

IN THE SUPREME COURT OF OHIO

Cincinnati School District)
Board of Education,)
)
Appellee,)
)
vs.)
)
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

Appeal from the Ohio
Board of Tax Appeals

BTA Case No. 2005-M-1069



APPELLANTS' REPLY BRIEF

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

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

Counsel for Appellant
Anchor Lyons Limited Partnership

Counsel for Appellee
Hon. Dusty Rhodes, Hamilton
County Auditor and Board of
Revision

David DiMuzio (0034428)
David C. DiMuzio, Inc.
1900 Krgoer Building
1014 Vine Street
Cincinnati, OH 45202
(513) 621-2888

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

Counsel for Appellee
Cincinnati School District
Board of Education

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

APPELLANTS' REPLY BRIEF

The taxation of real property in Ohio was founded in and has stressed that “[1]and and improvements thereon shall be taxed by uniform rule according to value.” Ohio Const. Art. XII, § 2. Recently, the principle of uniform taxation without regard to who owns or occupies the building was reaffirmed by this Court in *Higbee Co. v. Cuyahoga Cty. Bd. of Revision* (2006), 107 Ohio St. 3d 325, wherein the Ohio Supreme Court rejected evidence of value inextricably intertwined with the non-real estate business value of the tenant. In essence what the Appellees ask of this Court is to turn a blind eye to information and conditions surrounding a sale of real property and blindly accept a sales price as the value of the property regardless of whether it results in uniform taxation and represents, in significant part, the business success of the tenant subject to a long-term lease rather than the value of the underlying real estate.

The fact that this Court has never endorsed a blind acceptance of a recorded sale price when evidence indicates that it is not reflective of the true value of the real property was just recently endorsed by this Court in *St. Bernard Self-Storage, L.L.C. v. Hamilton Cty. Bd. of Revision* (October 10, 2007), ___ Ohio St. 3d ___, 2007-Ohio-5249. In *St. Bernard*, the purchaser argued that a sale price negotiated by the buyer and seller for the real estate and reflected on the face of the sale agreement and on the conveyance fee statement should “automatically acquire the force of presumptive—if not conclusive—validity.” *St. Bernard*, ¶ 16. This Court’s response—“We disagree.” *Id.* In not endorsing such a blind acceptance of the price stated for the real estate this Court commented that while such an approach would be simple to apply, it is not appropriate. *Id.* The same situation applies in the present case. Appellants agree that just accepting the sale price would be simple—it is just not appropriate.

This Court also recently commented in *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2007), 112 Ohio St. 3d 309, that this Court's *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2005), 106 Ohio St.3d 269 decision contemplates an analysis of the transaction and not blind acceptance of a sale price. The BTA, unfortunately, in this case just blindly accepted the sale price and failed to consider the evidence indicating that the sale price did not reflect the true value of the real estate. The blind acceptance of a sale price is obviously not this Court's mandate in *Berea* as its later decisions have indicated.

Such an analysis in this case, supported by market evidence and expert testimony, proves that the sale price does not reflect only the value of the real property and the decision of the Ohio Board of Tax Appeals blindly accepting such a value without deeper analysis of the fundamentals surrounding the transaction must be over turned.

In its brief, counsel for the Appellee, Hamilton County Auditor, asks this Court to take a "reality check" and sets forth several questions for this Court's consideration. County Appellee's Brief, pg. 1. The reality, and what this Court needs to consider, in determining what the property should be valued at for tax purposes is what the market evidence shows. This market evidence, summarized from Appellants' Brief is set forth below. Again, as this Court indicated in *St. Bernard* and *Strongsville, supra*, the Court anticipated that evaluation of sales transactions, rather than blind acceptance of the transfer price, would continue after its *Berea* decision. The market evidence, detailed in the record and the cases currently before this Court, demonstrates that these transactions reflect both the business success of the tenant and the value of the real estate. Other than arguing for a blind application of the holding in *Berea* to, basically, every sale transaction in the State of Ohio, the Appellees can point to no creditable evidence indicating that these sales reflect the value of the real property.

While the issues in this case concern the assessment of a single-tenant commercial property designed and built specifically for Wal-Mart, the principles are not altogether different than those faced by the typical homeowner. Does the cost of building a home always equal its value? What if the homeowner had unique tastes, perhaps wanted stained glass in the family room, wheelchair access for a disabled family member, solar panels to generate electricity or a wine cellar dug into the basement? While most of the home would probably maintain its value, it is quite possible that a subsequent buyer of that property might not place equal value on the stained glass, wheelchair access, solar electricity or wine cellar. So the home would have one value to the user it was designed for, perhaps reflected in their costs of construction, but likely an altogether different value to another user/buyer when it came time to sell the property. This valuation situation is addressed by *The Appraisal of Real Estate*, 12th Edition, and is distinguished from the fair market value of the property in exchange.

Specifically, in addressing the use value of a property, *The Appraisal of Real Estate*, 12th Edition, pp 24-25, (emphasis added) states:

The realities of current real estate practice frequently require appraisers to consider *other types of value in addition to market value*. One of these, use value, is a concept based upon the productivity of an economic good. *Use value is the value of a specific property has for a specific use*. In estimating use value, the appraiser focuses on the value of the real estate contributes to the enterprise of which it is a part, *without regard to the highest and best use of the property* or the monetary amount that might be realized from its sale. Use value may vary depending upon the management of the property and external conditions such as changes in business operations. For example, a manufacturing plant designed around a particular assembly process may have one use value before a major change in assembly technology and another use value afterward.

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

These are some of the exact same issues to be addressed in the instant case. It is important to consider this transaction not in a vacuum, but in the context of the market as a whole. To believe that it is probable that the sale of the subject property, as a function of its value-in-use lease, further driven by the business success and creditworthiness of Wal-Mart as lessee, is equal to the value of the underlying real estate, one would have to believe many other verifiably implausible propositions, including the following:

- Is it probable that a 15,000 square foot retail building on Kenny Road in Columbus, just north of Upper Arlington, is worth the same or less than an almost identical building on South High Street in South Columbus? (Appellants' Supplement, p. 138; Lorms,¹ p. 55). No, a property on Kenny Road is not equal in value to an identical property on South High Street. For further review of this exact situation, see Sales Comparison 1 on page 21 of Appellants' Brief.
- Is it probable that a ten year old 150,000 square foot retail storeroom on Brice Road in Columbus is worth twice as much as a nearly identical building in Mill Run in Hilliard? (Appellants' Supplement, p. 136; Lorms, p. 53). No, a nearly identical property on Brice Road in Columbus is not worth twice as much as a property in Mill Run in Hilliard. For further discussion of this exact situation, see Sales Comparison 2 on page 22 of Appellants' Brief.
- Is it probable that a Walgreens drugstore at the intersection of Demorest and Clime Roads in Columbus is worth 30% more than a CVS drugstore **at the same intersection?** (see *Board of Edn. of the Columbus City Schools v. Franklin Cty. Bd. of Revision* (May 18, 2007), BTA Case Nos. 2005-R-329 and 330, unreported, *on appeal to the Ohio Supreme*

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

Court docket number 2007-1086.) No, a similar drugstore at the same intersection would not be worth 30% more than the other. For further discussion of this exact situation, see Sales Comparison 3 on page 24 of Appellants' Brief.

- Is it probable that a storeroom leased by Kmart, recently out of bankruptcy, identical in every way to a Wal-Mart storeroom right next door, under the exact same lease terms, would sell on the open market for the same amount? No, the business success and creditworthiness of Wal-Mart would result in investors being willing to pay more for the Wal-Mart property. This is in contradiction to the guidance from this Court in *Higbee* stating that the properties should be similarly valued. For further discussion of this, see the discussion of *Higbee* beginning on page 27 of Appellants' Brief.
- Is it probable that a building designed specifically for the unique needs of one user is equally valuable to another user with different needs? No, the property was specifically built to meet the unique needs of one user and is valuable to that user. That value, however, is not shared by another user without the same unique needs. *The Appraisal of Real Estate*, 12th Edition, pg. 25. See the value-in-use discussion being on page 12 of Appellants' Brief.
- Is it probable that when a build-to-suit, single tenant property encumbered by a value in use lease entered into with an investment-grade tenant as a result of the tenant's business success and creditworthiness sells it is similar, in any meaningful way, to the sale of a multi-tenant property, not designed for a single user, without a value in-use lease or a purchase price driven by the business success and creditworthiness of the multiple tenants? No, there is no similarity between these transactions. The first transaction is the one, the Auditor argues in this case, that should be relied upon to value the real property

component of the subject property before the Court while the second transaction was at issue in *Berea City Schools v. Cuyahoga Cty. Bd. of Revision* (2005), 106 Ohio St. 3d 269. See the detailed discussion of *Berea*, beginning on page 10 of Appellants' Brief.

- Is it probable that a rational buyer would pay more for real estate than the cost to build and replace the same real estate? In other words, would a rational buyer pay almost \$16,000,000 for real estate if the same buyer could build a brand new identical property for \$11,600,000 or 13,500,000—depending upon which expert's opinion of land value is used? No, no rational buyer would pay more for a property than the cost to replicate an identical new property. Such a conclusion is consistent with the Principle of Substitution set forth in *The Appraisal of Real Estate*, 12th Edition, pp. 38-39. See the discussion of the Principle of Substitution beginning on page 25 of Appellants' Brief.
- Is it probable that the auditor's own appraiser's admission that the purchase of the subject property was driven by the business success and creditworthiness of the tenant was false? No, such an opinion is correct. It is not the appraiser's role to understand that this Court's holding in *Higbee* was that the business success of the tenant shall not impact the real property value for taxation purposes. See the further discussion of *Higbee* beginning on page 27 of Appellants' Brief.
- Is it probable that in addition to all of the other taxes imposed on businesses in Ohio that are directly correlated to their success, the legislature intended that the assessment of real estate taxes should also impose additional taxes on real estate users as a function of the success of the user's business? No, the real property tax is not a tax tied to the business success of the activities conducted on or in the property but rather of the property itself.

Such is the holding of this Court in *Higbee*. See the further discussion of *Higbee* beginning on page 27 of Appellants' Brief.

The probability that any of the above propositions are true is almost non-existent. The Appellees do not offer any contradiction to the above either. The sale relied upon by the Auditor and the BTA is as a result of the market described above and reflects the business success and creditworthiness of a lessee in a build-to-suit, value in use lease. It does not only reflect the value of the real property. Furthermore, the facts and circumstances surrounding the sale in *Berea* vary significantly in this case. In short, the transfer in this case is not reflective of the true value in fee simple of the underlying real property.

As the County Appellee correctly points out on page 5 of its brief, in *Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St. 3d 26, the Court set forth a two step approach to overcoming a sale price as indicative of value. First, it must be shown that the sale price did not reflect true value. Through market evidence and expert testimony, the Appellants' have met this burden. Second, the value requested must be established. The Appellants, too, have met this requirement. As the Appellants demonstrated the merit brief, only Appellants' expert appraiser presented credible, supported evidence that fully analyzed both the market and the actual transaction before the Court and arrived at a supportable value as to the value of the real estate. See Propositions of Law VII and VIII of Appellants' Brief.

The expert's role is to summarize and analyze the facts. Only Mr. Lorms provided a foundation for his opinions and analysis. The uniqueness of the property is demonstrated in his report based upon market knowledge and inspection of the property. Based upon the testimony of Mr. Lorms and after reviewing the lease rates and market lease information, the Board of Revision concluded that this sale was **not** reflective of the true value of the property. Unlike the

BTA, the Board of Revision actually engaged in an analysis of the transaction and found that it was not reflective of the true value of the property!! The opinions and factual assertions of Mr. Lorms do not compare with the unsubstantiated claims that Ms. Ebert sets forth.

The County Appellee's brief indicates that "[o]f course, the record is replete with testimony and appraisal of Ms. Ebert, as well as the vigorous cross-examination of Mr. Lorms rebutting and disproving this unsupported theory." County Appellee's Brief, pp. 8-9.

Unfortunately, there are no citations provided that actually support such a claim. Additionally, the "unsupported theory" related to value in use versus market value is that directly set forth in *The Appraisal of Real Estate* materials cited above—hardly an "unsupported theory." The representation that the manufacturing example is not appropriate as it relates to these big box properties (County Appellee's Brief, p. 9) ignores all market evidence that the improvements do not hold the same value to the market as they do the original user—it is exactly the same situation.

Likewise, the proposition that Mr. Lorms' comparables are all abandoned properties, second tier tenants, subleases, leases restricting the leases to non-competitor (County Appellee's Brief, pg. 9) is also without any citation for support. In fact, Mr. Lorms addresses in great detail the valuation considerations in selecting comparables in his Valuation Methodology section of his report. (Appellants' Supplement, pp. 127-139, Lorms, pp. 44-56). The concern that the comparables relied upon are just failed locations is also specifically addressed by Mr. Lorms in his report. (Appellants' Supplement, pp. 152-153, Lorms, pp. 69-70). The argument is again without support and without merit.

The testimony of Ms. Ebert is internally inconsistent and unsupportable in stating that the credit of the tenant drives the market but that location is paramount without any market evidence

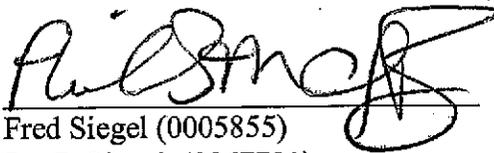
to support it. Furthermore, the claims attributed to Ms. Ebert, a county employee, by the County Appellee in its brief, while facially supporting the position of the county, lack market or factual support and should not be relied upon when the market evidence obviously supports a different conclusion.

Finally, in trying to distinguish *State ex. rel. Park Inv. Co. v. Board of Tax Appeals* (1972), 32 Ohio St. 2d 28, (discussed beginning on page 9 of Appellants' Brief), the County Appellee again argues for a position that is contrary to uniform rule. The Appellants correctly pointed out that this case established that real property is **not** to be valued based upon its current use value. The County, wanting to have valuation decisions only applied in favor of increased taxation, states that the Court in that case "was afraid that a lower value would result from a current use straight-jacket approach. Nowhere is the case does the Court infer that current use should be prohibited because a higher value might result." County Appellee's Brief, pg. 9. Summarized, the County Appellee would have this Court reject use value if it results in a lower value but finds no problem with it if it results in increased taxation!!

Furthermore, the Appellees confuse use value, a valuation construct, with highest and best use, a use construct. As quoted above, *The Appraisal of Real Estate*, 12th Edition, makes the distinction that "[i]n estimating use value, the appraiser focuses on the value of the real estate contributes to the enterprise of which it is a part, *without regard to the highest and best use of the property.*" *The Appraisal of Real Estate*, 12th Edition, p. 24. If highest and best use and use value were the same thing, there would be no need for such a distinction. The value is use is focused on the current user of the property; not the market use for the property. These are two different things.

The Appellants request that this Court refuse to sanction the blind acceptance of a sale price that the market evidence and expert testimony proves is intertwined with the business success of the tenant and find that the value of the real property as of January 1, 2004 is \$6,000,000.

Respectfully submitted,

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

Fred Siegel (0005855)

Jay P. Siegel (0067701)

Nicholas M.J. Ray (0068664)

Siegel Siegel Johnson & Jennings Co

3001 Bethel Rd., Suite 208

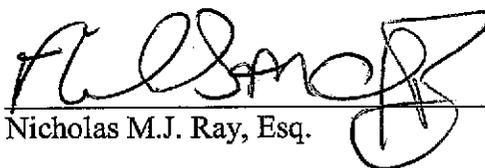
Columbus, OH 43220

(614) 442-8885

Attorneys for Appellants

CERTIFICATE OF SERVICE

This is to certify that on this 24th day of October 2007, a copy of the Appellants' Reply Brief was sent via regular U.S. mail to Thomas J. Scheve, Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, OH 45202, David C. DiMuzio, David C. DiMuzio, Inc., 1900 Kroger Building, 1014 Vine Street, Cincinnati, Ohio, 45202, and Lawrence Pratt, Section Chief-Taxation, Marc Dann, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, OH 43215-3428.



Nicholas M.J. Ray, Esq.