

IN THE SUPREME COURT OF OHIO

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SUPREME COURT OF OHIO  
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Hon. Dusty Rhodes, Hamilton County Auditor, )

Appellee, )

vs. )

Hamilton County Board of Revision, )  
the Board of Education of the Princeton )  
City School District and the Tax )  
Commissioner of the State of Ohio, )

Appellees, )

and )

MA Richter Villa Ltd. and Vigran )  
Brothers Villa Ltd., )

Appellants. )

Case No. \_\_\_\_\_

07-0615

Appeal from the Ohio Board of Tax Appeals

BTA Case No. 2005-M-1098

**NOTICE OF APPEAL OF MA RICHTER VILLA LTD. AND VIGRAN BROTHERS VILLA LTD.**

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**FILED**  
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SUPREME COURT OF OHIO

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**IN THE SUPREME COURT OF OHIO**

Hon. Dusty Rhodes, Hamilton County Auditor,	)	Case No. _____
	)	
Appellee,	)	
	)	
vs.	)	
	)	
Hamilton County Board of Revision, the Board of Education of the Princeton City School District and the Tax Commissioner of the State of Ohio,	)	Appeal from the Ohio Board of Tax Appeals
	)	
Appellees,	)	BTA Case No. 2005-M-1098
	)	
and	)	
	)	
MA Richter Villa Ltd. and Vigran Brothers Villa Ltd.,	)	
	)	
Appellants.	)	

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**NOTICE OF APPEAL OF MA RICHTER VILLA LTD. AND  
VIGRAN BROTHERS VILLA LTD.**

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Appellants MA Richter Villa Ltd. and Vigran Brothers Villa Ltd., collectively the owners of the property in question, hereby give notice of an appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Ohio Board of Tax Appeals, journalized in case number 2005-M-1098.

A true copy of the Decision and Order of the Ohio Board of Tax Appeals being appealed is attached hereto and incorporated herein by reference as Exhibit A.

The appellants complain of the following errors in the Decision and Order of the Ohio Board of Tax Appeals:

ASSIGNMENT OF ERROR NO. 1:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because the acceptance of the sale price as the property's value is inconsistent with the Ohio Supreme Court's holding in *Higbee Co. v. Cuyahoga Cty. Bd. of Revision* (2006), 107 Ohio St. 3d 325, wherein the Ohio Supreme Court rejected evidence of value inextricably intertwined with the non-real estate business value of the tenant which reflects the business success of the tenant rather than the value of the underlying real estate.

ASSIGNMENT OF ERROR NO. 2:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because the use of a sale price based upon non-real property factors results in exactly the type of inconsistent valuation of similarly-situated properties that the Ohio Supreme Court's *Higbee, supra*, decision states is unacceptable because the price is reflective of the business success of the tenant rather than the value of the underlying real estate.

ASSIGNMENT OF ERROR NO. 3:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because the acceptance of the sale price would be inconsistent with the Ohio Supreme Court's requirement that an assessment may not include elements of non-real estate business value.

ASSIGNMENT OF ERROR NO. 4:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because it subjects businesses that are more successful financially to increased real estate tax assessments when compared with less successful businesses because the price is reflective of the business success of the tenant rather than the value of the underlying real estate.

ASSIGNMENT OF ERROR NO. 5:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because it results in an assessment in use.

ASSIGNMENT OF ERROR NO. 6:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because the Board of Tax Appeals erred in

failing to find that the lease encumbering the subject property was a value-in-use lease resulting in a value-in-use sale.

**ASSIGNMENT OF ERROR NO. 7:**

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because it is subjecting the property to taxation based upon the value of its leased fee interest, not the fee simple interest as required by Ohio law.

**ASSIGNMENT OF ERROR NO. 8:**

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes violates Article XII, Section 2 of the Ohio Constitution which requires that property should be taxed by uniform rule according to value.

**ASSIGNMENT OF ERROR NO. 9:**

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because it values the property at an amount in excess of its replacement cost new, as determined by both appraisers, when such an assessment is not supportable based upon the fundamentals of real property valuation.

ASSIGNMENT OF ERROR NO. 10:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because, as shown by expert testimony, sales of properties in the net-lease market are not reflective of the fee simple value of the property but also, reflect other, non-real estate related elements such as the creditworthiness of the tenant and the relative business success of the tenant.

ASSIGNMENT OF ERROR NO. 11:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because the sale of a property with a successful tenant in place subject to a long-term lease does not capture the significant obsolescence inherent in the fee simple value of the real property, but also reflects the business success of the tenant subject to the long-term lease.

ASSIGNMENT OF ERROR NO. 12:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because the Appellants have established that the lease encumbering the property does not meet the requirements established under Ohio law and appraisal standards as an arm's length, market lease, and as a result, a subsequent transfer based upon this lease cannot meet the requirements of an arm's length, market transaction.

ASSIGNMENT OF ERROR NO. 13:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because the Board of Tax Appeals ignored the uncontroverted testimony that the buyer of the subject property was not typically motivated and therefore the transfer fails to meet the requirements of an arm's length, market transaction for purposes of both Ohio law and appraisal standards.

ASSIGNMENT OF ERROR NO. 14:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because the Board of Tax Appeals ignored the expert appraiser's testimony as to the conditions, facts and circumstances surrounding the transfer before the Board, when such experts are competent to testify as to such matter and when the Ohio Supreme Court has just recently in *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2007), 112 Ohio St. 3d 309, stated that such inquiry is exactly what the Court envisioned as part of its *Berea, infra*, decision.

ASSIGNMENT OF ERROR NO. 15:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because it is inconsistent with the rejection

by the Ohio Supreme Court of similar sale and leaseback transactions where these transactions are non-arm's length financing transactions and not reflective of the value of the underlying real property

ASSIGNMENT OF ERROR NO. 16:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because it erroneously relies upon the Ohio Supreme Court's decision in *Berea City Sch. Dist. Bd. of Edn. v. Cuyahoga County Bd. of Revision* (2005), 106 Ohio St.3d 269, when the facts and circumstances of *Berea* are not applicable, as the *Berea* case did not involve the sale of a single-tenant property sold in the net-lease market subject to a value-in-use lease influenced by the credit-worthiness and business success of the tenant.

ASSIGNMENT OF ERROR NO. 17:

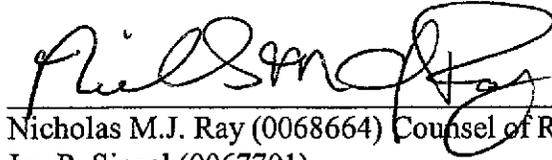
The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because it ignores the competent and probative evidence provided by the property owner's appraiser concerning the fee simple value of the subject property.

ASSIGNMENT OF ERROR NO. 18:

The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes violates the right of equal protection under Article I, Section 2 and Article II, Section 26

of the Ohio Constitution and Amendment XIV, Section 1 of the United States  
Constitution in that it treats these property owners differently from other property  
owners for taxation purposes.

Respectfully submitted,

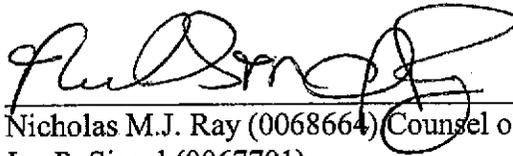


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MA RICHTER VILLA LTD. AND  
VIGRAN BROTHERS VILLA LTD.

**PROOF OF SERVICE UPON  
OHIO BOARD OF TAX APPEALS**

This is to certify that the Notice of Appeal of MA Richter Villa Ltd. and Vigran Brothers Villa Ltd. was filed with the Ohio Board of Tax Appeals, State Office Tower, 24<sup>th</sup> Floor, 30 East Broad Street, Columbus, Ohio as evidenced by its date stamp as set forth hereon.

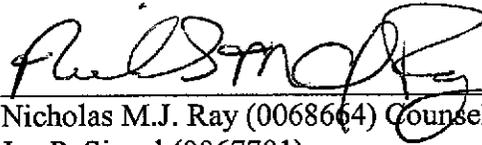


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BROTHERS VILLA LTD

**CERTIFICATE OF SERVICE**

This is to certify that on this 6<sup>th</sup> day of April 2007, a copy of the Notice of Appeal and a copy of the Demand to Certify Transcript were sent via certified mail to Thomas J. Scheve, Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, OH 45202, Joseph T. Deters, Hamilton County Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, OH 45202, John Hust, Schroeder, Maundrell, Barbieri, & Powers, 11935 Mason Road, Suite 110, Cincinnati, OH 45249, Marc Dann, Ohio Attorney General, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, OH 43215-3428, and Richard A Levin, Tax Commissioner of Ohio, 30 E. Broad Street, 22nd Floor, Columbus, Ohio 43215.



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COUNSEL FOR APPELLANTS  
MA RICHTER VILLA LTD. AND VIGRAN  
BROTHERS VILLA LTD.

**OHIO BOARD OF TAX APPEALS**

Hon. Dusty Rhodes, Hamilton )  
County Auditor, )  
 )  
Appellant, )  
 )  
vs. )  
 )  
Hamilton County Board of Revision, )  
the Hamilton County Auditor, MA )  
Richter Villa LTD & Vigran Brothers, )  
Villa LTD, and the Board of Education, )  
Princeton City School District, )  
 )  
Appellees. )

CASE NO. 2005-M-1098  
  
(REAL PROPERTY TAX)  
  
DECISION AND ORDER

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Entered March 9, 2007

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

**EXHIBIT A**

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal filed by appellant, Hon. Dusty Rhodes, Hamilton County Auditor ("Auditor"), on August 24, 2005 from a decision, mailed July 27, 2005, of the Hamilton County Board of Revision ("BOR"), appellee herein.

The subject property is located in the city of Cincinnati taxing district of Hamilton County, Ohio, and further identified as parcel no. 611-0020-0393-00. The Hamilton County Auditor found the true and taxable values of the subject property for tax year 2004 to be as follows:

Parcel No. 611-0020-0393-00

	True Value	Taxable Value
Land	\$ 2,875,000	\$1,006,250
Building	\$ 1,500,000	\$ 525,000
Total	\$ 4,375,000	\$1,531,250

Upon consideration of the complaint filed by the property owner, MA Richter Villa Ltd & Vigran Brothers Villa Ltd ("MA Richter") and the counter-complaint filed by the Princeton Board of Education ("BOE"), the BOR, by a two-to-one vote, found the following true and taxable values for the subject property for tax year 2004:

Parcel No. 611-0020-0393-00

	True Value	Taxable Value
Land	\$ 900,100	\$ 315,040
Building	\$ 1,049,900	\$ 367,470
Total	\$ 1,950,000	\$ 682,510

The auditor voted against the reduction in value. S.T., transcript of hearing. Through his notice of appeal, the auditor has alleged that his values were correct for tax year 2003 and this board should reinstate the values originally listed.

The matter was submitted to the Board of Tax Appeals pursuant to R.C. 5717.01 upon the notice of appeal, the statutory transcript received from the Hamilton County Auditor, fulfilling his duties as secretary of the BOR, and the record of the hearing held before this board. At that hearing, both the auditor and the property owner presented appraisal evidence. We are also in receipt of legal argument presented by the auditor.

The subject property is a 1.3830-acre parcel of land located in the village of Evendale, a suburb of Cincinnati. The property is improved with a one-story retail building, constructed in 2003 and containing 14,649 square feet. The current owner purchased the property on April 14, 2003<sup>1</sup> from Neyer Retail LLC for a purchase price of \$4,375,000. The property is currently occupied by a Walgreen's drugstore. Both appraisers describe the subject property as a "build-to-suit," a property that was developed and constructed under an agreement between the developer of the site and the ultimate user of the property.

While both appraisers agree on the manner in which the property was developed, they differ on the effect that the "build-to-suit" development has on the

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<sup>1</sup> It is unclear from the record whether the sale on April 14, 2003 was before or after the improvements' completion. The record merely indicates that the improvements were construction in 2003, but does not provide a more accurate completion date. However, there has been no suggestion that the improvements were not fully completed by tax lien date, January 1, 2004.

value of the subject for real property taxation purposes. The auditor's appraiser concludes that all three accepted methods of valuing the subject property result in a value for the subject property of \$4,375,000, a value which is equal to the April 14, 2004 sale price of the property. The property owner's appraiser comes to a different conclusion. It is his opinion that the sale taking place between Neyer Retail LLC and MA Richter is a sale of a leased fee interest, and, as such, is not indicative of the fair market value for ad valorem taxation purposes. It is the board's conclusion that neither appraiser's opinion will be relied upon in our ultimate determination of value. Instead, we conclude that *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, requires this board to find that the sale price controls the outcome of this appeal.<sup>2</sup>

We begin our review of this matter 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 the 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 a board of revision to come forward and offer evidence which demonstrates his right to the value sought. *Cleveland Bd. of Edn.*, supra; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493. Once an appellant has presented competent and probative evidence of true value,

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<sup>2</sup> The BOR's determination was made prior to the court's issuance of *Berea*.

other parties asserting a different value then have a corresponding burden of providing sufficient evidence to rebut the appellant's evidence. *Springfield Local Bd. of Edn.*, supra; *Mentor Exempted Village Bd. of Edn.*, supra.

Having noted the appropriate standard of review, we now proceed to determine the taxable value of the subject property. We first turn to the Ohio Revised Code for guidance. R.C. 5713.01 provides, in part:

“The auditor shall assess all the real estate situated in the county \*\*\* at its true value in money \*\*\*.”

It has long been established that the best evidence of “true value in money” of real property is an actual recent sale of 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. Further, R.C. 5713.03 provides:

“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 \*\*\* to be the true value for taxation purposes.”

Thus, where there is an actual sale of real property which is both recent and arm’s length, the county auditor, as well as this board, must consider such a sale as evidence of the property’s true value. *Conalco* and *Park Investment*, supra.

*Berea* is especially instructive in the present matter. In that appeal, the Ohio Supreme Court considered the value of a parcel of property improved with two buildings, one leased to a K-Mart and the other to a fast food restaurant. Both users

were tenants under long-term leases. A purchaser unrelated to either tenant purchased the property subject to both leases. In our decision, this board considered the effect that the below-market rents of the long-term leases would have on the sale price garnered, concluding that the sale price was not representative of the true value of the property. The court disagreed:

“In accordance with the plain language of R.C. 5713.03 and our decision in *Fountain Square*, today we \*\*\* hold that when the property has been the subject of a recent arm’s-length sale between a willing seller and a willing buyer, the sale price of the property shall be ‘the true value for taxation purposes.’ R.C. 5713.03. 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.

“While we recognize that several of our decisions have permitted the BTA to consider market rental value of commercial real property as an indicator of the true value of the property, none of those cases involved a recent arm’s-length sale of the property between a willing seller and a willing buyer. For instance, in *Wynwood Apts., Inc. v. Cuyahoga Cty. Bd. of Revision* (1979), 59 Ohio St.2d 34, 35, \*\*\*, this court noted that ‘there was no recent arm’s-length transfer of the property to serve as “best evidence” of the true value in money which the board must rely upon under R.C. 5717.03 and the case law of this court.’ See, also, *Alliance Towers*, 37 Ohio St.3d 16, \*\*\* and *Canton Towers, Ltd. v. Stark Cty. Bd. of Revision* (1983), 3 Ohio St.3d 4, \*\*\* each approving the use of ‘economic rental value of commercial real property as an indicium of value for *ad valorem* real property taxation purposes’ where the property had not been sold in a recent arm’s-length transaction between willing parties. *Alliance Towers*, 37 Ohio St.3d at 22, \*\*\*.

“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.' (Emphasis added; citations omitted.) *Columbus Bd. of Edn. v. Fountain Square Assoc., Ltd.* (1984), 9 Ohio St.3d 218 \*\*\*. See, also, *N. Olmsted Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1990), 54 Ohio St.3d 98, \*\*\*, in which we held that 'in the absence of evidence of a recent arm's-length sale between a willing buyer under no compulsion to buy and a willing seller under no compulsion to sell, the testimony of expert witnesses becomes necessary'; and *Dublin Senior Community Ltd. Partnership v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455, 459 \*\*\*, in which we held that 'when an actual sale is not available, "an appraisal becomes necessary,"' quoting *Park Invest. Co.*, 175 Ohio St. at 412, \*\*\*.

"Since the property at issue here had been sold in a recent arm's-length transaction, we do not need to determine whether actual rent or market rent should have been used in the property appraisal. Accordingly, the decision of the BTA is reversed, and the matter is remanded to the BTA for further proceedings consistent with this opinion and our instruction that pursuant to R.C. 5713.03, the sale price in a recent arm's-length transaction between a willing seller and a willing buyer shall be considered the true value of the property for taxation purposes." *Id.* at ¶¶13-16. (Parallel citations omitted.)

In the present matter, a conveyance fee statement, as well as the testimony of both appraisers, evidences a sale from Neyer Retail LLC to MA Richter. Case law has recognized a rebuttable presumption that the price for which a property sells reflects the true value of a property. *Cincinnati School District Bd. of Edn. v. Hamilton Cty Bd. of Revision* (1997), 78 Ohio St.3d 325. In *Cincinnati*, the Ohio Supreme Court also recognized that the rebuttable presumption that the sale price reflects true value extends to all the elements which characterize true value. *Id.* at

327. Those elements are succinctly provided in *Walters v. Knox County Board of Revision* (1989), 47 Ohio St.3d 23, as being “voluntary, i.e., without compulsion or duress; it generally takes place in an open market; and the parties act in their own self interest.”

We have no evidence in the record which would allow us to conclude that the sale did not meet the indices of an arm’s-length transaction. No one from either the purchaser or the seller testified regarding the sale. Mr. Lorms, the appraiser for the property owner, attempted to discount the sale by arguing that the lease executed by Walgreens, not market forces, set the sale price. The inference to be drawn from Mr. Lorms’ argument is that the sale itself did not meet the requirement of an arm’s-length sale. However, the sale in the present matter mirrors the sale consummated in *Berea*, which also concerned the sale of a property encumbered by long-term leases. The major difference between *Berea* and the present matter is reflected in the timing of the sale vis-à-vis the encumbrances. In *Berea*, the sale occurred in 1996, but one lease was entered into in 1967 and the other in 1985. In the present matter, the sale and the leases were consummated in the same year. That fact appears to be a distinction without a difference. The court instructed this board to focus on the arm’s-length nature of the sale, not the value or timing of the leaseholds.

Given the court’s holding in *Berea*, this board finds that the presumption that the sale between Neyer Retail LLC and MA Richter was an arm’s-length transaction was not rebutted. Therefore, the board finds that the record supports a valuation finding as of January 1, 2004 as follows:

Parcel No. 611-0020-0393-00

	True Value	Taxable Value
Land	\$ 2,875,000	\$1,006,250
Building	\$ 1,500,000	\$ 525,000
Total	\$ 4,375,000	\$1,531,250

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

ohiosearchkeybta