

IN THE SUPREME COURT OF OHIO

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. 2007-0615 Appeal from the Ohio Board of Tax Appeals BTA Case No. 2005-M-1098

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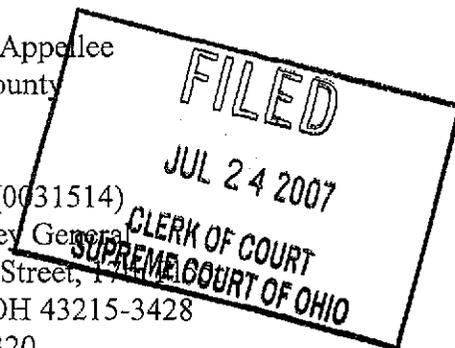


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INTRODUCTION

The subject property is a drugstore designed and built-to-suit specifically for use by Walgreens. Walgreens outsourced the development of the property to one of its regular contractors. Rather than utilizing mortgage loan financing to pay off the costs of constructing the store, Walgreens instead entered into a long term lease with the developer to amortize the construction costs in lieu of a mortgage. The lease did not reflect the market value of the improvements, as many of the design requirements of the store were unique to the needs of Walgreens. Rather, the lease reflected the value of the property to Walgreens as the user. In terms of valuing property, this is referred to as valuing in use. This value in use lease based on construction costs in turn formed the basis of a subsequent sale by the developer to an investor. The value-in-use lease based on construction costs carried the guarantee of payment by one of the most highly successful, credit-worthy tenants in the country—Walgreens. The County Auditor's and Taxpayers' appraisers agree that the sale price was driven significantly, if not totally, by the value-in-use lease and the business success and credit-worthiness of Walgreens as the tenant guaranteeing payment.

While the issues in this case concern the assessment of a single-tenant commercial property designed and built specifically for Walgreens, the principles are not altogether different than those faced by the typical homeowner. Does the cost of building a home always equal its value? What if the homeowner had unique tastes, perhaps wanted stained glass in the family room, wheelchair access for a disabled family member, solar panels to generate electricity or a wine cellar dug into the basement? While most of the home would probably maintain its value, it is quite possible that a subsequent buyer of that property might not place equal value on the stained glass, wheelchair access, solar electricity or wine cellar. So the home would have one

value to the user it was designed for, perhaps reflected in the costs of construction, but likely an altogether different value to another user/buyer when it came time to sell the property. This valuation distinction is addressed by *The Appraisal of Real Estate*, 12th Edition, pp. 24-25, and illustrates the important difference between the value of a property to a user and the fair market value to others on the open market.

In the instant matter, the original lease of the subject property reflects the costs of construction and the use-value to the tenant for which the property was designed. The subsequent sale of the property, subject to the 60 year value-in-use lease by Walgreens, a highly successful and credit-worthy tenant, also reflects the use-value of the property. Furthermore, reliance on *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2005), 106 Ohio St.3d 269 in arguing that the sale is the best evidence of value is misplaced, as the facts and circumstances of this case more closely reflect this Court's mandate in *Higbee Co. v. Cuyahoga Cty. Bd. of Revision* (2006), 107 Ohio St. 3d 325 that assessment of Ohio real property must disregard evidence concerning the success of the tenant's business and the value of the property to a specific user.

STATEMENT OF THE CASE AND FACTS

The subject property is designated by the Hamilton County Auditor as permanent parcel number 611-0020-0393-00. (Lorms, p. 1),¹ and is located at 3105 Glendale Milford Road, Cincinnati. (Lorms, p. 1). MA Richter Villa Ltd. and Vigran Brothers Villa Ltd. ("Taxpayers") own the subject parcel. The subject has a total land area of 1.3830 acres. (Lorms, p. 1). The site was improved in 2003 with a one-story, 14,490 square foot freestanding retail storeroom.

¹A copy of the appraisal report prepared by Mr. Robin Lorms was submitted into evidence as Appellees' (Taxpayers') Exhibit A before the BTA. The Taxpayers were the Appellees before the BTA and are now the Appellants before this Court. A copy of Mr. Lorms' appraisal is also in Appellants' Supplement to the Merit Brief, stamped pp. 52 to 227. It will hereafter be cited as "Lorms, p. ___" and the page numbers cited will correspond to the original page numbers in the appraisal report.

(Lorms, p. 1). The market area for this property is in the stability stage of its life cycle where property values are expected to stabilize to slightly increase in the near future. (Lorms, p. 19). All market attributes are considered average. (Lorms, p. 20).

The subject property was designed and constructed by a third party developer in accordance with the demands and unique business needs of a specific user, in this case Walgreens. (Lorms, p. 3). This process of development is frequently referred to as building a property to suit the user. As is the common practice with these “build-to-suit” properties, the developer secured a net lease from Walgreens *before* the commencement of construction based on the amortized cost of constructing the property. (Lorms, p. 3). A copy of the lease was provided during the hearing before the Hamilton County Board of Revision (“BOR”) which indicates that it was signed on September 30, 2002, for a property completed in 2003, and is for a sixty (60) year term. (Property Lease,² p. 1). The developer then sold the property with the lease in place in what is commonly referred to as the net lease market, distinguishable from transactions that typically occur in the open market. As will be discussed below, the sale price obtained for the property reflected the value of the property to Walgreens in use. (Lorms, p. 3). In other words, the sale price reflected “value-in-use” rather than “value-in-exchange” and therefore an assessment of the property based on its sale price in the net lease market would result in a use-value assessment prohibited by law in Ohio.

For the tax year 2004, the Hamilton County Auditor (“Auditor”) placed a fair market value on the subject parcel of \$4,375,000. On March 28, 2005, the Taxpayers filed a complaint with the Hamilton County Board of Revision (“BOR”) seeking to decrease the fair market value of the parcel to \$2,000,000. The Cincinnati School District Board of Education (“School

² A copy of the build-to-suit, value-in-use lease was entered into evidence before the BOR as Exhibit A. It is also included in Appellants’ Supplement to the Merit Brief, stamped pages 296 to 316.

Board”) filed a counter-complaint on May 23, 2005 seeking to retain the Auditor’s value. The Auditor had established the value for the property based upon an April 14, 2003 transfer of the subject property from the developer to the Taxpayers for \$4,375,000.

On July 19, 2005, the BOR held a hearing concerning the complaint. The Taxpayers presented the appraisal of Integra Realty Resources and Robin Lorms, MAI, CRE, expressing an opinion of value of \$1,950,000 and a copy of the build-to-suit, value-in-use lease. The Auditor’s staff appraiser, Antoinette Ebert, testified in support of the Auditor’s value. On July 27, 2005, the BOR issued its decision decreasing the Auditor’s value to \$1,950,000. The Auditor, a member of the BOR, appealed this decision to the Ohio Board of Tax Appeals (“BTA”) on August 22, 2005.

The case was assigned to Attorney Examiner Rebecca Luck. The case proceeded to hearing before the BTA on September 20, 2006. Once again, the Auditor relied on an appraisal prepared by Antoinette Ebert, staff appraiser for the Hamilton County Auditor’s office. Ms. Ebert testified that she believed that the value of the subject property was consistent with its sale price. Upon completion of her testimony, the appraisal of Ms. Ebert was entered into evidence as Appellant’s Exhibit 1.³

In addition to the statutory transcript from the BOR, which contained, among other things, the build-to-suit lease that encumbered the subject property at the time of its sale, the Taxpayers once again offered the appraisal and testimony of Robin Lorms at the BTA hearing. Mr. Lorms outlined various reasons why the sale price was not reflective of value, and how the sale price primarily reflected the use-value of the property instead of its value-in-exchange. Mr.

³ The appraisal report prepared by Ms. Ebert was admitted into evidence as Appellant’s (Auditor’s) Exhibit 1 before the BTA. It can also be found in Appellants’ Supplement to the Merit Brief, stamped pp. 228 to 295. It will hereafter be cited as “Ebert, p. ___” and the page numbers cited will refer to the original page numbers in the appraisal report.

Lorms further supported his opinion with an independent appraisal of the subject property for \$1,950,000. Upon completion of his testimony, Mr. Lorms' appraisal was admitted into evidence as Appellees' Exhibit A.

On March 9, 2007, the BTA reversed the BOR's decision and determined that the sale price was the best evidence of value. The Taxpayers' appeal from the BTA decision is now before this Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

The Taxpayers will establish, by clear and convincing evidence submitted in the record, the following:

- I. The holding in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2005), 106 Ohio St.3d 269, is not applicable to this case as the *Berea* case addressed the acceptance of a sale price that was indicative of the value of the real estate in-exchange where the property was multi-tenant and not built-to-suit a particular tenant. In contrast, the instant matter concerns the sale of a single tenant property valued in-use, where the property was built to that tenant's unique needs and the transfer is reflective of the business success and credit-worthiness of the tenant and is unrelated to the value of the underlying real estate.
- II. Adoption of the sale price of the subject property would result in an unlawful assessment in use.
- III. To adopt the sale price as the value of the subject property would be inconsistent with this Court's holding in *Higbee Co. v. Cuyahoga Cty. Bd. of Revision* (2006), 107 Ohio St. 3d 325, wherein this Court rejected evidence of value inextricably intertwined with the non-real estate business value of the tenant.
- IV. Accepting the sale price as the property's value is inconsistent with prior decisions of this Court, including most recently *Strongsville Bd. of Edn v. Cuyahoga Cty. Bd. of Revision* (2007), 112 Ohio St. 3d 309, that rejected similar sale and leaseback transactions.
- V. The testimony of the appraisers concerning the facts and circumstances surrounding the transfer of the property, and the characterization of the transfer's unreliability as an indication of value, constitutes admissible, competent, and probative evidence before the BTA.

- VI. Adoption of the sale price in this case is inconsistent with Ohio law, succinctly stated by this Court in *Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision* (1988), 37 Ohio St.3d 16, that it is the fee simple value of the property which is to be valued for real property tax purposes.
 - VII. The appraisal of the subject property by the Taxpayers' expert constitutes competent, probative evidence of its value.
 - VIII. The appraisal of the subject property by the Auditor's witness does not constitute competent, probative evidence of its value.
- I. **The holding in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2005), 106 Ohio St.3d 269 is not applicable to this case as the *Berea* case addressed the acceptance of a sale price that was indicative of the value of the real estate in-exchange where the property was multi-tenant and not built-to-suit a tenant. In contrast, the instant matter concerns the sale of a single tenant property valued in-use, where the property was built to that tenant's unique needs and the transfer is reflective of the business success and credit-worthiness of the tenant and is unrelated to the value of the underlying real estate.⁴**

In the instant matter, the Auditor is relying on a sale in support of the assessment of the subject property. In *Zazworsky v. Licking Cty. Bd. of Revision* (1991), 61 Ohio St. 3d 604, 605-606, this Court, quoting *Ratner v. Stark Cty. Bd. of Revision* (1988), 35 Ohio St.3d 26, 28, stated: "[A]lthough the actual sale price provides strong evidence of market value other factors can affect the use of the sale price of property as evidence of its true value. These factors might include the mode of payment, sale-lease arrangements, [or] abnormal economic conditions." While this Court overturned *Ratner* in *Berea, supra*, it only did so in part, specifically as it relates to a sale where the price incorporated favorable financing. Consideration of "other factors" showing that the sale is not indicative of value remains subject to review.

The Auditor and the BTA in its decision place great reliance on *Berea*. What is beyond dispute, however, is the substantial factual difference between *Berea* and the instant matter. In the instant matter, as will be explained below, the sale of the subject property, subject to a build-

⁴ This Proposition of Law addresses Assignments of Error 14 and 16.

to-suit, value-in-use, net lease, reflects the value of the property in use to a specific tenant. In contrast, the *Berea* sale price reflected the property's value-in-exchange and, absent evidence indicating otherwise, the Court adopted the sale price. The issue of whether the adoption of the sale price would reflect the use-value of the *Berea* property was not raised. Unlike the instant case, there was no evidence in *Berea* that the property in that case was subject to a built-to-suit, value-in-use lease that later formed the basis for the sale of the property in the net lease market. In fact, the *Berea* property had three tenants -- Kmart, Lentine's, and Burger King -- which would clearly be inconsistent with the idea that it was functional or built-to-suit for only one user, as is the case with the subject property. Furthermore, there was no evidence that the sale price in *Berea* was a function of the business success and credit-worthiness of the tenants. Because the *Berea* property was not sold subject to a value-in-use lease designed to amortize the costs of construction, the sale of the property reflected its value-in-exchange, not its value-in-use.

Conversely, as will be discussed below, the instant sale is clearly reflective of the subject property's use-value, driven by the build-to-suit, value-in-use lease encumbering the property as well as the credit-worthiness of Walgreens as a tenant. Accordingly, the *Berea* decision is inapposite and does not answer the issues raised in the instant appeal. Indeed, this Court's decision in *Higbee* addresses the facts and circumstances in the instant appeal and mandates that the sale of the subject property not be relied upon as an indication of value.

Finally, it should be emphasized that the exception to *Berea* at issue in this case is extremely narrow. Those properties that are single tenant are an extremely small component of the overall market for commercial real estate. Furthermore, not all single tenant commercial properties are designed specifically for a user, with a lease to amortize construction costs, and then sold pursuant to that lease in further reliance on the success and credit-worthiness of the

tenant. As such, the exception to *Berea* urged by the Taxpayers would apply to a very limited number of properties.

II. The adoption of the sale price of the subject property would result in an unlawful assessment in use of the subject property.⁵

The sale price of the subject property represents its value-in-use. (Lorms, p. 3). This Court has consistently ruled that the Ohio Constitution prohibits the adoption of the use-value of real estate for assessment purposes. In *State ex rel. Park Inv. Co. v. Board of Tax Appeals* (1972), 32 Ohio St. 2d 28, this Court stated as follows:

* * * We have held that Section 2, Article XII of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution require that the ultimate result of an appraisal must be to determine that amount which the property should bring if sold on the open market. *State ex rel. Park Invest. Co., v. Bd. of Tax Appeals, supra* (175 Ohio St. 410, 412); *State ex rel. Park Invest. Co., v. Bd. of Tax Appeals, supra* (26 Ohio St. 2d 161, 167).

* * *

Since the **current use** method of evaluation excludes, among other factors, location and speculative value which comprise market value, such **current use** method cannot be made the basis for valuation of real property for tax assessment purposes, and that portion of [the statute] making provision for such method of valuation is invalid, as being contrary to Section 2, Article XII of the Ohio Constitution, which enjoins that land and improvements thereon shall be taxed by uniform rule according to value. (Emphasis added.)

Consistent with the above holding of this Court, in a case virtually identical to the instant matter, the BTA recently held that the sale of a drugstore subject to a build-to-suit lease was, in fact, indicative of its value-in-use. In *Dayton School Dist. Bd. of Edn. v. Montgomery Cty. Bd. of Revision* (September 2, 2005), BTA No. 2004-V-76, unreported, the BTA had the opportunity to address the exact same questions that are at issue in the instant matter and concluded that the sale

⁵ This Proposition of Law addresses Assignments of Error 2, 3, 4, 5, 6, 8, 9, 10, 11, and 12.

price of a build-to-suit, single tenant retail property is a function of the tenant's credit-worthiness and an indication of the use-value of the property. Just weeks before this Court issued its decision in *Berea*, the BTA rejected an appraiser's reliance on sales of drug stores that were built-to-suit, stating the following:

Nevertheless, [the BOE's appraiser's] opinion of value is borne from his exclusive reliance on the sixteen similar build-to-suit comparables, all of which present the same issues concerning the occupants' credit-worthiness and the like. The data gleaned from the comparables appear to be tied (as is in the case of the subject) to the credit-worthiness of their tenants. The difficulty in relying upon income derived from a business activity, or **value in use**, is that the value ultimately derived may not be the market value of the subject property. (Emphasis added)

The decision in *Dayton* was, in part, a determination of the nature of single-tenant, net leased sales that is indistinguishable from the questions that are being raised in the instant appeal. The BTA in *Dayton* properly recognized the prohibition against use-value assessments articulated by this Court in *State ex rel. Park Inv. Co.* and *Higbee*. Obviously, the BTA in the instant matter only subsequently felt erroneously constrained by this Court's *Berea* decision in adopting a sale price that the BTA clearly believes reflects its value-in-use.

As discussed above, none of the questions relating to use-value and the non-real estate value of the tenant's credit-worthiness were at issue in *Berea*, unlike the instant case. The evidence in the instant record, which has not been impeached or rebutted in any way, and is supported by appraisal theory, law, expert testimony, and data from market transactions, indicates that the adoption of the sale price would result in a prohibited use-assessment of the subject property.

To understand how the transaction in this case represents the use-value of the subject property, it is necessary to review the theoretical and logical underpinnings of the notion that the

sale of the subject property is indicative of its use-value. The best way to examine the concept of use-value is to consider the often cited example of a hypothetical manufacturer with a unique manufacturing process. As discussed in *The Appraisal of Real Estate* on page 25, and in Mr. Lorms' appraisal beginning on page 37, the hypothetical manufacturer's property might have a use-value to the manufacturer for which it was designed and built in order to maximize the utility of their business enterprise. If the same building was placed on the open market, however, and other manufacturers that did not utilize the same manufacturing process were to purchase it, it would have a different, lesser value in exchange.⁶

The value-in-use to the manufacturer that designed the manufacturing property and had it built-to-suit its business enterprise cannot be the basis of the assessment of the property under Ohio law. To see how this prohibited result might occur if a transfer like the instant one is utilized to value property in Ohio, one first needs to consider how the occupancy by the hypothetical manufacturer might be accomplished.

If the manufacturer decides to own its facility, it could buy the land, hire an architect and contractor, and have the facility constructed to its specifications. (Lorms, p. 37). After it is built, the manufacturer can take out a mortgage to amortize the costs of the land and building. Many businesses, however, rather than investing in ownership of their real estate, can earn higher returns on their capital in their core business. (Lorms, p. 37). Therefore, these users prefer to lease their real estate. Again, returning to the hypothetical manufacturer, if it decides to lease its real estate, it can do so either via a sale/leaseback arrangement or by simply entering into a lease

⁶ The value-in-exchange need not necessarily be less than the value-in-use. Specifically, in Ohio, agriculture property is valued under the state's Certified Agricultural Use Valuation ("CAUV") program. The program is necessary because property is otherwise valued-in-exchange in Ohio. In contrast with the manufacturing property example and the subject property before this Board, the value of properties in use for agriculture are usually less than their value in exchange.

with a third party developer who is hired to construct the property for the manufacturer. As Mr. Lorms stated,

[W]hether the user designs, builds and owns their own facility; designs, builds and enters into a sale/leaseback transaction; or, enters into a build-to-suit lease agreement with a developer, the development costs, sale price or lease rates are driven by the value in use to the business enterprise. (Lorms, p. 39).

The resulting lease is a function of the costs to develop the property. (Lorms, pp. 37-38).

In turn, the costs to develop the property are a function of the specific and unique needs of the manufacturer's business enterprise. (Lorms, p. 37). The obsolescence that may be inherent in the design to other manufacturers is not reflected in the build-to-suit lease. (Lorms, p. 38).

Therefore, the lease reflects the property value to the user, or value-in-use, not its market value or value-in-exchange. (Lorms, p. 38). Similarly, any subsequent sale based upon that value-in-use lease is a reflection of the value of the property in-use, not in-exchange. (Lorms, p. 38).

Although the foregoing example concerns the development of a manufacturing facility that has different value-in-use than its value-in-exchange, the same principles apply to other property types as well. Whereas a manufacturer might have a floor-plan unique to its business enterprise, including specific square footage requirements, ceiling heights, loading docks, construction materials, and layout, so too may a retailer. (Lorms, pp. 38-39). Many retailers have floor-plans and requirements that are equally unique to their business enterprise. (Transcript of Hearing before the BTA. pp. 93-96, 98-100).⁷

Indeed, evidence that these specific design requirements differ from user to user can be found in the fact that single-tenant retail properties are almost always built-to-suit for the user. (Lorms, p. 21). If these design requirements were readily interchangeable, these stores would be

⁷ The Transcript of Hearing before the BTA is also included in Appellants' Supplement to the Merit Brief, stamped as pp. 1 to 51. It will hereafter be cited as "Tr., p. ___" and the page numbers cited will refer to the original page numbers identified in the Transcript.

built speculatively and held on the open market for sale or lease to the highest bidding user. This, however, is not the manner in which these stores are developed, as drugstores are never built on a speculative basis. (Lorms, p. 21).

One of the most obvious differences between various drugstore users is the size of the storeroom required by each. In Ohio, Walgreens utilizes the largest floorplan at 14,000 – 15,000 square feet, while the typical Rite Aid or CVS is only in the 10,000 square foot range. (Tr., pp. 98-99). Walgreens stores are over-forty percent (40%) bigger than other users in the exact same business which is generally dominated, in Ohio, by these three major market participants. There are also very few other types of retailers that can occupy this size of space. (Tr., pp. 99-100).

In addition to size requirements that are unique to Walgreens, additional aspects of these buildings render them obsolete to other retail users in the market. For example, the entryways are not forward facing and there are limited windows either for merchandising display or aesthetics. (Lorms, p. 22). Further, the pharmacy build-out and drive thru are of limited or no utility for other potential users. (Lorms, p. 22).

In the case of the subject property, whatever obsolescence is inherent in the Walgreens improvements is not reflected in the purchase price of the subject property when it is sold subject to a Walgreens build-to-suit lease, as the build-to-suit lease reflects the value of the property only to Walgreens, not the rest of the market in exchange. As Lorms explained:

Where a building is designed and constructed to meet the user's specific needs, regardless of whether the ultimate transaction results in the user leasing the new building, purchasing it from the developer, or building it itself and then selling to an investor (sale/leaseback), the final outcome is identical – a financial transaction to accommodate the value-in-use by the specific user. The value reflected by that transaction is unique to that specific user and not, in and of itself, reflective of the market value or value in exchange of the property.” (Lorms, p. 40).

PROPERTIES SUBJECT TO A VALUE-IN-USE LEASE ARE SOLD IN THE NET LEASE MARKET, NOT THE OPEN REAL ESTATE MARKET

After a user has a building built-to-suit, and executes a value-in-use lease with its developer to amortize the construction costs, the property will typically be sold to a third party in what is commonly referred to as the net lease market as opposed to the traditional real estate market. (Tr., p. 113). In the net lease market, single tenant properties with high credit tenants and long term leases are sold to investors. (Tr., pp. 113-116). As explained below, a sale of the property in this market is determined based on the value-in-use lease and the credit-worthiness of the lessee without regard to the value-in-exchange of the real estate, and therefore is not indicative of the market value of the property.

Many characteristics of the net lease market distinguish it from the typical real estate market. First, the typical buyer is frequently from out of town, has limited knowledge of local real estate market dynamics, and may not even personally see the property before purchasing it. (Tr., pp. 114-119). Such buyers base their purchase decisions on the value-in-use lease and the credit-worthiness of the tenant, without regard to the value of the real estate itself. (Tr., pp. 114-119). In contrast, the typical purchaser in the traditional real estate market is much more knowledgeable about the local market, is motivated by typical real estate fundamentals such as location and certainly would be unlikely to purchase a property without ever seeing it. (Lorms, p. 4).

Second, the financing of net lease transactions is quite different from other real estate transactions. (Tr., pp. 114-119). Whereas in the average real estate transaction the lender will require debt service coverage of 1.2 to 1.3 times the net income generated by the property, the debt service coverage required from a buyer of a net leased property is only 1.003. (Lorms, p.

42)⁸. The low debt service rate allows for buyers to pay higher prices and produce lower down payments in net lease transactions. Indeed, when the spread between net lease payments of the user/tenant and the debt service of the buyer is only 0.003, it suggests that the lessee, for all intents and purposes, stands in the shoes of the borrower/buyer. For all but the slimmest amount, it is the lease payment of the lessee servicing the entire debt on the property. This suggests that the build-to-suit net lease transactions, unlike sales in the traditional real estate market, are nothing more than financing mechanisms for the user. (Lorms, p. 21).

Third, unlike traditional real estate investments such as apartment buildings, office buildings, or shopping centers, which require active professional management for the investment to succeed, the ownership of net-leased property is completely passive. (Lorms, p. 44). A transaction involving net-leased property, with passive income based upon the credit-worthiness of the tenant, is much more akin to a financial or bond transaction than a real estate transaction. (Lorms, p. 44).

Fourth, much like the financial markets, net-leased properties are much more liquid than other types of investments in real estate. (Lorms, p. 44). Whereas the typical real estate transaction is culminated only after extensive time, effort, and due diligence, the net-leased properties are bought and sold over the internet, often sight unseen. (Lorms, p. 44). If it becomes necessary for the property to again be sold, it can again be listed on the internet and quickly sold, unlike a traditional real estate sale.

In summary, the value-in-use lease, which reflects the cost to construct the property to the specific requirements of the user's business enterprise, is the basis of the value-in-use sale price in the net-lease market. The net-lease market has many characteristics that distinguish it from traditional real estate markets, including (1) purchase prices driven by the value-in-use lease and

⁸ See also, a significant number of articles detailing this phenomenon in Lorms, Addendum F.

the credit-worthiness of the tenant without regard to the market value of the real estate being purchased, (2) different debt service requirements, (3) passive ownership with no need for any professional management in order to maintain the value of the investment, and (4) much greater liquidity. As such, the sale price of a net leased property in the net lease market does not reflect the value of the underlying real property in the normal real estate market, i.e. its value-in-exchange. Therefore, an assessment of the property based on the sale price in the net lease market is prohibited by Ohio law. *State ex rel. Park Inv. Co., supra.*

**MARKET EVIDENCE REFLECTS THE DISTINCTION BETWEEN
VALUE-IN-USE AND MARKET VALUE**

Based upon the foregoing, one would expect to find evidence of transactions in the market showing a lack of correlation between value-in-use net lease sale prices and the values of the underlying real estate. Such evidence is abundant. Consider the value-in-use net lease sales of various Walgreens drugstores in greater Columbus presented in Mr. Lorms' report. The comparison between the Walgreens on Kenny Road and the Walgreens on South High Street is but one of many that illustrates the lack of any relationship of the value-in-use net lease sale prices to the underlying real estate.

<p align="center">Sale Comparison 1 (A superior location on Kenny Rd. sells for less than an inferior location in South Columbus)</p>						
Property	Year Built	Sale Date	GLA⁹ (Square feet)	Price Per Square Foot	Population Household Income Housing Value	OAR¹⁰
Walgreens 4540 Kenny Rd. Columbus, Ohio	2005	12/05	14,820	\$367.85	24,961 \$70,218 \$181,130	6.25%
Walgreens 3445 S. High St. Columbus, Ohio	2003	11/04	14,560	\$376.48	13,207 \$49,249 \$90,666	6.25%

(Lorms, p. 46).

It seems unimaginable that a property on South High Street is equal in value to an identical property on Kenny Road. In fact, the Kenny Road property actually sold for less. Despite the fact that the Kenny Road property is newer, in a far superior location, with an 89% greater population, 43% greater income levels, and over twice the housing values, the South High Street property sold for slightly more. This cannot reasonably be explained on the basis of the underlying real estate fundamentals. Rather, it is strong evidence that the sale price in these types of transactions are determined by factors other than the real estate itself, such as the long term lease of a successful and credit-worthy tenant.

Another example showing that value-in-use net lease sales are not correlated to the value of the real estate is the comparison between two big box sales in the greater Columbus area. Below are the characteristics of the Lowe's property on Brice Road, which sold subject to a

⁹ Gross Leaseable Area.

¹⁰ Overall Capitalization Rate.

value-in-use net lease, and the former Kmart on Mill Run, which sold unencumbered.¹¹ As discussed above, this transaction also demonstrates the overwhelming difference between the sale price paid for a property subject to a build-to-suit, value-in-use lease, and the sale price paid for an unencumbered, fee simple interest.

Sale Comparison 2 (Demonstrating an inferior property sells for almost twice as much as a superior property due to a value-in-use net lease)		
	Lowes's 2888 Brice Road Columbus, Ohio (Net Lease, Value In Use Sale)	Former Kmart 3780 Mill Run Hilliard, Ohio (Unencumbered Fee Simple Sale)
Population (3-Mile Radius)	78,231	76,609
HH Income (3-Mile Radius)	\$55,594	\$88,655
Land Size	12.836 Acres	12.240 Acres
Building Size	125,357 SF	121,876 SF
Year Built	1995	1995
Sale Date	April-05	August-05
Sale Price	\$10,636,470	\$5,800,000
Price per SF	\$84.85	\$47.59

(Lorms, p. 45).

Again, it seems unimaginable that a nearly identical property on Brice Road in Columbus, in an inferior market, is worth twice as much as a property on Mill Run in Hilliard. Such transactions do happen, however, in the value-in-use net lease market. Once again, the comparison shows that the value-in use net lease sale price is completely unrelated to the value

¹¹ Kmart was the former tenant, not the seller of the property.

of the underlying, fee simple real estate. In fact, the former Kmart property is actually located in a superior area by many measures, including area rents, occupancy, development activity, and household income. (Lorms, p. 45). Yet the Lowe's property sold for almost twice as much. This is inexplicable on the basis of the unencumbered, fee simple value of the real estate. The vast divergence can only be explained by either (1) the credit-worthiness of Lowe's, or (2) the fact that, as discussed by Mr. Lorms on page 21 of his report, a build-to suit lease, as is the case with the Lowe's lease, does not reflect any market obsolescence but rather, the value to Lowe's as the tenant. Neither of these two factors is present in the sale of the unencumbered former Kmart in a superior location.

The last example concerns the Walgreens at Demorest and Clime in Columbus. At the opposite corner to the Walgreens drugstore, there is a CVS drugstore. Below are the characteristics of each.

Sale Comparison 3

(At the same intersection two comparable drugstore properties
sell for significantly different values)

Property	Year Built	Sale Date	GLA	Price Per SF	(Demographics) Population HH Income Housing Value
Walgreens 1280 Demorest Rd. Columbus, Ohio	2002	9/4/02	14,490	\$271.74	Same intersection
CVS (same corner) 3499 Clime Rd Columbus, Ohio	1999	7/26/04	10,113	\$206.90	Same intersection

(see *Bd of Edn. of the Columbus City Schools v. Franklin Cty. Bd. of Revision* (May 18, 2007), BTA Case Nos. 2005-R-329 and 330, unreported, *on appeal to the Ohio Supreme Court* docket number 2007-1086.)

It seems difficult to explain how a similar drugstore at the same intersection would be worth 30% more than the other. Again, this sale reflects that value-in-use net lease market transfer prices are not guided by real estate fundamentals, however. Just over a 30% difference in value for nearly identical properties *at the same intersection* is once again inexplicable on the grounds of real estate considerations. In fact, the CVS property sold almost two years later, over which time property values presumably went up. Certainly, these sales cannot be considered to be the best evidence of real estate value for each property, as their divergent sale prices cannot reasonably be reconciled. The differences in the sale price can only be accounted for if one goes beyond the underlying real estate and consider the differences in the success and credit-worthiness of Walgreen and CVS. Assessing the subject in accordance with its sale price, therefore, would be assessing Walgreens as a business, not the real estate. Such an assessment is prohibited by Ohio law. This transaction will also be revisited, *infra*, as it reflects almost

perfectly the hypothetical scenario outlined and rejected as evidence of value by this Court in *Higbee Co. v. Cuyahoga Cty. Bd. of Revision* (2006), 107 Ohio St. 3d 325.

**THE PRINCIPLE OF SUBSTITUTION PROVIDES FURTHER
EVIDENCE THAT THE SALE PRICE IS NOT CORRELATED TO THE
VALUE OF THE REAL ESTATE**

Another aspect of the instant matter that supports the proposition that the sale of the subject property is not reflective of its real estate value can be derived from the principle of substitution. According to the principle of substitution, “a prudent buyer would pay no more for a property than the cost to acquire a similar site and construct improvements of equivalent desirability and utility without undue delay.” (*The Appraisal of Real Estate*, 12th Ed. p. 350).

The brand new replacement cost estimate of the subject’s land and improvements determined by Mr. Lorms is \$2,469,907 (Lorms, p. 54), disregarding for the purpose of this argument the significant amount of depreciation identified by Mr. Lorms. Although the Taxpayers disagree with the Auditor’s appraiser, Ms. Ebert, even she admitted that the land and building could be replaced new for only \$3,552,610. (Ebert, p. 40). Yet, even though the replacement cost of the land and building is between \$2,469,907 (Lorms) and \$3,552,610 (Ebert), the property sold for \$4,375,000. As such, the purchase price is approximately 44% higher than the replacement cost determined by Mr. Lorms, ignoring any depreciation. Even if the replacement cost new determined by Ms. Ebert, is utilized, the purchase is still approximately 19% higher than the cost to purchase the land and build the exact same building.

Whether utilizing Mr. Lorms well-supported replacement cost or the hypothetical, unsupported replacement cost of Ms. Ebert, both estimates are significantly below the purchase price of the subject property. Why would a buyer pay so much more for a property than it would cost to build? Clearly, a sixty (60) year lease to a successful and credit-worthy tenant influenced

the price paid for the subject property. The sale in this case is so at odds with the principle of substitution that either a well-established principle of appraisal theory is wrong, or the sale of the subject property is not correlated to the value of the real estate. It is the Taxpayers' position that it is the sale price that is unreliable, not the principle of substitution.

As discussed above, the sale of the subject property is reflective of its value-in-use to the user for which it was built. The property was built-to-suit for Walgreens. Given a floor plan tailored to Walgreens's unique requirements, the construction costs reflect a value-in-use to Walgreens. The resulting lease was designed to amortize these value-in-use construction costs. The property was subject to this lease at the time of its sale in the net lease market. The net lease market, as demonstrated by the examples above, is motivated by non-real estate factors. Considering all of the unique characteristics of both this property and the market in which it transferred, the sale of this property is not reflective of its unencumbered, fee simple value.

III. To adopt the sale price as the value of the subject property would be inconsistent with this Court's holding in *Higbee Co. v. Cuyahoga Cty. Bd. of Revision* (2006), 107 Ohio St. 3d 325, wherein this Court rejected evidence of value inextricably intertwined with the non-real estate business value of the tenant.¹²

In *Higbee*, the Taxpayer proffered evidence in which the valuation of a single-tenant retail property was based upon the gross sales of a tenant. This Court rejected this approach as an impermissible valuation of the property essentially in use. In rejecting a valuation based on gross sales, this Court held:

If it is the real property being valued, its valuation cannot be made to vary depending on the success or lack thereof of the businesses located on the property. Admittedly, the location of a property may influence the sales made by a merchant at that property.

¹² This Proposition of Law addresses Assignments of Error 1, 2, 3, 4, 10, 11, and 18.

However, the merchant's business practices may also influence sales. The business factors and the real-property factors must be separated when the real property is being valued for tax purposes. *Higbee, supra*, at 395.

This Court acknowledged that gross sales could vary by location, but the influence of the tenant's business practices would remain with the tenant. That is, while gross sales could be partially attributable to the location of the real estate, they could also be attributable to the success or lack thereof of the tenant as a business, and therefore this Court rejected valuation based on gross sales. Similarly, in this case, the business practices of the tenant, Walgreens, have resulted in significantly above average credit-worthiness, which in turn drives the resulting sale price higher than it would otherwise be. Whether it is gross sales or credit-worthiness, both are a function of the tenant. In fact, credit-worthiness has an even stronger correlation with the tenant's business practices than gross sales do. Indeed, gross sales for the same tenant, say, Walgreens, can vary by location, but their credit-worthiness remains constant no matter which location they are operating from. As such, there would tend to be an even greater non-real estate component that is a function of credit-worthiness when compared to gross sales. If gross sales impermissibly clouded the value in *Higbee*, the successful business practices of Walgreens and its above-average credit-worthiness, which artificially inflated the sale price, should be of even greater concern to this Court.

The fact that the sale price in this case was driven by the success and credit-worthiness of Walgreens seems beyond dispute, as the appraisers for both the Taxpayers and the County have agreed. (Lorms, p. 4, Ebert, p. 41). Even the BTA, just weeks before it erroneously felt constrained by *Berea*, agreed with the position that the kind of sale at issue in the instant matter is a function of its use-value and the success and credit-worthiness of the tenant. In *Dayton*, when the BTA considered the valuation of a Rite Aid store, it concluded:

Nevertheless, [the BOE's appraiser's] opinion of value is borne from his exclusive reliance on the sixteen similar build-to-suit comparables, all of which present the same issues concerning the occupants' credit-worthiness and the like. The data gleaned from the comparables appear to be tied (as is in the case of the subject) to the credit-worthiness of their tenants. The difficulty in relying upon income derived from a business activity, or **value in use**, is that the value ultimately derived may not be the market value of the subject property. *Dayton, supra*.

In the instant matter, even the County's own appraiser, Ms. Ebert, admitted that the sale price of the subject property and other net-leased properties are driven by the business success and credit-worthiness of the tenant. According to Ms. Ebert, "[t]hese types of sales are 'Credit Tenant Net Lease Properties.' They are called Credit Tenant Net Lease properties because the credit-worthiness of the tenant is a major component in determining sales price and desirability to investors." (Ebert, p. 41).

On behalf of the Taxpayers, Mr. Lorms further elaborates on this point in his appraisal:

The tenant's credit is significantly above average and the length of the lease is significantly longer than average, both of which decrease the applicable capitalization rate and increase the market value of the leased fee interest. The tenant's credit is reflective of the strength of the business operation conducted by the tenant. Therefore, the sale price is positively influenced by economic characteristics which are atypical of most properties. In addition, the buyer was not buying the "right to lease an interest or occupy property." Therefore, the rights purchased did not meet the definition of the fee simple estate or provide an equivalent value indication. Rather, they reflect the underlying value of the business using the property. When it is unencumbered real property that is being valued, its valuation should not be made to vary based upon the success or lack thereof of the business located on the property." (Lorms, p. 4).

This Court further illuminated the problems associated with allowing a tenant's business success to influence the assessment of the real property, discussing the following scenario:

Assume two identical anchor department store buildings in the same mall, operated by different owners. If one store has higher

sales per square foot than the other, is the property housing the store with the lower sales worth less than the building housing the store with the higher sales? While the store with the higher sales per square foot may be worth more as a business, that consideration must be separated from a valuation of the real property. The two buildings in the hypothetical mall should be valued the same if they are identical. *Higbee* at p. 334.

Also consider the hypothetical described by Mr. Lorms in his appraisal:

As a final example of why these build-to-suit leased fee transfers can not be used as an indication of the market value of the fee simple estate, we provide a hypothetical situation where two identical retail buildings are sitting side by side, with identical physical characteristics and identical lease circumstances, except one is occupied by Walgreens and the other is occupied by Rite Aid. While the fundamental real estate characteristics are identical and the market value of the fee simple estate should be identical, the Walgreens store would have a significantly higher leased fee value because of the success of Walgreens' business operations and the resulting superior credit-worthiness and the lower applicable capitalization rate." (Lorms, p. 47).

In fact, as discussed above, the hypothetical examples that concerned both this Court in *Higbee* and Mr. Lorms in his appraisal have come to fruition in actual transactions in the market. Recall that the CVS and the Walgreens stores at Demorest sold for widely different prices, even though they are located at the same intersection and are essentially the same real estate. It is practically the same situation as the hypothetical this Court discussed in *Higbee* and Mr. Lorms discussed in his appraisal. (*Higbee*, at 334, Lorms, p. 47).

There appears to be substantial agreement between the parties in this case, their appraisers, the BTA in *Dayton* just prior to *Berea*, and this Court in *Higbee*. It is the opinion of Ms. Ebert for the County, Mr. Lorms for the Taxpayers, and the pre-*Berea* BTA in *Dayton*, *supra*, that the sale of the subject property was a function of the success and credit-worthiness of the tenant and its value-in-use. Therefore, pursuant to this Court's holding in *Higbee*, the sale of the subject property must be rejected as the best evidence of value.

IV. It would be inconsistent with prior decisions of this Court, including most recently *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2007), 112 Ohio St. 3d 309, that rejected similar sale and leaseback transactions, to accept the sale price of the subject property.¹³

This Court has consistently rejected as evidence of value a sale that involves a sale/leaseback transaction. See *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2007), 112 Ohio St. 3d 309; *S. Euclid/Lyndhurst Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1996), 74 Ohio St. 3d 314, 317; *Kroger Co. v. Hamilton Cty. Bd. of Revision* (1993), 67 Ohio St. 3d 145; *Cleveland Hts./Univ. Hts. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1995), 72 Ohio St. 3d 189; *Pingue v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St. 3d 62. In these cases, this Court concluded that such sales are nothing more than financing transactions for the underlying real estate. In the typical sale/leaseback transaction, the user builds the building, sells it, and leases it back. This type of transaction is virtually identical in both structure and purpose to the build-to-suit, net lease sale that is at issue in the instant matter. In both types of transactions, the leases are designed to amortize the costs of development, while allowing the user greater financial flexibility. As Mr. Lorms testified:

Whether the user designs, builds, and owns their own facility; designs, builds, and enters into a sale/leaseback transaction; or enters into a build to suit lease agreement with a developer, the development costs, sale price, or lease rates are driven by the value in use to the business enterprise. (Lorms, p. 39).

¹³ This Proposition of Law addresses Assignments of Error 9, 11, 12, and 15.

Mr. Lorms elaborates further on this point:

Where a building is designed and constructed to meet the user's specific needs, regardless of whether the ultimate transaction results in the user leasing the new building, purchasing it from the developer, or building it itself and then selling to an investor (sale/leaseback), the final outcome is identical – a financial transaction to accommodate the value-in-use by the specific user. The value reflected by that transaction is unique to that specific user and not, in and of itself, reflective of the market value or value in exchange of the property.” (Lorms, p. 40).

In its most recent decision concerning the utilization of sale/leaseback transaction, this Court in *Strongsville* reaffirms its rejection of sale/leaseback transactions as not reflective of fair market value. *Strongsville*, at 13. In the case of *Strongsville*, the rejection was based upon elements of duress. In so holding, however, this Court cited with approval *Kroger Co. v. Hamilton Cty. Bd. of Revision* (1993), 67 Ohio St. 3d 145, in which this Court rejected a sale/leaseback transaction due to the absence of an open market. As discussed above, the entire process of building the subject property and entering into the lease is a closed transaction not open to the market. (Lorms, p. 3). Indeed, the *Appraisal of Real Estate* and this Court have repeatedly emphasized the importance of exposure to the open market before properly relying on a transaction. (See, *Kroger, supra*).¹⁴ This fact alone should render the instant sale suspect.

In *Strongsville*, this Court found that *Berea* did not end any and all inquiries into the reliability of a given sale. When the BTA received evidence sufficient to rebut the presumption that the *Strongsville* sale was not arm's length, this Court found the BTA correctly rejected the sale as the best evidence of value. However, in the instant matter, decided before *Strongsville*, the BTA erroneously failed to make an equally important determination – whether the lease that

¹⁴ According to the *Appraisal of Real Estate*, 12th Ed., p. 83, market rent is “[t]he rental income that a property would probably command in the open market.” (Emphasis added). In its definition of market value, the *Appraisal of Real Estate*, 12th Ed. p. 22, indicates that it is “[t]he most probable price . . . for which the specified property rights should sell after reasonable exposure in a competitive market.” (Emphasis added).

encumbered the property at the time of the sale, which formed the basis for the purchase price, was itself an arm's length transaction.

As the original lease was not an arm's length transaction, it follows that any subsequent sale based upon that lease would render it unreliable. As Mr. Lorms states in his report,

The lease rate was negotiated prior to construction between Walgreens and the developer and the property was never available on the open market. In these build to suit arrangements, the developer acts as an outsourcing of the financing and construction for the retailer. The tenant selects the site and gives the developer all of the design and construction specifications. Walgreens has a specific rent to cost factor that determines the rent to be paid. Therefore, the rent is pre-determined, based on an amortization of the construction costs, and doesn't take what the property would lease for on the open market into consideration. (Lorms, p. 3).

In summary, the developer essentially acts as a financing and construction arm of the user/tenant and the characteristics of the arrangement do not meet the definition of an arm's length transaction." (Lorms, p. 21).

It must be emphasized that the Taxpayers' contention that the original lease does not meet the characteristics of an arm's length lease was never challenged by the Appellees or the BTA. In addition, there is no dispute that the purchase price for the property was driven by the lease. Consequently, any sale based upon a lease that is not arm's length must itself be rejected as an unreliable indication of value.

In *Strongsville*, the property owner negotiated a sale and leaseback arrangement, which the BTA, in this Court's view, properly rejected as the best evidence of value. Surely, if the sale and leaseback was not arm's length, any subsequent purchase based upon the same lease would be equally suspect. Similarly, in the instant matter, if the original lease was not arm's length, any subsequent sale cannot be relied upon. At minimum, the suspect nature of the original lease rebuts the presumption that the sale is the best evidence of value.

Because sale/leaseback transactions have been repeatedly rejected by this Court as indicators of value, and since value-in-use, net lease transactions have the same inherent unreliability in reflecting the unencumbered, fee simple value of the property, this Court should also reject value-in-use net lease sales which are similar in character to sale/leaseback transactions.

V. The testimony of the appraisers concerning the facts and circumstances surrounding the transfer of the property, and the characterization of the transfer's unreliability as an indication of value, constitutes admissible, competent, and probative evidence before the BTA.¹⁵

The BTA erred in not finding that the Taxpayers had provided competent evidence concerning the facts surrounding the transfer in question. As has been discussed and demonstrated above, the appraisal and testimony of Mr. Lorms and well as the appraisal and testimony of the county's appraiser, Ms. Ebert, clearly demonstrates that the transfer in question is not reflective of the unencumbered fee simple value-in-exchange. The testimony of expert witnesses to provide such information is clearly contemplated and allowed by the Rules of Evidence. Preliminarily, Rule of Evidence 602 provides that

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. **This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.** (Evid. R. 602, emphasis added).

The reference in Rule 602 to Rule 703 is designed to avoid any question of conflict between the two rules, the latter of which permits an expert to express opinions based on facts of which the expert does not have personal knowledge. Specifically, Rule 703 provides that:

¹⁵ This Proposition of Law addresses Assignments of Error 10, 13, 14, and 17.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. **If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.** (Evid. R. 703, emphasis added).

There is no question that the reports and testimony of both appraisers is admissible as it relates to the transaction in question. First, information relied upon by Mr. Lorms and Ms. Ebert was clearly made known to both appraisers prior to the trials, as not only was such information a part of each appraiser's testimony, but it also was included in the appraisal report of both appraisers. Secondly, it is beyond question that information regarding a facts and circumstances surrounding a sale is of the "type reasonably relied upon by [appraisers] in forming opinions or inferences."

This conclusion is further supported by the Notes to Rule 703. The Notes discuss the various sources of information which experts can rely in providing testimony. The type of information at issue in this case is covered under the third set of reliable information. These Notes date back to the 1972 and provide:

The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. (1972 Notes to Evid. R. 703).

In *Worthington City Schools v. ABCO Insulation* (1992), 84 Ohio App.3d 144, 152, the court stated:

Some hearsay evidence necessarily is always involved with expert testimony. To become an expert, one must read and learn from sources which are necessarily outside the evidence at trial. It is this knowledge obtained from outside sources which qualifies a

witness as an expert. (Citation omitted.) However, the facts or data which an expert relies upon in testifying must be either perceived by the expert or based upon evidence admitted at trial. Evid. R. 703.

The requirement of "perceived by the expert" refers to personal knowledge. Such perception and knowledge is recognized as being present in the case of an appraiser. *State v. Solomon* (1991), 59 Ohio St.3d 124, syllabus, held that "[w]here an expert bases his opinion, in whole or major part, on facts or data perceived by him, the requirement of Evid. R. 703 has been satisfied." In *Worthington City Schools v. ABCO Insulation* at 153, the court, in finding that the trial court did not abuse its discretion in admitting an expert's testimony, stated:

Here, the expert prepared the report personally, since he was the author. He had personal knowledge of the predicate for the contents of the article, so the facts were 'perceived by him' as required by Evid. R. 703.

Indeed, what is the job of an appraiser if it is not to determine whether a sale is arm's length, if it is indicative of value, or it reflects the use-value of the property? Appraisers by necessity speak with brokers, owners, and property managers to find out details about a sale or a lease. Based on their experience and education, they make judgments about such issues. These are the decisions appraisers make as a necessary part of including data in their appraisals. Some data passes their professional tests such that it can be relied upon and included in their appraisals, and some data fails to meet the proper standard. If the actual property owner in this case came to the BTA and declared that the sale price is not reliable, or is a reflection of the value of the property in-use, the Appellees would have undoubtedly objected on the grounds that the owner does not possess the requisite knowledge or education to make such characterizations. This is not a situation where the expert was asked to testify in lieu of the buyer or the seller, but, rather, one that required the opinion of an expert to characterize the reliability of the transfer. The use-

value issue, in particular, is a characterization that an appraiser seems uniquely qualified to support, pursuant to their education about such matters.

The testimony of both experts, Mr. Lorms and Ms. Ebert, provides competent evidence as to the facts and circumstances surrounding the transfer of the subject property, as well as the characterization of its reliability. Such testimony is clearly the intent of Rule of Evidence 703. It is without question that expert opinion of Mr. Lorms and Ms. Ebert in this case relates to facts that are of the type reasonably relied upon by appraisers in forming opinions or inferences.

VI. Adoption of the sale price in this case is inconsistent with Ohio law, succinctly stated by this Court in *Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision* (1988), 37 Ohio St.3d 16, that it is the unencumbered fee simple value of the property which is to be valued for real property tax purposes.¹⁶

As discussed above, reliance upon the transfer price would violate a fundamental principle of Ohio's real property tax law - that it is the unencumbered, fee simple value of the property which is to be valued and taxed. That is exactly why in *Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision* (1988), 37 Ohio St.3d 16, paragraph one of the syllabus, this Court held: "For real property tax purposes, the fee simple estate is to be valued as if it were unencumbered."

This Court further stated:

It is the fair market value of the property in its unrestricted form of title which is to be valued. It is to be valued free of the ownership of lesser estates such as leasehold interests, ***. For real property tax purposes, the fee simple estate is to be valued as if it were unencumbered. *Id.* at 23.

As discussed in *Alliance Towers*, for over 100 years, Ohio law has held that the unencumbered, fee simple interest in the property is to be valued. The properties in *Alliance Towers* are not unlike the instant property before this Court. In *Alliance Towers*, the apartment buildings were constructed at a cost greater than could be justified by market rents. Without

¹⁶ This Proposition of Law addresses Assignments of Error 7, 9, and 12.

government subsidies, this Court found, the developer would not have had sufficient rental income to justify the project. Here, as demonstrated in this case by Mr. Lorms, the feasibility rent needed to support the construction costs of the subject property significantly exceeds the market rent that could be achieved if the property were held out for lease on the open market. (Lorms, pp. 53-54). Furthermore, as Mr. Lorms discusses on page 3 of his report, the lease rate was negotiated prior to the commencement of construction and is based upon construction costs that reflect the value of the property to the user, Walgreens, not the value of the property on the open market.

As this Court summarized in *Alliance Towers*:

These tax and eminent domain cases demonstrate the decision by this court to view the fair market value of real property as uncomplicated by encumbrances. It is the fair market value of the property in its unrestricted form of title which is to be valued. It is to be valued free of the ownerships of lesser estates such as leasehold interests, deed restrictions, and restrictive contracts with the government. For real property tax purposes, the fee simple estate is to be valued as if it were unencumbered. *Alliance Towers* at p. 24.

If Ohio law were changed to allow for an assessment of the leased fee estate, overturning a century of assessment law in the process, the concerns raised by this Court in *Higbee*, further exemplified by real world transactions, (see the Brice Road/Mill Run big box sales and CVS/Walgreens Demorest sales discussed above), would come to fruition. Wal-Mart would pay more for the assessment of its stores than Kmart. Walgreens would pay more than Rite Aid. Best Buy would pay more than Circuit City. Staples would pay more than Office Depot. Such disparate assessments for each user is surely not what was intended. Successful businesses already pay their fair share of taxes that are a function of their success without having to pay higher real estate tax assessments as well.

A lease that was never negotiated on the open market, for an amount significantly above what could be achieved on the open market, designed simply to amortize the costs of construction, and the subsequent sale of the subject property pursuant to that lease, has resulted in a sale price well in excess of the value of the fee simple estate. Accordingly, any assessment based upon that sale would result in an assessment of the leased fee estate which is far in excess of what this Court has long held to be the taxable, fee simple estate pursuant to *Alliance Towers*.

VII. Mr. Lorms' appraisal of the subject property constitutes competent, probative evidence of the value of the subject property.¹⁷

In his appraisal, Robin Lorms relies on the cost, sales comparison, and income approaches to value. In his cost approach, Mr. Lorms relies on three land sales between \$709,607/acre and \$798,701/acre to arrive at a fair market value of the subject's land of \$1,040,000 or \$750,000 per acre. (Lorms, p. 50). Mr. Lorms then developed a replacement cost estimate from Marshall's Valuation Service of \$1,429,907. (Lorms, p. 52). After adding the value of the land, together with replacement cost of the building and site improvements, and deducting depreciation and obsolescence, Mr. Lorms arrived at a value of \$1,600,000 via the cost approach. (Lorms, p. 54). Mr. Lorms' estimate of obsolescence was confirmed by extraction from capitalized rent loss. (Lorms, pp. 53-54).

In the sales comparison approach, Mr. Lorms relied on ten comparable sales ranging from \$53.67 per square foot to \$163.90 per square foot. (Lorms, pp. 57-58). These sales reflect the unencumbered, fee simple value of the property transferred. After consideration of various criteria, including location, size, age, and condition of the comparable data, Mr. Lorms reconciled to a value of \$135 per square foot, or \$1,950,000 for the subject property. (Lorms, p. 60).

¹⁷ This Proposition of Law addresses Assignments of Error 9, 11, and 17.

In his income approach, Mr. Lorms relied on twelve market comparable rents ranging from \$5.25 per square foot to \$13.50 per square foot. (Lorms, pp. 64-65). Mr. Lorms also considered leases in the retail center directly behind the subject property. (Lorms, p. 65). After evaluating the comparables, Mr. Lorms concluded to a market rent at \$10 per square foot for the subject or a potential gross rent of \$144,900. (Lorms, p. 66). After adding expense reimbursements of \$48,231 and deducting 5% for vacancy and credit loss, Mr. Lorms arrived at an effective gross income of \$183,474. (Lorms, p. 67). From his estimate of the gross income, Mr. Lorms deducted \$55,523 in expenses, including reserves, to arrive at a projected net income of \$127,951. (Lorms, p. 67). Estimating a capitalization rate of 9.0% derived from two separate sources, review of investor surveys, and the band of investment method, Mr. Lorms concludes to a value of \$1,400,000 under the income approach. (Lorms, p. 70).

Because of the significant amount of depreciation and obsolescence inherent in a built-to-suit drugstore, Mr. Lorms relied on his cost approach the least. (Lorms, p. 71). Mr. Lorms gave primary consideration to the sales comparison approach, which was further supported by the income approach in reconciling to a final value of \$1,950,000. (Lorms, p. 71). This value was derived from 29 comparable, market-based indications, including three land sales, ten improved sales, and twelve market rentals, four of which were from the retail property directly behind the subject. Accordingly, the Taxpayers would submit that the market value of the subject property is well-supported by competent, probative evidence and clearly inconsistent with its value-in-use, leased fee sale price driven by the success and credit-worthiness of Walgreens.

VIII. The Auditor's appraisal by Ms. Ebert does not constitute competent, probative evidence of the value of the subject property.¹⁸

In addition to the sale of the subject property, the Auditor relied on the appraisal of Ms. Antoinette Ebert. Unlike Mr. Lorms, who is designated as an MAI and has decades of experience as an appraiser, Ms. Ebert has only been an appraiser for three years. She carries no designations, including MAI and, perhaps most importantly, she works exclusively for the Hamilton County Auditor. (Ebert, p. 62 and Tr., p. 41). What is most damaging to her credibility, however, is the suspect claim Ms. Ebert makes in her disclosure statement. (Ebert, p. 4). Specifically, even though Ms. Ebert is employed by the Hamilton County Auditor's office, and only does appraisals for the Auditor, she signed a document claiming that she was an unbiased and disinterested third party. Again, as an employee of the Auditor, who can only do appraisals for the Auditor, and who in this case has come up with a value favorable to the Auditor's office, her claim of impartiality is particularly troubling. Ms. Ebert's claim of impartiality should render her testimony and appraisal irrelevant and not credible.

Disregarding her suspect claim of impartiality, and turning to the merits of her report, her entire appraisal suffers from the same fatal flaw that the sale of the subject property suffers as a reliable indication of value. Because almost all of her comparable sales and leases relate to build-to-suit, value-in use transactions, she is unable to make any sort of market based determination of value for the subject property.

In addition to the fundamental flaw in her approach, Ms. Ebert was unable to explain how her cost figures were even calculated. (Tr., pp. 56-59). Furthermore, in her cost approach, she added a 10% entrepreneurial profit to her costs to allegedly reflect the developer's risk in the

¹⁸ This Proposition of Law addresses Assignments of Error 9 and 17.

property, even though the developer already had a tenant in place before construction started. In other words, why would a developer be compensated for risk when there was no risk with a tenant already in place? (Ebert, p. 39 and Tr., p. 52). The inclusion of entrepreneurial profit is incorrect in such circumstances and cannot be supported by any market evidence.

Ms. Ebert has a limited number of comparably sized land sales (Ebert, p. 38) and could not testify as to the facts surrounding the few transactions she had. She was unable to explain the cost figures outlined in her report (Tr. Pp. 56-59) and includes an entrepreneurial profit to reflect a risk that she admitted on cross-examination really does not exist. (Tr., p. 52). Ms. Ebert's cost approach lacks credibility and should not be considered.

After attempting the cost approach, Ms. Ebert turns to her sales comparison approach. She utilizes ten comparable sales. (Ebert, p. 54). Again, all of these properties arise from transactions where the property was built-to-suit for the tenant, and then sold subject to the value-in-use lease designed to amortize construction costs. (Tr. p. 63). Given the issues raised with these types of transactions above, as well as her own characterization of the nature of these transactions, her reliance on such sales is incomprehensible. Accordingly, Ms. Ebert's sales comparison approach is of limited probative value.

Finally, in Ms. Ebert's income approach she seems to rely on four leases to arrive at an indicated market rent for the subject (Ebert, p. 57). Again, Ms. Ebert admits that these leases arose out of build-to-suit situations, (Tr., p. 79) where the lease rate is a function of construction costs, not the market rental value of the space. Although she utilized the transactions as indications of "market rent," Ms. Ebert admitted that "I think the developer approached the business and they did their study to make sure that it was feasible to have one built in such a location. . . . there is no negotiation." (Tr., p. 80). She was unable to testify as to whether any of

the properties were offered to other retailers or were subject to any open market activity at all. (Tr., p. 80). Based upon this testimony, none of the comparables utilized meets the definition of “market rent” discussed above. Since not one of her comparable rental indications meets the definition of market rent, the entire income approach to value is flawed and cannot be relied upon in reaching a conclusion of value.

Ms. Ebert presents all three approaches to value—cost, sales comparison, and income approach. Her inability to support either the cost calculations in her report or to point to any significant risk that justified the inclusion of a 10% entrepreneurial profit can only lead this Court to the conclusion that Ms. Ebert’s cost approach is not well supported. Similarly, the sales comparisons utilized by Ms. Ebert are all subject to original build-to-suit leases, which have no correlation to market-based, fee simple transactions unrelated to the value-in-use lease or the success of the tenant. Ms. Ebert’s sales comparison approach is fatally flawed for this reason alone. Finally, Ms. Ebert does not present one comparable rental that meets the definition of “market rent.” As such, Ms. Ebert’s income approach to value is also not well supported. Accordingly, the Auditor has failed to present any competent, probative evidence to establish the value of the subject property.

CONCLUSION

The sale of the subject property is not indicative of the market value of the real estate, but the value-in-use of the subject to a highly successful tenant. This conclusion is supported by the record in this case, appraisal theory, and overwhelming confirmation from sales that occurred in the market under similar circumstances. If there were any correlation between value-in-use, net lease sale prices and the value of the underlying real estate, the Kenny Road Walgreens would not have sold for less than the South High Street property. Similarly, the Brice Road Lowe’s

would not have sold for nearly twice as much as a practically identical property on Mill Run, a better location. And the Demorest Walgreens would not sell for 30% more than a CVS at the same intersection. These transactions demonstrate that the sale prices of properties such as the subject are entirely unrelated to the value of the underlying real estate.

Further proof of this can be found in the fact that the sale of the subject was well in excess of its replacement cost, contradicting the well-established principle of substitution that no buyer would pay more for a property than it would cost to build a similar property. In this case, however, the purchase price was over 44% higher than the cost to replace the property. No buyer would pay such a premium unless the transfer price also reflected the value of the sixty (60) year Walgreens lease.

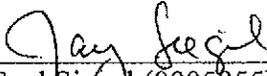
The sale is also functionally equivalent to other types of evidence of value rejected by this Court, including evidence of valuations intertwined with the success of the tenant as a business as seen in *Higbee*. In the instant case, the sale price is undeniably linked to the successful business practices of Walgreens and its above-average credit-worthiness. Therefore, acceptance of the sale price in the instant matter would be contrary to this Court's mandate in *Higbee*. Finally, the *Berea* case is not applicable to the instant matter as the *Berea* sale did not reflect the value of that property in use or the success and credit-worthiness of the tenants.

The Taxpayers have further offered competent, probative appraisal evidence in support of an unencumbered, fee simple value of the subject property. The appraisal report presented on behalf of the Auditor is seriously flawed and not indicative of the unencumbered, fee simple market value of the subject property.

For all of the foregoing reasons, the Taxpayers respectfully submit that the decision of the BTA is unreasonable and unlawful. Accordingly, the Taxpayers respectfully request that this

Court reverse the decision of the BTA and find that the value of the subject property as of the tax lien date was \$1,950,000. Alternatively, due to the failure of the BTA to properly consider the testimony of the expert witnesses, the Taxpayers would respectfully request that this matter be remanded to the BTA with instructions that the sale is not reflective of the value of the subject property and that the BTA should analyze the reports and testimony of the experts to arrive at the value of the subject property.

Respectfully submitted,

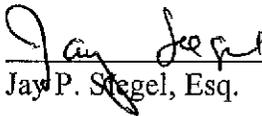


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CERTIFICATE OF SERVICE

This is to certify that on this 23rd day of July, 2007, a copy of the Merit Brief of Appellants was mailed to Thomas J. Scheve, Assistant 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, and Lawrence D. Pratt, Section Chief, Taxation, 30 East Broad Street, 17th Floor, Columbus, OH 43215-3428.


Jay P. Stegel, Esq.

13058-2004

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IN THE SUPREME COURT OF OHIO

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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IN THE SUPREME COURT OF OHIO

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

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

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:

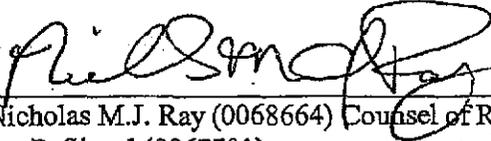
The Decision and Order of the Board of Tax Appeals adopting the sale price of the subject property as its true value in money for assessment purposes is unreasonable, unlawful and arbitrary because it ignores the competent and probative evidence provided by the property owner's appraiser concerning the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

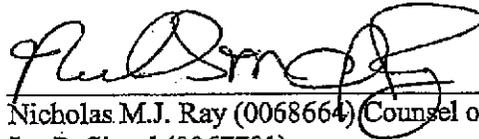


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VIGRAN BROTHERS VILLA LTD.

**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, 24th Floor, 30 East Broad Street, Columbus, Ohio as evidenced by its date stamp as set forth hereon.



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Jay P. Siegel (0067701)

**COUNSEL FOR APPELLANTS
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BROTHERS VILLA LTD.**

CERTIFICATE OF SERVICE

This is to certify that on this 6th 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, 17th 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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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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Property Owner

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Columbus, Ohio 43220

For the Appellee
Bd. of Edn.

- Schroeder, Maundrell, Barbieri & Powers
John W. Hust
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Entered March 9, 2007

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

EXHIBIT A

000013

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, 2003¹ 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

¹ 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.²

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,

² 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

Board of Revision

of Hamilton County, Ohio

PHONE: 946-4035

138 E. Court Street, Rm. 304
Cincinnati, Ohio 45202



NOTICE OF RESULT OF BOARD OF REVISION CASE

Board of Review Reference Number: 2004-179-4-070371-RG

Tax Year: 2004

Property Class: 425

Date: **JUL 27 2005**

SIEGEL SIEGEL JOHNSON & JENNINGS
25700 SCIENCE PARK DR
SUITE 210
BEACHWOOD, OH 44122

Taxing District: EVENDALE-PRINCETON CSD-00360

RESOLUTION STATUS

THE COUNTY AUDITOR IS HEREBY AUTHORIZED TO MAKE THE FOLLOWING ADJUSTMENTS TO THE TAX LIST AND THE COUNTY TREASURER IS HEREBY AUTHORIZED TO ADJUST TAXES ON REAL PROPERTY FOR THE BELOW INDICATED PARCELS IN THE AMOUNTS SHOWN.

FINAL NOTICE

TO APPEAL FROM A DECISION OF THE COUNTY BOARD OF REVISION, YOU MAY APPEAL TO THE BOARD OF TAX APPEALS, UNDER THE PROVISIONS OF SECTION 5717.01 R.C. AN APPEAL MAY ALSO BE TAKEN DIRECTLY TO THE COURT OF COMMON PLEAS. AN APPEAL MUST BE FILED WITHIN 30 DAYS OF THE DATE HEREON.

<u>Property Number</u>	<u>Address</u>	<u>Resolved Reason</u>
611-0020-0393-00	3105 GLENDALE MILFORD RD	Decreased NO Class ~ Change

	<u>Land</u>	<u>Improvement</u>	<u>Total</u>
Currently reads	2,875,000	1,500,000	4,375,000
Adjustments	(1,974,900)	(450,100)	(2,425,000)
Will read after adjustment	900,100	1,049,900	1,950,000

Tax amount for this parcel was:	70,824.32
New tax amount for this parcel is:	31,567.88
Total tax amount adjustment for this parcel is:	(39,256.44)
Total tax amount refund for this parcel is:	(39,256.44)
Penalty remit/refund if applied is:	0.00
December Interest refund/remit if applied is:	0.00

THIS IS NOT A TAX BILL.
IT IS A NOTIFICATION OF A DECISION BY THE BOARD OF REVISION.

000022

OHIO BOARD OF TAX APPEALS

Board of Education for the Berea)
City School District,)
)
Appellant/Appellee,)
and)
)
Manlaw Investment Company,)
)
Appellee/Appellant,)
)
vs.)
)
Cuyahoga County Board of Revision and)
the Cuyahoga County Auditor,)
)
Appellees.)

CASE NOS. 2002-V-2595
2002-V-2800

(REAL PROPERTY TAX)

DECISION AND ORDER

Dismissed on Appeal Nov. 1, 2006
Ohio Supreme Court

APPEARANCES: __ Ohio St.3d __, 2006-Ohio-5601

For the Appellant/Appellee - Kadish, Hinkel & Weibel
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For the County - William D. Mason
Appellees Cuyahoga County Prosecuting Attorney
Timothy J. Kollin
Assistant Prosecuting Attorney
Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

Entered July 14, 2006

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

000023

This cause and matter came on to be considered by the Board of Tax Appeals upon cross notices of appeal filed herein by the Board of Education for the Berea City School District ("BOE") and by the property owner Manlaw Investment Company, Ltd. ("Manlaw") from a decision of the Cuyahoga County Board of Revision ("BOR").

The subject property is improved with two commercial buildings. According to the county records, the first building was constructed in 1969 and has 113,100 square feet of space. S.T., Ex. F. On January 1, 2000, Kmart occupied roughly 93,100 square feet of space and Lentine's Music Store occupied 20,000 square feet of space.¹ The second building situated on the subject property was constructed in 1986, is occupied by a Burger King restaurant, and contains 3,454 square feet of space. The subject is located in the Middleburg Heights/Berea City Schools taxing district, Cuyahoga County, Ohio.

The values of the subject for 2000, as originally assigned by the Cuyahoga County Auditor ("auditor"), are as follows:

Parcel 371-10-004	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 842,710	\$ 294,950
BLDG	\$3,518,400	\$1,231,440
TOTAL	\$4,361,110	\$1,526,390

¹ There appears to be a minor discrepancy wherein the county's records indicate that the building has 113,100 square feet of space, whereas the lease agreement indicates 113,333 square feet of space. Statutory Transcript ("S.T."), Ex. F, H.R., Ex. B.

After considering a complaint filed by the BOE to increase the subject's value to \$4,800,000, the BOR determined the true and taxable values of the subject property for tax year 2000 should remain unchanged.

In *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, the court considered the subject's valuation for tax year 1997. In its decision, the court held that the March 1996 arm's-length sale of the subject property was the best evidence of value.

We now consider this matter upon the notices of appeal and the statutory transcripts certified by the auditor.² At hearing before this board, counsel for the BOE and Manlaw³ stipulated that in addition to the record contained in the statutory transcript, this board shall consider the tax year 2000 appraisal report of Mr. Richard G. Racek (Ex. A); lease agreements for the subject (Exs. B and C); the tax year 2000 appraisal report of Dr. Robert J. Weiler (Ex. 1); and the entire record previously before this board in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (May 24, 2002), BTA Nos. 1999-J-1920, 1921, 1942, 1944, unreported (the 1997 case), rev'd 106 Ohio St.3d 269, supra. Counsel for the BOE and Manlaw have filed merit briefs before this board.

No party has argued that the March 1996 sale price of the subject property should be determinative of the subject's value in 2000. "There is no

² The instant appeals are a continuation of prior cases filed with this board but dismissed upon the authority of *Cleveland Elec. Illum. Co. v. Lake Cty. Bd. of Revision*, 96 Ohio St.3d 165, 2002-Ohio-4033. See *Manlaw Investment Company v. Cuyahoga Cty. Bd. of Revision* (Oct. 25, 2002), BTA Nos. 2002-M-1020,1023 unreported.

³ The county appellees have not participated in the present appeal.

statutory guidance for the time frame within which the purchase price of land will govern true value determinations for purposes of real estate taxation, ***." *Dublin-Sawmill Properties v. Franklin Cty. Bd. of Revision* (1993), 67 Ohio St.3d 575. We find the sale which occurred 45 months before tax lien date to be too remote for purposes of determining value, without any evidence to the contrary.

In *Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision* (1988), 37 Ohio St.3d 16, paragraph one of the syllabus, the Supreme Court held: "For real property tax purposes, the fee simple estate is to be valued as if it were unencumbered." The court further held:

"It is the fair market value of the property in its unrestricted form of title which is to be valued. It is to be valued free of the ownership of lesser estates such as leasehold interests, ***. For real property tax purposes, the fee simple estate is to be valued as if it were unencumbered." *Id.* at 23.

Manlaw argues, as it did in the 1997 case, that the subject should be valued under a leased fee analysis, based upon the current below-market lease encumbering the property. Focusing upon the 1997 case, Manlaw argues that the 1996 sale price it paid for subject property was predicated upon the existing long-term lease encumbering the property. Manlaw reasons that the Supreme Court's decision to accept the 1996 sales price embraces the concept of a leased fee analysis.⁴ Based

⁴ In the event that this board rejects Manlaw's position, Manlaw requests "a hearing before the full board to afford the taxpayer an opportunity to present" testimony and evidence. Manlaw brief at 4. Manlaw waived its opportunity to present further evidence at hearing on May 4, 2004 and instead elected to have this board consider the appeal based upon the evidence stipulated by the parties. Manlaw's request for an additional hearing is denied.

upon said reasoning, Manlaw argues that the doctrine of collateral estoppel precludes this board from valuing the subject property as if unencumbered. We disagree.

In *Berea City School Dist.*, supra, the court's holding was based upon the statutory mandate found in R.C. 5713.03, which provides that "[i]n determining the true value of any *** parcel, **the auditor shall consider the sales price *** to be the true value for taxation purposes." The court further overruled its previous holdings in *Ratner v. Stark Cty. Bd. of Revision* (1986), 23 Ohio St.3d 59 (*Ratner I*); and in *Ratner v. Stark Cty. Bd. of Revision* (1988), 35 Ohio St.3d 26 (*Ratner II*), "to the extent that they direct the board of revision and the BTA to 'consider and review evidence presented by independent real estate appraisers that adjusts the contract sale price to reflect both the price paid for real estate and the price paid for favorable financing.'" *Berea City School Dist.*, supra, at ¶ 13.

The court further factually distinguished its holding in *Berea City School Dist.* from its decisions in *Wynwood Apt., Inc. v. Cuyahoga Cty. Bd. of Revision* (1979), 59 Ohio St.2d 34; *Alliance Towers*, supra, and *Canton Towers, Ltd. v. Stark Cty. Bd. of Revision* (1983), 3 Ohio St.3d 4, reasoning that none of these prior cases approving the use of "economic rental value of commercial real property" involved a recent arm's-length sale of property:

"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 these cases involved a recent arm's-length sale of the property between a willing seller and a willing buyer." *Berea City School Dist.*, supra, at ¶ 14.

Manlaw further argues that the court's previous decision in *Wynwood Apt., Inc.*, supra, supports its concept of a leased fee analysis, insofar as the court did not preclude this board from considering contract rent.

Much like the case before us today, *Wynwood* involved the 1976 valuation of a retail building that was subject to a long-term lease at a below-market rate. This board had determined that the contract rent was not reflective of the property's value and adopted a value based upon the economic (market) rent. On appeal, the court upheld the decision of the BTA, characterizing the issue as a factual one only requiring the court to review the "reasonableness and lawfulness of the board's decision."⁵ *Id.* at 37.

As was the case in *Wynwood*, we fail to see how the below-market contract rent for the subject property is reflective of value when we have competent probative evidence of market rents as provided by the BOE.

This board has consistently held, based upon Supreme Court pronouncements, that a finding of value for a prior tax year is not res judicata as to subsequent years. *Freshwater v. Belmont Cty. Bd. of Revision* (1997), 80 Ohio St.3d 26; *Health Care & Retirement Corp. v. Franklin Cty. Bd. of Revision* (Sept. 25, 1998), BTA No. 1997-K-127, unreported. This board is well aware that the doctrines of res judicata and collateral estoppel are to prevent the relitigation of facts and issues between the same parties. *National Amusements, Inc. v. Springdale* (1990), 53 Ohio

⁵ The court refrained from characterizing the issue of economic rent versus contract rent as a legal question requiring the court's final decision. Further, the court noted the twelve other states' decisions applying market rent in favor of below-market contract rents.

St.3d 60; *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36. Thus, while we acknowledge that determinations of value for the subject property have been made for previous tax years, the 1996 sale of the subject property is too remote for us to consider in 2000, unless otherwise demonstrated by the parties.

Turning to the subject's 2000 valuation, the subject property has not been involved in a recent arm's-length transaction. Therefore, we must consider the evidence of value of the property before us.

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

It is not enough, however, to simply come forward with some evidence of value. Neither is it sufficient to grant the requested increase or decrease merely because no evidence is adduced in contradiction to the claim. *Western Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340. In short, there is a burden of persuasion that rests with the appellant to convince this board that the appellant is

entitled to the value which it seeks. *Cincinnati School Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325. Once the appellant presents competent and probative evidence of value, other parties asserting a different value then have the corresponding burden of providing evidence that rebuts appellant's evidence of value. *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493. Accordingly, this board must proceed to examine the available record and to determine value based upon the evidence before it. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120; *Clark v. Glander* (1949), 151 Ohio St. 229. In so doing, we will determine the weight and credibility to be accorded to the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

The appraisal report provided by Manlaw's expert, Dr. Weiler, "is limited in scope to an analysis of the Kmart's leased fee estate utilizing the terms of the existing leases and the fee simple analysis of the Burger King." Ex. 1 at 3.

In valuing the retail building, Dr. Weiler prepared an income approach to valuation using the contract rents in place for the Kmart space and the Lentine's Music Store space. In discussing the potential gross rental income from the retail space, Dr. Weiler explains:

"Discussions with Realtors and property owners have indicated that big box retail space in this location and size exhibit (sic) operating expenses⁶ (sic) in the range of \$3.50 per square foot to \$6.00 per square foot depending on the location, quality, age, and

⁶ The report appears to have mistakenly referred to "expenses" instead of rent.

condition. The subject's contractual lease rate is \$1.77 per square foot with the lessor responsible for all operating expenses except utilities. It appears, therefore, that the tenant has a substantial leasehold interest in the property. Lentine [sic] Music Store [sic] contractual lease rate varies from \$5.00 to \$8.00 per square foot on a gross basis over a four year period. A [sic] in depth rent study was conducted on the subject property; however, conversations with realtors suggests (sic) that Lentine [sic] Music lease is at or near market." Id. at 18.

After including amounts associated with contractual overage rent provisions for gross sales mileposts, applying a vacancy factor of 3%, deducting operating expenses, and reserves for replacements, Dr. Weiler arrived at a net operating income of \$256,023. Dr. Weiler applied a 10.58% capitalization rate to arrive at an opinion of \$2,420,000 for the Kmart and Lentine's Music Store retail space. Id. at 22.

In valuing the Burger King restaurant space, Dr. Weiler reviewed the sales of three comparable properties in his sales comparison approach. The three sales provided a price range of \$124.15 to \$153.06 per square foot. After adjustments, Dr. Weiler applied \$145 per square foot to the subject restaurant's 3,454 square feet of space to arrive at an opinion of value of \$500,000 for the restaurant. Id. at 28.

In his final reconciliation, Dr. Weiler added his leased fee opinion for the retail space to the fee simple opinion for the restaurant and arrived at a final value of \$2,920,000 for the subject property as of January 1, 2000. Id. at 29. For the reasons stated above, we are unable to conclude that the leased fee analysis can be

used to determine the fair market value of the property. *Alliance Towers, supra, Wynwood Apt., Inc., supra.*

As was the case in the 1997 matter, the BOE has offered the appraisal of Mr. Racek for the subject property. Mr. Racek has conducted both a sales comparison and an income analysis to arrive at an opinion of value for January 1, 2000.

In his sales comparison approach, Mr. Racek considered the sale of five big box retail properties and five fast food restaurant properties. Ex. A at 28-50.

The retail comparables ranged from \$25.99 per square foot to \$56.28 per square foot, including land. After making adjustments for differences between the comparables and the subject property, Mr. Racek applied a value of \$41.50 per square foot to the subject's 113,100 square feet of retail area to arrive at a value of \$4,693,650 for the subject's retail building. Id at 49.

In considering the restaurant comparables, Mr. Racek developed an unadjusted range in value from \$22.00 to \$278.93 per square foot of space. After making adjustments to the comparable sales, Mr. Racek applied a value of \$85.00 per square foot to the subject's 3,454 square feet of restaurant space to arrive at a value of \$293,590 for the subject's fast food restaurant. Id. at 50.

The income approach to valuation developed by Mr. Racek is based upon comparable rental rates gleaned from eleven other properties. Id. page facing 52. The rental comparables include occupied and vacant big box retail space, including the 20,000 square feet of space on the subject property leased to Lentine's

Music Store at \$5.00 per square foot. Mr. Racek did not consider the current rate paid by Kmart based upon the lease that commenced in 1969, concluding that the rental rates provided by the eleven comparables more accurately depicted what the subject property would rent for if available on tax lien date. *Id.* at 52. Focusing upon the comparables in Cuyahoga County, the rental rate comparables provide a range from \$4.45 to \$8.00 per square foot. After taking into consideration the age and condition of the subject's retail space, Mr. Racek concluded to a rental rate of \$5.00 per square foot for the subject's retail building. *Id.* at 53.

Mr. Racek then made adjustments for vacancy and credit loss (5%), for management (3%), and deducted \$33,930 for reserves for replacements to the retail building's potential income. After applying a 10% capitalization rate, Mr. Racek concluded to a value of \$4,871,780 for the subject's retail building. Mr. Racek then added the value of the restaurant (\$293,590) derived under the sales comparison approach to opine to an overall value of \$5,165,370 for the subject property under the income approach. *Id.* at 56.

In his reconciliation of value, Mr. Racek gave "significant weight" to the sales comparison approach and attributed "reasonable weight" to the income analysis. In his final analysis, Mr. Racek opined to a value of \$5,000,000 for the subject property.⁷

⁷ Mr. Racek further allocated his value between land and building, concluding that the subject's land valuation should be fixed at \$200,000 per acre, or \$2,145,000 for the subject's 10.725 acres, based upon comparable land sales contained in his report. *Id.* at 57.

Based upon all the evidence before us, we find Mr. Racek's opinion to be competent and probative evidence of the subject property's fair market value as of January 1, 2000.

Upon consideration of the existing record and the applicable law, the Board of Tax Appeals finds and determines from the preponderance of the evidence the value of the subject property as of January 1, 2000 to be:

Parcel 371-10-004	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$2,145,000	\$ 750,750
BLDG	\$2,855,000	\$ 999,250
TOTAL	\$5,000,000	\$1,750,000

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

ohiosarchkeybta

OHIO BOARD OF TAX APPEALS

Board of Education of the)
Columbus City Schools,)
)
Appellant,)
)
)
vs.)
)
)
Franklin County Board of Revision,)
Franklin County Auditor, and)
Max E. Cougill,)
)
Appellees.)

CASE NO. 2005-R-329
(REAL PROPERTY TAX)
DECISION AND ORDER
Appeal Filed June 18, 2007
Ohio Supreme Court

Board of Education of the)
South-Western City Schools,)
)
Appellant,)
)
)
vs.)
)
)
Franklin County Board of Revision,)
Franklin County Auditor, and)
Max E. Cougill,)
)
Appellees.)

CASE NO. 2005-R-330
(REAL PROPERTY TAX)
DECISION AND ORDER

APPEARANCES:

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Appellees

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Property Owner

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Entered May 18, 2007

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

This matter comes to be considered by the Board of Tax Appeals upon two notices of appeal, one filed by the Board of Education of the Columbus City Schools and another filed by the Board of Education of the South-Western City Schools (collectively, "BOE"), on April 1, 2005 from decisions, mailed March 3, 2005, of the Franklin County Board of Revision ("BOR").

The subject property is located in the city of Columbus taxing district of Franklin County, Ohio, and further identified as parcel numbers 010-122746 (Columbus City School District) and 570-138815 (South-Western City School District). The Franklin County Auditor found the true and taxable values of the subject property for tax year 2003 to be as follows:

Parcel No: 010-122746

	True Value	Taxable Value
Land	\$ 345,300	\$ 120,860
Building	\$ 854,700	\$ 299,150
Total	\$1,200,000	\$ 420,010

Parcel No. 570-138815

	True Value	Taxable Value
Land	\$ 50,500	\$ 17,680
Building	\$ -0-	\$ -0-
Total	\$ 50,500	\$ 17,680

Upon consideration of the complaints filed by the BOE, the BOR concluded that the auditor's values were correct and affirmed the values listed above.

The BOE asserts that the real property should be valued in accordance with a recent sale of the property and the following are the true and taxable values supported by that recent sale:

Parcel No. 010-122746

	True Value	Taxable Value
Land	\$ 345,300	\$ 120,860
Building	\$3,541,700	\$1,239,600
Total	\$3,887,000	\$1,360,460

Parcel No. 570-138815

	True Value	Taxable Value
Land	\$ 50,500	\$ 17,680
Building	\$ -0-	\$ -0-
Total	\$ 50,500	\$ 17,680

The matter was submitted to the Board of Tax Appeals pursuant to R.C. 5717.01 upon the notice of appeal, the statutory transcripts received from the Franklin County Auditor, fulfilling his duties as secretary of the BOR, and the record of the

hearing held before this board. The board also has considered the written legal argument presented subsequent to the conclusion of the hearing.

The subject property is a 2.1405-acre parcel of land located in the city of Columbus at the corner of Demorest and Clime Roads.¹ The property is improved with a one-story retail building, constructed in 2002 and containing 14,490 square feet. As evidenced by documentation presented to the BOR and affirmed before this board, the subject property transferred to the current owner in September 2002 for a transfer price of \$3,937,500. The property is leased to the Walgreen Co. ("Walgreens"). See Appellee's Ex. 1. The lease required the original developer of the property to build the store to Walgreens' specifications. At the time of sale, the property was encumbered by this lease.

At the hearing before this board, the BOE directed attention to the statutory transcript. Contained in the statutory transcript is documentation supporting the transfer identified above, the conveyance fee statement and the deed.

Before the BOR, the property owner presented the testimony of Mr. Curtis P. Hannah, a certified general real estate appraiser. However, Mr. Hannah did not prepare an appraisal, but prepared a "retrospective market rent study," in which he opined that the market rent for the subject property as of January 1, 2003 was \$8.00 per square foot. This market rental rate contrasts with the lease rate of \$21.73 per square foot.²

¹ 1.729 acres are located in the Columbus City School District (010-122746), and .4015 acres is in the South-Western City School District (570-138815).

² The lease rate is found in the lease attached to Mr. Hannah's market-rent study and also in Appellee's Ex. 1.

That lease, entered into on November 15, 2001 by Columbus-Clime, LLC and Walgreen Co., also calls for additional rent based upon a percentage of sales. The term of the lease is seventy-five years.

Before this board, the property owner presented the testimony of Mr. John Murphy, the real estate assessment manager for Walgreens. Mr. Murphy, although he was not personally involved in negotiating this transaction, explained Walgreens' method of expansion and real estate leasing model. He also confirmed that his records indicated that the costs to build the improvements for the subject property were \$3,300,000. H.R. at 39.

At the hearing before this board, the property owner also presented the testimony and appraisal report of Mr. Robin Lorms, an MAI appraiser. It was Mr. Lorms' opinion that the subject property should be valued at \$1,300,000 as of tax lien date. To support his opinion that the subject property should be valued at far less than its original construction costs plus land purchase, the appraiser opined that when a property encumbered by a long-term lease to a successful retail establishment is valued, it is valued taking into consideration the economics of that lease, the value derived is related to the use of the property as opposed to the value of the realty itself. To prove that the value of an encumbered property is more than an unencumbered property, Mr. Lorms researched the state of Ohio and found other properties that were sold after some retail establishment no longer occupied the specific location. Mr. Lorms' retrospective supported his opinion that the property without a tenant was worth far less than a

tenanted property. Mr. Lorms testified that major retailers that enter into build-to-suit arrangements do not purchase locations no longer in use by other major retailers. H.R. at 69-70. Mr. Lorms believes that this is because the design in use by each major retailer is different from the design of the others. H.R. at 70.

As to the retailer for which the property was originally developed, Mr. Lorms opines that the leases in such transactions are not transferring an interest in real property, but rather are financing instruments. Appellee's Ex. 1, at 53. Mr. Lorms' theory underpins the appellee property owner's claim that the sale of the leasehold interest should not be found to be an arm's-length sale. The property owner then turns to other evidence of value in the record. The other evidence relied upon is Mr. Lorms' appraisal testimony and report.

On the other hand, the BOE argues 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. The BOE argues that the only "evidence" in the record that would support a finding that the sale was not arm's length is Mr. Murphy's testimony, which the BOE argues is not probative since Mr. Murphy has no personal knowledge of the sale transaction at issue here, and Mr. Lorms' testimony, which the BOE argues is not evidence at all, but a theory upon which to disregard a market sale.

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, 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.

There is no argument that a sale taking place in September 2002 is recent to the tax lien date of January 1, 2003. Thus, the issue which this board must consider is whether the sale of the property in issue in this appeal meets the legal definition of arm’s length. That definition is characterized 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.” *Id.* at 25.

In making a determination regarding the arm’s-length nature of the sale, this board is guided by recent Ohio Supreme Court decisions. In *Berea City School Dist. Bd. of Edn.*, supra, the court reaffirmed the provisions of R.C. 5713.03, holding 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.’” *Id.* at 13. See, also, *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059.

In *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 112 Ohio St.3d 309, 2007-Ohio-6, the court held, “[i]f no arm’s-length sale occurred, the [sales]

price does not necessarily represent the property's true value, and reliance on appraisal evidence for valuation is appropriate." Id. at 311. This finding was made after reviewing the circumstances surrounding a sale-leaseback transaction. In that appeal, a representative of the property owner testified as to the dire circumstances surrounding the need to refinance his business as well as the fact that the owner had been forced to reject a different offer because the terms could not be met quickly enough for the property owner to meet other financial obligations.

Thus, the board must look to the evidence and determine whether the sale meets the definition of "arm's length," sufficient for it to be used as an indicator of value. In the present appeal, there has been no direct testimony from a principal to the sale transaction. The property owner's appraiser did not confirm in his testimony that he spoke with an employee of the seller or buyer. Rather, his conclusions seemed to be based upon his personal opinion of what happened in this transaction to reach the conclusion that the buyer and the seller were not typically motivated. No reliable testimony was elicited that special considerations were involved in motivating the buyer and the seller and establishing the sales price. Such speculation is not sufficient for this board to conclude that the parties were not acting in their own self-interests.

There is 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. The presumption extends to all the elements which characterize true value. Id. at 327. Having no evidence regarding the sale

itself sufficient to conclude that the circumstances surrounding this particular sale removed it from qualifying as a market transaction, this board cannot conclude that the sale was not market driven.

The property owner argues that the build-to-suit nature of the original lease is sufficient in and of itself to remove the sale of the leased fee interest from consideration. In essence, the property owner seeks a finding that all sales following build-to-suit transactions can never be considered qualifying sales.

The valuation of real property is fact intensive and rarely are there theories that fit every situation. The only case cited to support the property owner's claim that a sale following a build-to-suit lease is not indicative of value is *Dayton School Dist. Bd. of Edn. v. Montgomery Cty. Bd. of Revision* (Sept. 2, 2005), BTA No. 2004-V-76, unreported. However, that case was decided prior to *Berea*, supra. After *Berea*, this board has had occasion to review the valuation of four freestanding drugstores. On three occasions, the board has concluded that the sale price of the leased fee interest controls value for ad valorem tax purposes. The board has made this determination, despite testimony contained in each record from Mr. Lorms that the sale price is predicated upon the manner in which the property is used. *Hon. Dusty Rhodes v. Hamilton County Bd. of Revision* (Mar. 9, 2007), BTA No. 2005-M-1098, unreported; *Bd. of Edn. of the Columbus City Schools v. Franklin Cty. Bd. of Revision* (June 30, 2006), BTA No. 2005-A-381, unreported, appeal pending Sup. Ct. No. 06-1429; *Dayton School Dist. Bd. of*

Edn. v. Montgomery Cty. Bd. of Revision (Jan. 6, 2006), BTA No. 2004-V-73, unreported.

The value of a fourth freestanding drugstore was considered in *RX Bedford Investors, LLC vs. Cuyahoga Cty. Bd. of Revision* (Feb. 3, 2006), BTA No. 2002-R-2509, unreported, settled upon appeal, Sup. Ct. No. 06-448. In that case, the record contained testimony from persons related to the parties involved in a sale of a drugstore location. This board, after fully reviewing the record, including the circumstances surrounding the sale, concluded that the costs of construction, as found by the board of revision, indicated the best evidence of the property's value. It is the testimony of persons knowledgeable of the transaction involved that allowed this board to determine that the sale was not the best evidence of value, and not an appraiser's hypothesis that all sales of successful retail locations should be disregarded.

Given the earlier decisions of this board, we are unable to conclude, as a matter of law, that a sale of a property encumbered with a long-term lease entered into by a developer and a user can never be considered indication of the fair market value of a property. Properties encumbered by leases are purchased and sold regularly in the real estate market. The record does not contain evidence regarding the unique nature of the building itself or the special costs involved in construction of the property. Some build-to-suit properties may require the developer to add unique features to a property which would not be valued in the general marketplace; others may not. See discussion regarding build-to-suit properties in *Camelot Distribution Co. v. Stark Cty. Bd. of*

Revision (Nov. 12, 2004), BTA No. 2003-M-24, unreported. As stated above, the specifics regarding the subject have not been disclosed.

In the present matter, the property owner did not come forth with evidence rebutting the presumption that the sale of the subject meets the indices of an arm's-length transaction. Therefore, the board finds that the record supports a valuation finding as of January 1, 2003 as follows:

Parcel No. 010-122746

	True Value	Taxable Value
Land	\$ 345,300	\$ 120,860
Building	\$3,541,700	\$1,239,600
Total	\$3,887,000	\$1,360,460

Parcel No. 570-138815

	True Value	Taxable Value
Land	\$ 50,500	\$ 17,680
Building	\$ -0-	\$ -0-
Total	\$ 50,500	\$ 17,680

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

OHIO BOARD OF TAX APPEALS

Dayton School District Board of Education,)	CASE NO. 2004-V-76
)	
Appellant,)	(REAL PROPERTY TAX)
)	
vs.)	DECISION AND ORDER
)	
Montgomery County Board of Revision, the)	
Montgomery County Auditor, and)	
Dayton Rite Aid, LLC,)	
)	
Appellees.)	Dismissed on Appeal 1/24/06 Ohio Supreme Ct.

APPEARANCES:

- | | | |
|--|---|---|
| For Appellant
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Entered September 2, 2005

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

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the Dayton School District Board of Education ("BOE") from a decision of the Montgomery County Board of Revision ("BOR") regarding the subject property owned by Dayton Rite Aid, LLC ("Rite Aid"). In said decision, the BOR determined the true and taxable values of the subject

property for tax year 2002 originally established by the Montgomery County Auditor
 ("auditor") should remain as follows:

Parcel R72-27-8-11	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 16,490	\$ 5,770
BLDG	\$696,950	\$243,930
TOTAL	\$713,440	\$249,700
Parcel R72-27-8-12	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$16,490	\$5,770
BLDG	\$ 0	\$ 0
TOTAL	\$16,490	\$5,770
Parcel R72-27-8-14	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$18,560	\$6,500
BLDG	\$ 0	\$ 0
TOTAL	\$18,560	\$6,500
Parcel R72-27-8-15	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$12,470	\$4,360
BLDG	\$ 0	\$ 0
TOTAL	\$12,470	\$4,360
Parcel R72-27-8-16	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$35,560	\$12,450
BLDG	\$ 0	\$ 0
TOTAL	\$35,560	\$12,450
Parcel R72-27-8-18	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$15,050	\$5,270
BLDG	\$ 0	\$ 0
TOTAL	\$15,050	\$5,270
Parcel R72-27-8-30	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$12,470	\$4,360
BLDG	\$ 0	\$ 0
TOTAL	\$12,470	\$4,360
Parcel R72-27-8-40	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$240	\$80
BLDG	\$ 0	\$ 0
TOTAL	\$240	\$80

Parcel R72-27-8-44	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$1,460	\$510
BLDG	\$ 0	\$ 0
TOTAL	\$1,460	\$510
Parcel R72-27-8-45	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$130	\$50
BLDG	\$ 0	\$ 0
TOTAL	\$130	\$50
Parcel R72-27-7-56	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$68,190	\$23,870
BLDG	\$ 0	\$ 0
TOTAL	\$68,190	\$23,870
Parcel R72-27-7-73	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$220	\$80
BLDG	\$ 0	\$ 0
TOTAL	\$220	\$80
TOTALS	\$894,280	\$313,000

The BOE requests that the combined total of the subject property's twelve parcels be increased to a true value of \$2,570,000 based upon appraisal evidence presented to this board. We now consider this matter upon the notice of appeal, the statutory transcript ("S.T.") certified by the auditor, and the evidence presented at this board's evidentiary hearing ("H.R."), and the briefs submitted by the BOE and Rite Aid.

The subject property is located in Montgomery County, Ohio and is a combination of the twelve parcels listed above that form one economic unit, a free-standing retail drugstore constructed in 1999. The building has 11,180 square feet of space and is situated upon 7.467 acres of land. S.T., Ex.7. The subject was originally

built to suit for Rite Aid as a long-term tenant. On September 17, 2001, Rite Aid purchased the property for \$3,035,000.

The BOE had originally filed a complaint before the BOR arguing that the 2001 sales price of the subject was the best evidence of value. Before the BOR, counsel for Rite Aid advocated that the sale was not the best evidence of value, because the sale price represented a leased fee value, as Rite Aid was the former tenant, subject to a long-term lease at an above-market rate. In support of its position, Rite Aid presented the testimony of appraiser Robin Lorms. Mr. Lorms did not provide an analysis of the subject; rather, he provided a list of comparable rental rates and comparable sales that suggested that the long-term rental rate paid by Rite Aid (\$30.40 per square foot) was well above the market rate supported by his comparables of \$8.00 to \$9.00 per square foot. S.T. at A. Ultimately, the BOR decided not to adopt the sale price as the best evidence of value and to leave the 2002 values of the subject property unchanged.

Before this board the BOE appears to have abandoned its theory regarding the sales price and presented the appraisal and testimony of Mr. Eric Gardner, MAI and state-certified appraiser.

As a preliminary matter, Rite Aid challenges the jurisdiction of the appeal before us and alternatively argues that the decision of the BOR is in error. Rite Aid asks this board for an order to vacate the decision of the BOR for lack of jurisdiction, arguing that the original complaint filed by the BOE is insufficient to establish jurisdiction before the BOR because it was not brought in the proper name of

the Dayton School District Board of Education, but instead it was brought in the name of "Dayton Board of Education." S.T., Exhibit A.

Rite Aid argues that the misnomer of the BOE's proper legal name in the complaint fails to vest jurisdiction before the BOR, relying on the decision of the Fairfield County Court of Appeals in *Pennington v. Fairfield Cty. Bd. of Revision* (Dec. 21, 1992), Fairfield App. No. 24-CA-92, unreported, holding that a complaint with a similar misnomer in the name of a board of education was properly dismissed.

In the past we have not looked favorably upon arguments based upon a mere misnomer of a proper party. *Whitehall City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Feb. 5, 1999), BTA No. 1996-N-519, unreported. *Pennington*, supra, the case which appellant cites as controlling, has been addressed by this board and accorded limited persuasive authority. See *MRSLV Alliance LLC v. Stark Cty. Bd. of Revision* (Interim Order, Dec. 18, 1998), BTA No. 1998-N-510, unreported, and *Bd. of Edn. of the Vandalia-Butler City Schools v. Montgomery Cty. Bd. of Revision* (Interim Order, Aug. 1, 1997), BTA No. 1996-P-1220, where this board declined to follow *Pennington* in jurisdictions other than that in which it was decided.

Further, the facts before us are distinguishable from *Buckeye Foods v. Cuyahoga Cty. Bd. of Revision* (1997), 78 Ohio St.3d 459, where the Supreme Court affirmed the dismissal of a complaint for failure of the complainant to properly identify itself. In *Buckeye Foods* a "fictitious name" was used in violation of R.C. 1329.10(B), which requires one to register with the Secretary of State before commencing or maintaining an action in a fictitious name. Additionally, in *Buckeye*

Foods, there were at least five other entities that used the "Buckeye Foods" name as a part of their name. Thus, it was unclear as to which entity the fictitious name made reference. In its decision, the court stated that the complainant must "be better identified than occurred here" and that one must have "the ability to discern who is complaining about the value of real property." *Id.* at 462. In the case before us there can be little doubt that all parties were aware that the Dayton School District Board of Education was the complaining party.

Furthermore, we distinguish the facts before us from the circumstances in *Bd. of Edn. of the Delaware City Schools v. Delaware Cty. Bd. of Revision* (June 21, 1996), BTA 1995-A-1093, 1202, unreported, where we held that a complaint brought in the name of another school district is jurisdictionally defective. See, also, *Bd. of Edn. for the Washington Local Schools v. Lucas Cty. Bd. of Revision* (Nov. 3, 2000), BTA Nos. 1997-V-1066, et seq., unreported.

Therefore, appellant's motion to dismiss for failure to name a proper party is denied.

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

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

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

In support of its contention of value, the BOE offered at this board's evidentiary hearing the testimony and written appraisal report of Mr. Gardner. Ex. A. Mr. Gardner developed two approaches to value, the income and sales comparison approaches, to arrive at an opinion of value for the subject property. Rite Aid rested upon the record below and its cross-examination of Mr. Gardner. The county appellees did not appear at hearing before this board.

Mr. Gardner's appraisal report was prepared with an "as of" date of January 1, 2002. Mr. Gardner ultimately arrived at an opinion of value of \$2,570,000 for the subject property. *Id.*, H.R. at 42.

Mr. Gardner used sixteen comparables to arrive at his opinion of value under both the sales comparison and income approaches. Ex. A at 31. All sixteen comparables¹ are newly constructed "built-to-suit" drugstores, all subject to leases. H.R. at 26, 29, 52, 63. Four of the comparables are in Ohio; the remaining

¹ Of the sixteen comparables, four are Rite Aid drugstores; seven are CVS drugstores; and five are Walgreens drugstores. Ex. A at 31.

comparables include properties in North Carolina, Alabama, Tennessee, South Carolina, Virginia, Minnesota, Colorado, and California.

In what is titled as a "Sales Comparison Approach Leased Fee Conclusion," Mr. Gardner used each comparables' actual rental rate and deducted .20 cents per square foot to account for operating expenses, and arrived at an effective gross income (EGI) figure for each property. By dividing the EGI into the sales prices of the comparable properties, Mr. Gardner calculated an Effective Gross Income Multiplier (EGIM) for each of the sixteen properties ranging from 11.19 to 12.86. Ex. A at 31. Utilizing what he estimates to be "market rent" for the subject property (derived from his income approach to value), Mr. Gardner applies EGIM of 11.20 and 12.00 to his own estimate of market rent for the subject and estimates a low value of \$2,500,000 and a high value of \$2,680,000 for the subject. Mr. Gardner elects to draw a value conclusion of \$2,590,000 for the subject (with a corresponding EGIM of 11.58) utilizing the gross income multipliers he extracted from the sixteen comparables.

Utilizing the 11,180 square feet of space on the subject property, Mr. Gardner then proceeds to adopt a price per square foot analysis from his comparables, estimating a low value of \$225 per square foot (\$2,520,000) and a high value of \$250 per square foot (\$2,800,000) for the subject. Id. Mr. Gardner concluded to a value somewhere between the high and low figures: \$2,660,000 for the subject at \$237.92 per square foot. After considering the value conclusion from his EGIM and sale price

per square foot analysis, Mr. Gardner arrived at a final value conclusion of \$2,600,000 under his sales comparison approach to value. Ex. A at 32.

In developing an income approach to value, Mr. Gardner again utilized the same sixteen comparable properties, which established a rental range between \$16.62 to \$29.84 per square foot. Id. at 35. Mr. Gardner determined that \$20.00 per square foot would be an appropriate rental rate for the subject. Mr. Gardner elected not to make any reduction in the subject's pro forma operating statement for replacements for reserves or for vacancy and credit loss. Instead, Mr. Gardner made a deduction of .20 cents per square foot for operating expenses as he did for the comparable properties, estimating a net operating income of \$221,364 for the subject. Id. at 36. After evaluating the capitalization rates derived from his comparables, national and regional surveys, and utilizing the band-of-investment technique, Mr. Gardner estimated a capitalization rate of 8.61% for the subject. Id. at 41. Applying the rate to the subject's net operating income, Mr. Gardner estimated a value of \$2,570,000 utilizing his income approach to value. Id.

Although the subject property was only three years old on tax lien date, Mr. Gardner refrained from conducting a cost approach on the subject property, because of "the subjective nature of estimating the total depreciation associated with the improvements." Id. at 29, H.R. at 25, 50.

In his final reconciliation of value, Mr. Gardner describes that the sales comparison approach is given secondary consideration. Id. at 42. Mr. Gardner relies

primarily upon his income approach, and arrives at a final value of \$2,570,000 for the subject. Id.

The case before us today is different than the issues presented to the BOR. The BOR was faced with the issue of whether the September 2001 sales price of \$3,035,000 was the best evidence of value. Rite Aid successfully challenged the sale price after establishing that the purchaser (Rite Aid) was subject to a long-term lease of the subject for over \$30.41 per square foot. Rite Aid established that the rental rate was well above the market rates of other similar buildings through the testimony of Mr. Lorms. Mr. Lorms offered comparables rental data, primarily of former CVS and Rite Aid drugstores, which established actual rates² between \$5.25 to \$9.00 per square foot. S.T. at A. Before this board, no party has advocated that the September 2001 sales price of the subject is the best evidence of value, nor do we find it representative of the property's value for tax purposes.³

In reviewing Mr. Gardner's analysis, we are concerned that the comparables, and hence, his opinion, amount to a value in use. We have previously held that real estate must be valued separately, without regard to the particular business or business activities conducted within the premises. "**** Without significant 'adjustment,' there is a real risk of violating the mandate of *Dinner Bell Meats, Inc. v. Cuyahoga Cty. Bd. of Revision* [(1984), 12 Ohio St.3d 270], that 'value in exchange,' not 'value in use,' be determined." *Chippewa Place Dev. Co. v.*

² We have excluded those comparables characterized as "asking rates."

Cuyahoga Cty. Bd. of Revision (Sept. 24, 1993), BTA No. 1991-P-245, unreported, at 13, appeal dismissed, (June 15, 1994) Cuyahoga App. No. 66341, unreported. See, also, *Dublin Senior Community L.P. v. Franklin Cty. Bd. of Revision* (1977), 80 Ohio St.3d 455 (business income must remain separate from income produced by the real estate).

Mr. Gardner refrains from relying upon the subject's 2001 sales price and former rental rate, concluding that both were above market. Specifically, Mr. Gardner testified that the following factors would explain why the subject's sale price and rental rate were above market: (1) Rite Aid is a "credit tenant," (2) the lease was for a long term at a flat rate, (3) there is a strong demand for triple net investments such as is the case with the subject, (4) record low interest rates, and (5) the lack of alternative investments with similar risks and rewards. H.R. at 43, Ex. A at 43.

Nevertheless, Mr. Gardner's opinion of value is borne from his exclusive reliance on the sixteen similar build-to-suit comparables, all of which present the same issues concerning the occupants' creditworthiness and the like. The data gleaned from the comparables appear to be tied (as is in the case of the subject) to the creditworthiness of their tenants. The difficulty in relying upon income derived from a business activity, or value in use, is that the value ultimately derived may not be the market value of the subject property. As *The Appraisal of Real Estate* cautions:

"An important distinction is made between market value and investment value. Investment value is the value of a certain property use to a particular investor. Investment value may

³ The BOE's expert (Mr. Gardner) testified before this board that the sale price as well as the underlying rental rate in place at the time of the sale was above market. H.R. at 24,43,52-53.

coincide with market value * * *, if the client's investment criteria are typical of investors in the market. In this case, the two opinions of value may be the same number, but the two types of value and their concepts are not interchangeable.

"Market value is objective, impersonal, and detached; investment value is based on subjective personal parameters. To develop an opinion of market value with the income capitalization approach, the appraiser must be certain that all the data and forecasts used are market-oriented and reflect the motivations of a typical investor who would be willing to purchase the property at the time of the appraisal. A particular investor may be willing to pay a price different from market value, if necessary, to acquire a property that satisfies other investment objectives unique to that investor." *Id.* at 476.

As we review the evidence of value of the subject before us, we are mindful that "certain types of transactions, albeit arm's-length transactions, call into question whether the sale price reflects the true value of the property. Among the types * * * prompting an investigation of the sale, is a sale-lease arrangement." *S. Euclid/Lyndhurst Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1996), 74 Ohio St.3d 314, 317. See, also, *Kroger Co. v. Hamilton Cty. Bd. of Revision* (1993), 67 Ohio St.3d 145; *Cleveland Hts./Univ. Hts. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1995), 72 Ohio St.3d 189; *Pingue v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St. 3d 62. This board has previously held:

"[T]he details of the sale/leaseback must be reflective of market rates and terms for the sale price to be equally reflective of market value." *Corpline v. Hamilton Cty. Bd. of Revision* (May 17, 2002), BTA No. 2001-A-422, unreported, appealed to the Supreme Court of Ohio and remanded for implementation of settlement, 97 Ohio St.3d 1212, 2002-Ohio-5805.

The appraisal report and opinion of Mr. Gardner attempts to define and narrow the market in the context of "first generation" rental rates to the exclusion of secondary uses.

When asked to define a "first-generation tenant" versus a "second-generation tenant," Mr. Gardner testified:

"First generation tenant has to do with the tenant, or user, that maybe had the property built for a build-to-suit. Maybe they incorporated some specific branding within the architecture of the real estate.

"One of the best examples would be a McDonald's restaurant. When you look at their roofing, when you look at their design of the building, whether they're here in Ohio or if you travel to California, the branding of McDonald's is built into that architecture of the building.

"Second-generation would be the -- just refers to the second user. And the example I just gave of a McDonald's, if McDonald's were to move out, and if a Chinese restaurant were to move in, there would be some renovation to kind of de-brand that building to another user and another use." H.R. at 47-48.

When asked whether he viewed the subject property as a first- or second-generation user, Mr. Gardner responded that "the property was being occupied by Rite Aid Corporation, thus, the first-generation user." Id. at 49.

As promulgated by R.C. 5713.01, Ohio Adm. Code 5703-3-03 charges the county auditor with the duty of appraising property according to true value as it existed on tax lien date of the year in which the property is appraised. Pursuant to Ohio Adm. Code 5703-25-05, the auditor is to determine "the price at which the property should change hands on the open market between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having

knowledge of all the relevant facts.” Mr. Gardner’s national comparables narrowly detailing what Rite Aid, Walgreen’s, and CVS are leasing (and subsequently purchasing) as built-to-suit properties amounts to a value in use. By Mr. Gardner’s own admissions, the initial rental rates and prices paid for these comparables were driven by a build-to-suit scenario and the existence of a quality long-term tenant.⁴ Therefore, we are not persuaded that these so-called “first generation” comparables bear any demonstrated relevance to what the subject should sell for in the open market on January 1, 2001. Mr. Gardner’s analysis would only be relevant if we were seeking to value the property subject to a long-term, creditworthy tenant (such as Rite Aid).

The issue before this board is what would the fee simple interest in the subject property sell for on tax lien date based on market conditions. *Dublin Senior Comm. Ltd. Partnership v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455. Mr. Gardner’s attempt to utilize other build-to-suit lease transactions, and the like, does not adequately reflect the market forces that would be in place had the subject been offered for sale on January 1, 2001, without any regard to the creditworthiness of Rite Aid.

In order to establish an estimate of what the property would actually sell for on the open market, we must look to the market for sale prices and rental rates.

⁴ Just as Mr. Gardner and the BOR reasoned that the September 2001 sales price as well as the initial rental rate established between Rite Aid and the subject’s developer is not reflective of market value for the subject property, we question Mr. Gardner’s reliance upon sixteen other sales and rental rates of similarly built-to-suit drugstores. During cross examination, Mr. Gardner was asked about the comparable properties:

“Q: If I may, in other words, that a prospective investor is more interested in the income stream and the creditworthiness of the user than the actual attributes of the property?

“A: Both are strongly considered.” H.R., at 70-71

That market may include purchasers and tenants of high creditworthiness, such as a Walgreen's or a CVS, and/or it may include a local business venture. Ultimately, said market analysis needs to demonstrate what value should have been achieved for the subject had it sold on tax lien date.

Even assuming that his sixteen comparables were viewed as competent probative evidence of value, Mr. Gardner fails to make any adjustments to account for differences between the subject and his comparables in his sales comparison approach. In his income approach, Mr. Gardner fails to take a reduction in the subject's pro forma for any potential vacancy loss or any reserve for replacement. Furthermore, Mr. Gardner fails to provide any support or explanation as to how he arrived at values and rates between the "highs" and "lows" found throughout his report.

The Board of Tax Appeals is given great discretion in what weight to give the evidence presented before it. *Cardinal Fed. S. & L. Assn.*, supra. The board may accept or reject any and all evidence presented. Therefore, for the above-mentioned reasons, this board finds that the opinion of Mr. Gardner fails to accurately reflect the value of the subject property.

We further find that neither Rite Aid nor the county appellees have responded with any evidence of value. Therefore, we find the value of the subject as of January 1, 2002 to be:

Parcel R72-27-8-11	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$ 16,490	\$ 5,770
BLDG	<u>\$696,950</u>	<u>\$243,930</u>
TOTAL	\$713,440	\$249,700

Parcel R72-27-8-12	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$16,490	\$5,770
BLDG	\$ 0	\$ 0
TOTAL	\$16,490	\$5,770
Parcel R72-27-8-14	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$18,560	\$6,500
BLDG	\$ 0	\$ 0
TOTAL	\$18,560	\$6,500
Parcel R72-27-8-15	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$12,470	\$4,360
BLDG	\$ 0	\$ 0
TOTAL	\$12,470	\$4,360
Parcel R72-27-8-16	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$35,560	\$12,450
BLDG	\$ 0	\$ 0
TOTAL	\$35,560	\$12,450
Parcel R72-27-8-18	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$15,050	\$5,270
BLDG	\$ 0	\$ 0
TOTAL	\$15,050	\$5,270
Parcel R72-27-8-30	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$12,470	\$4,360
BLDG	\$ 0	\$ 0
TOTAL	\$12,470	\$4,360
Parcel R72-27-8-40	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$240	\$80
BLDG	\$ 0	\$ 0
TOTAL	\$240	\$80
Parcel R72-27-8-44	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$1,460	\$510
BLDG	\$ 0	\$ 0
TOTAL	\$1,460	\$510
Parcel R72-27-8-45	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$130	\$50
BLDG	\$ 0	\$ 0
TOTAL	\$130	\$50

Parcel R72-27-7-56	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$68,190	\$23,870
BLDG	\$ 0	\$ 0
TOTAL	\$68,190	\$23,870
Parcel R72-27-7-73	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
LAND	\$220	\$80
BLDG	\$ 0	\$ 0
TOTAL	\$220	\$80
TOTALS	\$894,280	\$313,000

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

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Not Reported in N.E.2d, 1977 WL 200712 (Ohio App. 10 Dist.)
(Cite as: Not Reported in N.E.2d)

N

Schottenstein v. Board of Revision of Franklin County.

Ohio App. 10 Dist., 1977.

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.

Jerome Schottenstein, c/o Joseph F. Frasc, Jr.,
Appellant-Appellant,

v.

Board of Revision of Franklin County, et al.,
Appellees-Appellees.

Nos. 77AP-713 and 77AP-714.

December 29, 1977.

BESSEY, FRASCH & LAWSON, MR. JOSEPH F. FRASCH, JR., 330 South High Street, Columbus, Ohio, For Appellant-Appellant.

MR. GEORGE C. SMITH, Prosecuting Attorney, MR. WILLIAM R. HAMELBERG, MR. FRANK A. RAY and MR. RICHARD SIEHL, Assistants, MR. FREDERICK W. RICE, Legal Intern, Franklin County Hall of Justice, 369 South High Street, Columbus, Ohio, For Appellees-Appellees.

DECISION

McCORMAC, J.

*1 Appellant is the owner of two parcels of real estate leased for use as parking lots. One parcel is located at the northwest corner of Mound and High Streets in Columbus, Ohio, and the second parcel is located at the northeast corner of Mound and Front Streets in Columbus, Ohio. Both parcels are leased to Mid-state's Parking Corporation for use as parking lots, one lease to expire in 1979 and the other lease to expire in 1991.

Pursuant to statute, these parcels of real estate were appraised in 1975 to determine their values for

purposes of real estate taxation. Appellant appealed the values established for his properties by the Franklin County Board of Revision to the Board of Tax Appeals, who held that parcel F-200, the property located on the northwest corner of Mound and High Streets, had a taxable value of \$469,000, and that parcel F-202, the property located on the northeast corner of Mound and Front Streets, had a taxable value of \$440,000, as of the valuation date of January 1, 1975.

From the order of the Board of Tax Appeals, the property owner has appealed, setting forth the following assignments of error:

"1. The Board of Tax Appeals erred in not considering the appraisal report of Robert D. Morrison, since the oral testimony clearly showed that the difference in appraisal dates was immaterial, and that the value determined for December 31, 1975, was in his expert opinion, the same as it would have been on January 1, 1975.

"2. The Board of Tax Appeals erred in relying on the appraisal report of Thomas Schirack in that his appraisal were based on fee simple title only, and did not consider as a factor of market value, the fact that both properties were encumbered by long-term leases.

"3. The Board of Tax Appeals further erred in considering the appraisal report of Thomas Schirack in that the transaction cited as being most comparable in value to the property in question, were between parties with the same interest or predicated on an unfeasible land use.

"4. The decision of the Board of Tax Appeals was contrary to the manifest weight of the evidence when the oral testimony is combined with the appraisal reports."

The property was reappraised as of January 1, 1975, to establish the value of the property for tax purposes pursuant to R. C. 5713.03, which, as pertinent, provides as follows:

"The county auditor, from the best sources of

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information available, shall determine, as nearly as practicable, the true value of each separate tract, lot, or parcel of real property * * *."

True value is the amount at which property could be sold to a willing buyer by a willing seller on the open market. *State, ex rel. Park Investment Co., v. Board of Tax Appeals* (1964), 175 Ohio St. 410; *McVeigh v. Bd. of Revision* (1976), 48 Ohio St. 2d 57.

*2 There are three basic methods of appraisal used by experts to ascertain the true value of real estate. These methods are the cost approach, the income approach, and the comparative sales approach. In the instant cases, the appraiser for the county utilized the comparative sales approach. He rejected the cost approach as the properties were not improved other than by a blacktop surface. He also rejected the income approach as he felt that the use of the properties for surface parking were not their highest and best use and that the income derived from the leases on the properties did not represent the best test of the current market value of the properties. The county's expert further stated that he felt that the highest and best use of the property for which a willing buyer would pay the highest price was for development for office facilities. He stated that he evaluated the properties without reference to the leases based upon an analysis of comparable sales in the vicinity, thus, arriving at the values which he established for the properties for the applicable date of January 1, 1975.

The owner's appraiser also rejected the cost approach method for establishing value. He used the income approach, evaluating the value of the property during the respective periods of the leases on the property, adding thereto the reversionary value of the fee; thus, arriving at somewhat lower values than established by the county's appraiser. The owner's appraiser rejected the comparable sales approach, claiming that there were not enough bonafide sales in the vicinity. He had also stated that a lease affects the sales price of a property and must be taken into account in evaluating comparable sales.

The first issue is whether it is proper to ignore an unfavorable lease upon a property in order to establish the true value of the property so far as a willing buyer and a willing seller is concerned. This issue is properly answered in the affirmative. If the real estate will bring a higher market value for use for construction of an office building than for use for surface parking, a willing buyer interested in such development will offer an amount based upon his ability to use the property for that purpose. It may be that the offer will be contingent upon a cancellation of the unfavorable lease so that the property can be utilized at a time favorable to the buyer for other legal purposes than surface parking. However, that does not mean that the value of the property, pursuant to R.C. 5713.03, is tied to the use set forth in lease agreements. The lessee may be entitled to part of the total purchase price which reflects the true value of the property for its highest and best use, which may pose a problem to the owner but not to the buyer who bases his offer upon conveyance of an unencumbered fee simple title. Thus, an unfavorable lease agreement does not have to be taken into account in establishing the true value of property, as it only affects the distribution of sale proceeds rather than the value of the property.

*3 Assignment of error number two is overruled.

Appellant's other assignments of error will be combined for discussion as pertinent to such is the standard of review of a Board of Tax Appeals decision by the Court of Appeals:

R. C. 5717.04 provides as follows:

"If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification."

The Ohio Supreme Court has recently stated that the board is vested with wide discretion in determining the weight to be given to evidence and

Not Reported in N.E.2d, 1977 WL 200712 (Ohio App. 10 Dist.)
(Cite as: Not Reported in N.E.2d)

the credibility of witnesses which come before the board. *Cardinal Federal S.&L. Assn. v. Bd. of Revision* (1975), 44 Ohio St. 2d 13. As pointed out by the Supreme Court, the board is not required to adopt the evaluation fixed by any expert or witness and its determination will not be disturbed unless a patent abuse of discretion is shown.

Not Reported in N.E.2d, 1977 WL 200712 (Ohio App. 10 Dist.)

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Appellant questions the validity of the county's appraiser in using comparable sales claiming that the two sales most relied upon were questionable in that one was between parties not dealing at arm's length and that the other was predicated on an unfeasible land use. That contention is not well taken. This evidence was before the board. The county's appraiser stated that he was aware of these situations and that his investigation disclosed the sales to be a reasonable indication of the market value of the subject properties. The Board of Tax Appeals did not abuse its discretion in adopting the values established by the county's appraiser through use of the comparable sales approach.

Appellant also protests the rejection of the board of the appraisal report of the owner's appraiser as immaterial because it was based on an evaluation date of December 31, 1975, instead of the proper date of January 1, 1975. Once again, this determination was within the discretion of the board even though, when this error was called to the attention of the appraiser, he testified that the values he established would be about the same on January 1, 1975. Obviously, the board felt that the approach utilized by the county's appraiser better established the true value to be assigned to each property on January 1, 1975. It was within their discretion to so find.

Appellant's assignments of error one, three and four are overruled.

Appellant's assignments of error are overruled, and the decision of the Board of Tax Appeals is affirmed.

HOLMES and REILLY, JJ., concur.

Ohio App. 10 Dist., 1977.

Schottenstein v. Board of Revision of Franklin County

Not Reported in N.E.2d, 1986 WL 9522 (Ohio App. 10 Dist.)
(Cite as: Not Reported in N.E.2d)

C

Zell v. Franklin County Bd. of Revision
Ohio App., 1986.

Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
County.

Samuel ZELL, Trustee, Appellant-Appellee,

v.

FRANKLIN COUNTY BOARD OF REVISION,
(Palmer McNeal, Franklin County Auditor),
Appellees-Appellants,
WESTERVILLE CITY SCHOOL DISTRICT,
Appellee-Appellee.
No. 86AP-153.

Aug. 26, 1986.

APPEAL from the Ohio Board of Tax Appeals.

Mr. Ronald B. Noga, for appellee.
Mr. Michael Miller, Prosecuting Attorney, and Mr.
James R. Gorry, for appellants.
Messrs. Means, Bichimer & Burkholder, and Mr.
James P. Burnes, for appellee.

OPINION

McCORMAC, Judge.

*1 Samuel Zell, trustee, appellee herein, purchased the property in question in an arm's-length transaction for \$2,628,700 in October 1979. This property was part of the Westerville Square Shopping Mall. The portion that was purchased consists of an enclosed shopping mall with 73,165 square feet of space, a theater building attached to the west end of the mall with an additional 20,021 square feet of space, a parking lot with about 250,000 square feet of blacktop parking, and land consisting of 10.138 acres. The tenant of the theater building, the American Multi-Cinema, leased the theater in 1975 for a period of

twenty-five years with an option to renew for another five years. The lease provides that the rent for the property is about \$1.30 per square foot, plus one percent of the gross sales over and above \$1,000,000. Experience has been that the overage part of the lease represented a nominal amount of additional rent. An appraiser for the auditor considered the leasehold interest to be valuable because the square foot rent was substantially less than the market value for rental of this type property. Thus, the Franklin County Auditor valued the land at the purchase price, plus the value of the tenant's leasehold for a total value of \$3,381,330.

Samuel Zell filed a complaint with the Franklin County Board of Revision contesting the appraised value of the property for the tax year 1981. Westerville School District filed a counter-complaint supporting the value of the auditor. The Board of Revision heard the complaint on August 4, 1982 and refused to reduce the value of the property to the sale price.

Zell filed an appeal with the Ohio Board of Tax Appeals, which conducted a hearing after which it reduced the true value of the property to the sale price of \$2,628,700.

The Franklin County Auditor has appealed, asserting the following assignments of error:

"(1) The Ohio Board of Tax Appeals erred in holding that the sale price of the real property, which was \$2,645,320, was the true value of such property for tax purposes for tax year 1981:

"(2) The Ohio Board of Tax Appeals erred in that it failed to value the theater building located on the property for tax purposes for tax year 1981;

"(3) The Ohio Board of Tax Appeals erred in holding that the sale price of the property included any value attributable to the right to use and occupy

Not Reported in N.E.2d, 1986 WL 9522 (Ohio App. 10 Dist.)
(Cite as: Not Reported in N.E.2d)

the theater building;

"(4) The Ohio Board of Tax Appeals erred in holding that the sale, itself, included the right to use and occupy the theater building;

"(5) The Ohio Board of Tax Appeals erred in refusing to hold that the true value of the subject property, including the value of the right to use and occupy the theater building, for tax year 1981 was \$3,381,550;

"(6) The decision of the Ohio Board of Tax Appeals was against or contrary to the weight of the evidence."

The assignments of error are combined for discussion as they are interrelated.

The issue in this case is whether an arm's-length sale price recently paid for real estate accurately reflects the true value in money of the property for tax purposes when the property is subject to a valuable leasehold interest in a tenant.

*2 R.C. 5709.01 provides that all real property in this state is subject to taxation. R.C. 5701.02 defines real property and land to include land and all buildings on the land and all rights and privileges belonging or appertaining thereto. The fee owner of the property is taxed based upon the value of all of the interest in the property, including leasehold interest, as only one tax bill is submitted. There is no doubt that a favorable long-term lease constitutes a recognizable value in favor of the leaseholder and that it also diminishes the price that a buyer will pay for the property which is subject to the lease which is unfavorable considering the standpoint of the owner. For example, a lot located in downtown Columbus might be highly valued unencumbered by a lease. If, however, it is subject to a twenty-year lease as a parking lot at a very low cost per year, a bona fide purchaser may be willing to pay a much lower price for the land since, to use the land for what it is really worth as development, it would be necessary to buy out the leasehold interest. If that property were acquired by eminent domain under that hypothesis, the land owner would recover only the present market value of his fee

subject to the lease, and the leaseholder would recover the value of the leasehold interest. Similarly, in the case at hand, the purchaser of the theater would pay substantially more for the property if the long-term lease were at the current market rate of about \$4.50 per square foot than would be paid when the property was subject to the very low \$1.30 per square foot provision.

Appellee recognizes that only one tax bill is submitted but argues that the taxing authority simply loses the tax on the valuable leasehold interest and can only tax the owner of the fee for the purchase price of the property made at a recent arm's-length transaction. We disagree with that analysis. The recent sale price of a property at an arm's-length transaction is the best evidence of its value for taxing purposes if it reflects the true value of all of the rights and interest in the property. When there is a valuable leasehold interest to which the property is subject, the sale price does not truly reflect the value of the land, the buildings, and all rights and privileges belonging or appertaining thereto due to the fact that a valuable interest was not purchased, *i.e.*, the leasehold interest. Although R.C. 5713.03 provides that the county auditor shall consider the sale price to be the true value for taxation purposes, reliance on the sale price as the sole factor is not justified where it is shown that the sale price is not reflective of true value. *Columbus Board of Education v. Fountain Square* (1984), 9 Ohio St.3d 218. Rule 5705-3-03(D)(2) of the Ohio Administrative Code, a rule of the tax commissioner which governs the determination of "true value," provides that "the value should consider both the value of the lease fee and the leasehold."

The Board of Tax Appeals did not consider or determine whether the leasehold interest had value above and beyond the recent sale price which should be added to the sale price to determine the total taxable value. Apparently, the Board of Tax Appeals did not understand appellants' argument and evidence concerning the leasehold value, as the Board of Tax Appeals labeled appellants' contention as the fact that the sale did not include the theater. Appellants make no contention to that effect but, instead, assert that the sale price was not

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the entire value of the real estate land and rights and privileges pertaining thereto because it did not reflect the value of the leasehold interest.

*3 The evidence before the board was undisputed that the leasehold interest had substantial value being for long-term and at a much lower rate than the current market value. Thus, the board's decision, basing the taxable value solely upon the recent sale price, is unreasonable and unlawful. The order of the Board of Tax Appeals is reversed and the case is remanded to the board with instructions to determine the value, if any, of the leasehold interest if the leasehold is determined to have a value above and beyond the sales price of the property. The board is ordered to include that value in determining the true value of the property for tax purposes.

Judgment reversed and case remanded with instructions.

HANDWORK, J., concurs.

STRAUSBAUGH, J., dissents.

HANDWORK, J., of the Sixth Appellate District, sitting by assignment in the Tenth Appellate District.

STRAUSBAUGH, J., dissenting.

I regret being unable to concur with the majority. The Supreme Court has held, in a *per curiam* decision, that:

"We have consistently adhered to the rule that [t]he best evidence of the "true value in money" of real property is an actual, recent sale of the property in an arm's-length transaction. * * * *Conalca v. Bd. of Revision* (1977), 50 Ohio St.2d 129 [4 O.O.3d 309], paragraph one of the syllabus. See, also, *Consolidated Aluminum Corp. v. Bd. of Revision* (1981), 66 Ohio St.2d 410, 414 [20 O.O.3d 357]; *Meyer v. Bd. of Revision* (1979), 58 Ohio St.2d 328, 333 [12 O.O.3d 305].

"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 (*id.* at 333), or where it is shown that the sales price is not reflective of true value (*Consolidated Aluminum Corp. v. Bd. of Revision, supra*, at 414)."

Columbus Bd. of Edn. v. Fountain Square Assoc., Ltd. (1984), 9 Ohio St.3d 218.

It is conceded that, in the instant case, "appellee herein, purchased the property in question in an arm's-length transaction * * *." Therefore, the initial consideration enunciated by the Supreme Court has been satisfied and it is not necessary to consider whether the sale price is not reflective of true value.

I concede that in some cases, even where the parties deal at arm's-length, there might be a situation where the sale price, and thus "true value" for tax purposes, is grossly distorted. However, here that is not the case. Rather, the court attempts to tax a speculative value where there is no allegation of distortion.

I am troubled not only by the majority's application of *Columbus Bd. of Edn., supra*, but, also, by the troublesome and unpredictable implications of taxing a speculative value. Accordingly, I must respectfully dissent, and would affirm the order of the Board of Tax Appeals.

Ohio App., 1986.

Zell v. Franklin County Bd. of Revision

Not Reported in N.E.2d, 1986 WL 9522 (Ohio App. 10 Dist.)

END OF DOCUMENT

U.S. CONSTITUTION: AMENDMENT XIV

Passed by Congress June 13, 1866. Ratified July 9, 1868.

Note: Article I, section 2, of the Constitution was modified by section 2 of the 14th amendment.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

**Changed by section 1 of the 26th amendment.*

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ARTICLE XII: FINANCE AND TAXATION

Notwithstanding any provision of this constitution or any law regarding the residence of senators and representatives, a plan of apportionment made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election.

The governor shall give the persons responsible for apportionment two weeks advance written notice of the date, time, and place of any meeting held pursuant to this section.

(1967)

CONTINUATION OF PRESENT DISTRICT BOUNDARIES.

§14 The boundaries of House of Representatives districts and Senate districts from which representatives and senators were elected to the 107th General Assembly shall be the boundaries of House of Representatives and Senate districts until January 1, 1973, and representatives and senators elected in the general election in 1966 shall hold office for the terms to which they were elected. In the event all or any part of this apportionment plan is held invalid prior to the general election in the year 1970, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment to be effective until January 1, 1973, in accordance with section 13 of this Article.

(1967)

SEVERABILITY PROVISION.

§15 The various provisions of this Article XI are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions.

(1967)

ARTICLE XII: FINANCE AND TAXATION

POLL TAXES PROHIBITED.

§1 No poll tax shall ever be levied in this state, or service required, which may be commuted in money or other thing of value.

(1851, am. 1912)

LIMITATION ON TAX RATE; EXEMPTION.

§2 No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may

be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value, except that laws may be passed to reduce taxes by providing for a reduction in value of the homestead of permanently and totally disabled residents, residents sixty-five years of age and older, and residents sixty years of age or older who are surviving spouses of deceased residents who were sixty-five years of age or older or permanently and totally disabled and receiving a reduction in the value of their homestead at the time of death, provided the surviving spouse continues to reside in a qualifying homestead, and providing for income and other qualifications to obtain such reduction. Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

(1851, am. 1906, 1912, 1918,
1929, 1933, 1970, 1974, 1990)

**AUTHORITY TO CLASSIFY REAL ESTATE FOR TAXATION;
PROCEDURES.**

§2a (A) Except as expressly authorized in this section, land and improvements thereon shall, in all other respects, be taxed as provided in Section 36, of Article II and Section 2 of this article

(B) This section does not apply to any of the following:

(1) Taxes levied at whatever rate is required to produce a specified amount of tax money or an amount to pay debt charges;

(2) Taxes levied within the one per cent limitation imposed by Section 2 of this article;

(3) Taxes provided for by the charter of a municipal corporation.

ARTICLE XII: FINANCE AND TAXATION

(C) Notwithstanding Section 2 of this article, laws may be passed that provide all of the following:

(1) Land and improvements thereon in each taxing district shall be placed into one of two classes solely for the purpose of separately reducing the taxes charged against all land and improvements in each of the two classes as provided in division (C)(2) of this section. The classes shall be:

- (a) Residential and agricultural land and improvements;
- (b) All other land and improvements.

(2) With respect to each voted tax authorized to be levied by each taxing district, the amount of taxes imposed by such tax against all land and improvements thereon in each class shall be reduced in order that the amount charged for collection against all land and improvements in that class in the current year, exclusive of land and improvements not taxed by the district in both the preceding year and in the current year and those not taxed in that class in the preceding year, equals the amount charged for collection against such land and improvements in the preceding year.

(D) Laws may be passed to provide that the reductions made under this section in the amounts of taxes charged for the current expenses of cities, townships, school districts, counties, or other taxing districts are subject to the limitation that the sum of the amounts of all taxes charged for current expenses against the land and improvements thereon in each of the two classes of property subject to taxation in cities, townships, school districts, counties, or other types of taxing districts, shall not be less than a uniform per cent of the taxable value of the property in the districts to which the limitation applies. Different but uniform percentage limitations may be established for cities, townships, school districts, counties, and other types of taxing districts.

(1980)

IMPOSITION OF TAXES.

§3 Laws may be passed providing for:

(A) The taxation of decedents' estates or of the right to receive or succeed to such estates, and the rates of such taxation may be uniform or may be graduated based on the value of the estate, inheritance, or succession. Such tax may also be levied at different rates upon collateral and direct inheritances, and a portion of each estate may be exempt from such taxation as provided by law.

(B) The taxation of incomes, and the rates of such taxation may be either uniform or graduated, and may be applied to such incomes and with such exemptions as may be provided by law.

(C) Excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas, and other minerals; except that no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

(1976)

REVENUE TO PAY EXPENSES AND RETIRE DEBTS.

§4 The General Assembly shall provide for raising revenue, sufficient to defray the expenses of the state, for each year, and also a sufficient sum to pay principal and interest as they become due on the state debt.

(1851, am. 1976)

LEVYING OF TAXES.

§5 No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied.

(1851)

USE OF MOTOR VEHICLE LICENSE AND FUEL TAXES RESTRICTED.

§5a No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.

(1947)

NO DEBT FOR INTERNAL IMPROVEMENT.

§6 Except as otherwise provided in this constitution the state shall never contract any debt for purposes of internal improvement.

(1851, am. 1912)

Appraisal Institute Definition

In 1993 the Appraisal Institute adopted the following definition of market value, which was developed by the Appraisal Institute Special Task Force on Value Definitions to clarify distinctions among market value, disposition value, and liquidation value:

The most probable price which a specified interest in real property is likely to bring under all the following conditions:

1. Consummation of a sale occurs as of a specified date.
2. An open and competitive market exists for the property interest appraised.
3. The buyer and seller are each acting prudently and knowledgeably.
4. The price is not affected by undue stimulus.
5. The buyer and seller are typically motivated.
6. Both parties are acting in what they consider their best interest.
7. Marketing efforts were adequate and a reasonable time was allowed for exposure in the open market.
8. Payment was made in cash in U.S. dollars or in terms of financial arrangements comparable thereto.
9. The price represents the normal consideration for the property sold, unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

This definition can be modified to provide for valuation with specified financing terms.

Other Definitions of Market Value

Market value definitions can be found in a variety of sources, including appraisal texts, real estate dictionaries, and court decisions. The Uniform Standards caution appraisers to use the exact definition of market value that applies in the jurisdiction in which the services are being performed. International standards further emphasize that appraisers should recognize the jurisdiction in which the appraisal will be used. Government and regulatory agencies redefine or reinterpret market value from time to time, so individuals performing appraisal services for these agencies or for institutions under their control must be sure to use the applicable definition.

Use Value

The realities of current real estate practice frequently require appraisers to consider other types of value in addition to market value. One of these, use value, is a concept based on the productivity of an economic good. Use value is the value a specific property has for a specific use. In estimating use value, the appraiser focuses on the value the real estate contributes to the enterprise of which it is a part, without regard to the highest and best use of the property or

the monetary amount that might be realized from its sale. Use value may vary depending on the management of the property and external conditions such as changes in business operations. For example, a manufacturing plant designed around a particular assembly process may have one use value before a major change in assembly technology and another use value afterward.

Real property may have a use value and a market value. An older factory that is still used by the original firm may have considerable use value to that firm but only a nominal market value for another use.

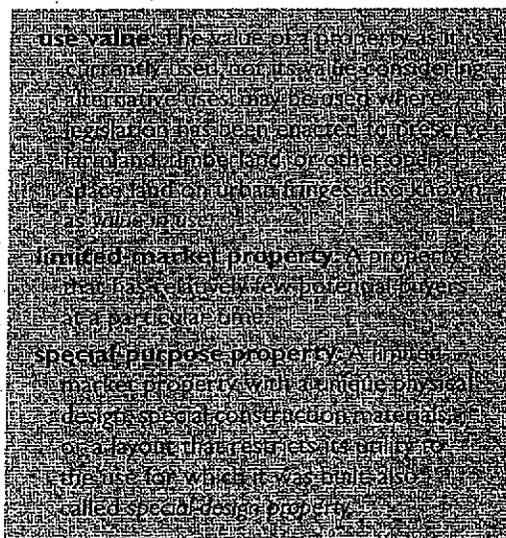
Use value appraisal assignments may be performed to value assets (including real property) for mergers, acquisitions, or security issues. This type of assignment is sometimes encountered in appraising industrial real estate when the existing business enterprises include real property.

Court decisions and specific statutes may also create the need for use value appraisals. For instance, many states require agricultural use appraisals of farmland for property tax purposes rather than opinions of value based on highest and best use. The current IRS regulation on estate taxes allows land under an interim agricultural use to be valued according to this alternative use even though the land has development potential.⁴

Limited-Market and Special-Purpose Properties

When appraising a type of property that is not commonly exchanged or rented, it may be difficult to determine whether an opinion of market value can be reasonably supported. Such limited-market properties can cause special problems for appraisers. A limited-market property is a property that has relatively few potential buyers at a particular time, sometimes because of unique design features or changing market conditions. Large manufacturing plants, railroad sidings, and research and development properties are examples of limited-market properties that typically appeal to relatively few potential purchasers.

Many limited-market properties include structures with unique designs, special construction materials, or layouts that restrict their utility to the use for which they were originally built. These properties usually have limited conversion potential and, consequently, are often called *special-purpose* or *special-design*



4. The section on special use valuation in United States Estate (and Generation-Skipping Transfer) Tax Return (IRS Instructions for Form 706) states: "Under section 2032A, you may elect to value certain farm and closely held business real property at its farm or business use value rather than its fair market value. You may elect both special use valuation and alternate valuation."

Competition

Competition between buyers or tenants represents the interactive efforts of two or more potential buyers or tenants to make a purchase or secure a lease. Between sellers or landlords, competition represents the interactive efforts of two or more potential sellers or landlords to effect a sale or lease. Competition is fundamental to the dynamics of supply and demand in a free enterprise, profit-maximizing economic system.

Buyers and sellers of real property operate in a competitive market setting. In essence, each property competes with all other properties suitable for the same use in a particular market segment and often with properties from other market segments. For example:

- A profitable motel faces competition from newer motels nearby.
- Existing residential subdivisions compete with new subdivisions.
- Downtown retail properties compete with suburban shopping centers.

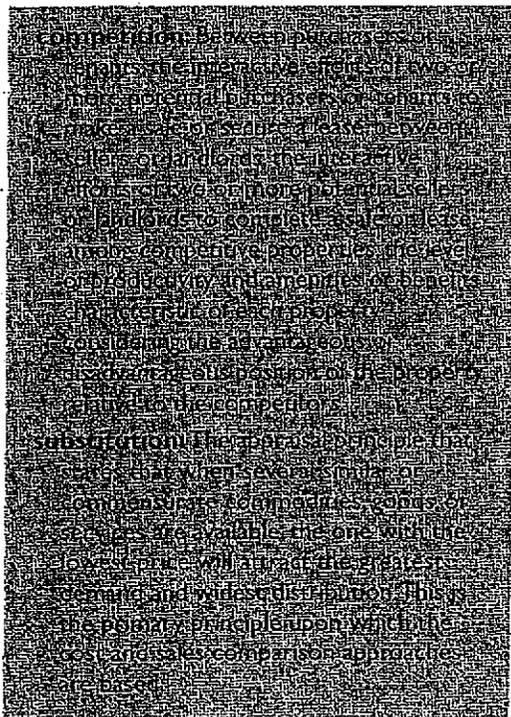
Over time, competitive market forces tend to reduce unusually high profits. Profit encourages competition, but excess profits tend to breed ruinous competition. For example, the first retail store to open in a new and expanding area may generate more profit than is considered typical for that type of enterprise. If no barriers to entry exist, owners of similar retail enterprises will likely gravitate to the area to compete for the surplus profits. Eventually there may not be enough business to support all the retailers. A few stores may profit, but others will fail. The effects of competition and

market trends on profit levels are especially evident to appraisers making income projections as part of the income capitalization approach to value.

Substitution

The principle of substitution states that when several similar or commensurate commodities, goods, or services are available, the one with the lowest price attracts the greatest demand and widest distribution. This principle assumes rational, prudent market behavior with no undue cost due to delay. According to the principle of substitution, a buyer will not pay more for one property than for another that is equally desirable.

Property values tend to be set by the price of acquiring an equally desirable substitute property. The principle of substitution recognizes that buyers and



sellers of real property have options, i.e., other properties are available for similar uses. The substitution of one property for another may be considered in terms of use, structural design, or earnings. The cost of acquisition may be the cost to purchase a similar site and construct a building of equivalent utility, assuming no undue cost due to delay; this is the basis of the cost approach. On the other hand, the cost of acquisition may be the price of acquiring an existing property of equal utility, again assuming no undue cost due to delay; this is the basis of the sales comparison approach.

The principle of substitution is equally applicable to properties such as houses, which are purchased for their amenity-producing attributes, and properties purchased for their income-producing capabilities. The amenity-producing attributes of residential properties may include excellence of design, quality of workmanship, or superior construction materials. For an income-producing property, an equally desirable substitute might be an alternative investment property that produces equivalent investment returns with equivalent risk. The limits of property prices, rents, and rates tend to be set by the prevailing prices, rents, and rates of equally desirable substitutes. The principle of substitution is fundamental to all three traditional approaches to value—sales comparison, cost, and income capitalization.

Although the principle of substitution applies in most situations, sometimes the characteristics of a product are perceived by the market to be unique. The demand generated for such products may result in unique pricing.²

Balance

The principle of balance holds that real property value is created and sustained when contrasting, opposing, or interacting elements are in a state of equilibrium. This principle applies to relationships among various property components as well as the relationship between the costs of production and the property's productivity. Land, labor, capital, and entrepreneurship are the agents of production, but for most real property the critical combination is the land and improvements. Economic balance is achieved when the combination of land and improvements is optimal—i.e., when no marginal benefit or utility is achieved by adding another unit of capital. The law of diminishing returns holds that increments in the agents of production added to a parcel of property produce greater net income up to a certain point. At this point, the point of decreasing or diminishing returns, maximum value is achieved. Any additional expenditures will not produce a return commensurate with the additional

The principles of balance, increasing and decreasing returns, contribution, surplus, productivity, and conformity explain how the integration of property components affects property value.

2. The specific issues involved in the valuation of unique properties are addressed in Frank E. Harrison, *Appraising the Tough Ones: Creative Ways to Value Complex Residential Properties* (Chicago: Appraisal Institute, 1996).

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Since all partial and fractional interests are “cut out” of the fee simple interest, the appraiser must have an understanding of the fee simple interest in a property prior to appraising a fractional or partial interest.

Economic Interests

The most common type of economic interests is created when the fee simple interest is divided by a lease. In such a circumstance, the lessor and the lessee each obtain partial interests, which are stipulated in contract form and are subject to contract law. The divided interests resulting from a lease represent two distinct but related interests—the leased fee interest and the leasehold interest. Additional economic interests, including sub-leasehold (or sandwich) interests, can be created under special circumstances.

Leased Fee Interests

A leased fee interest is the lessor's, or landlord's, interest. A landlord holds specified rights that include the right of use and occupancy conveyed by lease to others. The rights of the lessor (the leased fee owner) and the lessee (leaseholder) are specified by contract terms contained within the lease. Although the specific details of leases vary, a leased fee generally provides the lessor with the following:

- Rent to be paid by the lessee under stipulated terms
- The right of repossession at the termination of the lease
- Default provisions
- The right of disposition, including the rights to sell, mortgage, or bequeath the property, subject to the lessee's rights, during the lease period

When a lease is legally delivered, the lessor must surrender possession of the property to the tenant for the lease period and abide by the lease provisions.

The lessor's interest in a property is considered a leased fee interest regardless of the duration of the lease, the specified rent, the parties to the lease, or any of the terms in the lease contract. A leased property, even one with rent that is consistent with market rent, is appraised as a leased fee interest, not as a fee simple interest. Even if the rent or the lease terms are not consistent with market terms, the leased fee interest must be given special consideration and is appraised as a leased fee interest.

The valuation of a leased fee interest is best accomplished using the income capitalization approach. Regardless of the

Leases specify the rights of the lessor (e.g., to collect rent or repossess the property upon lease expiration) and the rights of the lessee (e.g., to use, occupy, improve, and sublease the property).

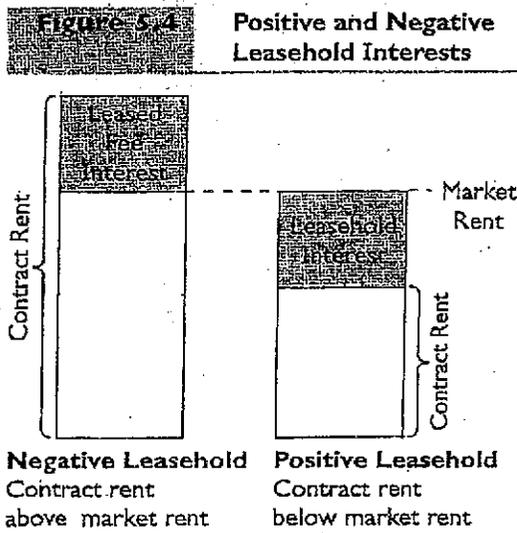
lessee: One who has the right to use or occupy a property under a lease agreement; the leaseholder or tenant.
lessor: One who holds property title and conveys the right to use and occupy the property under a lease agreement; the leased fee owner or landlord.

capitalization method selected, the value of the leased fee interest represents the owner's interest in the property. The benefits that accrue to an owner of a leased fee estate generally consist of income throughout the lease and the reversion at the end of the lease. The sales comparison approach can be used to value leased fee interests, but this analysis is only really meaningful when the sales being used as comparables are similar leased fee interests. If not, adjustments for real property rights conveyed must be considered. The cost approach is more suited to valuing a fee simple interest than a leased fee interest. If contract rent and terms are different than market rent and terms, the cost approach must also be adjusted to reflect the differences.

When an assignment involves the valuation of a leased fee interest, the appraiser often must also appraise the fee simple interest. If the rent and/or terms of the lease are favorable to the landlord (lessor), the value of the leased fee interest will usually be greater than the value of the fee simple interest, resulting in a negative leasehold interest. If the rent and/or terms of the lease are favorable to the tenant (or lessee), the value of the leased fee interest will usually be less than the value of the fee simple interest, resulting in a positive leasehold interest (see Figure 5.4). The negative or positive leasehold interests will cease if contract rent and/or terms equal market rent and/or terms any time during the lease or when the lease expires.

When analyzing a leased fee interest, it is essential that the appraiser analyze all of the economic benefits or disadvantages created by the lease. An appraiser should ask the following questions:

- What is the term of the lease?
- What is the likelihood that the tenant will be able to meet all of the rental payments on time?
- Are the various clauses and stipulations in the lease typical of the market, or do they create special advantages or disadvantages for either party?



- Is either the leased fee interest or the leasehold interest transferable, or does the lease prohibit transfers?
- Is the lease written in a manner that will accommodate reasonable change over time, or will it eventually become cumbersome to the parties?

An appraiser cannot simply assume that each of the interests created by the lease has a market value. Many leases create no separate value for the tenant. For example, when the tenant cannot or will not pay the rent, the market value of the leased fee interest may be reduced to an

- Reproduction cost
- Replacement cost

The market and physical condition of the appraised property usually suggest whether an exact replica of the subject property (reproduction cost) or a substitute property with similar utility (replacement cost) would be a more suitable comparison.

The appraiser estimates the cost to construct the existing structure and site improvements (including direct costs, indirect costs, and an appropriate entrepreneurial profit or incentive) using one of three traditional techniques:

1. Comparative-unit method
2. Unit-in-place method
3. Quantity survey method

The appraiser then deducts all depreciation in the property improvements from the cost of the new structure as of the effective appraisal date. The amount of depreciation present is determined using one or more of the three fundamental methods:

1. Market extraction method
2. Age-life method
3. Breakdown method

When the value of the land is added to the cost of the improvements less depreciation, the result is an indication of the value of the fee simple interest in the real estate component of the property, assuming stabilization.

This chapter provides an outline of the cost approach and explains the fundamental appraisal concepts that support this approach to value. Chapters 15 and 16 discuss the specifics of cost and depreciation estimates—i.e., the essential techniques applied to render a convincing opinion of value using the cost approach.

Relation to Appraisal Principles

Substitution

The principle of substitution is basic to the cost approach. This principle affirms that a prudent buyer would pay no more for a property than the cost to acquire a similar site and construct improvements of equivalent desirability and utility without undue delay. Older properties can be substituted for the property being appraised, and their value is also measured relative to the value of a new, optimal property. In short, the cost of property improvements on the effective date of the appraisal plus the accompanying land value provides a measure against which prices for similar improved properties may be judged.