

IN THE SUPREME COURT OF OHIO

Cincinnati City School District,
Board of Education

Appellee,

v.

Hamilton County Board of Revision,
Hamilton County Auditor, and the Tax
Commissioner of the State of Ohio

Appellees,

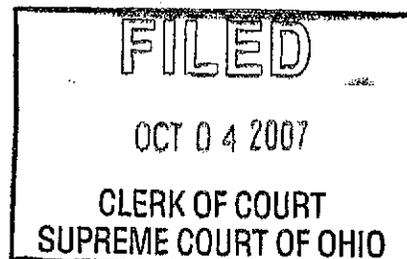
and

Anchor Lyons Limited Partnership,

Appellant.

Case No. 2007-1217

On Appeal from the Ohio
Board of Tax Appeals
Case No. 2005-M-1069



MERIT BRIEF OF APPELLEE CINCINNATI SCHOOL DISTRICT,
BOARD OF EDUCATION

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I. STATEMENT OF THE FACTS

The subject property is a 14.006 acre parcel of land improved with a one-story retail building, constructed in 1996 and containing 148,925 square feet. (Supp. 86.) The property is located at 2322 Ferguson Road in the city of Cincinnati and further identified as parcel no. 248-0002-033. (Id.) It is undisputed that the subject property was built specifically for Wal-Mart who leases the property on a triple net lease. (Id.) The initial lease was entered into in April 1996. (Id.) The annual lease payment is \$7.95 per square foot plus additional rent based upon a percentage of sales, capped at \$1.00 per square foot beginning with the eighth lease year. (Id.) The term of the lease is 20 years. (Id.)

Appellant Anchor Lyons Limited Partnership (hereinafter "Anchor Lyons") purchased the subject property from Ferguson Hills Market, Inc. on or about October 7, 2004 for the price of \$15,918,900. (Supp. 10.) Approximately one year later, on or about September 7, 2005, Anchor Lyons sold the property to the current owner, Ballantrae Investments LLC, an unrelated entity, for the price of \$17,800,000. (Id.) The lease to Wal-Mart was in place during both the 2004 and 2005 sales. (Supp. 14.)

On March 30, 2005, Appellee Cincinnati School District, Board of Education (hereinafter "BOE") filed an Original Complaint with the Hamilton County Board of Revision (hereinafter "BOR") for tax year 2004, seeking to increase the true value of the subject property to the 2004 sale price of \$15,918,900. The BOR held a hearing on the complaint on July 26, 2005. Appellant presented the testimony of Robin Lorms, an appraiser, who prepared a "retrospective market rent study," not an appraisal, in which he opined that the market rent for the subject property was \$3.50 per square foot. (App. 15.)

Antoinette Ebert, an appraiser from the Hamilton County Auditor's office, testified that the Auditor's value should be increased based on the October 2004 arm's-length sale of the property to Anchor Lyons. The BOR voted 2-1 (Auditor dissenting) not to change the value of the property since it felt that the long-term lease affected the sale price. (App. 25.)

The BOE filed a Notice of Appeal to the Board of Tax Appeals on August 22, 2005.¹ (See Notice of Appeal to the Board of Tax Appeals). At the BTA hearing, Anchor Lyons again presented the testimony of Mr. Lorms, who prepared an appraisal for the hearing. (Decision at 3). Mr. Lorms testified that the subject property should be valued at \$6,000,000 as of the tax lien date. (Id. at 4). The Hamilton County Auditor presented the testimony of Ms. Ebert, who opined that the subject property should be valued at \$15,918,900 based on the 2004 sale of the subject property and further supported by her own appraisal. (Supp. 15.)

On June 8, 2007, the BTA rendered a decision holding that the sale by which Anchor Lyons acquired the property was an arm's-length transaction and that the sale price of \$15,918,900 was the true value for tax year 2004. (Decision at 11-12.) On July 6, 2007, Anchor Lyons filed a notice of appeal with this Court. (App. 2.)

II. ARGUMENT

A. Appellant's Proposition of Law #1

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

¹ At the time the BOE filed its appeal to the BTA, Anchor Lyons had not yet sold the property to Ballantrae Investments LLC.

Appellant wants this Court to carve out an “extremely narrow exception” to the Berea rule that the sale price of a recent arm’s-length transaction is the true value for taxation purposes. Appellant would have this Court disregard the plain language of R.C. 5713.03 and the court’s precedent of “consistently adhering to the rule that ‘[t]he best evidence of the true value in money’ of real property is an actual, recent sale of the property in an arm’s-length transaction.” Id. at 271 (quoting Ratner v. Stark Cty. Bd. of Revision (1988), 35 Ohio St.3d 26, 30) (“Ratner II”). Appellant wants the Court to ignore the October 2004 sale price since it was “affected by the long-term lease and credit-worthiness of Wal-Mart, and instead consider appraisal evidence.” (Appellant’s Brief at 11-12.) Simply put, Appellant wants the Court to overturn Berea.

Berea eliminated the need to consider appraisal evidence where there is a recent, arm’s-length transaction. In that case, the Court adopted the sale price even though the property at issue, a multi-tenant retail development, was encumbered with two long-term leases. Id. at 269. Like our case, one party (the BOE) wanted the sale disregarded because it contended that the long-term leases affected the sale price. Id. The Court explicitly rejected that argument and overruled Ratner I and Ratner II to the extent that those cases allowed the boards of revision and the BTA to “consider and review evidence presented by independent real estate appraisers that adjusts the contract sale price to reflect both the price paid for real estate and the price paid for favorable financing.” Id. at 271; (quoting Ratner v. Stark Cty. Bd. of Revision (1986), 23 Ohio St.3d 59, 62) (“Ratner I”). Based on the foregoing controlling authority, the BTA correctly adopted the sale price as the true value of the subject property.

The applicability of Berea depends on whether the sale meets the indicia of an arm's-length transaction, not whether the property at issue is multi-tenant or built-to-suit a single tenant. Berea, Id. at 272; see also Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (2007), 112 Ohio St.3d 309 (resolution of the question of an arm's-length sale is an essential first step in the Berea analysis). Appellant erroneously attempts to distinguish Berea on this basis. There is no support for Appellant's contention in Berea or subsequent case law. Conversely, recent case law demonstrates the Court's intent to apply Berea to cases where there is evidence of "other factors" that might affect the sale price. For example, in Lakota Local School Dist. Bd. of Educ. v. Butler Cty. Bd. of Revision (2006), 108 Ohio St.3d 310, the Court upheld a recent sale despite uncontested evidence that the transaction was seller financed. Id. The Court dismissed that evidence as "*immaterial*" since there was a recent, arm's-length transaction that established the true value of the property. Id. (emphasis added).

The facts in this case are virtually indistinguishable from Berea. The subject property is also a building used for retail that is subject to a long-term lease. The fact that the property was built-to-suit a tenant and then subsequently sold is immaterial. The undisputed evidence is that the property was sold on the open market between a willing buyer and a willing seller.² R.C. 5713.03. The law requires that the sale price be the true value of the subject property. See Berea, Id. at 272.

Appellant failed to refute the evidence that the October 2004 sale of the subject property was arm's-length. Counsel for the BOE introduced undisputed evidence of an arm's-length transaction between Ferguson Hills Market and Anchor Lyons. Ms. Ebert also testified that she recommended the adoption of the 2004 sale price since it was an arm's-

² Notably, the property was again sold approximately one year later for an even higher sale price, which is further evidence that the October 2004 sale was reflective of its market value. (Supp. 10.)

length sale. (Supp. 15.) In contrast, neither opposing counsel nor Mr. Lorms had personal knowledge of the details of the transaction to share with the BOR. Before the BTA, Mr. Lorms inexplicably commented on cross-examination that his son told him “to be careful of the transaction.” (Supp. 67.) There was also a discussion about whether the transaction was a sale-leaseback, but Mr. Lorms testified that it was not a sale-leaseback situation. (Supp. 66.) Typically, in a sale-leaseback transaction only two parties are involved and the owner of the property sells the building to the buyer and leases it back. In this case, Anchor Lyons purchased the property from Ferguson Hills Market with the long-term lease to Wal-Mart already in place. The Wal-Mart lease was not affected in any way by the transfer. Therefore, there is no evidence that the subject transfer was a sale-leaseback.

If this Court carves out an “extremely narrow exception” to Berea for Appellant, it will open the door to other “narrow exceptions” until the clear language of R.C. 5713.03 is unrecognizable. If the Court considers “other factors” where there is a recent, arm’s-length transaction, the Court will be straying from the clear edict of R.C. 5713.03:

In determining the true value of any of any tract, lot or parcel...if such tract, lot or parcel has been the subject of an arm’s-length sale between a willing seller and a willing buyer within a reasonable length of time either before or after the tax lien date, the auditor **shall** consider the sale price of such tract, lot or parcel to be the true value for taxation purposes.

R.C. 5713.03 (emphasis added). The consideration of other factors, like whether the tenant was a single tenant with unique needs, whether the sale was seller-financed, or whether the property was subject to a long-term lease, creates unnecessary confusion and returns the law to its fragmented pre-Berea status. The Berea court sought to eliminate those “other factors” considered in Ratner I and Ratner II and return to the clear unequivocal language of R.C.

5713.03 where there is evidence of a recent arm's-length transaction. Therefore, the Court should affirm the BTA's application of Berea to this case and hold that the sale price is the true value for taxation purposes.

B. Appellant's Proposition of Law #2

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

Appellant's argument is illogical. The Ohio Constitution requires that an appraisal determine "the amount which the property should bring if sold on the open market." State ex rel. Park Inv. Co. v. Board of Tax Appeals (1972), 32 Ohio St.2d 28. Since Berea provides that a recent arm's-length sale is the best evidence of value, appraisal evidence is not necessary in this case.

Additionally, Appellant bases its argument on a 2005 BTA case that was decided pre-Berea. Since this Court made it clear in Berea that "other factors" like long-term leases and seller-financing will not affect the validity of adopting the sale price as the true value for taxation purposes, Appellant's argument is moot.

C. Appellant's Proposition of Law #3

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.

The facts in Higbee are completely distinguishable from the instant case. In that case, the Court rejected the use of sales per square foot as a method to value real property. Id. at 331. Most importantly, Higbee did not involve a recent arm's-length transaction. In the instant case, there was no evidence that the October 2004 sale price was based on gross sales.

Furthermore, the lease to Wal-Mart was negotiated ten years before Anchor Lyons purchased the store.

It is worth noting that the Higbee court recognized that some transactions might have different “economics” than traditional real estate transactions:

The testimony in this case clearly indicated that the economics of real-property transactions involving anchor stores and mall developers is *different from the usual types of real estate* transactions. Nevertheless, for ad valorem tax purposes the property still *must be valued on the basis of what a willing buyer would pay a willing seller for the real property.*

Id. at 335. The instant transaction is such an example. There may be “different” economic considerations in a real-estate transaction involving a big box build-to-suit property, but the normal market forces, such as income generation, location, and aesthetic quality, are still present and do not undermine that the subject property should be valued based on what a “willing buyer would pay a willing seller.” Higbee, Id. at 335. The BTA properly adopted the sale price as the true value of the subject property since it represented a sale between two willing, sophisticated, knowledgeable parties.

D. Appellant’s Proposition of Law #4

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.

Based on the testimony of Appellant’s own expert witness, Mr. Lorms, the transaction between Ferguson Hills Market and Anchor Lyons *is not a sale-leaseback.* (Supp. 66.) (emphasis added). Neither opposing counsel nor Mr. Lorms attempted to negate the arm’s-length nature of the sale of the subject property. Therefore, it is inappropriate for Appellant to argue this on appeal. See Casa 94, L.P. v. Franklin Cty. Bd. of Revision (2000),

89 Ohio St.3d 622 (R.C. 5715.19(G) precludes a property owner from testifying about the terms and conditions of a sale before the BTA if the owner did not testify or otherwise present admissible evidence concerning the sale to the board of revision).

The Strongsville case is not applicable to the case *sub judice*. There were only two parties to the sale of the subject property, Ferguson Hills Market and Anchor Lyons—Walmart was not a party because its long-term lease was negotiated ten years before the sale to Anchor Lyons. Unlike our case, the sale at issue in Strongsville was “marked by the presence of duress.” *Id.* at 312. In making its finding of duress, the BTA considered evidence of Ceres’ financial situation and the influence that situation had upon the sale of the property in question. *Id.* Ceres had a balloon mortgage payment due but did not have the cash on hand to make the payment. *Id.* In contrast, there was no evidence that Ferguson Hills Market sold the subject property or that Anchor Lyons purchased the property under duress. As previously mentioned, Appellant failed to introduce *any evidence* regarding the sale.

While it is convenient for Appellant to now claim that the October 2004 sale was a sale-leaseback, this argument of convenience is “Monday-morning quarterbacking,” at its best. Now, in the “eleventh hour,” Appellant wants this Court to create new evidence negating the arm’s-length nature of the sale. There is no such evidence. In the words of Appellant’s “expert” witness, this was not a sale-leaseback. Therefore, Strongsville is not applicable and the sale price should be affirmed as the best evidence of value.

E. Appellant’s Proposition of Law #5

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

Again, Appellant's argument is illogical. Appellant implies that the BTA prohibited testimony from Mr. Lorms and Ms. Ebert concerning the facts surrounding the subject transfer. This assertion is without merit. The BTA allowed both appraisers to testify and admitted both appraisal reports into evidence. (Supp. 76.)

Following the Court's example in Berea, the BTA did not need to consider the appraisals since there was undisputed evidence of a recent arm's-length transaction. In Berea, the Court refused to consider whether actual rent or market rent should have been used in the property appraisal since the property sold in a recent arm's-length transaction. Berea, Id. at 272.

F. Appellant's Proposition of Law #6

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.

The Berea court specifically recognized several other decisions where the Court has permitted the BTA "to consider market rental value of commercial real property as an indicator of the true value of the property." Berea, Id. at 272. However, the Court also noted that "none of those cases involved a recent arm's-length sale of the property between a willing seller and a willing buyer." Id. Alliance Towers falls into that category. While the Court approved the use of market rents as an indicator of value for taxation purposes, the Court also noted that market rents are only applicable where the property had not been sold in a recent arm's-length transaction. Alliance Towers, Id. at 22. Based on the foregoing, the BTA's adoption of the sale price is "consistent," not "inconsistent," with current law as set by this Court in Alliance Towers and later, Berea.

Appellee Cincinnati School District further addresses Mr. Lorms' "market rents" in response to Appellant's Proposition of Law #7.

G. Appellant's Proposition of Law #7

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

It is well-established law that the Court gives the BTA great discretion in what weight to give the evidence presented before it. Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision (1975), 44 Ohio St.2d 13. The board may accept or reject any and all evidence presented. Id. As previously mentioned, it was not necessary for the BTA to use appraisal evidence since the Berea court made it clear that a recent arm's-length transaction is to be used as the true value for taxation purposes.

Even though Berea specifically applies and Appellant's appraisal was not necessary, Appellant's evidence was not sufficient to meet its burden of proof. Mr. Lorms relied on sales of buildings that were vacant or buildings in poor locations with subleases, or sales of buildings that did not attract top quality tenants. (Supp. 53, 54, 55, 58.) None of the buildings used by Mr. Lorms in his market approach were "comparable" to the subject property. Mr. Lorms' income approach was equally flawed. He relied on rents of second-generation users as his "market." (Supp. 160.) It is undisputed that Wal-Mart is a highly successful, first tier tenant, and Mr. Lorms adopted the contract rents of second-tier tenants, such as Hobby Lobby and Steve and Barry's. (Id.) Since the "comparable" properties lacked similar economic value, they were not probative of the market and would have been disregarded by the BTA.

In contrast, Ms. Ebert's appraisal presented properties with similar economic characteristics and location to the subject property. She used properties with first-tier tenants

such as HH Gregg and Dilliard's, as well as several other Wal-Mart locations. (Supp. 314, 322.) Undoubtedly, the BTA would have accorded more weight to Ms. Ebert's opinion of value than to Mr. Lorms' self-serving appraisal.

H. Appellant's Proposition of Law #8

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

Appellee BOE addressed this duplicative argument in Appellant's Proposition of Law #7 that Ms. Ebert's appraisal was objective and reflective of the market for a first-tier tenant in a prime location.

IV. CONCLUSION

This case is not distinguishable from Berea and does not warrant any exception to the law that the best evidence of value is a recent arm's-length transaction. Appellant attempts to muddy the waters with "other factors," such as the fact that the tenant is a big-box retailer, the property was built-to-suit, and the existence of a long-term lease, but behind the smoke is an uncontested arm's-length sale. The Board of Tax Appeals correctly followed precedent set by this Court and adopted the sale price as the true value for taxation purposes.

Appellee Cincinnati School District, Board of Education, respectfully requests that the Court affirm the decision of the Board of Tax Appeals.

Respectfully submitted,

David C. DiMuzio, Counsel of Record



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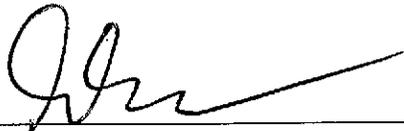
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I certify that a copy of this Merit Brief of Appellant Cincinnati School District, Board of Education was sent by ordinary U.S. Mail this 3 day of October, 2007 to:

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