subject to remission by the county auditor for such year under division (C) of section 5713.08 of the Revised Code, the estimated taxes paid shall be considered the tax liability on the exempted property for that year.

Section 319.42 of the Revised Code applies to the apportionment of special assessments.

Complaint against such values as determined by the auditor or the allocation of assessments by the certifying authority may be filed by the transferee or the remaining owner, and if filed, proceedings including appeals shall be had in the manner and within the time provided by sections 5717.01 to 5717.06 and 5715.19 to 5715.22 of the Revised Code, for complaints against valuation or assessment of real property.

The auditor shall endorse on the deed or other evidences of title presented to the auditor that the proper transfer of the real estate described in the deed has been made in the auditor's office or that it is not entered for taxation, and sign the auditor's name to the deed. The address of the grantee, or any one of the grantees, set forth in the deed or other evidences of title shall be entered by the auditor on the transfer sheets and on the general tax list of real property prepared pursuant to section 319.28 of the Revised Code.

ORC Ann. 5713.03 (2006)

§ 5713.03. Taxable valuation of real property

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.

HISTORY:

RS § 2790; S&C 1450; 77 v 130; 87 v 76; GC § 5554; 107 v 29; Bureau of Code Revision, 10-1-53; 127 v 65; 128 v 410 (Eff 11-4-59); 131 v 1329 (Eff 11-5-65); 135 v S 423 (Eff 7-26-74); 136 v H 920 (Eff 10-11-76); 137 v H 1 (Eff 8-26-77); 140 v H 260. Eff 9-27-83.

§ 5715.12. Duty to give notice before increasing valuation; service

The county board of revision shall not increase any valuation without giving notice to the person in whose name the property affected thereby is listed and affording him an opportunity to be heard. Such notice shall describe the real property, the tax value of which is to be acted upon, by the description thereof as carried on the tax list of the current year, and shall state the name in which it is listed; such notice shall be served by delivering a copy thereof to the person interested, by leaving a copy at the usual place of residence or business of such person, or by sending the same by registered letter mailed to the address of such person. If no such place of residence or business is found in the county, then such copies shall be delivered or mailed to the agent in charge of such property. If no such agent is found in the county, such notice shall be served by an advertisement thereof inserted once in a newspaper of general circulation in the county in which the property is situated. Notices to the respective persons interested in different properties may be united in one advertisement under the same general heading. Notices served in accordance with this section shall be sufficient.

HISTORY:

GC § 5599; 107 v 29(42); 114 v 714(765), § 3; Bureau of Code Revision. Eff 10-1-53.

§ 5715.19. Complaints; tender of tax; determination of common level of assessment

(A) As used in this section, "member" has the same meaning as in section 1705.01 of the Revised Code.

(1) Subject to division (A)(2) of this section, a complaint against any of the following determinations for the current tax year shall be filed with the county auditor on or before the thirty-first day of March of the ensuing tax year or the date of closing of the collection for the first half of real and public utility property taxes for the current tax year, whichever is later:

(a) Any classification made under section 5713.041 [5713.04.1] of the Revised Code;

(b) Any determination made under section 5713.32 or 5713.35 of the Revised Code;

(c) Any recoupment charge levied under section 5713.35 of the Revised Code;

(d) The determination of the total valuation or assessment of any parcel that appears on the tax list, except parcels assessed by the tax commissioner pursuant to section 5727.06 of the Revised Code;

(e) The determination of the total valuation of any parcel that appears on the agricultural land tax list, except parcels assessed by the tax commissioner pursuant to section 5727.06 of the Revised Code;

(f) Any determination made under division (A) of section 319.302 [319.30.2] of the Revised Code.

Any person owning taxable real property in the county or in a taxing district with territory in the county; such a person's spouse; an individual who is retained by such a person and who holds a designation from a professional assessment organization, such as the institute for professionals in taxation, the national council of property taxation, or the international association of assessing officers; a public accountant who holds a permit under section 4701.10 of the Revised Code, a general or residential real estate appraiser licensed or certified under Chapter 4763. of the Revised Code, or a real estate broker licensed under Chapter 4735. of the Revised Code, who is retained by such a person; if the person is a firm, company, association, partnership, limited liability company, or corporation, an officer, a salaried employee, a partner, or a member of that person; if the person is a trust, a trustee of the trust; the board of county commissioners; the prosecuting attorney or treasurer of the county; the board of township trustees of any township with territory within the county; the board of education of any school district with any territory in the county; or the mayor or legislative authority of any municipal corporation with any territory in the county may file such a complaint regarding any such determination affecting any real property in the county, except that a person owning taxable real property in another county may file such a complaint only with regard to any such determination affecting real property in the county that is located in the same taxing district as that person's real property is located. The county auditor shall present to the county board of revision all complaints filed with the auditor.

(2) As used in division (A)(2) of this section, "interim period" means, for each county, the tax year to which section 5715.24 of the Revised Code applies and each subsequent tax year until the tax year in which that section applies again.

No person, board, or officer shall file a complaint against the valuation or assessment of any parcel that appears on the tax list if it filed a complaint against the valuation or assessment of that parcel for any prior tax year in the same interim period, unless the person, board, or officer alleges that the valuation or assessment should be changed due to one or more of the following circumstances that occurred after the tax lien date for the tax year for which the prior complaint was filed and that the circumstances were not taken into consideration with respect to the prior complaint:

(a) The property was sold in an arm's length transaction, as described in section 5713.03 of the Revised Code;

(b) The property lost value due to some casualty;

(c) Substantial improvement was added to the property;

(d) An increase or decrease of at least fifteen per cent in the property's occupancy has had a substantial economic impact on the property.

(3) If a county board of revision, the board of tax appeals, or any court dismisses a complaint filed under this section or section 5715.13 of the Revised Code for the reason that the act of filing the complaint was the

unauthorized practice of law or the person filing the complaint was engaged in the unauthorized practice of law, the party affected by a decrease in valuation or the party's agent, or the person owning taxable real property in the county or in a taxing district with territory in the county, may refile the complaint, notwithstanding division (A)(2) of this section.

(B) Within thirty days after the last date such complaints may be filed, the auditor shall give notice of each complaint in which the stated amount of overvaluation, undervaluation, discriminatory valuation, illegal valuation, or incorrect determination is at least seventeen thousand five hundred dollars to each property owner whose property is the subject of the complaint, if the complaint was not filed by the owner or the owner's spouse, and to each board of education whose school district may be affected by the complaint. Within thirty days after receiving such notice, a board of education; a property owner; the owner's spouse; an individual who is retained by such an owner and who holds a designation from a professional assessment organization, such as the institute for professionals in taxation, the national council of property taxation, or the international association of assessing officers; a public accountant who holds a permit under section 4701.10 of the Revised Code, a general or residential real estate appraiser licensed or certified under Chapter 4763. of the Revised Code, or a real estate broker licensed under Chapter 4735. of the Revised Code, who is retained by such a person; or, if the property owner is a firm, company, association, partnership, limited liability company, corporation, or trust, an officer, a salaried employee, a partner, a member, or trustee of that property owner, may file a complaint in support of or objecting to the amount of alleged overvaluation, undervaluation, discriminatory valuation, illegal valuation, or incorrect determination stated in a previously filed complaint or objecting to the current valuation. Upon the filing of a complaint under this division, the board of education or the property owner shall be made a party to the action.

(C) Each board of revision shall notify any complainant and also the property owner, if the property owner's address is known, when a complaint is filed by one other than the property owner, by certified mail, not less than ten days prior to the hearing, of the time and place the same will be heard. The board of revision shall hear and render its decision on a complaint within ninety days after the filing thereof with the board, except that if a complaint is filed within thirty days after receiving notice from the auditor as provided in division (B) of this section, the board shall hear and render its decision within ninety days after such filing.

§ 5715.20. Certification of action; time for appeal; tax commissioner may request decisions

(A) Whenever a county board of revision renders a decision on a complaint filed under section 5715.19 of the Revised Code, it shall certify its action by certified mail to the person in whose name the property is listed or sought to be listed and to the complainant if the complainant is not the person in whose name the property is listed or sought to be listed. A person's time to file an appeal under section 5717.01 of the Revised Code commences with the mailing of notice of the decision to that person as provided in this section. The tax commissioner's time to file an appeal under section 5717.01 of the Revised Code commences with the last mailing to a person required to be mailed notice of the decision as provided in this division.

(B) The tax commissioner may order the county auditor to send to the commissioner the decisions of the board of revision rendered on complaints filed under section 5715.19 of the Revised Code in the manner and for the time period that the commissioner prescribes. Nothing in this division extends the commissioner's time to file an appeal under section 5717.01 of the Revised Code.

HISTORY:

GC § 5609-1; 116 v 383; 118 v 148; Bureau of Code Revision, 10-1-53; 135 v S 423 (Eff 7-26-74); 136 v H 920 (Eff 10-11-76); 140 v H 260 (Eff 9-27-83); ♦ 149 v H 675. Eff 3-14-2003.