

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

APPELLANT'S REPLY BRIEF MA RICHTER VILLA LTD. AND VIGRAN BROTHERS VILLA LTD.

Nicholas M.J. Ray (0068664) Jay P. Siegel (0067701) Siegel Siegel Johnson & Jennings Co. LPA 3001 Bethel Road, Suite 208 Columbus, OH 43220 (614) 442-8885

Counsel for Appellants MA Richter Villa Ltd. and Vigran Brothers Villa Ltd.

John Hust (0027121) Schroeder, Maundrell, Barbieri, & Powers 1935 Mason Road, Suite 110 Cincinnati, OH 45249 (513) 583-4209

Counsel for Appellee Board of Education of Princeton City Schools

Thomas J. Scheve (0011256) Assistant Prosecuting Attorney 230 East Ninth Street Suite 4000 Cincinnati, OH 45202 (513) 946-3040

Counsel for Appellee Hamilton County

Marc Dann (031514) Ohio Attorney General 30 E. Broad Street, 17th Floor Columbus, OH 43215-3428 (614) 466-4320

Counsel for Appellee Richard A. Levin, Tax Commissioner of Ohio

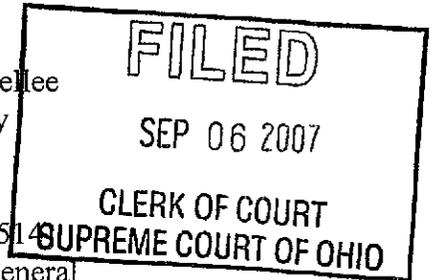


TABLE OF AUTHORITIES

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APPELLANT'S REPLY BRIEF

The taxation of real property in Ohio was founded in and has stressed that “[1]and and improvements thereon shall be taxed by uniform rule according to value.” Ohio Const. Art. XII, § 2. Recently, the principle of uniform taxation without regard to who owns or occupies the building was reaffirmed by this court 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. In essence what the Appellees and amicus curie ask of this court is to turn a blind eye to information and conditions surrounding a sale of real property and blindly accept a sales price as the value of the property regardless of whether it results in uniform taxation and represents, in significant part, the business success of the tenant subject to a long-term lease rather than the value of the underlying real estate. As this court most recently commented in *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2007), 112 Ohio St. 3d 309, this court’s *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2005), 106 Ohio St.3d 269 decision contemplates an analysis of the transaction and not blind acceptance of a sale price. Such an analysis in this case, supported by market evidence and expert testimony, proves that the sale price does not reflect only the value of the real property and the decision of the Ohio Board of Tax Appeals blindly accepting such a value without deeper analysis of the fundamentals surrounding the transaction must be over turned.

In its brief, counsel for the Appellee, Hamilton County Auditor, asks this court to take a “reality check” and sets forth several questions for this court’s consideration. County Appellee’s Brief, pg. 5. The reality, and what this court needs to consider, in determining what the property should be valued at for tax purposes is what the market evidence shows. This market evidence,

summarized from Appellants' Brief is set forth below. Again, as this court indicated in *Strongsville, supra*, the court anticipated that evaluation of sales transactions, rather than blind acceptance of the transfer price, would continue after its *Berea* decision. The market evidence, detailed in the record and the cases currently before this court, demonstrates that these transactions reflect both the business success of the tenant and the value of the real estate. Other than arguing for a blind application of the holding in *Berea* to, basically, every sale transaction in the State of Ohio, the Appellees and amicus curie can point to no creditable evidence indicating that these sales reflect the value of the real property.

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 their costs of construction, but likely an altogether different value to another user/buyer when it came time to sell the property. This valuation situation is addressed by *The Appraisal of Real Estate*, 12th Edition, and is distinguished from the fair market value of the property in exchange.

These are some of the exact same issues to be addressed in the instant case. It is important to consider this transaction not in a vacuum, but in the context of the market as a whole. To believe that it is probable that the sale of the subject property, as a function of its

value-in-use lease, further driven by the business success and creditworthiness of Walgreens as lessee, is equal to the value of the underlying real estate, one would have to believe many other verifiably implausible propositions, including the following:

- Is it probable that a 15,000 square foot retail building on Kenny Road in Columbus, just north of Upper Arlington, is worth the same or less than an almost identical building on South High Street in South Columbus? (Lorms,¹ p. 46). No, a property on Kenny Road is not equal in value to an identical property on South High Street. For further review of this exact situation, see Sales Comparison 1 on page 16 of Appellants' Brief.
- Is it probable that a ten year old 150,000 square foot retail storeroom on Brice Road in Columbus is worth twice as much as a nearly identical building in Mill Run in Hilliard? (Lorms, p. 45). No, a nearly identical property on Brice Road in Columbus is not worth twice as much as a property in Mill Run in Hilliard. For further discussion of this exact situation, see Sales Comparison 2 on page 17 of Appellants' Brief.
- Is it probable that a Walgreens drugstore at the intersection of Demorest and Clime Roads in Columbus is worth 30% more than a CVS drugstore **at the same intersection?** (see *Board 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.) No, a similar drugstore at the same intersection would not be worth 30% more than the other. For further discussion of this exact situation, see Sales Comparison 3 on page 19 of Appellants' Brief.
- Is it probable that a storeroom leased by Kmart, recently out of bankruptcy, identical in every way to a Wal-Mart storeroom right next door, under the exact same lease terms,

¹ The appraisal report prepared by Robin Lorms and admitted into evidence as Appellee's Exhibit 1 before the Ohio Board of Tax Appeals will hereafter be cited as "Lorms, p. ___".

would sell on the open market for the same amount? No, the business success and creditworthiness of Wal-Mart would result in investors being willing to pay more for the Wal-Mart property. This is in contradiction to the guidance from this Court in *Higbee* stating that the properties should be similarly valued. For further discussion of this, see the discussion of *Higbee* beginning on page 21 of Appellants' Brief.

- Is it probable that a building designed specifically for the unique needs of one user is equally valuable to another user with different needs? No, the property was specifically built to meet the unique needs of one user and is valuable to that user. That value, however, is not shared by another user without the same unique needs. *The Appraisal of Real Estate*, 12th Edition, pg. 25. See the value-in-use discussion being on page 8 of Appellants' Brief.
- Is it probable that when a build-to-suit, single tenant property encumbered by a value in use lease entered into with an investment-grade tenant as a result of the tenant's business success and creditworthiness sells it is similar, in any meaningful way, to the sale of a multi-tenant property, not designed for a single user, without a value in-use lease or a purchase price driven by the business success and creditworthiness of the multiple tenants? No, there is no similarity between these transactions. The first transaction is the one, the Auditor argues in this case, that should be relied upon to value the real property component of the subject property before the Court while the second transaction was at issue in *Berea City Schools v. Cuyahoga Cty. Bd. of Revision* (2005), 106 Ohio St. 3d 269. See the detailed discussion of *Berea*, beginning on page 6 of Appellants' Brief.
- Is it probable that a rational buyer would pay more for real estate than the cost to build and replace the same real estate? In other words, would a rational buyer pay \$5,000,000

for real estate if the same buyer could build an identical property for \$3,000,000? No, no rational buyer would pay more for a property than the cost to replicate an identical new property. Such a conclusion is consistent with the Principle of Substitution set forth in *The Appraisal of Real Estate*, 12th Edition, pp. 38-39. See the discussion of the Principle of Substitution beginning on page 20 of Appellants' Brief.

- Is it probable that the auditor's own appraiser's admission that the purchase of the subject property was driven by the business success and creditworthiness of the tenant was false? No, such an opinion is correct. It is not the appraiser's role to understand that this Court's holding in *Higbee* was that the business success of the tenant shall not impact the real property value for taxation purposes. See the further discussion of *Higbee* beginning on page 21 of Appellants' Brief.
- Is it probable that in addition to all of the other taxes imposed on businesses in Ohio that are directly correlated to their success, the legislature intended that the assessment of real estate taxes should also impose additional taxes on real estate users as a function of the success of the user's business? No, the real property tax is not a tax tied to the business success of the activities conducted on or in the property but rather of the property itself. Such is the holding of this Court in *Higbee*. See the further discussion of *Higbee* beginning on page 21 of Appellants' Brief.

The probability that any of the above propositions are true is almost non-existent. The sale relied upon by the Auditor and the BTA is as a result of the market described above and reflects the business success and creditworthiness of a leasee in a build-to-suit, value in use lease. It does not only reflect the value of the real property. Furthermore, the facts and

circumstances surrounding the sale in *Berea* vary significantly in this case. In short, the transfer in this case is not reflective of the true value in fee simple of the underlying real property.

As the County Appellee correctly points out on page 9 of its brief, in *Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St. 3d 26, the court set forth a two step approach to overcoming a sale price as indicative of value. First, it must be shown that the sale price did not reflect true value. Through market evidence and expert testimony, the Appellants' have met this burden. Second, the value requested must be established. The Appellants, too, have met this requirement. As the Appellant demonstrated in its merit brief, only Appellant's expert appraiser presented credible, supported evidence that fully analyzed both the market and the actual transaction before the court and arrived at a supportable value as to the value of the real estate. See Propositions of Law VII and VIII of Appellants' Brief.

The expert's role is to summarize and analyze the facts. Only Mr. Lorms provided a foundation for his opinions and analysis. The uniqueness of the property is demonstrated in his report based upon market knowledge and inspection of the property. The property's lease, which the County Appellee claims was not introduced into evidence (County Appellee's Brief, pg. 20) while not reintroduced at the Ohio Board of Tax Appeals was presented before the Board of Revision. Where, when reviewing the lease rates and market lease information, the Board concluded that this sale was **not** reflective of the true value of the property. The opinions and factual assertions of Mr. Lorms do not compare with the unsubstantiated claims that Ms. Ebert sets forth. The County Appellee's brief indicates that "[o]f course, the record is replete with testimony and appraisal of Ms. Ebert, as well as the vigorous cross-examination of Mr. Lorms rebutting and disproving this unsupported theory." County Appellee's Brief, pp. 11-12. Unfortunately, there are no citations provided that actually support such a wild claim.

Likewise, the proposition that Mr. Lorms' comparables are all abandoned properties, second tier tenants, subleases, leases restricting the leases to non-competitor (County Appellee's Brief, pg. 13) is also without any citation for support. In fact, Mr. Lorms addresses in great detail the valuation considerations in selecting comparables in his Valuation Methodology section of his report. (Appellants' Supplement, pp. 90-103, Lorms, pp. 35-48). The concern that the comparables relied upon are just failed locations is also specifically addressed by Mr. Lorms in his report. (Appellants' Supplement, pp. 110-111, Lorms, pp. 55-56). The county appellee's argument is again without support and without merit.

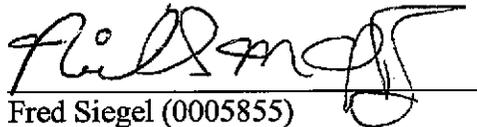
The testimony of Ms. Ebert is internally inconsistent and unsupportable in stating that the credit of the tenant drives the market but that location is paramount without any market evidence to support it. Furthermore, the claims attributed to Ms. Ebert, a county employee, by the County Appellee in its brief, while facially supporting the position of the county, lack market or factual support and should not be relied upon when the market evidence obviously supports a different conclusion. Such claims, like the claims of counsel made in the County Appellee's brief are not supported.

Finally, in trying to distinguish *State ex. rel. Park Inv. Co. v. Board of Tax Appeals* (1972), 32 Ohio St. 2d 28, (discussed beginning on page 8 of Appellants' Brief), the County Appellee again argues for a position that is contrary to uniform rule. County Appellee's Brief, pg. 12. The Appellants' correctly point out that this case established that real property is **not** to be valued based upon its current use value. The County, wanting to have valuation decisions only applied in favor of increased taxation, states that the court in that case "was afraid that a lower value would result from a current use straight-jacket approach. Nowhere is the case does the court infer that current use should be prohibited because a higher value might result."

County Appellee's Brief, pg. 12. Summarized, the County Appellee would have this court reject use value if it results in a lower value but finds no problem with it if it results in increased taxation!! The Appellants' would submit that an inference by the court was necessary when the Ohio Constitution provides for "taxation by uniform rule according to value."

The Appellants' request that this court refuse to sanction the blind acceptance of a sale price that the market evidence and expert testimony proves is intertwined with the business success of the tenant and find that the value of the real property as of January 1, 2004 is \$1,950,000.

Respectfully submitted,



Fred Siegel (0005855)

Jay P. Siegel (0067701)

Nicholas M.J. Ray (0068664)

Siegel Siegel Johnson & Jennings Co

3001 Bethel Rd., Suite 208

Columbus, OH 43220

(614) 442-8885

Attorneys for Appellants

CERTIFICATE OF SERVICE

This is to certify that on this 6th day of September 2007, a copy of the Appellant's Reply Brief MA Richter Villa Ltd. and Vigran Brothers Villa Ltd. was mailed via regular U.S. mail 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, Assistant Attorney General, 30 East Broad Street, 17th Floor, Columbus, OH 43215-3428.


Nicholas M.J. Ray, Esq.

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