

IN THE SUPREME COURT OF OHIO

Board of Education of the Columbus
City Schools, :

Appellee, :

v. :

Franklin County Board of Revision,
et al., :

Appellees. :

and :

Max E. Cougill, :

Appellant

Case No. 2007-1086

Appeal from the Ohio Board of
Tax Appeals - BTA Case Nos.
2005-R-329 and 2005-R-330

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

Appellant, :

v. :

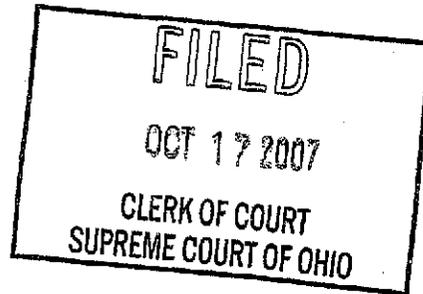
Franklin County Board of Revision,
et al., :

Appellees. :

and :

Max E. Cougill, :

Appellant.



**MERIT BRIEF OF APPELLEE BOARD OF EDUCATION OF
THE COLUMBUS CITY SCHOOL DISTRICT AND APPELLEE
BOARD OF EDUCATION OF THE SOUTH-WESTERN CITY
SCHOOL DISTRICT**

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

Attorney for Appellant
Max E. Cougill

Mark H. Gillis (0066908)
COUNSEL OF RECORD
Jeffrey A Rich (0017495)
Rich, Crites & Dittmer, LLC
300 East Broad Street, Suite 300
Columbus, Ohio 43215
(614) 228-5822
Fax (614) 228-2725
Email: mgillis@richcrites.com

Attorney for Appellees
Board of Education of the Columbus
City School District and the
Board of Education of the South-
Western City School District

Paul M. Stickel (0025007)
COUNSEL OF RECORD
373 South High Street, 20th Floor
Columbus, Ohio 43015
(614) 462-3500

Attorney for Appellee Board of
Revision and County Auditor

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STATEMENT OF THE CASE AND FACTS

This is an appeal from the Ohio Board of Tax Appeals (BTA) taken pursuant to R.C. 5717.04 by Appellant, Max E. Cougill. The issue is the determination of the true value in money of certain real property for tax year 2003. Mr. Cougill purchased the property in an arm's-length transaction for \$3,937,500 in September, 2002. The BTA properly determined that the sale price of the property constituted its true value for tax year 2003 under R.C. 5713.03. Mr. Cougill contests that determination.

1. The Subject Property

As of tax lien day (January 1, 2003), the property was a brand new 14,490 square-foot retail store, built in 2002, located on 2.1405 acres of land at the corner of Demorest and Clime Roads in the City of Columbus. The store and 1.739 acres of the site are located in the Columbus School District (parcel number 010-122746). The balance of the site is in the Southwestern City School District (parcel number 570-138815). Both Boards of Education filed complaints with the Board of Revision based on the sale.

The seller of the property, Columbus-Clime LLC, purchased the two parcels of land for \$622,000 in December, 2001 (see Appellant's Supp. p. 58; appraisal report of Robin Lorms, p. 3). The Franklin County Auditor valued the 2.14-acre site (both parcels) at only \$395,800 for tax year 2003, even though this land had sold for \$622,000 in December, 2001. Columbus-Clime then constructed the improvements on the site in 2002 and leased the property to the Walgreens Company, which uses the property as a retail drug store. According to Robert Murphy, an employee of Walgreens, the costs to "construct" the property was "around \$3.3 million" (Supp. p. 11; BTA Tr, p. 39). The County Auditor's total value for the property was only \$1,250,000 for tax year 2003.

Columbus-Cline then subsequently sold the property to Appellant, Max Cougill, for \$3,937,500. There is no dispute that the sale was arm's-length sale between unrelated parties, each acting in their own best interests.

2. Mr. Cougill Does Not Object to the Use of the Sale Price to Value His Property

An extraordinary amount of paper has been wasted in an attempt to argue over why the owner of the property, Max Cougill, paid \$3,937,500 for the property. All of this is a waste because Mr. Cougill never bothered to testify before the Board of Revision or the BTA. The claim is made in Mr. Cougill's brief that the price paid by Mr. Cougill "is reflective of the business success and creditworthiness of the tenant and is unrelated to the value of the underlying real estate" (Appellant's brief, p. 8). However, Mr. Cougill never claimed that the price he paid for the property had anything to do with the "business success and creditworthiness of the tenant." Mr. Cougill has not objected to the use of the sale price to value his property for tax purposes; and there is no evidence in the record to suggest that Mr. Cougill does not believe that the sale price actually reflects the true value of his property. No one who was involved in the sale of the property has ever appeared and there is no evidence in the record which relates to the actual sale of the property.

3. Appellant's Witness Robert Murphy

The two witnesses who appeared before the BTA were Robert Murphy, who is the "real estate assessment manager" of Walgreens, and an appraiser, Robin Lorms. Murphy testified about the lease on the property and the construction costs of the brand new property. Murphy had no personal knowledge of either subject. Murphy was not involved in the negotiation of the particular lease in question or in any of Walgreens' leases. Murphy testified as follows:

"Q. *** Have you ever been involved in the actual negotiations of any leases?"

A. No, I have not.” (Supp., p. 12; BTA Tr. p. 44)

Murphy was, likewise, not involved in the construction of the property and had no personal knowledge about the construction of the property (Supp, p. 13, BTA Tr. p. 46). Murphy testified as follows in this respect:

“Q. And you, yourself, were not involved in the actual construction of the property, the negotiation of the construction details, anything like that; is that correct?

A. That’s correct.” (Supp. p. 13; BTA Tr. p. 46).

Murphy’s testimony was based on looking at some documents and on “general discussions with individuals in [the] company” (Supp. p. 12; BTA Tr. p. 45). Mr. Murphy’s information about the costs of the property came from documents given to him by someone else in the company (Supp, p. 12; BTA Tr. p. 45). Numerous objections were made to Mr. Murphy’s testimony concerning the negotiations for the lease between the tenant and a prior owner of the property (Supp. pp 6-7; BTA Tr. pp. 20-25, 33, 38) and to Murphy’s testimony concerning the construction of the property (Supp. p. 11; BTA Tr. p. 39).

4. The Claims Made By Appellant’s Appraiser

All of the arguments set forth in Appellant’s 45-page brief are based on the claims made by the appraiser Robin Lorms. There is no evidence that Lorms had ever met Mr. Cougill, and Lorms never claimed that he had any information concerning the sale of the property. In his appraisal report, Lorms stated that he disregarded the sale of the property solely because the property “is subject to a build-to-suit lease agreement”! According to Lorms:

“The sale of the subject property on September 4, 2002 is not given any consideration in providing an opinion of market value for the fee simple estate. The subject property is subject to a build-to-suit lease agreement” (Appellant’s Supp. p. 58; Lorms’ report, p. 3).

However, Lorms acknowledged throughout his testimony before the BTA that it was not important that the lease was a “build-to-suit lease,” but rather that the rent being paid under the lease was, in Lorms’ opinion, greater than his own estimate of the market rent for the property at the time of the sale. Lorms testified as follows:

“Q. As I read your appraisal report and as I understand your testimony, you rejected the sale. That is, you determined that the sale price did not accurately reflect the market value of the property at the day of the sale?

A. That’s correct.

Q. Because your analysis of the lease led you to believe or indicated to you that the rent provided and set forth in the lease was not in your opinion anywhere near or did not even approximate what market rents for the property would be at the time of sale?

A. That’s correct.” (Supp. p. 46; BTA Tr. pp. 178-179)

Lorms also testified as follows on this same point:

“Q. Whether a Kmart or any other property is build to suit or not, we have already admitted isn’t terribly relevant, what is relevant is whether or not the actual or contract rents in the lease in place on that property approximate the market rent at the date of the sale. That is the critical issue, right?

A. [Lorms] That is correct.” (Supp. p. 48; BTA Tr. p. 189)

Lorms also admitted that “there is nothing wrong with [a sale] being a leased fee sale. The issue is whether or not the actual rent or the contract rent is this lease approximates market rent for the property.” (Supp. p. 40; BTA Tr. p. 40; see also Supp. p. 42; BTA Tr. pp. 164-165).

The lease on Appellant’s property was never introduced into evidence. Robert Murphy testified that he downloaded a document from the company’s computer system which appears to be an outline or summary of a lease (Supp. p. 12; BTA Tr. p. 43; the document is set forth at Supp. pp. 240-255). As will be shown below, none of Lorms’ claims concerning the lease of the property were legally relevant to the determination of the true value of Mr. Cougill’s property for real property tax purposes. Objections were made to Mr. Lorms’ testimony at the outset (Supp. p. 16; BTA(Tr. p. 60) and to the admission of his appraisal report into evidence (Supp. p. 48; BTA Tr. p. 189).

LAW AND ARGUMENT

Introduction

Appellant has the burden to prove that the sale price of his property did not reflect its true value for real property tax purposes. In attempting to carry this burden, Appellant makes numerous claims in its 45-page brief, none of which are supported by any evidence in the record and none of which have merit. In summary, this appeal is governed by the following principles:

(1) There was a perfectly valid sale of the property and the sale price accurately reflects the true value of the property under R.C. 5713.03.

(2) There is no evidence that the existing lease on the property had any effect or impact on the agreed-upon sale price of the property.

(3) The sale price of real property cannot be rejected as the best evidence of the true value of the property simply because some appraiser testifies that in his or her opinion the actual rent on the property is greater than the appraiser's estimate of market rent for the property. This is Appellant's "build-to-suit lease" or "value-in-use lease" issue, and this is precisely the same issue which this Court addressed in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005 Ohio 4979, 834 N.E.2d 782. In order to accept any of Appellant's claims, this Court will have to overrule *Berea*.

(4) According to Appellant's appraiser, all "freestanding retail buildings built specifically for a single tenant" have what is essentially a nominal value for real property tax purposes (Lorms' appraisal report, Supp. p. 59). Based on this unusual claim, Appellant argues that a brand new Walgreens' pharmacy is worth less than one-third of its actual construction costs because of "functional obsolescence." There is no credible evidence in the record to support this claim. This

is the very same claim that was rejected by the BTA and this Court in *Meijer, Inc. v. Montgomery Cty. Bd. of Revision* (1996), 75 Ohio St. 3d 181, 661 N.E.2d 1056, which dealt with the valuation of a new Meijer store. See also *Dayton-Montgomery County Port Auth. v. Montgomery County Bd. of Revision*, 113 Ohio St. 3d 281, 2007 Ohio 1948, 865 N.E.2d 22 (actual costs provides some evidence of the value of a brand new building). However, the claim that these brand new properties suffer from massive amounts of functional obsolescence for real property tax purposes will never go away because of the profits that will result from the successful litigation of the claim.

The appellees will first address the fundamental question of whether there is any evidence in the record to support any of the claims made by Appellant (Appellant's proposition of law number V). Appellees will then address the attempt by Appellant to distinguish the *Berea City School Dist.* and the *Lakota Local Sch. Dist.* cases (proposition of law number I). Finally, Appellees will address the numerous objections raised by Appellant to use of the sale price to value Appellant's property.

Reply to Appellant's Proposition of Law No. V:

The Property Owner Has The Burden to Prove that The Sale Price of Real Property Does Not Reflect Its True Value In Money.

The fundamental claims made in Appellant's brief is that the price that Mr. Cougill paid for the property was affected by or impacted by the Walgreens lease on the property. This claim cannot be accepted because Appellant failed to present any evidence to support this claim. The BTA correctly stated in its Decision the following (p. 9):

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

There was, in fact, no direct or indirect testimony or other form of evidence from anyone who had any knowledge about the sale. Mr. Cougill cannot claim in his brief that the price he paid for the property was based on or affected by a lease on the property when Mr. Cougill never bothered to testify that this was the case.

R.C. 5713.03 requires the sale price of Appellant's property to be its true value in money for real property tax purposes for tax year 2003. This provision reads as follows:

"In determining the true value of any tract, lot, or parcel of real estate under this section, if such tract, lot, or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer

within a reasonable length of time, either before or after the tax lien date, the auditor shall consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes.”

Once the sale price of the property has been established, the property owner has the burden to “prove a lesser value” for the property. *Columbus Board of Education v. Franklin County Board of Revision; Nestle Foods Corporation* (1996), 76 Ohio St. 3d 13, 16; 665 N.E.2d 1098; and *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St. 3d 493, 628 N.E.2d 1365. Most recently, the Court has stressed that R.C. 5713.03 means what it says, and the price paid for real property in an arm’s-length sale must be taken as its true value in money as a matter of law. In *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005 Ohio 4979, 834 N.E.2d 782, and *Lakota Local Sch. Dist. Bd. of Educ. v. Butler County Bd. of Revision*, 108 Ohio St. 3d 310, 2006 Ohio 1059, 843 N.E.2d 757, this Court held that under the “plain language” of R.C. 5713.03, the sale price is required to be taken as the true value of the property and appraisal evidence cannot be used to discredit or contradict the sale price. In *Berea*, for instance, this Court stated the following:

“*** [W]hen the property has been the subject of a recent arm’s-length sale between a willing seller and a willing buyer, the sale price of the property shall be ‘the true value for taxation purposes.’ R.C. 5713.03. Accordingly, because the property at issue in this case had been recently sold in an arm’s-length transaction for \$ 2,600,000, the law requires that sale price to be the true value of that property for the tax year 1997.” [P13]

There is a “presumption that the sale price reflect[s] true value” for the purposes of R.C. 5713.03 (*Ratner v. Stark Cty. Bd. of Revision* (1986), 23 Ohio St. 3d 59, 61, 23 OBR 192, 193, 491 N.E. 2d 680, 682; overruled on other grounds by *Berea City School Dist.*, supra). There is also the

presumption that “the sale was made at arm’s-length.” *Cincinnati School District Board of Education v. Hamilton Cty. Bd. of Revision* (1996), 78 Ohio St. 3d 325, 327; 677 N.E.2d 1197.

Appellant attempts to fill the massive hole in the evidence created by the failure of Mr. Cougill to testify by claiming that the appraiser, Robin Lorms, could provide “competent evidence concerning the facts surrounding the transfer” of the property (brief, p. 33). Appellant does not show how this could be possible. First, Lorms never claimed that he had any direct or indirect knowledge about any of the “facts” concerning the sale of the property. Lorms never testified that he talked to either Mr. Cougill or anyone else involved in this sale. Lorms never testified that he talked to anyone who had talked to Mr. Cougill about the sale. Lorms never testified that he was able to look at any documents relating to the sale. Second, Lorms never testified that Mr. Cougill did, in fact, base the purchase price on the existing lease. Lorms never claimed to know what Mr. Cougill did, or did not do, because Lorms appeared to have no information of any kind about Mr. Cougill. Lorms never claimed to have met Mr. Cougill or to have discussed any issues with Mr. Cougill. Appellant claims that an appraiser can rely on hearsay evidence in an appraisal of real property (brief, p. 34). This is not an issue because Lorms never attempted to testify about what Mr. Cougill told Lorms about the sale.

Even if Lorms had attempted to testify that Cougill told him that the sale price was based on the Walgreens lease on the property, this testimony could not be relied on by the BTA. In *Almondree Apartments of Columbus, Ltd. v. Franklin Cty. Bd. of Revision* (June 28, 1988), Franklin App. No. 87AP-1216, 1988 Opinions 2427, 1988 Ohio App. Lexis 2665, the Court held that an appraiser could not testify that the sale of the property was not an “arm’s-length sale” based solely on hearsay evidence. The Court held that although the rules of evidence do not strictly apply to the

BTA, this testimony constituted the “rankest type of hearsay” and could not be used to prove the “key issue” in an appeal (p. 5). While much of the market data used by appraiser is essentially hearsay information, an appraiser is not permitted to rely on hearsay to testify about the intentions, motivations, or thinking of the buyer of the property. Appellee submits that the *Almondtree* decision sets forth the correct law on this issue.

Appellant claims that Lorms was entitled to comment upon or provide an opinion about “the reliability of a sale” (brief, pp. 33-36). It is unclear what this means. In any event, it is not particularly relevant that Lorms or any other appraiser has an opinion as to whether the price paid for real property in a recent arm’s-length sale does or does not reflect the true value of the property under R.C. 5713.03. The provisions of R.C. 5713.03 cannot be set aside because an appraiser happens to disagree with the consequences of the statute.

Reply to Appellant’s Propositions of Law Nos. I and VI:

Appraisals Of Real Property Based Upon Factors Other Than Sales Price Are Appropriate For Use In Determining Value Only When No Arm’s-length Sale Has Taken Place, Or Where It Is Shown That The Sales Price Is Not Reflective Of The True Value.

The claim is made that the price paid by Mr. Cougill for the property cannot be used to determine its true value because the sale price was based on a “build-to-suit lease” or a “value-in-use lease” that was on the property. Appellant also claims that the lease constituted an encumbrance and that the fee simple was not involved in the sale under the doctrine set forth in *Alliance Towers, Ltd. v. Stark County Bd. of Revision* (1988), 37 Ohio St. 3d 16, 523 N.E.2d 826. None of these claims have merit. First, as indicated above, Appellant has failed to prove that as a matter of fact the lease had any impact or effect on the sale price of the property. At this point, this appeal should be over. Second, as Appellant’s appraiser, Robin Lorms, makes clear, the claim that a “build-to-suit

lease” was involved in the sale is nothing more than the claim that the actual rent under the lease exceeded Lorms’ estimate of the market rent for the property. This is the issue addressed by this Court in *Berea*, supra. Third, there is no such thing as a “value-in-use lease” and taking the sale price of Appellant’s property to be its true value clearly cannot constitute an impermissible value-in-use or use value.

1. The Fact That Property Is Subject To A Lease At The Time Of Sale Does Not Preclude The Sale Price From Being The True Value Of The Property Under R.C. 5713.03.

R.C. 5713.03 requires the recent sale price of the property in an arm’s-length sale to be taken to be the true value of the property. There is nothing in R.C. 5713.03 that excludes a sale of real property because it is being leased at the time of sale. Indeed, the General Assembly must have contemplated that R.C. 5713.03 would apply to properties subject to a lease because much of the commercial real property in the State of Ohio sells with one or more leases in place. For instance, office buildings, apartments, shopping centers, warehouses, and free-standing drug stores (such as Appellant’s property), all sell with leases in place. The sale prices of these properties are used to value the properties themselves and to value other properties as comparable sales.

There is nothing peculiar or unusual about this. As a general rule, the sale of real property under “peculiar” or “unusual” circumstances does not fall with the sale price definition of true value set forth in R.C. 5713.03. For instance, in *In re Estate of Sears* (1961), 172 Ohio St. 443, “market value” was defined as follows:

“Market value is the fair and reasonable cash price which can be obtained in the open market, not at a forced sale or under peculiar circumstances but at voluntary sale between persons who are not under any compulsion or pressure of circumstances and who are free to act; or in other words,

between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so.”

Reference to the same principle is found in Administrative Rule 5703-25-05(G)(4), a long-standing rule of the Tax Commissioner adopted under R.C. 5715.01, which states that the “reliability” of the “market value approach” is said to be based upon “[t]he absence of unusual conditions affecting the sale.” This last provision was cited by this Court in *Alliance Towers Ltd. v. Stark Cty. Bd. of Revision*, supra, at page 17, footnote 1. The fact that Appellant’s property was subject to a lease or a build-to-suit lease at the time of sale does not prevent the sale price from being the best evidence of the true value of the property. The rent being charged for the property was neither unusual or atypical because the rent was based on the actual construction costs of the brand new property (Lorms, Supp. p. 23; BTA Tr. p. 88).

The terms “ build-to-suit lease” or a “value-in-use lease” appear to have been invented by Appellant’s appraiser. These terms were taken from prior appraisal reports and arguments made by this particular appraiser (Lorms) in cases dealing with the valuation of Meijer stores, Target stores, Wal-Mart stores, and other big box retail stores. This is part of Lorms’ theory that all “freestanding retail buildings built specifically for a single tenant” have what is essentially a nominal value because all suffer from massive amounts of “functional obsolescence” for real property tax purposes the moment the stores open their doors. Like everything else, Lorms bases the estimate of functional obsolescence on the difference the actual rent and what Lorms estimates to be the “market rent” for the property. According to Lorms, the actual sale prices of these properties and the rents being paid for these properties (such as in the case of Appellant’s property) do not reflect the value of the properties because the leases in place are “ build-to-suit leases” and “value-in-use leases.”

As this Court made clear in *Berea* and *Lakota*, supra, an appraisal cannot be used to discredit a sale or to overcome the presumptions which relate to an arm's-length sale. The same thing was also said in earlier cases. In *Columbus Board of Education v. Fountain Square Associates, Ltd.* (1984), 9 Ohio St. 3d 218, 9 OBR 528, at p. 219, this Court held that appraisal evidence is relevant only when it has first been shown that the sale price did not reflect true value: "Appraisals based upon factors other than sales price are appropriate for use in determining value only when no arm's-length sale has taken place, or where it is shown that the sales price is not reflective of true value." In *Pingue v. Franklin County Board of Revision* (1999), 87 Ohio St. 3d 62, 64; 717 N.E.2d 293, the Court summarized these principles in the following manner: "It is only when the purchase price does not reflect the true value that a review of independent appraisals based upon other factors is appropriate."

2. A Claimed Distinction Between Market Rent And Actual Rent Cannot Be Used To Overcome The Presumption That The Sale Price Of Real Property Is The Best Evidence Of Its True Value In Money For Real Property Tax Purposes.

The primary claim made by Appellant is that the sale price cannot be used as the true value of Appellant's property because a "build-to-suit lease" was on the property at the time of sale. Appellant does not claim that a "build-to-suit lease" is different than any other kind of lease; and Appellant does not explain how or why a "build-to-suit lease" would differ than any other lease for purposes of R.C. 5713.03.

In fact, Appellant well understands that the arguments he makes in his brief are inconsistent with this Court's decisions in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005 Ohio 4979, 834 N.E.2d 782, and *Lakota Local Sch. Dist. Bd. of Educ. v. Butler County Bd. of Revision*, 108 Ohio St. 3d 310, 2006 Ohio 1059, 843 N.E.2d 757.

Consequently, Appellant makes an attempt to distinguish these cases with the “build-to-suit” claim. Appellant’s claim is that *Berea* only applies to cases where there is more than just one lease on the property involved in the sale: Appellant refers to this as a distinction between a “multi-tenant” property and a “build-to-suit” property (brief, p. 9). There is no rational basis for this distinction.

As indicated in the facts, Lorms acknowledged that the “build-to-suit lease” issue was nothing more than a question of whether contract rent exceeded Lorms’ opinion of market rent for the property. In fact Lorms acknowledges that he relies on sales of properties that have been leased and “build-to-suit sales”(Supp. p. 42; BTA Tr. p. 165). Lorms acknowledged that a “build-to-suit lease” is just like any other lease and Lorms agreed that “whether the property is subject to a lease or not, is not the key” - the “key” or the “critical point, the essential point” is whether the actual rent under the lease is different than the appraiser’s opinion of market rent. Several statements of Lorms in this respect were included in the Statement of the Facts. Several more statements from Lorms are as follows:

Q. *** the fact that a property has a lease on it is not critical. It’s not the important point. The important point, as you indicated before, is whether the lease - the contract rent under the lease is at or approximates market rent or not.

A. [Lorms] That’s correct.” (Supp. p. 41; BTA Tr, p. 160).

“Q. *** So, the principle is that whether the property is subject to a lease or not, is not the key. The key is - critical point, the essential point is to determine whether or not the lease is at market rent?

A. [Lorms] That’s exactly right” (Supp. p. 41; BTA Tr, p. 161).

In *Berea*, supra, this Court held that the opinion of some appraiser cannot be used to discredit the sale price under R.C. 5713.03. This Court held that where there is an arm’s-length sale it is

improper to consider an “appraisal” of the property or to consider “whether market rent or actual rent should be used in a property appraisal” in determining the true value of the property. According to the Court:

[P15] Consequently, *Wynwood Apts.* and similar cases addressing whether market rent or actual rent should be used in a property appraisal do not apply to situations in which the property has been recently sold in an arm’s-length transaction. Indeed, as this court has often observed, ‘appraisals based upon factors other than sales price are appropriate for use in determining value only when no arm’s-length sale has taken place, or where it is shown that the sales price is not reflective of the true value.’ [Appellant attempts to rely on *Wynwood Apts.* in its brief at p. 37)

[P16] Since the property at issue here had been sold in a recent arm’s-length transaction, we do not need to determine whether actual rent or market rent should have been used in the property appraisal.”

The *Berea* case dealt with the sale of a Kmart store that was subject to a long-term lease, which was what Appellant calls a “build-to-suit lease” - in other words, the property was built for Kmart just as Appellant’s property was built for Walgreens. Kmart also happens to have subleased a small portion of the property to Burger King [P13]. The fact that a small portion of the property in *Berea* was subleased and Appellant’s property is not subleased does not constitute a rational basis for making a distinction between the two cases for the purposes of R.C. 5713.03.

Appellant also claims that the sale price cannot be used to value his property under the principles set forth in *Alliance Towers Ltd. v. Stark Cty. Bd. of Revision*, *supra*, because the sale did not involve the fee simple unencumbered because of the lease on the property (proposition of law number VI, brief, p. 36). In *Berea*, *supra*, at [P14], this Court noted that principles of *Alliance*

Towers apply “where the property had not been sold in a recent arm’s-length transaction between willing parties.” Appellant’s property, of course, sold in a recent arm’s-length transaction between willing and unrelated parties. *Alliance Towers* also dealt with “the true value of federally subsidized housing under R.C. 5713.03.” In exchange for HUD mortgage insurance and rent subsidies, the property owner “must accept a regulatory agreement which embodies the management requirements *** and which controls to whom and under what conditions an apartment may be rented” (p. 21). In citing from *Canton Towers, Ltd. v. Bd. of Revision* (1983), 3 Ohio St. 3d 4, 3 OBR 302, 444 N.E. 2d 1027, this Court held “that the actual cost of construction, the ‘controlled’ contract rent, and the actual mortgage rate did not indicate the true value of the property,” and it noted “that the federal loan guarantees, the favorable mortgage terms, the rent subsidies, and the income tax advantages allowed the project to be built in an area which would not support market rents high enough to make the construction of the apartments feasible.” None of these facts apply to Appellant’s property or to the sale of Appellant’s property.

Reply to Appellant’s Proposition of Law No. II:

A Value In Use Or Use Value Is A Value That Is Based On A Use Other Than The Highest And Best Use Of The Property.

Appellant mistakenly claims that a value based on the sale price of its property would constitute a “value-in-use” because it was based on a “value-in-use lease” or a “build-to-suit lease” There is no such thing as a “value-in-use lease.” A “build-to-suit lease” lease is simply a lease.

A “value in use” or “use value” is based on a use that is not the highest and best use of the property. See *Meijer, Inc. v. Montgomery Cty. Bd. of Revision* (1996), 75 Ohio St. 3d 181,184-185. The “highest and best use” of real property is that use which provides the “highest present value” for the property. “Highest and best use” is defined in *Youngstown Sheet & Tube Co. v. Bd. of*

Revision (1981), 66 Ohio St. 2d 398, 400 (footnote 3), as “[t]hat reasonable and probable use that will support the highest present value *** as of the effective date of appraisal.”

Walgreens, the tenant of the property, is using the property for the “highest and best use” of the property according to Appellant’s own appraiser (Lorms’ report, Supp. p. 102), so there can be no value in use or use value issue at all. Notwithstanding the fact that Cougill never testified, it appears clear that sale price of the property was based upon a use of the property “that will support the highest present value *** as of the effective date of appraisal,” which is the present use of the property.

Reply to Appellant’s Proposition of Law No. III:

A Claim That A Sale Price Is Based On The Credit Worthiness Of A Tenant Is Not Sufficient To Preclude The Use Of The Sale Price To Value The Property For Tax Purposes Under R.C. 5713.03.

Appellant claims (brief, p. 25) that using the sale price to value his property is like using gross sales or sales per square foot to value the property, which was addressed by this Court in *Higbee Co. v. Cuyahoga Cty. Bd. of Revision*, 107 Ohio St.3d 325, 2006 Ohio 2, 839 N.E.2d 385 (motion for reconsideration den., 108 Ohio St. 3d 1490, 2006 Ohio 962, 843 N.E.2d 795). In *Higbee*, this Court was critical of the use of “sales per square foot as a factor to determine [true] value” because the actual sales of the retail user of the property may reflect the value of the “business” conducted on the property rather than the value of the real estate itself [P42]. According to this Court: “If it is the real property that is being valued, its valuation cannot be made to vary depending on the success or lack thereof of the businesses located on the property” [P44].

Once again, Appellant cannot claim that the sale price of his property was based on the “credit worthiness” of the tenant, Walgreens, or on anything else the tenant did or on how the tenant

makes use of the property, because Coughill never testified that this was the case. Furthermore, Appellant failed to establish what part of the sale price may have been attributable to the real estate and what part attributable to the “credit-worthiness” of Walgreens. If Appellant’s appraiser, Lorms, is to be believed, then \$1.3 million of the sale price of \$3.9 million is based on the real estate and the rest on the “credit-worthiness” of Walgreens. This claim appears to be inherently unreliable and irrational. At the very least, there is no credible evidence to support the claim.

Finally, Appellant relies on the opinion of its appraiser that the credit-worthiness of the actual tenant (Walgreens) is greater than the credit-worthiness of some other usual or typical tenant (brief, p. 26), and thus the sale price was higher than would be expected or anticipated to be the case. This is essentially the same thing as the appraiser claiming that, in his or her opinion, the sale price cannot be used to value the property because the actual rent is greater than the appraiser’s opinion of market rents for the property. This is the claim that was rejected in *Berea*, supra.

Reply to Appellant’s Proposition of Law No. IV:

An Arm’s-Length Sale Between Unrelated Parties With No Prior Dealings Is Not A Sale/Leaseback Transaction.

Appellant claims that the sale of its property is similar to the “sale/leaseback transaction” which was addressed by this Court in *Strongsville Bd. of Educ. v. Cuyahoga County Bd. of Revision*, 112 Ohio St. 3d 309, 2007 Ohio 6, 859 N.E.2d 540. In *Strongsville*, this Court affirmed the decision of the BTA which held that a sale made under “duress” was not a valid sale for purposes of R.C. 5713.03. According to this Court:

“[P15] The BTA specifically determined that the sale-leaseback transaction was marked by the presence of duress. This finding is sufficiently supported by the evidence presented to the BTA.

[P16] A sale conducted under duress is characterized by ‘compelling business circumstances * * * clearly sufficient to establish that a recent sale of property was neither arm's-length in nature nor representative of true value.’”

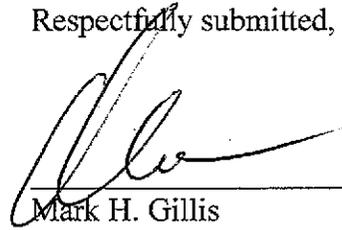
Appellant does not claim that he was compelled to purchase the property under “the presence of duress” or that there were “compelling business circumstances” which made it necessary that he purchase the property. Furthermore, the sale of Appellant’s property was clearly not similar to a “sale/leaseback transaction.” As far as the evidence shows, the sale of Appellant’s property was nothing more than a straight-forward arm’s-length sale between unrelated parties.

Even if the sale had been similar to a sale/leaseback transaction the sale would not have fallen outside the scope of R.C. 5713.03. The BTA has held numerous times that a sale and leaseback transaction can be an arm’s-length transaction for purposes of R.C. 5713.03. See *Worthington City School District Board of Education vs. Franklin County Board of Revision, et al.* (January 7, 2005), BTA Case No. 2003-A-1494, unreported, 2005 Ohio Tax Lexis 17 (“While we do not agree that the sale/leaseback nature of the subject sale causes it to lose its arm’s-length nature, we are mindful that certain types of transactions, albeit arm’s-length transactions, call into question whether the sale price reflects the true value of the property. ***”).

CONCLUSION

For the reasons set forth herein, this Court is respectfully requested to affirm the decision of the Ohio Board of Tax Appeals, which accepted the sale price of Appellant’s property as the best evidence of the true value in money of the property for real property tax purposes.

Respectfully submitted,

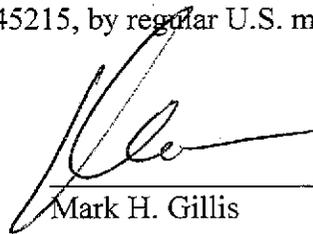


Mark H. Gillis (0066908)
Rich, Crites & Dittmer, LLC
300 East Broad Street, Suite 300
Columbus, Ohio 43215
(614) 228-5822

Attorneys for Appellees
Board of Education of the Columbus
City School District and the
Board of Education of the South-
Western City School District

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing brief was served upon Nicholas M.J. Ray, 3001 Bethel Road, Suite 208, Columbus, Ohio, 43220, and Paul M. Stickel, 373 South High Street, 20th Floor, Columbus, Ohio 45215, by regular U.S. mail, postage prepaid, this 17th day of October, 2007.



Mark H. Gillis

ORC Ann. 5713.03 (2007)

§ 5713.03. Taxable valuation of real property

The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the true value of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon and the current agricultural use value of land valued for tax purposes in accordance with section 5713.31 of the Revised Code, in every district, according to the rules prescribed by this chapter and section 5715.01 of the Revised Code, and in accordance with the uniform rules and methods of valuing and assessing real property as adopted, prescribed, and promulgated by the tax commissioner. He shall determine the taxable value of all real property by reducing its true or current agricultural use value by the percentage ordered by the commissioner. In determining the true value of any tract, lot, or parcel of real estate under this section, if such tract, lot, or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor shall consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes. However, the sale price in an arm's length transaction between a willing seller and a willing buyer shall not be considered the true value of the property sold if subsequent to the sale:

(A) The tract, lot, or parcel of real estate loses value due to some casualty;

(B) An improvement is added to the property. Nothing in this section or section 5713.01 of the Revised Code and no rule adopted under section 5715.01 of the Revised Code shall require the county auditor to change the true value in money of any property in any year except a year in which the tax commissioner is required to determine under section 5715.24 of the Revised Code whether the property has been assessed as required by law.

The county auditor shall adopt and use a real property record approved by the commissioner for each tract, lot, or parcel of real property, setting forth the true and taxable value of land and, in the case of land valued in accordance with section 5713.31 of the Revised Code, its current agricultural use value, the number of acres of arable land, permanent pasture land, woodland, and wasteland in each tract, lot, or parcel. He shall record pertinent information and the true and taxable value of each building, structure, or improvement to land, which value shall be included as a separate part of the total value of each tract, lot, or parcel of real property.

HISTORY:

RS § 2790; S&C 1450; 77 v 130; 87 v 76; GC § 5554; 107 v 29; Bureau of Code Revision, 10-1-53; 127 v 65; 128 v 410 (Eff 11-4-59); 131 v 1329 (Eff 11-5-65); 135 v S 423 (Eff 7-26-74); 136 v H 920 (Eff 10-11-76); 137 v H 1 (Eff 8-26-77); 140 v H 260. Eff 9-27-83.

5703 Department of Taxation
Chapter 5703-25 Public Utility Property Tax

OAC Ann. 5703-25-05 (2007)

5703-25-05. Definitions.

As used in rules 5703-25-05 to 5703-25-17 of the Administrative Code:

(A) "True value in money" or "true value" means one of the following:

(1) The fair market value or current market value of property and is the price at which property should change hands on the open market between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having a knowledge of all the relevant facts.

(2) The price at which property did change hands under the conditions described in section 5713.03 of the Revised Code, within a reasonable length of time either before or after the tax lien date, unless subsequent to the sale the property loses value due to some casualty or an improvement is added to the property.

(B) In compliance with the provisions of sections 5713.01, 5713.03, 5715.01 and 5715.24 of the Revised Code, the "taxable value" of each parcel of real property and the improvements thereon shall be thirty-five per cent of the "true value in money" of said parcel as of tax lien date in the year in which the county's sexennial reappraisal is or was to be effective beginning with the tax year 1978 and thereafter or in the third calendar year following the year in which a sexennial reappraisal is completed beginning with the tax year 1978.

(C) "Computer assisted appraisal systems" - A method in which the value of a property is derived by any or all of the following computerized procedures:

(1) Multiple regression analysis using sales to form the data base for valuation models to be applied to similar properties within the county.

(2) Computerized cost approach using building cost and other factors to value properties by the cost approach as defined in this rule.

(3) Computerized market data approach where a subject property is valued by adjusting comparable sales to subject by adjustments based on regression or other analyses.

(4) Computerized income approach using economic and income factors to estimate value of properties.

(5) Computerized market analysis to provide trend factors used by appraisers as basis of market valuation.

(D) "Cost approach" - A method in which the value of a property is derived by estimating the replacement or reproduction cost of the improvements: deducting therefrom the estimated physical depreciation and all forms of obsolescence if any; and then adding the market value of the land. This approach is based upon the assumption that the reproduction cost new normally sets the upper limit of building value provided that the improvement represents the highest and best use of the land.

(E) "Effective tax rate" - Real property taxes actually paid expressed as a percentage rate in terms of actual true or market value rather than the statutory rate expressed as mills levied on taxable or assessed value. In Ohio four factors must be considered in arriving at the effective tax rate:

(1) The statutory rate in mills;

(2) The composite tax reduction factor as calculated and applied under section 319.301 of the Revised Code;

(3) The percentage rollback prescribed by section 319.302 of the Revised Code;

(4) The prescribed assessment level of thirty-five per cent of true or market value.

(F) "Income approach" - An appraisal technique in which the anticipated net income is processed to indicate the capital amount of the investment which produces the net income. The reliability of this technique is dependent upon four conditions:

(1) The reasonableness of the estimate of the anticipated net annual incomes;

(2) The duration of the net annual income, usually the economic life of the building;

(3) The capitalization (discount) rate;

(4) The method of conversion (income to capital).

(G) "Market data approach" - An appraisal technique in which the market value estimate is predicated upon prices paid in actual market transactions and current listings, the former fixing the lower limit of value in a static or advancing market (price wise), and fixing the higher limit of value in a declining market; and the latter fixing the higher limit in any market. It is a process of correlation and analysis of similar recently sold properties. The reliability of this technique is dependent upon:

(1) The degree of comparability of each property with the property under appraisal;

(2) The time of sale;

(3) The verification of the sale data;

(4) The absence of unusual conditions affecting the sale.

(H) "Replacement cost"

(1) The cost that would be incurred in acquiring an equally desirable substitute property;

(2) The cost of reproduction new, on the basis of current prices, of a property having a utility equivalent to the one being appraised. It may or may not be the cost of a replica property;

(3) The cost of replacing unit parts of a structure to maintain it in its highest economic operating condition.

History: Eff 10-20-81; 9-18-03.

Rule promulgated under: RC 5703.14.

Rule authorized by: RC 5703.05.

Rule amplifies: RC 5713.01, 5715.01 Replaces: 5705-3-01 R.C. 119.032 review dates: 09/18/2008.

Almondtree Apartments of Columbus, Ltd., Appellant-Appellee, v. Board of Revision of Franklin County et al., Appellees-Appellants

No. 87AP-1216

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

1988 Ohio App. LEXIS 2665

June 28, 1988, Decided

PRIOR HISTORY: [*1] APPEAL from the Board of Tax Appeals.

DISPOSITION: *Board of Tax Appeals' decision reversed and remanded.*

LEXISNEXIS® HEADNOTES

+ [Show](#)

COUNSEL: FRED SIEGEL CO., L.P.A., and MR. WAYNE E. PETKOVIC, for appellee.

MR. MICHAEL MILLER, Prosecuting Attorney, and MR. JAMES R. GORRY; MESSRS. TEAFORD, RICH, BELSKIS, COFFMAN & WHEELER, MR. JEFFREY A. RICH and MR. GARY H. DICKER, for appellants.

JUDGES: McCORMAC, J., STRAUSBAUGH and REILLY, JJ., concur.

OPINION BY: McCORMAC

OPINION

OPINION

McCORMAC, J.

The Columbus Board of Education, the Franklin County Auditor, and the Franklin County Board of Revision, appellants, appeal the Board of Tax Appeals' assessment for property tax purposes of the Almondtree Apartments, appellee, for the tax year 1985.

Appellants assert the following assignments of error:

"I. The Board of Tax Appeals unreasonably and unlawfully rejected the arm's-length sale of real property as the best evidence of the true value in money of the property.

"II. The Board of Tax Appeals unreasonably and unlawfully erred in finding this was not an arm's-length sale.

"III. The Board of Tax Appeals erred unreasonably and unlawfully in setting aside sworn testimony declared under penalty of perjury on the real property conveyance fee statement of value, that [*2] the sale price in this transaction was \$ 3,475,000 for the real property, and instead unreasonably and unlawfully relied on the hearsay evidence of the appraiser who had not spoken with the buyer or seller and yet concluded that this was not an arm's-length transaction.

"IV. The Board of Tax Appeals decision was unreasonable and unlawful in finding that the

testimony of the appraiser was competent on the crucial issue of whether or not this was an arm's-length sale.

"V. The Board of Tax Appeals unreasonably and unlawfully erred finding that the buyer and the seller in the sale which is the subject of this case were affiliated, despite the fact there was no evidence in the record to support such a finding, except unsupported hearsay and irrelevant statements.

"VI. The Board of Tax Appeals unreasonably and unlawfully in [sic] erred in holding on page 4 of its decision that the inclusion of certain items 'have artificially inflated the sale price of the realty,' in that there was no evidence to support this conclusion.

"VII. The decision of the Board of Tax Appeals was unreasonable and unlawful.

"VIII. The decision of the Board of Tax Appeals was against the manifest weight [*3] of the evidence.

"IX. The decision of the Board of Tax Appeals was contrary to law."

The Columbus Board of Education filed a complaint about the tax valuation of the Almondree Apartments for the tax year 1985 with the Franklin County Auditor. It sought to increase the true value of the property to the sale price obtained on January 17, 1985. The property's general warranty deed and real property conveyance fee statement both stated that the apartments were sold on January 17, 1985, at a purchase price of \$ 3,475,000. After considering and investigating the complaint, the Board of Revision increased the market value of the property for tax purposes to \$ 3,475,000, the sale price. The Almondree Apartments appealed this decision to the Board of Tax Appeals which found, after a hearing, that the January 17, 1985 transfer was not an arm's-length sale, but that it was a resyndication and included nonreal estate items which artificially inflated the sale price of the realty. The Board of Tax Appeals relied on the property value calculated by an appraiser hired by the Almondree Apartments. He testified that the subject property had a true value on January 1, 1985, of \$ 2,770,000, which [*4] the Board of Tax Appeals found was approximately the value of the property.

The nine assignments of error deal with the same issue and, thus, will be considered together. Appellants argue, in essence, that the Board of Tax Appeals unreasonably and unlawfully found that the sale of the real property was not the best evidence of the true value of the property. They allege that the Board of Tax Appeals mistakenly relied on the testimony of the appraiser despite the fact that the only evidence in the record to support that testimony was unsupported hearsay and irrelevant statements.

The determination of the fair market value of real property by the Board of Tax Appeals is a question of fact which is primarily within the province of the board. The court will not disturb it unless it affirmatively appears from the record that such decision is unreasonable and unlawful. Cardinal Federal S. & L. Assn. v. Bd. of Revision (1975), 44 Ohio St. 2d 13.

A property's recent sales price in an arm's-length transaction is considered to be the best, though not the only, evidence of the "true value of real property for tax purposes." A review of independent appraisals is appropriate where it is [*5] shown that the sale price does not reflect true value. Ratner v. Stark Cty. Bd. of Revision (1988), 35 Ohio St. 3d 26 ("Ratner II"), citing with approval Ratner v. Stark Cty. Bd. of Revision (1986), 23 Ohio St. 3d 59 ("Ratner I").

An arm's-length transaction is defined as an actual sale of property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so Ratner II citing with approval State, ex rel. The Park Investment Co. v. Bd. of Tax Appeals (1964), 175 Ohio St. 410, 412.

According to Tele-Media Co. v. Lindley (1982), 70 Ohio St. 2d 284, a taxpayer has the burden of proof to establish that a recent sale is not the best evidence of a property's value.

The Board of Tax Appeals found that the January 17, 1985 sale of the apartment complex was not an arm's-length sale. It found that the prior owners of the apartment complex and the current owners of the apartment complex are partnerships. It stated that:

"* * * However, some of the parties in the new partnership were also affiliated with the old partnership. The sale herein was not in cash but was in essence a resyndication. [*6] It included such non real estate items as warranty for workmanship, labor and materials, financing fees, guarantees for additional working capital, fees for organizational costs, and fees for guarantee of the first mortgage. The inclusion of these items have artificially inflated the sale price of the realty. * * *"

The Board of Tax Appeals based this statement on the testimony of the appraiser hired by the current apartment complex owners and the appraisal of the same appraiser.

The appraiser compiled his information according to his testimony from a review of the sales contract and the closing statement. However, neither of these two documents were presented at the hearing before the Board of Tax Appeals. Neither was there testimony from any of the parties involved in the sales transaction. Thus, the appraiser's opinion, that this sale was not an arms-length sale but that it was a resyndication, is only supported by hearsay or double hearsay evidence.

An administrative agency is not bound by strict rules of evidence in its proceedings. Ohio Bell Tel. Co. v. Pub. Util. Comm. (1984), 14 Ohio St. 3d 49. The hearsay rule is relaxed in administrative proceedings, but the discretion [*7] to consider hearsay evidence cannot be exercised in an arbitrary manner. Haley v. Ohio State Dental Bd. (1982), 7 Ohio App. 3d 1.

The entire testimony of the appraiser, relating to the key issue of whether the recent sale was an arm's-length transaction, was based upon the rankest type of hearsay. The appraiser relied solely on statements of employees of the taxpayer and the evaluation of documents not placed into evidence. In our opinion, the Board of Tax Appeals acted in an arbitrary manner when it relied on an appraiser's testimony that was strictly hearsay without requiring the production of any underlying documents or the testimony of parties to the sales transaction. The opinions of the appraiser about the identity of the parties to the sale or the nature of the transaction is not sufficient to carry the taxpayer's burden absent production of the underlying data that provides support for the naked opinions of the appraiser, partly, at least, of which are outside his areas of expertise.

The apartment owners argue, and we agree, that the function of this court is not to substitute its judgment on factual issues for that of the Board of Tax Appeals. Citizens Financial Corp. v. Porterfield (1971), 25 Ohio St. 2d 53. However, the Board of Tax Appeals' decision must be supported by competent and probative evidence, Hatchadorian v. Lindley (1986), 21 Ohio St. 3d 66, or credible and substantial evidence, Bd. of Revision v. Federal Reserve Bank (1968), 16 Ohio St. 2d 42. If not, the Board of Tax Appeals decision is unreasonable or unlawful and must be reversed.

Thus, the taxpayer did not carry his burden of proof that the appraisal rather than the recent sales price is the best evidence of the land's value. The Board of Tax Appeals' decision, that the value of the property for tax purposes as of January 1, 1985 is \$ 2,775,000, is unreasonable and unlawful.

Appellants' assignments of error are sustained to the extent indicated. The decision of the Board of Tax Appeals is reversed and the cause remanded to the Board of Tax Appeals for further procedure consistent with this opinion.

Worthington City School District Board of Education, Appellant, vs. Franklin County Board of Revision, Franklin County Auditor, and CAR JMC, LLC, Appellees.

CASE NO. 2003-A-1494 (REAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

2005 Ohio Tax LEXIS 17

January 7, 2005, Entered

[*1]

APPEARANCES:

For the Appellant -- Bricker & Eckler LLP, Mark A. Engel, 100 South Third Street, Columbus, Ohio 43215-4291

For the County Appellees -- Ron O'Brien, Franklin County Prosecuting Attorney, Richard F. Hoffman, Assistant Prosecuting Attorney, 373 South High Street, Columbus, Ohio 43215

For the Appellee Property Owner -- Rich, Crites & Dittmer, LLC, Mark H. Gillis, 300 East Broad Street, Suite 300, Columbus, Ohio 43215-3756

OPINION:

DECISION AND ORDER

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

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant, from a decision of the Franklin County Board of Revision. In said decision, the board of revision determined the taxable value of the subject property for tax years 2001 and 2002.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the county board of revision, the evidence and testimony presented at a hearing before this board, and the briefs filed by counsel to all parties.

The property in question is located in the city of Worthington -- Worthington city school [*2] district taxing district and appears on the auditor's records as parcel numbers 100-2999, 100-2440, 100-2127, 100-3931, 100-2798, and 100-3942. Located on the subject 420, 400 square feet of property is an automobile dealership, which includes four buildings, originally built in 1958 and 1963, and renovated in 1997 and 1998.

The value for the subject parcels for tax years 2001 and 2002, as determined by the county auditor and retained by the board of revision, is as follows:

PARCEL # 100-2999

	2001		2002	
	TRUE VALUE	TAXABLE VALUE	TRUE VALUE	TAXABLE VALUE
Land	\$ 78,800	\$ 27,580	\$ 86,700	\$ 30,350
Bldg	363,800	127,330	400,200	140,070
Total	\$ 442,600	\$ 154,910	\$ 486,900	\$ 170,420

PARCEL # 100-2440

	2001	2002
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	TRUE VALUE	TAXABLE VALUE	TRUE VALUE	TAXABLE VALUE
Land	\$ 87,400	\$ 30,590	\$ 96,100	\$ 33,640
Bldg	-0-	-0-	-0-	-0-
Total	\$ 87,400	\$ 30,590	\$ 96,100	\$ 33,640

PARCEL # 100-2127

	2001		2002	
	TRUE VALUE	TAXABLE VALUE	TRUE VALUE	TAXABLE VALUE
Land	\$ 685,000	\$ 239,750	\$ 753,500	\$ 263,730
Bldg	1,930,800	675,780	2,123,900	743,370
Total	\$ 2,615,800	\$ 915,530	\$ 2,877,400	\$ 1,007,100

PARCEL # 100-3931

	2001		2002	
	TRUE VALUE	TAXABLE VALUE	TRUE VALUE	TAXABLE VALUE
Land	\$ 284,200	\$ 99,470	\$ 312,600	\$ 109,410
Bldg	-0-	-0-	-0-	-0-
Total	\$ 284,200	\$ 99,470	\$ 312,600	\$ 109,410

PARCEL # 100-2798

	2001		2002	
	TRUE VALUE	TAXABLE VALUE	TRUE VALUE	TAXABLE VALUE
Land	\$ 326,200	\$ 114,170	\$ 358,800	\$ 125,580
Bldg	86,800	30,380	95,500	33,430
Total	\$ 413,000	\$ 144,550	\$ 454,300	\$ 159,010

PARCEL # 100-3942

	2001		2002	
	TRUE VALUE	TAXABLE VALUE	TRUE VALUE	TAXABLE VALUE
Land	\$ 161,000	\$ 56,350	\$ 177,100	\$ 61,990
Bldg	239,000	83,650	268,100	93,840
Total	\$ 400,000	\$ 140,000	\$ 445,200	\$ 155,830

[*3]

The appellant board of education contends that the auditor and the board of revision have undervalued the parcels in question (\$ 4,243,00 for 2001, \$ 4,672,500 for 2002) by not relying upon the price for which the subject property sold on September 24, 2001, i.e., \$ 7,800,000, as the indicator of its value on the tax lien dates in question.

Before turning to the merits of this case, we must first rule upon the admissibility of the testimony of appellant's expert witness who appeared before this board's attorney examiner at hearing, as well as the exhibit about which he testified, an appraisal, namely Ex. 3. Specifically, counsel to both the county appellees and the property owner objected to the testimony of such witness, Mr. John Garvin, MAI, a state-certified appraiser in Ohio, who critiqued an appraisal done on the subject by another appraiser.

First, the appellees claim that since the appraiser was not identified by appellant's counsel as a potential witness who would testify before this board, pursuant to Ohio Adm. Code 5717-1-11 (A)(5), his testimony should not have been permitted. Such rule specifically provides that "in all events, the identity of the expert and the written [*4] valuation reports shall be provided to counsel seven days prior to hearing, except as otherwise ordered by the attorney examiner." Apparently, appellant's counsel had previously identified Mr. Garvin to opposing counsel, but, at a later time, updated his witness list to indicate that he did not intend to call any expert

witnesses. Appellant's counsel, in his brief, indicated that the appraiser had been disclosed to all opposing parties not only two weeks prior to the hearing, but also five days n1 before the hearing. Appellant's brief at 15. That contention is partially supported by a copy of a letter, dated June 1, 2004, from appellant's counsel to the county appellees' counsel, with a copy to the property owner's counsel, that updated earlier discovery responses by indicating that the appraiser would be called to provide an opinion of value regarding the subject property. Appellant's brief attachment. However, another letter dated June 7, 2004, from appellant's counsel to this board, with copies to the appellees' counsel, indicates that the appellant did "not anticipate the testimony of any witnesses during our case in chief." Appellees' brief attachment. Thus, based upon the pronouncement [*5] by appellant's counsel seven days prior to the hearing in this matter, it could not be anticipated that the appraiser would testify.

n1 There is nothing in the record to support appellant's counsel's statement that opposing counsel had been notified five days before the hearing of appellant's intention to call Mr. Garvin as a witness.

Further, appellees object to the admission of Ex. 3, an appraisal report prepared by Steven Sullivan, an appraiser who did not appear before this board. Appellant's counsel had notified appellees' counsel five days prior to the scheduled hearing in this matter that the appraisal report was a possible exhibit to be used at hearing on June 9, 2004.

Considering the objections to Ex. 3 first, this board finds that although the report was not provided within the seven days prior to the hearing, it was identified in sufficient time for counsel to be aware of the appellant's intention to use it at hearing. As the exhibit was produced by the appellee property owner through discovery, clearly the appellee property owner should have been aware of its contents. In fact, the property owner obtained its own documents to rebut some of the contents of Ex. 3. [*6] Thus, the property owner clearly had sufficient time to tailor its case to address appellant's Ex. 3. With regard to the county appellees, their counsel was also given sufficient time to review the report's contents and prepare for its use at hearing. As no specific prejudice with regard to the appraisal report was claimed by the appellees (other than the failure to provide the report in a timely fashion), this board hereby receives Ex. 3 into evidence.

With regard to the testimony of appellant's witness, Mr. Garvin, we will allow his testimony to remain a part of the record. First, appellees claim that Mr. Garvin's testimony violates the provisions of Ohio Adm. Code 5717-1-11(A)(5). We disagree, at least with respect to the property owner. The rule cited by the appellees deals with obligations of parties arising from discovery. The record demonstrates that only the appellant and the county appellees propounded discovery requests in this matter, and, as such, only the county appellees can properly argue that they should have been notified of the intent to present Mr. Garvin's testimony, pursuant to such rule. As we stated in *NACCO Industries v. Tracy* (June 7, 1996), BTA No. 1995-K-1210, [*7] unreported, affirmed on other grounds (1997), 79 Ohio St.3d 314, "the language included within this section will not be construed by this Board to permit a party which has not attempted to learn the identity of witnesses through discovery, to achieve, as a sanction, the exclusion of an expert witness at hearing."

Further, neither the county appellees nor the appellee property owner has demonstrated any specific prejudice that was caused to their respective cases by the appearance of Mr. Garvin as a witness. See *NAACO*, supra. We note that opposing counsel did not request additional time to prepare for the cross examination of Mr. Garvin. In addition, although told that Mr. Garvin had a copy of his own summary report with him, opposing counsel never asked him to produce a copy for their review. n2 Cf. *Lake Ambulatory Care Center v. Cuyahoga Cty. Bd. of Revision* (Jan. 13, 1995), BTA No. 1993-X-851, unreported. If appellees' counsel felt their cases had been prejudiced by Mr. Garvin's appearance and testimony, they had ample opportunity to request specific action from this board to remedy the perceived inequities, beyond striking his testimony from the [*8] record. They made no such requests.

n2 We note that although Mr. Garvin apparently prepared a summary report of his conclusions regarding Ex. 3, it was never offered into evidence at hearing, and, as such, there is no requirement that it be turned over to opposing counsel.

In summary, when considering objections to certain evidence or testimony presented, this board will not condone the disregard or manipulation of this board's rules to create an advantage for one party over another. n3 However, we must also consider the circumstances in question, and weigh this board's need to receive the facts and evidence against a party's need to adequately prepare its case prior to hearing. In the instant matter, neither the county appellees nor the appellee property owner was able to demonstrate how it would be prejudiced by making Ex. 3 and Mr. Garvin's testimony a part of the record. Without such a showing, this board will overrule counsel's objections and make both a part of the instant record.

n3 In fact, whether deliberate or unintentional, we take a critical view of appellant's counsel's failure to meet the deadlines, set out in this board's rules, for providing information regarding witnesses and evidence to be presented at hearing. In the future, such actions could warrant the imposition of sanctions. [*9]

Having made the foregoing determinations, we will now review how the instant matter came to this board on appeal. Specifically, the appellant board of education filed an original increase complaint against the valuation of the subject parcels with the Franklin County Board of Revision. S.T. at Ex. 1. The BOE sought to increase the subject's value to reflect its recent sale price, as listed on the conveyance fee statement from the sale. S.T. at Ex. 10(B). A counter complaint was filed by the property owner, CAR JMC, LLC & Jack Maxton Chevrolet, wherein it indicated that it believed the auditor's valuation of the subject property was correct, stating "the property transferred sic on 9-24-01 for \$ 7,800,000 in a sale-leaseback transaction, the transfer price of which had nothing to do with the FMV of the property." S.T. at Ex. 4.

At the board of revision hearing on October 1, 2003, the property owner, as represented by the general manager and CFO of the company as well as its counsel, appeared. The board of education's counsel also appeared. Included in the statutory transcript from the board of revision proceedings are the exhibits presented by the parties, including the deed for the [*10] property, the purchase agreement and closing statement from the sale under consideration, a copy of the memorandum of lease and lease of the subject, a guaranty & subordination and owner's certificate from the sale, and the post-closing agreement. S.T. at Ex. 10(B), Ex. 10(1-2, 4-8). Upon consideration of the record before it, the county board of revision questioned the arm's-length nature of the subject sale and did not believe the sale could be relied upon as a basis for valuation, and, accordingly, made no change to the auditor's valuation. S.T. at Ex. 8.

In our review of this matter, we initially note the decisions in Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (1994), 68 Ohio St.3d 336, 337, and Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision (1994), 68 Ohio St.3d 493, 495, wherein the Supreme Court held that an appealing party has the burden of coming forward with evidence in support of the value which it has claimed. Once competent and probative evidence of true value has been presented, the opposing parties then have a corresponding burden of providing evidence which rebuts appellant's evidence [*11] of value. Id.; Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision (1988), 37 Ohio St.3d 318, 319.

Further, when determining value, the Supreme Court has on numerous occasions held that "the best evidence of true value in money' of real property is an actual, recent sale of the property in an arm's-length transaction." Conalco v. Bd. of Revision (1977), 50 Ohio St.2d 129; State ex rel. Park Investment Co. v. Bd. of Tax Appeals (1964), 175 Ohio St. 410; Pingue v. Franklin Cty. Bd. of Revision (1999), 87 Ohio St.3d 62. See, also, Reynoldsburg Bd. of Edn. v. Licking Cty. Bd. of Revision (1997), 78 Ohio St.3d 543; Dublin-Sawmill Properties v. Franklin Cty. Bd. of Revision (1993), 67 Ohio St.3d 575. "An arm's-length sale is characterized by these elements: it is voluntary, i.e., without compulsion or duress; it generally takes place in an open

market; and the parties act in their own self-interest." Walters v. Knox Cty. Bd. of Revision (1988), 47 Ohio St.3d 23. [*12]

It is also well established that when a sale occurs, there is a rebuttable presumption the sale price reflects the true value of the property in question. However, the presumption that the sale price is the best evidence of value is rebuttable when "another indicator is a more accurate representative of that value." Tele-Media Co. v. Lindley (1982), 70 Ohio St.2d 284. Consequently, it is the burden of a party who claims that a sale is other than arm's length to meet such presumption. However, the burden of persuasion does not change, as it is still on the appealing party, the board of education, to establish, through the presentation of competent and probative evidence, a different value than that found by the board of revision. See Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision (1997), 78 Ohio St.3d 325; Bd. of Edn. of the Columbus City School Dist. v. Franklin Cty. Bd. of Revision (Nov. 28, 1997), BTA No. 1996-S-93, unreported.

The board of education seeks application of the presumption by this board herein, and has supported its position with evidence of the sale of the subject real property for \$ 7,800,000. [*13] The appellees argue that the subject sale was not arm's length. We disagree.

Generally, an arm's-length sale is voluntary, i.e., without compulsion or duress, takes place in an open market, and the parties act in their own self-interest. Walters, supra. There is nothing in the record to indicate that these indicia were not present in the transaction under consideration. While there was testimony that a minimum sale price was determined based upon the property owner's "estimate to pay off all * * * debts, * * * unsecured loans, * * * approximately eight million," there was no evidence that the property owner's actions rose to the level of compulsion or duress. H.R. at 33. The appellees also claim that because the property, which was never offered on the open market, was sold privately, the sale cannot be considered arm's length. However, this board has previously held that a sale need not necessarily be advertised on the open market for it to qualify as arm's length. See MACQ Inc. v. Marion Cty. Bd. of Revision (Sept. 11, 1998), BTA No. 1996-K-1457, unreported. Finally, there is no evidence in the record that the parties were not acting in their own [*14] self-interest.

The appellees also point to the terms of the sale, where the seller has leased back the subject, as evidence of a "less than market" transaction. While we do not agree that the sale/leaseback nature of the subject sale causes it to lose its arm's-length nature, we are mindful that "certain types of transactions, albeit arm's-length transactions, call into question whether the sale price reflects the true value of the property. Among the types * * * prompting an investigation of the sale, is a sale-lease arrangement." S. Euclid/Lyndhurst Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (1996), 74 Ohio St.3d 314, 317. See, also, Kroger Co. v. Hamilton Cty. Bd. of Revision (1993), 67 Ohio St.3d 145; Cleveland Hts./Univ. Hts. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (1995), 72 Ohio St.3d 189. Clearly, the details of the sale/leaseback must be reflective of market rates and terms for the sale price to be equally reflective of market value.

In support of the validity of the sale price as reflective of the market, the board of education offered an appraisal report that was done on [*15] the subject just prior to the sale. However, for a variety of reasons, this board cannot rely upon the value established in such report as a basis for our valuation determination, regardless of the fact that another expert appraiser endorsed the conclusions set forth therein. First, the property owner had two appraisals done on the subject property. When the first appraisal came in well short of the number needed to pay off the property owner's outstanding debt, a second appraisal was secured. H.R. at 20; S.T. at audio tape. Testimony was offered at the board of revision to indicate that the completion of the sale was dependent upon the owner finding an appraiser who could reach the number needed. S.T. at audio tape. Thus, there is a clear implication that the appraiser was given an assignment to find value for the subject at a certain amount, so that the property owner's debts could be satisfied, as a result of the sale. These facts clearly

illustrate why this board has, in the past, questioned the reliability and accuracy of appraisals done for purposes of financing. *Bowtown Apartments, Ltd. v. Delaware Cty. Bd. of Revision* (Aug. 6, 2004), BTA Nos. 2003-A-1576, et al., unreported; [*16] *Laughlin v. Erie Cty. Bd. of Revision* (Aug. 23, 1996), BTA No. 1995-S-1005, unreported. Thus, without having the appraiser appear before us to be cross-examined as to what his specific appraisal assignment was, we cannot accord much weight to the appraisal report.

Second, not only with regard to questions about how the appraiser was instructed to complete his report, but also with regard to all aspects of the report and the conclusions made therein, we find that without having the author of such report before us to give testimony about the report and further explanation about its contents, as well as to be cross examined, we are unwilling to place significant reliance upon the conclusions set forth therein. See *Horn v. Montgomery Cty. Bd. of Revision* (Oct. 1, 2004), BTA No. 2003-G-1652, unreported; *Carlyle Management Co. and L&P Valley Forge ltd. Partnership v. Cuyahoga Cty. Bd. of Revision* (Apr. 25, 1997), BTA No. 1996-T-49, unreported; *East Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (June 21, 1996), BTA No. 1994-J-458, unreported. Specifically, this board would seek further clarification on several portions of the appraisal report, including the valuation [*17] date utilized of July 19, 2001, some six months after the tax lien date in question. With regard to such date, the appraiser stated that "the market value of the subject property appraised in this report is estimated as of the aforementioned date. Constantly changing economic, social, political and physical conditions have varying effects upon real property values. Even after the passage of a relatively short period of time, property values may change substantially and require a review based on differing market conditions." Ex. 3 at 22-23. While, arguably, market conditions may have only changed minimally during those six months, it remains incumbent upon the author of the report to confirm such an outcome and justify the use of a report generated for a date other than the tax lien date in question. n4 See *Freshwater v. Belmont Cty. Bd. of Revision* (1997), 80 Ohio St.3d 26. See, also, *North Olmsted Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Feb. 2, 1996), BTA Nos. 1994-T-1055, et seq., unreported. Further, several of the sales and lease comparables utilized in the report were the subject of sale/leaseback transactions themselves, and without further [*18] information from the appraisal author to indicate that he had investigated, evaluated, and considered these circumstances in his utilization of such information in determining market rates, we cannot presume that he arrived at accurate conclusions.

n4 We acknowledge that Mr. Garvin testified to his belief that the values for the subject as of the tax lien dates in question would be the same as those derived in the appraisal report for July 2001; however, based upon our position with regard to Mr. Garvin's testimony, as set forth hereinafter, we do not find Mr. Garvin's conclusion probative.

Finally, with regard to Mr. Garvin's expert opinion of Ex. 3, the appraisal report offered to support the sale price, we do not find his conclusions probative of value. Specifically, Mr. Garvin testified that he read the report in question and "went through the various sections that relate to the preparation of the report, the background that it created and developed and presented, as far as the basis of demographics, the basis for the support of use of this special type of property, and the support of the highest and best use of this property as an automobile dealership." He then indicated [*19] that he "reviewed the various appraisal approaches: the cost approach, the market approach and the income approach, including all of the calculations in the report. Completing that work, I then rendered my opinion as to the accuracy of the report, as far as market value of the property is concerned." H.R. at 60-61. Mr. Garvin indicated that the report comported with all USPAP [Uniform Standards of Professional Appraisal Practice] requirements and that he considered the process used and conclusions rendered to be reasonable. H.R. at 96, 97. However, Mr. Garvin did not speak with the author of the report to verify any of the sales or lease information contained therein, and, although he was familiar with some of the sales and lease information, he did not take steps to verify the information on his own. H.R. at 117. Since several of the sales and lease comparables that were used in the report were the subject of sale/leaseback transactions, it is imperative that we be able to verify whether the use of such transactions could provide accurate market rates.

Thus, we find that Mr. Garvin had to assume that all of the information included in the three approaches to value was complete and [*20] accurate. As such, we are unwilling to rely upon Mr. Garvin's opinion of what is essentially a hearsay document as the basis for our valuation of the subject.

Based upon the foregoing, we find that the evidence of sale of the subject is insufficient upon which to base its real property tax valuation. Thus, we conclude that the sale price alone does not constitute sufficient, probative evidence of the subject's value. There being no other competent evidence of value offered to this board by the parties hereto, we will rely upon the board of revision's valuation of the subject. As the Supreme Court stated in Simmons v. Cuyahoga Cty. Bd. of Revision (1988), 81 Ohio St.3d 47, 49 "where the BTA rejects the evidence presented to it as not being competent and probative, or not credible, and there is no evidence from which the BTA can independently determine value, it may approve the board of revision's valuation, without the board of revision's presenting any evidence."

Accordingly, based upon the preponderance of evidence currently before this board, the value of the subject property for tax years 2001 and 2002 shall be that which was determined by the Franklin [*21] County Board of Revision. It is the decision and order of the Board of Tax Appeals that the Franklin County Auditor shall list and assess the subject property in conformity with this decision.