

IN THE SUPREME COURT

STATE OF OHIO

APPEAL FROM THE BOARD OF TAX APPEALS

POLARIS AMPHITHEATER CONCERTS,)
INC.,)

Appellant,)

v.)

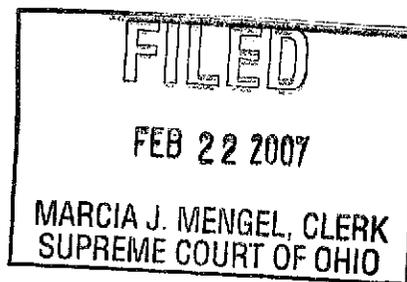
DELAWARE COUNTY BOARD OF)
REVISION, DELAWARE COUNTY)
AUDITOR, BOARD OF EDUCATION OF)
THE OLENTANGY LOCAL SCHOOLS)
AND TAX COMMISSIONER OF THE)
STATE OF OHIO,)

Appellees.)

SUPREME COURT CASE
NUMBER: _____

07-0347

BOARD OF TAX APPEALS
CASE NUMBER 2004-V-1294



NOTICE OF APPEAL

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IN THE SUPREME COURT

STATE OF OHIO

APPEAL FROM THE BOARD OF TAX APPEALS

POLARIS AMPHITHEATER CONCERTS, INC.,)	SUPREME COURT CASE
)	NUMBER: _____
Appellant,)	
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v.)	
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DELAWARE COUNTY BOARD OF REVISION, DELAWARE COUNTY AUDITOR, BOARD OF EDUCATION OF THE OLENTANGY LOCAL SCHOOLS, AND TAX COMMISSIONER OF THE STATE OF OHIO,)	BOARD OF TAX APPEALS
)	CASE NUMBERS 2004-V-1294
Appellees.,)	<u>NOTICE OF APPEAL TO THE</u>
)	<u>SUPREME COURT OF OHIO</u>
)	<u>PURSUANT TO SECTION</u>
)	<u>5717.04 REVISED CODE</u>

The Appellant, Polaris Amphitheater Concerts, Inc., by and through counsel, hereby gives notice of its appeal to the Supreme Court of The State of Ohio, from a Decision and Order of the Ohio Board of Tax Appeals, rendered on the 26th day of January 2007, a copy of which is attached hereto as "Exhibit A" and which is incorporated herein as though

fully rewritten in this Notice of Appeal. The Errors complained of are attached hereto as "Exhibit B" which are incorporated herein by reference.

Respectfully submitted,

SLEGGs, DANZINGER & GILL, CO., LPA

A handwritten signature in black ink, appearing to read "Todd W. Sleggs", is written over a horizontal line.

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ATTORNEYS FOR APPELLANT

POLARIS AMPHITHEATER CONCERTS, INC.

EXHIBIT "B"

ASSIGNMENT OF ERRORS

ASSIGNMENT OF ERROR NO. 1

The Board of Tax Appeals value for the land in its decision and order is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 2

There is no evidence in the record to support the Board of Tax Appeals valuation of the land, its decision and order is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 3

The Board of Tax Appeals finding "that the evidence of value provided by the [Board of Education] is supportive of the original values assigned to the subject property by the [A]uditor and affirmed by the Delaware County Board of Revision" for the land is unreasonable and unlawful.

11765-03

OHIO BOARD OF TAX APPEALS

Polaris Amphitheater Concerts, Inc.,)
)
 Appellant,)
)
 vs.)
)
 Delaware County Board of Revision, the)
 Delaware County Auditor, and the)
 Board of Education of the Olentangy Local)
 Schools,)
)
 Appellees.)

CASE NO. 2004-V-1294

(REAL PROPERTY TAX)

DECISION AND ORDER

APPEARANCES:

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Entered JAN 26 2007

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

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by Polaris Amphitheater Concerts, Inc. ("Polaris") from a decision of the Delaware County Board of Revision ("BOR"). In said decision, the BOR determined the true and taxable values of the subject property

Exhibit "A"
(1 of 19)

for tax year 2003 originally established by the Delaware County Auditor ("auditor").

should remain as follows:

Parcel 318-442-02-025-001	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 3,666,700	\$1,283,350
BLDG	\$ 5,668,400	\$1,983,940
TOTAL	\$ 9,335,100	\$3,267,290
Parcel 318-442-02-025-918	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 3,224,200	\$1,128,470
BLDG	\$ 0	\$ 0
TOTAL	\$ 3,224,200	\$1,128,470
Parcel 318-442-02-025-000	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 1,102,300	\$ 385,810
BLDG	\$ 0	\$ 0
TOTAL	\$ 1,102,300	\$ 385,810
Parcel 318-442-02-025-919	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 5,688,700	\$1,991,050
BLDG	\$ 1,258,700	\$ 440,550
TOTAL	\$ 6,947,400	\$2,431,600
Parcel 318-442-02-024-000	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 117,200	\$ 41,020
BLDG	\$ 8,500	\$ 2,980
TOTAL	\$ 125,700	\$ 44,000
Grand Totals	\$20,734,700	\$7,257,170

Polaris requests that the subject property's improvements be reclassified as personalty and for the remaining land to be valued at \$7,200,000.¹ The Olentangy Local Schools Board of Education ("BOE") requests that the subject property's value remain unchanged as originally determined by the auditor. We now consider this matter upon the notice of appeal, the statutory transcript ("S.T.") certified by the

¹ In its brief, Polaris notes that it does not contest the value of the fifth parcel, 318-442-02-024-000. Brief of appellant, at 5, footnote 2.

auditor, and the evidence presented at this board's evidentiary hearing ("H.R. I" and "H.R. II").

The subject property is an outdoor amphitheater constructed in 1994 and is located on 90.685 acres² of land located in Delaware County, Ohio. S.T., Ex. 3.

Before this board, Polaris presented the appraisal and testimony of Mr. Robin Lorms, an MAI appraiser, who rendered an opinion of value of \$7,200,000 for the land only. Polaris further presented the testimony of Mr. Bryan A. Ross, a civil engineer employed by Advance Civil Design; Mr. Thomas M. Warner, project engineer and managing partner of Advance Civil Design; and Ms. Michelle Galaida, tax consultant employed by Deloitte & Touche. The BOE presented the testimony of Mr. Sam Koon, an MAI appraiser, who opined a value of \$21,000,000 for the subject's land and improvements.

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

² The appellee BOE's appraiser describes the property as 90.687 acres. Ex. A at 27. The appellant's appraiser describes the subject to be 83.086 acres; however, said description does not include the fifth parcel, 318-442-02-024-000, containing approximately 8 acres. Ex. 13 at 2.

its right to the value sought. *Cleveland Bd. of Edn.*, supra; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493.

It is not enough, however, to simply come forward with some evidence of value. Neither is it sufficient to grant the requested increase or decrease merely because no evidence is adduced in contradiction to the claim. *Western Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340. In short, there is a burden of persuasion that rests with the appellant to convince this board that the appellant is entitled to the value which it seeks. *Cincinnati School Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325. Once the appellant presents competent and probative evidence of value, other parties asserting a different value then have the corresponding burden of providing evidence that rebuts appellant's evidence of value. *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493. Accordingly, this board must proceed to examine the available record and to determine value based upon the evidence before it. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120; *Clark v. Glander* (1949), 151 Ohio St. 229. In so doing, we will determine the weight and credibility to be accorded to the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13. We proceed by examining the evidence of the subject's true value as presented by the parties.

When determining value, the Ohio Supreme Court has long held 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.

Polaris argues that the court's decision in *Funtime v. Wilkins*, 105 Ohio St.3d 74, 2004-Ohio-6890, dictates that all improvements situated upon the subject property should be classified as "business fixtures" under R.C. 5701.03(B), and hence, not subject to taxation as real property. Polaris asks this board to value the subject property, in essence, as land only.

The issue before the court in *Funtime* was whether construction contracts relating to the repair and installation of amusement park rides and accessory structures should be excepted from sales tax liability as real property pursuant to R.C. 5739.01(B)(5).³ The court held that the rides and accessory structures were "business fixtures" under R.C. 5701.03(B), and therefore constituted personal property not entitled to the sales and use tax exception. The court analyzed the statutory definitions of real property, building, fixture, improvement, and structure found in R.C. 5701.02, and the definitions of personal property and business fixture found in R.C. 5701.03.

³ R.C. 5739.01(B)(5) excepts from the sales tax provisions the incorporation of tangible personal property into a structure or improvement on and becoming a part of real property.

R.C. 5701.02 provides in pertinent part:

“(A) ‘Real property,’ ‘realty,’ and ‘land’ include land itself, *** with all things contained therein, and, unless otherwise specified in this section or section 5701.03 of the Revised Code, all buildings, structures, improvements, and fixtures of whatever kind on the land, ***.

“(B)(1) ‘Building’ means a permanent fabrication or construction, attached or affixed to land, consisting of foundations, walls, columns, girders, beams, floors, and a roof, or some combination of these elemental parts, that is intended as a habitation or shelter for people or animals or a shelter for tangible personal property, and that had structural integrity independent of the tangible personal property, if any, it is designed to shelter. ***

“(C) ‘Fixture’ means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the realty and not the business, if any, conducted by the occupant on the premises.

“(D) ‘Improvement’ means with respect to a building or structure, a permanent addition, enlargement, or alteration that, had it been constructed at the same time as the building or structure, would have been considered a part of the building or structure.

“(E) ‘Structure’ means a permanent fabrication or construction, other than a building, that is attached or affixed to land, and that increases or enhances utilization or enjoyment of the land. ‘Structure’ includes, but is not limited to, bridges, trestles, dams, storage silos or agricultural products, fences, and walls.”

R.C. 5701.03 provides in pertinent part:

“(A) ‘Personal property’ includes every tangible thing that is subject to ownership, whether animate or inanimate, including a business fixture, and that does not constitute real property as defined in section 5701.02 of the Revised Code. ***

“(B) ‘Business fixture’ means an item of tangible personal property that has become permanently attached or affixed to the

land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty. 'Business fixture' includes, but is not limited to, machinery, equipment, signs, storage bins and tanks, whether above or below ground, and broadcasting, transportation, transmission, and distribution systems, whether above or below ground. 'Business fixture' also means those portions of buildings, structures, and improvements that are specially designed, constructed, and used for the business conducted in the building, structure, or improvement, including, but not limited to, foundations and supports for machinery and equipment. 'Business fixture' does not include fixtures that are common to buildings, including, but not limited to, heating, ventilation, and air conditioning systems primarily used to control the environment for people or animals, tanks, towers, and lines for potable water or water for fire control, electrical and communication lines, and other fixtures that primarily benefit the realty and not the business conducted by the occupant on the premises."

Counsel for the BOE has filed an expansive brief chronicling the history of case law and legislative enactments relating to the classification of real and personal property. The BOE argues that classification of property is necessarily governed by Section 2, Article XII of the Ohio Constitution, which provides that "[l]and and improvements thereon shall be taxed by uniform rule according to value."

The statutory transcript certified by the auditor includes "property record cards" for the subject parcels; however, none of the exhibits describe the improvements upon the land.⁴ S.T. at 3. The BOE's appraiser, Mr. Koon, has included a foundation sketch of the 46 structures on the subject property. Ex. A, page facing 30. Mr. Koon further describes the improvements as follows:

⁴ Entitled "Parcel Maintenance," the information on the property record cards is minimal. Ohio Adm. Code Section 5703-25-09 requires the auditor to maintain property record cards that describe, among other things, building details and construction features, dimensions, and the like.

"The subject improvements have been designed for use as a regional, outdoor amphitheater and entertainment complex. The semi-circular amphitheater represents the core structure, around which all other surrounding improvements have been constructed. *** There are two wings which attach to either side of the stage. The west wing consists of a cafeteria and six fully finished dressing rooms, each with its own full bath. A patio and deck area extends from the west wing, and attaches to a hospitality building, which is essentially a large, open room which is used for small meetings and events. The hospitality building is approximately 900 square feet in area. The east wing consists of administrative offices and the video control room.

"In addition to the above-described improvements, that facility features several maintenance buildings which service the property. These include a pole building and a steel framed maintenance building to the rear of the amphitheater, as well as a metal Quonset-style storage building both to the rear of the amphitheater and on the south side of the parking lot.

"The amphitheater structure exhibits a nearly semi-circular shape and consists primarily of masonry construction. It has a sloping, poured concrete floor, tilt-up concrete panel walls, and poured concrete support columns. The roof consists of a pre-engineered metal truss system under metal decking with a rubber membrane cover. There is a metal panel parapet around the perimeter of the roof which houses several large video projection screens which service the amphitheater's uncovered, rear lawn seating. Additionally, two large video projection screens are mounted on the inside wall of the amphitheater and service the seated area. The amphitheater's lawn area is contained with a wood fence. To the rear of the amphitheater there are eight, (sic) dock-height loading bays which service the stage area from the rear.

"There are two main food concession buildings which are located on either side of the amphitheater. These structures are nearly identical in design and construction quality. They consist of single story, concrete block structures on concrete slab foundations. Each has a gable-style, asphalt shingle roof. These buildings are designed with food sales areas to the front, with

food preparation and cool/dry storage rooms to the rear. There is additional office space to the rear of the west concession building. These facilities are heated and cooled via gas-fired heat/electrically-fired HVAC units.

“There are men’s/women’s restroom facilities located adjacent to each of the main concession buildings. These facilities are contained within one story, concrete block buildings. Additional building improvements include medical/first aid, police, and equipment storage buildings. There is a VIP/covered outdoor bar/lounge area to the east of the amphitheater with separate restroom facilities. The facility’s main ticket sales building consists of a one story structure located at the amphitheater’s main entrance. There is also an ATM machine and several vending machines adjacent to the front ticket sales building. There are multiple kiosk-type, open, wood frame concession booths and memorabilia sales buildings which line the main entrances to the amphitheater areas.

“The interior finish of the facility’s office, administrative, and back-stage video, sound, dining, and dressing rooms primarily consists of a combination of carpeted and/or vinyl flooring with vinyl basing, painted drywall walls, drywall or acoustical panel ceilings with a combination of recessed incandescent and recessed fluorescent lighting.

“Site improvements include two main asphalt-paved parking areas, as well as asphalt paved walkways providing pedestrians with access to both sides of the amphitheater. There is a substantial amount of asphalt paved parking and truck-turnaround areas to the rear of the amphitheater’s stage. It is significant to note that a substantial amount of required parking for the amphitheater is not paved and consists of driveways through grassy parking areas.” Id. at 30-32.

The threshold issue before us is whether the amphitheater’s facilities should be valued as real property by the auditor.

Setting aside the issue of whether the facilities are business fixtures under R.C. 5701.03(B) for the moment, we find the facilities described above are real property under R.C. 5701.02. The amphitheater stage, loading docks, attached wings,

concession facilities, merchandising facilities, restroom facilities, storage facilities, video production facilities, administrative offices, VIP lounges, outdoor lounges, storage facilities, maintenance facilities, cafeteria, hospitality facility, first aid and public safety facilities, paved parking lots and walkways, and the like all constitute buildings, improvements, and/or structures as defined by R.C. 5701.02, as they all are of “permanent fabrication or construction,” affixed to the land, intended as “habitation for people, animals or a shelter for tangible personal property” and furthermore “increase the utilization or enjoyment of the land.”

R.C. 5701.02(A) defines realty, with the caveat: “unless otherwise specified in this section or section 5701.03 of the Revised Code.” We next turn to the issue of whether the buildings, improvements, and/or structures on the subject property should be classified as business fixtures. We find that they should not.

R.C. 5701.03(B) provides “[b]usiness fixture’ means an item of tangible personal property that has become permanently attached or affixed to the land, ***.” The evidence before us concerning the nature of the buildings, improvements, and structures fails to demonstrate that any of them are items of personal property that have become permanently attached to the subject property. The buildings, improvements, and structures before us are borne from permanent fabrication and construction upon the property (e.g., brick and mortar construction “consisting of foundations, walls, columns, girders, beams, floors, and a roof”), rather than item(s) of personal property (e.g., “machinery, equipment, signs, storage bins and tanks, ***,

broadcasting, transportation, transmission, and distribution systems”) that have been otherwise delivered and permanently attached to the land.

It is unnecessary to consider whether or not the buildings, improvements and structures before us “primarily benefit the business conducted” on the property because the brick and mortar buildings, improvements and structures fail to constitute “[an] item of personal property” under R.C. 5701.03(B) in the first instance.

Furthermore, there is no evidence before us that would enable us to conclude that there are any portions of buildings, structures or improvements on the subject property specifically constructed for use in business, such as foundations and supports for machinery and equipment. Within the definition of business fixture, R.C. 5701.03(B) provides: “‘Business fixture’ also means those portions of buildings, structures, and improvements that are specially designed, constructed, and used for the business conducted in the building, structure, or improvement.” Polaris mis-interprets said portion of the definition and argues that because the subject property is put to a commercial use, any and all buildings, any and all structures and any and all improvements “are specially designed, constructed and used in business” and are therefore business fixtures. We disagree.

As the Ohio Supreme Court held in *Funtime*, supra, R.C. 5701.02 and 5701.03 must be interpreted in *pari materia*. The distinction between real property and personal property does not hinge upon the singular distinction of whether property is used in business or a commercial venture. Rather, only the distinction of whether an item of personal property constitutes a “fixture” under R.C. 5701.02(C) and is

therefore defined as real property, or whether an item of personal property constitutes a "business fixture" under R.C. 5701.03(B) and is therefore defined as personal property does hinge upon the determination of whether the item of personal property is used in business.

The limited inclusion of language by the legislature in the definition of business fixture permits foundations and supports specifically designed for machinery, equipment, and the like to be classified as business fixtures.⁵ If we were to accept Polaris' argument, the definition of business fixture would necessarily eclipse all the definitions of real property found in R.C. 5701.02 and require that all buildings, structures and improvements (e.g., car washes, office buildings, retail stores, banks, gas stations, indoor and outdoor arenas) be classified as personal property solely because they are all used for a commercial purpose. We fail to read the statutory enactments and the court's holdings to produce this result.

Based upon the evidence before us, we find that the buildings, structures and improvements situated upon the subject property are properly classified and valued as realty pursuant to Ohio law.

In support of its contention of value, Polaris offered at this board's evidentiary hearing the testimony and written appraisal report of Mr. Robin Lorms. Mr. Lorms has limited his analysis to the valuation of the subject's land only. We are

⁵ All of the examples cited within the definition of business fixture found in R.C. 5701.03(B) support the conclusion that business fixtures are items of personal property that have been brought upon the land and otherwise affixed (i.e., machinery, equipment, signs, storage bins and tanks; broadcasting, transportation, transmission, and distribution systems).

unable to assign any more than limited weight to the report and opinion of Mr. Lorms because he has failed to value the buildings, improvements and structures on the subject property.

Even if we were to rely upon Mr. Lorms' opinion of value for the subject, we are concerned about his failure to consider the subject's current use in determining the highest and best use for the subject property. Mr. Lorms' highest and best use analysis concludes that "no use of the site would be as profitable as office use." Ex. 13 at 33.

The Appraisal of Real Estate (12th Ed.) defines "highest and best use" as:

"[T]he reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and results in the highest value." Id. at 297.

The text further describes:

"Appraisal theory holds that as long as the value of a property as improved is greater than the value of the site unimproved, the highest and best use is use of the property as improved. Once the value of the vacant land exceeds the value of the improved property, the highest and best use becomes use of the land as though vacant." Id. at 298.

The subject property is improved with a regional outdoor amphitheater. Any analysis of the subject's highest and best use must necessarily include a determination that the value of the vacant land would exceed the value of the property as improved. Before this board, Mr. Lorms acknowledged that he did not endeavor to value the subject property as improved. H.R. I at 170-181. Furthermore, Mr. Lorms

testified that he had not formed an opinion that the subject property's value, if vacant, would exceed its valuation as improved. Id.

Based on the evidence before us presented by Polaris, we fail to see any discussion or consideration of the subject's valuation as improved. Furthermore, we are unable to conclude that the value of the subject property as vacant necessarily exceeds the value of the property with its current improvements. Therefore, we find Mr. Lorms' analysis premised upon the highest and best use of the subject as vacant land for redevelopment as office space fails to constitute competent and probative evidence of value.

Polaris additionally provided the testimony of two civil engineers who provided their opinions and documentary evidence concerning how the subject property might be redeveloped and reconfigured as office-space development. Because Polaris has failed to demonstrate that the subject's highest and best use of the property, if vacant, would exceed its value as improved, we must necessarily conclude that evidence concerning possible redevelopment for an alternative use fails to constitute competent and probative evidence of the subject's value on January 1, 2003.

Polaris additionally provided testimony and evidence concerning proposed changes to its personal property tax returns, assuming the buildings, structures and improvements on the subject property were reclassified as business fixtures. As the instant appeal comes to this board through a complaint filed before the BOR pursuant to R.C. 5715.19, our jurisdiction is limited to determining the value of the subject real property as it appears on the 2003 tax list and duplicate. See R.C.

5715.19(A)(1)(d). Furthermore, there is nothing in the record to suggest that Polaris has sought any reassessment for its previously filed personal property tax returns with the Tax Commissioner, and hence, there is no final determination of the Tax Commissioner from which Polaris may appeal.⁶ Therefore, we are without the requisite jurisdiction to assess or otherwise determine the accuracy of Polaris' proposed personal property returns, and further find that the testimony and evidence regarding Polaris' proposed returns fail to constitute competent and probative evidence of value for the subject parcels before us.

The BOE presented the written appraisal report and testimony of Mr. Sam Koon. Mr. Koon's appraisal report was prepared with an "as of" date of January 1, 2003. Ex. A at 62. Mr. Koon ultimately arrived at an opinion of value of \$21,000,000 for the subject property. Ex. B at 62, H.R. II at 15.⁷

Given the special use and nature of the subject's improvements as a regional outdoor amphitheater, Mr. Koon testified that he was unable to identify any comparable sales data or comparable economic rental data from the sale or lease of other amphitheaters. H.R. II at 16, Ex. A at 59-60. Therefore, Mr. Koon's opinion of value is limited to his conclusions derived from his cost approach valuation of the subject.

⁶ R.C. 5717.02 sets forth certain prerequisites necessary to invoke the jurisdiction of this board from a final determination of the Tax Commissioner, providing in pertinent part:

"Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner *** within sixty days after notice of the *** determination *** by the commissioner *** has been given or otherwise evidenced as required by law."

⁷ At hearing before this board, Mr. Koon identified various corrected pages to his appraisal report, marked as Exhibit B.

In his cost approach, Mr. Koon began by arriving at a raw land value by considering five comparable land sales that occurred between August 2000 and July 2005. All of the comparable sales were in close proximity to the subject property, utilizing the Polaris Parkway/I-71 freeway interchange. The price per acre paid for the comparables ranged between \$85,237 and \$151,146 per acre. After making adjustments to the comparable sales, Mr. Koon developed a range of \$95,000 to \$110,000 per acre. Utilizing the lower end of the range of value, Mr. Koon opined to a land value of \$95,000 per acre for the subject, or \$8,600,000 for the subject's 90.687 acres. Ex. A at 39-53.

In estimating the subject's replacement cost (as new), Mr. Koon used the actual construction costs as supplied by the subject's developer. Ex. A at 54. Mr. Koon testified that the subject's special use necessitates reliance upon the actual costs to construct, given information pertaining to the reproduction costs of an outdoor amphitheater is not included in the majority of national cost indexes. Id.

Mr. Koon analyzed the subject's 1994 construction costs, which totaled \$9,629,200 for both the costs of site and building improvements. Relying upon his analysis of trend multipliers for the subject's regional location, Mr. Koon increased the 1994 site and improvement costs by 27%, to arrive at a cost to construct value of \$12,229,084 for January 1, 2003. Id. at 54. Mr. Koon then included the cost to construct additional special use improvements (i.e., outdoor grill and a patio/deck area) made upon the subject property after 1994, again utilizing trend multipliers to determine the costs relevant to 2003. The additional cost of the new special use

improvements was estimated to be \$68,296. Id. at 55. Additionally, Mr. Koon included the costs to construct additional improvements (i.e., maintenance building and concession kiosk buildings) made upon the subject property after 1994, utilizing Marshal Valuation Service reproduction cost estimates relevant to 2003. The additional costs of the new improvements were estimated to be \$267,446. Combining the updated cost to construct the original facility, together with additional improvements, Mr. Koon arrived at a value of \$12,600,000 for the hard costs associated with the subject for January 1, 2003. Id. at 55, H.R. II at 14.

Mr. Koon next estimated the soft costs (i.e., architectural, engineering fees, financing costs, various legal and administrative fees, and the like), by utilizing 10% of the total hard cost of the development, or \$1,260,000. Mr. Koon fixed entrepreneurial profit at \$1,100,000. In sum, Mr. Koon's total reproduction cost of the subject property was \$14,960,000. Id. at 56, H.R. II at 14.

To estimate accrued depreciation of the improvements, Mr. Koon assigned an economic life of 40 years to the buildings that consist of masonry construction, assigned an economic life of 35 years for the steel frame and wood pole buildings, and assigned an economic life of 15 years to the remaining smaller wood frame buildings pursuant to the indexes provided by the Marshall Valuation Service. Ex. B at 57. The subject's original improvements were approximately eight years old on tax lien date. Mr. Koon assigned depreciation percentages to the various grades of buildings, based upon their economic life and their age as of January 1, 2003. The sum total of depreciation was estimated at \$2,588,079. Id., H.R. II at 14.

In conclusion, Mr. Koon arrived at a depreciated value for all improvements of \$12,371,921. After adding his valuation of the subject's land (\$8,600,000), Mr. Koon arrived at a final value of \$21,000,000 for the subject property as of January 1, 2003. Ex. B at 58, H.R. II at 15.

As described above, the county auditor's and BOR's valuation of the subject property for January 1, 2003 is \$20,734,700. Mr. Koon's opinion of \$21,000,000 for the subject is nearly the same, and it provides support for such value. In addition, in its brief, the BOE urges this board to leave the auditor's and BOR's value unchanged. BOE brief at 86.

Based upon the record and the evidence before us, we hold that Polaris has not met its burden of demonstrating the subject property's fair market value as of tax lien date. We further find that the evidence of value provided by the BOE is supportive of the original values assigned to the subject property by the auditor and affirmed by the Delaware County Board of Revision. Therefore, we find the value of the subject as of January 1, 2003 to be:

Parcel 318-442-02-025-001	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 3,666,700	\$1,283,350
BLDG	\$ 5,668,400	\$1,983,940
TOTAL	\$ 9,335,100	\$3,267,290
Parcel 318-442-02-025-918	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 3,224,200	\$1,128,470
BLDG	\$ 0	\$ 0
TOTAL	\$ 3,224,200	\$1,128,470
Parcel 318-442-02-025-000	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 1,102,300	\$ 385,810
BLDG	\$ 0	\$ 0
TOTAL	\$ 1,102,300	\$ 385,810

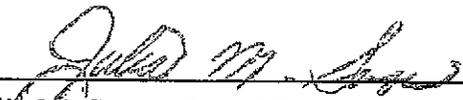
Parcel 318-442-02-025-919	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 5,688,700	\$1,991,050
BLDG	\$ 1,258,700	\$ 440,550
TOTAL	\$ 6,947,400	\$2,431,600

Parcel 318-442-02-024-000	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 117,200	\$ 41,020
BLDG	\$ 8,500	\$ 2,980
TOTAL	\$ 125,700	\$ 44,000

Grand Totals \$20,734,700 \$7,257,170

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

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

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing NOTICE OF APPEAL was mailed via Certified United States Mail, postage prepaid, to Dave Yost, Prosecuting Attorney, 140 North Sandusky Street, Delaware, Ohio 43015, Attorney for Appellees, Delaware County Board of Revision and County Auditor; James R. Gorry, Rich, Crites & Dittmer, LLC, 300 East Broad Street, Suite 300, Columbus, Ohio 43215, Attorney for Appellee Board of Education of the Olentangy Local Schools and Marc Dann, Ohio Attorney General, State Office Tower, 17th Floor, 30 East Broad Street, Columbus, Ohio 43215-3428, Attorney for Appellee Tax Commissioner of the State of Ohio and the Tax Commissioner of the State of Ohio, 30 East Broad Street, 22nd Floor, Columbus, Ohio 43215 on this 22nd day of February 2007.



Todd W. Sleggs, Esq. (0040921)

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