

IN THE SUPREME COURT OF OHIO

Board of Education of the )  
Columbus City Schools )

Case No. 2007-1086

Appellee, )

vs. )

Franklin County Board of Revision, )  
Franklin County Auditor, and )  
Max E. Cougill, )

Appeal from the Ohio  
Board of Tax Appeals

Appellees. )

BTA Case No. 2005-R-329  
BTA Case No. 2005-R-330

and )

Board of Education of the )  
South-Western City Schools, )

Appellant, )

vs. )

Franklin County Board of Revision, )  
Franklin County Auditor, and )  
Max E. Cougill, )

Appellees. )



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APPELLANT MAX E. COUGILL MERIT BRIEF

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## INTRODUCTION

The subject property was designed and built-to-suit specifically for use by Walgreens. Walgreens outsourced the development of the property. 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. As the Property Owner’s appraiser indicates, 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.

The taxation of real property in Ohio was founded in and has stressed that “[l]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. A blind application of this court’s decision in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2005), 106 Ohio St.3d 269 without further analysis of the transaction and where the decision is distinguishable from the facts in this case would result in an unconstitutional, non-uniform

assessment of real property in Ohio. As this court recently commented in *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2007), 112 Ohio St. 3d 309, this court's *Berea* 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.

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 distinction is addressed by *The Appraisal of Real Estate*, 12<sup>th</sup> Edition, pp. 24-25, and illustrates the important difference between the value of a property to a user in contrast to the fair market value to others on the open market.

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. As will be discussed in further detail below, the adoption of the sale price of the subject property as its

value for real estate tax purposes presents exactly the type of situation this Court warned against in *Higbee*. Is it probable that this Walgreens drugstore at the intersection of Demorest and Clime Roads in Columbus is worth 30% more than a CVS drugstore **at the same intersection**? 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 1 on page 19, *infra*.

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? (Appellant's Supplement, p. 114; Lorms,<sup>1</sup> p. 59). 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 2 on page 21, *infra*.
- 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? (Appellant's Supplement, p. 113; Lorms, p. 58). 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 3 on page 22, *infra*.
- 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,

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<sup>1</sup> The appraisal report prepared by Robin Lorms and admitted into evidence as Appellee's Exhibit 2 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 25, *infra*.

- 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*, 12<sup>th</sup> Edition, pg. 25. See the value-in-use discussion being on page 11, *infra*.
- 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 Board of Education argues in this case should be relied upon to value the real property component of the subject property 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 9, *infra*.
- 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 almost \$4,000,000 for real estate if the same buyer could build a brand new identical property

for \$2,200,000? 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*, 12<sup>th</sup> Edition, pp. 38-39. See the discussion of the Principle of Substitution beginning on page 23, *infra*.

- 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 25, *infra*.

The probability that any of the above propositions are true is almost non-existent. The sale relied upon by the Board of Education and the BTA is as a result of the market described above and reflects the business success and creditworthiness of a lessee in a 75 year, build-to-suit, value in use lease. It does not only reflect the value of the real property. In the instant matter, the original lease of the subject property reflects the costs of construction and the use-value to the tenant the property was designed for. The subsequent sale of the property, subject to the 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 Property Owner, Max E. Cougill, owns certain real property in Franklin County, Ohio, designated as permanent parcel numbers 010-122746 and 570-138815. The former parcel is located in the Columbus City School District while the latter parcel is located in the Southwestern City School District.

The subject parcels are located at the corner of Demorest and Clime Roads in Columbus. The area around the subject property has a stable to declining population base and household income levels substantially below average for the greater Columbus area. (Appellant's Supplement, p. 80; Lorms, p. 25). The West Columbus retail submarket of which the subject property is a part suffers from low rents and high vacancies (28%), and ranked 29<sup>th</sup> out of 32 retail market according to Integra's 2005 Columbus Retail Overview. (Appellant's Supplement, p. 91; Lorms, p. 36).

Parcel 010-122746 consists of approximately 1.739 acres of land. Parcel 570-138815 consists of approximately .4 acres of land. In 2002, the subject site was improved with a one story drugstore totaling 14,490 square feet. The subject building was designed and built-to-suit for Walgreens. Walgreens entered into a build-to-suit 75 year lease designed to amortize the costs of constructing the subject property. (Appellant's Supplement, p. 58; Lorms, p. 3). After the property was developed and leased, the property sold to Max Cougill on September 4, 2002 for a reported purchase price of \$3,937,500 subject to the Walgreens lease. (Appellant's Supplement, p. 58; Lorms, p. 3).

For the tax year 2003, the Franklin County Auditor placed a fair market value on the subject parcels of \$1,200,000 for parcel 010-122746 and \$50,500 for parcel 570-138815. On March 30, 2004, the Columbus City School District Board of Education and the Southwestern City School District Board of Education (collectively the "School Boards") filed complaints for each parcel with the Franklin County Board of Revision seeking to increase the collective assessment of the parcels to \$3,937,500. The basis of the increase being sought by the School Boards was the sale of the subject parcels on September 4, 2002.

On March 2, 2005, the Franklin County Board of Revision held a hearing concerning the School Boards' complaints. The School Boards offered as evidence a conveyance fee statement purporting to establish a sale of the subject property as the best evidence of value. The Property Owner rebutted the School Boards' evidence with a rental survey, a copy of the lease encumbering the subject property, and expert opinion of Robin Lorms, MAI, of Integra Realty Resources – Columbus. On March 3, 2005, the BOR issued its decisions maintaining the Auditor's original values for the parcels.

The School Boards then appealed to the Ohio Board of Tax Appeals ("BTA") on April 1, 2005. The cases were assigned to Attorney Examiner Susan Hollanshead. After the parties had an opportunity to conduct discovery, the consolidated cases proceeded to hearing before the BTA on August 16, 2006. Once again, the School Board relied on the conveyance fee statement in support of its claimed value.

In addition to the statutory transcript from the Board of Revision, which contained, among other things, the build-to-suit lease that encumbered the subject property at the time of its sales (included in the Supplement to Appellant's Merit Brief beginning on page 240), the Property Owner offered the testimony of John Murphy, Real Estate Tax Manager for Walgreens.

Mr. Murphy testified to the development process for this and other Walgreens stores. The Property Owner also offered the appraisal and testimony of Robin Lorms. Mr. Lorms outlined various reasons why the sale price was not reflective of value and further supported his opinion with an independent appraisal of the subject property for \$1,300,000. Although already contained in the statutory transcript without any prior objection by the school board, the build-to-suit lease was also identified and admitted into evidence at the BTA as Appellee's Exhibit 1. The appraisal of Mr. Lorms was admitted into evidence as Appellee's Exhibit 2.

On May 18, 2007, the BTA reversed the BOR's decision and determined that the sale price was the best evidence of value. The Property Owner's appeal from the BTA decision is now before this Court.

#### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

The Property Owner 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, it 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 appraiser concerning the facts and circumstances surrounding the transfer of the property, and the characterization of the transferer'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 Property Owner's expert constitutes 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.<sup>2</sup>**

In the instant matter, the School Boards are relying on a sale to argue for the valuation 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

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<sup>2</sup> This Proposition of Law addresses Assignments of Error 10, 16, 20 and 21.

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 School Boards, 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-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 75 year, 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 Property Owner 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.<sup>3</sup>**

The sale price of the subject property represents its value-in-use. (Appellant's Supplement, p. 58; Lorms, p. 3; see also, Appellant's Supplement, pp. 105-115; Lorms, pp. 50-60). 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

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<sup>3</sup> This Proposition of Law addresses Assignments of Error 2, 3, 4, 5, 6, 7, 11, 13, 14, 15, 16, 19 and 20.

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 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 factual determination of the nature of single-tenant, net leased sales that is indistinguishable from the factual question that is 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 now felt erroneously constrained by this Court's *Berea* decision in adopting a sale 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 50 (Appellant's Supplement, p. 105), 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.<sup>4</sup>

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 value is blindly 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. (Appellant's Supplement, p.

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<sup>4</sup> 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 values of properties in use for agriculture are usually less than their value in exchange.

105; Lorms, p. 50). 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. (Appellant's Supplement, p. 105; Lorms, p. 50). 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 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. (Appellant's Supplement, p. 107; Lorms, p. 52).

The resulting lease is a function of the costs to develop the property. (Appellant's Supplement, p. 106; Lorms, p. 51). In turn, the costs to develop the property are a function of the specific and unique needs of the manufacturer's business enterprise. (Appellant's Supplement, pp. 105-106; Lorms, pp. 50-51). The obsolescence that may be inherent in the design to other manufacturers is not reflected in the build-to-suit lease. (Appellant's Supplement, p. 21; Tr., pp. 79-80). Therefore, the lease reflects the property value to the user, or value-in-use, not its market value or value in exchange. (Appellant's Supplement, p. 106; Lorms, p. 51). 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. (Appellant's Supplement, p. 106; Lorms, p. 51).

Although the foregoing example concerns the development of a manufacturing facility that has different value-in-use and 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. (Appellant's Supplement, pp. 106-107; Lorms, pp. 51-52). Many retailers have floor-plans and requirements that are equally unique to their business enterprise. (Appellant's Supplement, pp. 18-19; Tr., pp. 69-71; Appellant's Supplement, p. 106-107; Lorms, pp. 51-52).

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. (Appellant's Supplement, pp. 82-83; Lorms, pp. 27-28). If these design requirements were readily interchangeable, these stores would be 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 freestanding drugstores are never built on a speculative basis. (Appellant's Supplement, p. 83; Lorms, p. 28).

One of the most obvious differences just between various drugstore users is the size of the storeroom required by each. (Appellant's Supplement, p. 84; Lorms, p. 29). Walgreens, for example, utilizes a floor-plan of 14,000 +/- square feet. CVS, conversely, usually has a floor-plan of approximately 10,000 +/- square feet. (Appellant's Supplement, pp. 6, 18-19, 84, 123-124, 130-131; Tr., p. 18, 69-70; Lorms, pp. 29, 68-69, 75-76). Walgreens stores are over 40% bigger than other users in the exact same business.

In addition to size requirements that are unique to each drugstore user, 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. (Appellant's Supplement, p. 83; Lorms, p. 28). Further, the pharmacy build-out

and drive thru are of no use to other retailers who might otherwise be inclined to occupy the space. (Appellant's Supplement, p. 83; Lorms, p. 28).

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 that 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. (Appellant's Supplement, p. 108; Lorms, p. 53).

**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. In the net lease market, single tenant properties with high credit tenants and long term leases are sold to investors. 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. (Appellant's Supplement, p. 108; Lorms, p. 53).

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. (Appellant's Supplement, pp. 58-59, 110; Lorms, pp. 3-4, 55). 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. (Appellant's Supplement, pp. 24-29; Tr., pp. 91-110; Appellant's Supplement, pp. 58-59; Lorms, pp. 3-4). 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. (Appellant's Supplement, pp. 58-59; Lorms, pp. 3-4).

Second, the financing of net lease transactions is quite different from other real estate transactions. (Appellant's Supplement, p. 110; Lorms, p. 55). 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. (Appellant's Supplement, p. 110; Lorms, p. 55; Appellant's Supplement, pp. 191-236; Lorms, Addendum G). 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. (Appellant's Supplement, p. 108; Lorms, p. 53).

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. (Appellant's Supplement, p. 112; Lorms, p. 57). 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. (Appellant's Supplement, p. 111; Lorms, p. 56).

Fourth, much like the financial markets, net-leased properties are much more liquid than other types of investments in real estate. (Appellant's Supplement, p. 112; Lorms, p. 57). 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. (Appellant's Supplement, p. 112; Lorms, p. 57). 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 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*.

As Mr. Lorms concludes:

[U]sing net-leased comparable sales in a fee simple valuation is not appropriate because they do not account for the normal risk and return factors in a given market that would influence rents and occupancy. Only fee simple sale comparables will reflect the relevant market norms in the areas of financing, market dynamics, capitalization rates, liquidity, ownership and management. . . . Comparing net-leased sale or lease data to a fee simple property is like comparing apples to oranges. (Appellant's Supplement, p. 112; Lorms, p. 57).

**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. **In fact, such evidence involves the subject property before the Court.**

The first example concerns the subject 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.

<p align="center"><b>Sale Comparison 1</b> (At the same intersection two comparable drugstore properties sell for significantly different values)</p>					
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

(Appellant's Supplement, pp. 38-39; Tr., pp. 149-151).

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**. 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 we go 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.

Another comparison presented in Mr. Lorms' report also concerns Walgreens locations. The comparison is between the Walgreens on Kenny Road and the Walgreens on South High Street in Central Ohio. It is but one of many that illustrates the lack of any relationship to the underlying real estate.

<p style="text-align: center;"><b>Sale Comparison 2</b>  <b>(A superior location on Kenny Rd. sells for less than an inferior location in South Columbus)</b></p>						
Property	Year Built	Sale Date	GLA <sup>5</sup> (Square feet)	Price Per Square Foot	Population Household Income Housing Value	OAR <sup>6</sup>
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%

(Appellant's Supplement, p. 114; Lorns, p. 59).

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 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

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<sup>5</sup> Gross Lease Area.

<sup>6</sup> Overall Capitalization Rate.

value-in-use net lease, and the former Kmart in Mill Run, which sold unencumbered.<sup>7</sup> 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.

<p align="center"><b>Sale Comparison 3</b>  <b>(Demonstrating an inferior property sells for almost twice as much as a superior property due to a value-in-use net lease)</b></p>		
	<p><b>Lowe's 2888 Brice Road Columbus, Ohio</b></p> <p><b>(Net Lease, Value In Use Sale)</b></p>	<p><b>Former Kmart 3780 Mill Run Columbus, Ohio</b></p> <p><b>(Unencumbered Fee Simple Sale)</b></p>
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

(Appellant's Supplement, p. 113; Lorms, p. 58).

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 in Mill Run in the Hilliard area. **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

<sup>7</sup> Kmart was the former tenant, not the seller of the property.

the value 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. (Appellant's Supplement, p. 113; Lorms, p. 58). 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 27 of his report (Appellant's Supplement, p. 82), 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 them as the tenant. Neither of these two factors is present in the sale of the unencumbered former Kmart in a superior location.

**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*, 12<sup>th</sup> Ed. p. 350).

The brand new replacement cost estimate of the subject's land and improvements determined by Mr. Lorms is \$2,206,051 (Appellant's Supplement, p. 120; Lorms, pp. 65), disregarding for the purpose of this argument the significant amount of depreciation identified by Mr. Lorms. Even the actual, historical costs, which include many substantial items of personal property, as well as finish unique to Walgreens, totaled only \$3,300,000. (Appellant's Supplement, p. 11; Tr., p. 39).

Even though the subject property was less than one year old at the time of sale, the sale price exceeds the cost to acquire the land and build a brand new replacement building by \$1,731,449. As such, the purchase price is approximately **44% higher** than the replacement cost new determined by Mr. Lorms, ignoring any depreciation.

The cost to replace the subject property with a like property is 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 **brand new**? Clearly, as both discussed by Mr. Lorms and demonstrated by significant market evidence in his report, a 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 Property Owner's position that it is the sale price that is unreliable, not the principle of substitution.

As discussed above and on page 3 of Mr. Lorms' report (Appellant's Supplement, p. 58), 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' unique requirements, the construction costs reflect a value in use to Walgreens. The resulting 75 year 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, it 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.<sup>8</sup>**

In *Higbee*, the Property Owner 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. 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 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 does. 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

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<sup>8</sup> This Proposition of Law addresses Assignments of Error 1, 2, 3, 4, 5, 14, 15, 20 and 22.

operating from. (See the discussion and market examples in Mr. Lorms' report on pages 58 through 60. Appellant's Supplement, pp. 113-115.) 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 has not been disputed. (Appellant's Supplement, p. 59; Lorms, p. 4). 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*.

On behalf of the Property Owner, Mr. Lorms further elaborates on this point in his appraisal and his testimony. In his appraisal, Mr. Lorms states:

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.” (Appellant’s Supplement, p. 59; Lorms, p. 4).

Mr. Lorms further testified regarding these sales as follows:

- Q. In a hypothetical world, I have two exact same properties right next door to each other.
- A. Right.
- Q. So, again, in your opinion, the fee simple value would be the same?
- A. Yes.
- Q. If each of those entities, Rite Aid and Walgreens were to have identical leases on those properties – Okay. So now I have identical properties and identical leases.
- A. Okay.
- Q. Would you anticipate that the properties would sell on a leased fee basis for the same amount?
- A. No.
- Q. Okay. And why not?
- A. Credit-worthiness of the tenant is a variable. Everything else is the same, you’re saying, identical leases, identical terms, net, right, everything the same?
- Q. Right.
- A. Just the credit-worthiness of the tenant would alter the cap rate. You see that on the internet. You can go on the internet and see different credit tenants. And I described that earlier in the report that credit-worthiness of the Rita Aid versus the credit-worthiness of Walgreens would dictate a lower cap rate on the Walgreens sale.

- Q. So all else being equal, the difference in the credit-worthiness of the tenant, solely, could impact the value of the sale?
- A. Absolutely.
- Q. And is this not, in fact, similar to what happened at the exact [subject property] location?
- A. Yes. The subject property was a build to suit; predetermined rent between the tenant and the developer;; the rent negotiated for a long-term credit tenant; and the property sold on the open market to a 1031 buyer based on Walgreens credit.
- Q. Okay. Is there another sale on an – of a free-standing drugstore at this corner?
- A. Yes, there is.
- Q. And what sale would that be?
- A. On the other corner, there is a CVS. The CVS sold – it's about 10,500 square feet. It sold for a little under \$2,100,000 or about \$200 a square foot..
- Q. So relatively same locations?
- A. Opposite corners.
- Q. You discussed on a per square foot basis, so we have the issue of different sizes of the properties –
- A. Right.
- Q. -- but the properties –one occupied by a CVS and one occupied by a Walgreens sold for different amounts per square foot.
- A. \$200 on the CVS and about \$270 on the Walgreens.
- Q. And in your opinion why was there a difference [in the sale price per foot]?
- A. Credit-worthiness of Walgreens for sure.

(Appellant's Supplement, pp. 38-39, Tr., pp. 148-151).

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.

Additionally, as discussed above, the hypothetical examples that concerned this Court in *Higbee* have come to fruition in actual transactions in the market **involving the subject property!!** 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 essentially the same situation as the hypothetical this Court discussed in *Higbee*. *Higbee* at p. 334.

There appears to be substantial agreement between the Property Owner's appraiser, the BTA in *Dayton* just prior to *Berea*, and this Court in *Higbee*. 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.<sup>9</sup>**

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<sup>9</sup> This Proposition of Law addresses Assignments of Error 7, 8, 15, 19 and 20.

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 the basis of the School Boards' opinion of value 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. (Appellant's Supplement, p. 107; Lorms, p. 52).

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.” (Appellant's Supplement, pp. 24 and 108; Tr., p. 90; Lorms, p. 53).

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 is based upon elements of duress. In so holding, however, this Court cites 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. (Appellant's Supplement, p. 58; 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*).<sup>10</sup> 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, the BTA erroneously failed to make an equally important determination – whether the lease that 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

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<sup>10</sup> According to the Appraisal of Real Estate, 12<sup>th</sup> 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, 12<sup>th</sup> 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).

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. (Appellant's Supplement, p. 86; Lorms, p. 3).

The lease is never negotiated on the open market. . . . 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." (Appellant's Supplement, p. 82; Lorms, p. 27).

It must be emphasized that the Property Owner's 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 appraiser 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.<sup>11</sup>**

The BTA erred in not finding that the Property Owner 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 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:

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).

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<sup>11</sup> This Proposition of Law addresses Assignments of Error 9, 14, 16, 17, 18 and 21.

There is no question that the report and testimony of an appraiser is admissible as it relates to the transaction in question. First, the information relied on by Mr. Lorms was clearly made known to all parties and Mr. Lorms prior to the trial and it was both a part of Mr. Lorms testimony and his appraisal report. Secondly, it is beyond question that information regarding the 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 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. In fact, Mr. Murphy of Walgreens did testify as to certain facts and circumstances surrounding the property. 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 Mr. Lorms 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 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.<sup>12</sup>**

As just discussed above, a blind reliance upon the transfer price would violate the fundamental principles of Ohio's real property tax 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, in a decision authored by Chief Justice Moyer, the Ohio 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.

This Court's analysis both in the past and the present expects an analysis of the sale transaction to confirm that the transfer price represents the fee simple, unencumbered value of the real estate.

As discussed in *Alliance Towers*, Ohio law for over 100 years 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 the Court. In *Alliance Towers*, the apartment buildings were constructed at a cost greater than could be justified by market rents and the excessive costs were covered by the safety of federal programs. Without those government subsidies, the Court found, the developer would not have had sufficient rental income to justify

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<sup>12</sup> This Proposition of Law addresses Assignments of Error 5, 9, 12, 16, 19 and 20.

the project. As demonstrated in Mr. Lorms' cost approach on page 65 (Appellant's Supplement, p. 120), the feasibility rent needed to support the construction costs of the subject property significantly exceeds the market rent for the subject property. Furthermore, as Mr. Lorms discusses on page 3 of his report (Appellant's Supplement, p. 58), 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 market. This is supported by the Property Lease. Furthermore, the greater costs of constructing a property that meets the unique use needs of Walgreens is justified by the seventy-five (75) year lease, backed by tenant's credit worthiness and the length of the lease were are significantly above average. (Appellant's Supplement, p. 58; Lorms, p. 3).

In *Canton Towers, Ltd. v. Bd. of Revision* (1983), 3 Ohio St.3d 4, a case concerning similar properties where the underlying encumbrances supported the construction of a property that was otherwise not supported by market evidence, this Court affirmed the BTA's determination of true value based upon economic rent and current returns on mortgages. It is Mr. Lorms' appraisal and opinion of value that is based upon this approach. Both *Canton Towers* and *Alliance Towers* cite to *Wynwood Apartments, Inc. v. Bd. of Revision* (1979), 59 Ohio St.2d 34 in support of their holding. *Wynwood Apartments* is another in the long line of cases, relied upon by both taxpayers and taxing authorities for decades that it is the economic rental value of commercial real property that should be looked to as an indicia of value for *ad valorem* real property taxation purposes. In *Wynwood Apartments*, the contract rent for a commercial property was lower than the economic rent. The owner was required, thus, to pay real estate taxes based upon a value higher than what would be indicated using contract rent.

For valuation purposes, economic rent equates to market rent. *Alliance Towers*, pg. 18. The concept of market rent is set forth by Mr. Lorms on page 73 (Appellant's Supplement, p. 128) of his report. One of the required elements in the definition of market rent is that "[a] reasonable time is allowed for exposure in the open market." As discussed by Mr. Lorms on pages 3, 27-30 and 73-74 (Appellant's Supplement, pp. 58, 82-85 and 128-129) as well as in his testimony before the BTA, the build-to-suit lease is not open for exposure to open market. It is a closed transaction. Drugstores, similar to the subject, are not built on a speculative basis. (Appellant's Supplement, pp. 82-83, Lorms, pp. 27-28). The contract rent for the subject property fails the definition of being a market, or economic, rent. Mr. Lorms undertakes the analysis necessary to determine the market rental rate of the subject property that meets the definition of market rent. (Appellant's Supplement, pp. 130-132; Lorms, pp. 75-77).

Ohio court decisions in eminent domain cases parallel these tax decisions. For over 100 years this has been the case. Such a significant body of law can not be directly or constructively overturned without creating significant distress to both property owners and taxing authorities in the State. The eminent domain case of *Cincinnati v. Eversman* (1904), 4 Ohio Law Rep. 140, 53 W.L.B. 476 stresses that the fee simple estate is to be valued free of any restriction or limitation upon the title to the property. The value must be determined on an unencumbered basis. *Sowers v. Schaeffer* (1949), 152 Ohio St. 65, and (1951), 155 Ohio St. 454; *Bd. of Cty. Commrs. v. Thormyer* (1959), 169 Ohio St. 291.

It is again established precedent that only evidence of the reasonable rental value of property is competent and that evidence of the outstanding leasehold interest is incompetent, even if this interest may be very valuable. *Queen City Realty Co. v. Linzell* (1957), 166 Ohio St. 249. See, also, *Schottenstein v. Bd. of Revision of Franklin Cty.* (Dec. 29, 1977), Franklin App.

Nos. 77AP-713 and 77AP-714, unreported; and *Zell v. Franklin Cty. Bd. of Revision* (Aug. 26, 1986), Franklin App. No. 86AP-153, unreported [available on Westlaw; 1986 WL 9522].

The fee simple value of the property is contrasted with the leased fee value of the property. While the fee simple value is the unencumbered interest discussed above, the leased fee interest is that held by a landlord with the rights of use and occupancy conveyed by lease to others. *The Dictionary of Real Estate Appraisal*, Fourth Edition, Appraisal Institute, Chicago, Illinois, 2002. “[T]he value of the leased fee interest represents the owner’s interest in the [leased] 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 Appraisal of Real Estate*, Twelfth Edition, Appraisal Institute, Chicago, Illinois, 2001. This leased fee value could, and does in most circumstances, equate to the fee simple value when the property is rented at market rent, discussed above. (Appellant’s Supplement, p. 104; Lorms, p. 49). However that fact that the leased fee value could, as does in this case, vary from the unencumbered, fee simple value is demonstrated by the example from *The Appraisal of Real Estate*:

If the rent and/or terms of the lease are favorable to the landlord (lessor) [both are the case here], 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. *The Appraisal of Real Estate*, p. 82.

Sales Comparison 3, comparing the Brice Road Lowes and Mill Run Kmart, discussed *infra*, also demonstrates the difference between a sale reflecting a leased fee value of a property subject to a build-to-suit, value in use lease and an unencumbered fee simple sale. It is not the intent of Ohio law to value only a partial interest in property reflective of the lease fee value of the property

subject to the relative position of the owner to the leasehold interest of the tenant, but rather, to value the complete, unencumbered, fee simple interest in the property.

As the court said in *Alliance Towers* in summarizing the law in this area:

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.

The property in this case is encumbered by a leasehold interest. *A valuable one.* But it is not this interest, based upon the value in use to Walgreens that is subject to tax in Ohio. Ohio law in this area is long-standing and settled—it is the unencumbered, fee simple interest in the property that is subject to tax. This value is determined by looking at the market rental value for subject property. As shown by this Court's comments in *Strongsville, supra, Berea* is not intended to instruct parties to quit analyzing transactions to determine if they reflect the value of the unencumbered, fee simple interest but that when there are no factors to indicate that it does not, a recent, arm's length sale is the best indication of value.

If Ohio law were changed to allow for an assessment of the leasehold 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. All for the same real estate. Such an assessment scheme cannot be allowed to engulf Ohio and further

discourage business enterprise. Successful businesses already have their fair share of taxes that are a function of their success without having to pay higher real estate tax assessments too.

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 leasehold 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. The appraisal of the subject property by the Property Owner's expert constitutes competent, probative evidence of its value.<sup>13</sup>**

Although the Property Owner would submit that there has been overwhelming evidence offered to satisfy its obligation to rebut the presumption that the sale of the subject property is the best evidence of value, the Property Owner nonetheless has also offered an appraisal of the subject property to buttress the foundation of its position. In his appraisal, Robin Lorms relies on the cost, sales comparison, and income approaches to value.

Preliminarily, recall that the area around the subject property has a stable to declining population base, well below average income levels and housing values, high retail vacancies (28%) and low rents. (Appellant's Supplement, pp. 80 and 91; Lorms, pp. 25 and 36). In fact, the shopping center next to the subject has three bingo parlors and a dollar store, with rents between \$4.75 to \$5.50 per foot. (Appellant's Supplement, p. 18; Tr., p. 67)

Turning to Mr. Lorms' cost approach, Mr. Lorms relies on five land sales between \$262,000/acre and \$344,000/acre to arrive at a fair market value of the subject's 2.145 acres of \$700,000. (Appellant's Supplement, pp. 116-117; Lorms, pp. 61-62). Mr. Lorms then

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<sup>13</sup> This Proposition of Law addresses Assignments of Error 7, 9, 15 and 20.

developed a replacement cost estimate from Marshall's Valuation Service of \$1,506,000. (Appellant's Supplement, p. 119; Lorms, p. 64). After adding the value of the land, together with replacement cost of the building and site improvements, then deducting depreciation and obsolescence, Mr. Lorms arrived at a value of \$1,300,000 via the cost approach. (Appellant's Supplement, p. 121; Lorms, p. 66).

In the sales comparison approach, Mr. Lorms relied on ten comparable sales ranging from \$53 per foot to \$163 per foot. (Appellant's Supplement, pp. 123-124; Lorms, pp. 68-69). After consideration of various criteria, including locations, size, age, and condition. Mr. Lorms reconciled to the middle of the range at \$90 per foot, or \$1,300,000. (Appellant's Supplement, p. 126; Lorms, p. 71).

In his income approach, Mr. Lorms again relied on ten market comparable rents ranging from \$5.25 per foot to \$8.39 per foot. (Appellant's Supplement, pp. 130-131; Lorms, pp. 75-76). Mr. Lorms concluded to a market rent of \$8 per foot for the subject or a potential gross income of \$115,920. (Appellant's Supplement, p. 133; Lorms, p. 78). After adding expense reimbursements of \$44,057 and deducting 5% for vacancy and credit loss, Mr. Lorms arrived at an effective gross income of \$151,978. (Appellant's Supplement, p. 134; Lorms, p. 79). From his estimate of the gross income, Mr. Lorms deducted \$51,444 in expenses, including reserves, to arrive at a projected net income of \$100,535. (Appellant's Supplement, p. 134; Lorms, p. 79). Estimating a capitalization rate of 9% derived from three separate sources, Mr. Lorms concludes to a value of \$1,100,000 under the income approach. (Appellant's Supplement, pp. 136-137; Lorms, pp. 81-82).

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. (Appellant's Supplement, p. 138;

Lorms, p. 83). 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 \$1,300,000. (Appellant's Supplement, p. 138; Lorms, p. 83). This value was derived from twenty five comparable indications, including five land sales, ten improved sales, and ten market rentals. Accordingly, the Property Owner would submit that the value of the subject property is well-supported and clearly inconsistent with its sale price, which reflected its use value, rather than the constitutionally mandated value-in-exchange.

### 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. Contrary to the assertion by the BTA, the Property Owner has not and does not argue that *all* build-to-suit transactions can *never* be considered qualifying sales; that *all* sales of successful retail locations should be disregarded; or, that a sale of a property encumbered with a long-term lease entered into by a developer and a user can *never* be considered an indication of fair market value. In a fluid market, it is not possible to extrapolate one transaction to an entire market and the Property Owner does not argue that here. The evidence in this case, both in terms of the subject property and supporting market examples, demonstrates that the specific transaction before the Board does not reflect the value of the underlying real property.

If there were any correlation between value-in-use, net lease sale prices and the value of the underlying real estate, the subject Walgreens would not sell for 30% more than a CVS at the same intersection; the Kenny Road Walgreens would not have sold for less than the South High

Street property; and, the Brice Road Lowe's would not have sold for nearly twice as much as a practically identical property in Mill Run, a better location. 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, the purchase price was approximately 44% higher than the cost to replace the property **with a new building**. No buyer would do that unless the transfer price reflects the value of the Walgreens lease.

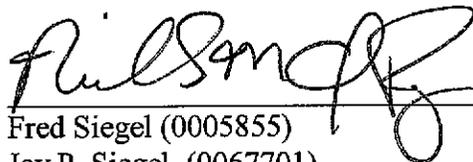
The sale is also functionally equivalent to other types of evidence of value rejected by this Court, including evidence of valuations intertwined with the success of the tenant as a business as seen in *Higbee*. In the instant case, the sale price is undeniably linked to the successful business practices 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 relevant 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 Property Owner has further offered competent, probative appraisal evidence in support of an unencumbered, fee simple value of the subject property.

For all of the foregoing reasons, the Property Owner respectfully submits that the decision of the BTA is unreasonable and unlawful. Accordingly, the Property Owner respectfully requests that this Court reverse that decision and find that the value of the subject property as of the tax lien date was \$1,300,000. Alternatively, due to the failure of the BTA to

properly consider the testimony of the expert witness, the Property Owner 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 the BTA should analyze the reports and testimony of the expert to arrive at the value of the subject property.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Fred Siegel", written over a horizontal line.

Fred Siegel (0005855)

Jay P. Siegel (0067701)

Nicholas M.J. Ray (0068664) (Counsel of Record)

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**CERTIFICATE OF SERVICE**

This is to certify that on this 17<sup>th</sup> day of September 2007, a copy of the Appellant Max E. Cougill Merit Brief and Appendix to the Appellant's Merit Brief was sent via regular U.S. mail to Mark H. Gillis, Rich Crites & Dittmer, LLC 300 East Broad Street, Suite 300, Columbus, OH 43215, William Stehle, Franklin County Assistant Prosecuting Attorney, 373 South High Street, 20<sup>th</sup> Floor, Columbus, OH 43215, and Lawrence Pratt, Section Chief-Taxation, Marc Dann, Ohio Attorney General, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, OH 43215-3428.

  
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Nicholas M.J. Ray, Esq.