IN THE SUPREME COURT

STATE OF OHIO

APPEAL FROM THE BOARD OF TAX APPEALS

OLMSTED FALLS BOARD OF EDUCATION, Appellee, v. CUYAHOGA COUNTY BOARD OF REVISION, CUYAHOGA COUNTY AUDITOR, AND TAX COMMISSIONER OF THE STATE OF OHIO, Appellees, and M & B OLMSTED, LLC, Appellant.	)	SUPREME COURT CASE NUMBER: 08-1035 BOARD OF TAX APPEALS CASE NUMBER 2005-H-1436

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NOTICE OF APPEAL

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APPEAL FROM THE BOARD OF TAX APPEALS

OLMSTED FALLS BOARD OF EDUCATION, Appellee, v. CUYAHOGA COUNTY BOARD OF REVISION, CUYAHOGA COUNTY AUDITOR, AND TAX COMMISSIONER OF THE STATE OF OHIO, Appellees, and M & B OLMSTED,LLC, Appellant.	))))))))))))))))))	SUPREME COURT CASE NUMBER:_____ BOARD OF TAX APPEALS CASE NUMBER 2005-H-1436 <u>NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO PURSUANT TO SECTION 5717.04 REVISED CODE</u>

The Appellant, M & B Olmsted, LLC, by and through counsel, hereby gives notice of its appeal to the Supreme Court of The State of Ohio, from a Decision and Order of the Ohio Board of Tax Appeals, rendered on the 29th day of April 2008, a copy of which is attached hereto as "Exhibit A" and which is incorporated herein as though fully rewritten in this Notice of Appeal. The Errors complained of are attached hereto as "Exhibit

B" which are incorporated herein by reference.

Respectfully submitted,

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OHIO BOARD OF TAX APPEALS

Olmsted Falls Board of Education,	)	CASE NO. 2005-H-1436
	)	
Appellant,	)	(REAL PROPERTY TAX)
	)	
vs.	)	DECISION AND ORDER
	)	
Cuyahoga County Board of Revision, the Cuyahoga County Auditor, and M & B Olmsted, LLC,	)	
	)	
Appellees.	)	

APPEARANCES:

For the Appellant Board of Education	-	Kolick & Kondzer John P. Desimone 24500 Center Ridge Road, Suite 175 Westlake, Ohio 44145
For the County Appellees	-	William D. Mason Cuyahoga County Prosecuting Attorney Timothy J. Kollin Assistant Prosecuting Attorney Courts Tower, 8th Floor 1200 Ontario Street Cleveland, Ohio 44113
For the Appellee Property Owners	-	Sleggs, Danzinger & Gill Co., L.P.A. Todd W. Sleggs 820 W. Superior Avenue, Suite 400 Cleveland, Ohio 44113

Entered April 29, 2008

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

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by appellant Olmsted Falls Board of Education ("BOE") from a decision of the Cuyahoga County Board of Revision ("BOR"). In its decision, the BOR determined the taxable value of the subject property for tax year 2003.

Exhibit "A"
(1 of 12)

The matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the BOR, the record of the hearing ("H.R.") before this board, and the briefs submitted by the BOE and the appellee M&B Olmsted, LLC ("property owner").

The subject real property consists of a parcel that is improved with a new addition that joins two wings of a former school and is now used as a day care center. The property is located in the Olmsted Falls taxing district, Cuyahoga County, Ohio. The parcel appears on the auditor's records as parcel number 281-15-004. The value of the parcel, as determined by the Cuyahoga County auditor and retained by the BOR, is as follows:

	TRUE VALUE	TAXABLE VALUE
Land	$ 48,500	$ 16,975
Building	$276,500	$ 96,775
Total	$325,000	$113,750

The BOE contends that the auditor and BOR have undervalued the subject property and, based on an appraisal of the subject, claims that the subject's market value for tax year 2003 should be $1,200,000.

A review of the record indicates this appeal originated with the BOE filing an original complaint against the valuation of the subject property with the BOR, seeking to increase the subject's value based on "comparable sales, economic data, improvements, and other evidence ***." S.T. at Ex. A. After consideration of all the information provided by the BOE, including an appraisal and supplemental report by Timothy C. Nash, MAI, and James T. Caldwell, MAI, the BOR retained the auditor's $325,000 valuation of the subject for tax year 2003.

The history of the subject and its surrounding parcels is set forth in *Olmsted Holdings LLC and Olmsted Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (May 7, 2004), BTA Nos. 2002-M-2524, et seq., unreported. In that decision, which considered the subject's value for 1999, we described the subject property and its surrounding parcels as follows:

> "The property under consideration was in 1998 a 10.3287-acre parcel of land located on Bagley Road in Olmsted Falls, a suburb of Cleveland. As of tax lien date 1998, the property was improved with a middle school complex, constructed over a period beginning in 1916 and ending in 1958. The improvements contained three major divisions, a large, two-story classroom building containing approximately 39,831 square feet, two one-story classroom wings containing approximately 17,172 square feet and a gymnasium, containing approximately 18,070 square feet of gross building area, including basement. The buildings, while updated through the years, were showing the wear and tear attendant to buildings of similar age and use. *** The property was sold to Olmsted Holdings, LLC ('Olmsted Holdings') on or about October 1997 for a sale price of $225,000.
>
> "The new property owner caused the 10-acre tract to be divided into four parcels. Concurrent with the lot split, the property owner made small improvements, painting, retiling and generally cleaning the buildings within the complex. However, no asbestos remediation was completed by Olmsted Holdings.
>
> "In 1998, parcel no. 281-15-003, a parcel now containing 1.9548 acres of land and the main school building, was sold to the City of Olmsted Falls for use as a city hall and police headquarters. The reported purchase price was $125,000. ***
>
> "Parcel no. 281-15-004, which contained 1.5674 acres of land and two, single-story classroom wings, was converted to use as a day-care facility. Parcel no. 281-15-005, which now contained .6167 acres of land and was improved with

> what was once the gymnasium of the old school, was sold on or about July 30, 1999 to The Activity Center, an Ohio non-profit corporation, for a sale price of $140,000. The value of the remaining 6.1890 acres of vacant land under its new configuration is not before the board." Id. at 4-5.

The subject parcel was again before this board for consideration in *Olmsted Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (June 11, 2004), BTA Nos. 2002-A-2617, et al., unreported. That case involved a review of 2000 to 2002 values and, as in the present appeal, the BOE presented Nash and Caldwell's appraisal report and Nash's testimony.[1]

We begin our review of this matter by noting that a party who asserts a right to an increase or decrease in the value of real property has the burden to prove the right to the value asserted. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336; *Crow v. Cuyahoga Cty. Bd. of Revision* (1990), 50 Ohio St.3d 55; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318. Consequently, it is incumbent upon an appellant challenging the decision of a board of revision to come forward and offer evidence that demonstrates its right to the value sought. *Cleveland Bd. of Edn.*, supra; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493. Once an appellant has presented competent and probative evidence of true value, other parties asserting a different value then have a corresponding burden of providing sufficient evidence to

[1] We note that references to prior decisions of this board involving determinations of value for different tax years have no bearing on the valuation decision that must be made in this appeal. See, e.g., *Freshwater v. Belmont Cty. Bd. of Revision* (1997), 80 Ohio St.3d 26. See, also, *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision* (1998), 81 Ohio St.3d 58; *Fawn Lake Apts. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 609.

rebut the appellant's evidence. *Springfield Local Bd. of Edn.*, supra; *Mentor Exempted Village Bd. of Edn.*, supra.

When determining value, the Supreme Court has long held, "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. Absent a recent sale, as in the instant case, true value in money is typically calculated for appraisal purposes by applying any of three alternative methods: 1) the market data (sales) approach, which compares recent sales of comparable properties, 2) the income approach, which capitalizes net income attributable to the property, and 3) the cost approach, which depreciates improvements to the land and then adds them to the land value.

In support of its position that the subject property had been undervalued by the auditor and board of revision, the appellant board of education offered this board the testimony and appraisal report of Timothy C. Nash, MAI. In describing the subject in his report, Nash indicated that the classroom structures/two buildings contain approximately 20,011 square feet, including twenty-two rooms, five of which are bathrooms. The brick and concrete block buildings, built in 1940, have ceiling heights of twelve and fourteen feet, gas hot water and central air conditioning. The structures are situated on approximately 1.57 acres or 68,258 square feet of land. Nash described the quality and condition of these improvements as "good." Appellant's Ex. 1 at 18, 42. In analyzing the immediate neighborhood, Nash stated that the subject is

located next to the city hall, police station, a renovated community activity center, and an elementary school, all of which, according to Nash, should provide for long-term growth in property values. Id. at 11.

Discussing the subject's highest and best use, Nash indicated that, "the highest and best use is for any of the uses noted in the zoning code under the P2 designation and includes a day care facility and educational uses." Id. at 21. Within his report, Nash utilized two of the three standard approaches to valuation, sales comparison and income capitalization, to determine the market value for the subject's improvements. He indicated that "the land only will be valued in the cost approach since the subject is too aged for a viable cost approach." Id. at 22; H.R. at 24-25.

First, to value the subject's land, Nash looked at four vacant commercial land sales that occurred between April 2003 and December 2005. The comparables ranged in size from 1 to 3.5 acres and sold for between $150,000 and $310,000. When adjusted to the subject's 1.57 acres, the sales ranged in price from $89,000 to $147,000 per acre. Nash testified that he verified each land sale with either the buyer or seller. H.R. at 122-123. He said he knew sale numbers three and four were listed with brokers on the open market, but he did not know the listing status for the first two sales. Based on these comparables selling at an average and median price of approximately $120,000 per acre, Nash concluded to a value of $190,000 for the subject's land.

Nash also utilized the sales comparison approach to estimate the subject's total value, comparing the subject's features to those of six properties. Nash

indicated that he was looking for sales of other similarly sized properties that have been converted for use as day care centers. H.R. at 27-28. The sale comparables listed, all day care, school or school/church facilities, sold between November 2000 and January 2005. The comparables ranged in price from $435,000 to $1,200,000, in building size from approximately 5,000 to 30,000 square feet, and in land size from 20,000 to 100,000 square feet. Appellant's Ex. 1 at 35-42.

Nash made adjustments for differences between the subject and his comparables, including location, age, size, condition, and land-to-building ratio. Id. at 42-43. Nash indicated that as of the tax lien date, the subject had been "operating as an established day care facility for about three years. It is well located next to a school, the new city hall and police station and the activity center." Id. at 44. "Based on experience and judgment," Nash reached a conclusion for the subject's value, using the sales comparison approach, of $60 per square foot for the subject, or $1,200,000 (rounded). Id.

Under the income approach, Nash began by estimating the subject's annual gross potential income at $150,083, or $7.50 per square foot, based on six rental comparables from the market. He applied a 10 percent vacancy/credit loss rate to arrive at an effective gross income of $135,074. Fixed and operating expenses, including 1.48 percent for insurance ($2,000), 3 percent for management ($4,052), 1 percent for miscellaneous ($1,350), .74 percent for legal/accounting ($1,000), and 5.19 percent for reserves for replacement ($7,004), were deducted and a net operating income of $115,616 resulted. Deriving his capitalization rate from both the market

and the band-of-investment method, Nash concluded to a rate of 10 percent. Accordingly, his overall value via the income approach was $1,160,000 (rounded). Id. at 48.

In reconciling his conclusions, Nash indicated that he gave greatest weight to the sales comparison approach with support from the income capitalization approach. Accordingly, Nash derived a final value for the subject property for tax year 2003 of $1,200,000. Id. at 49.

In defense of this opinion of value, Nash testified that the subject property and its surrounding area experienced significant change between 2000 and 2002. "All of a sudden, we went from a closed school building on ten acres *** to a new city hall, a new police station, new community center and this new day care. *** It's the focal point of the community. The whole location and the identity of the location has changed dramatically. That's why I have a rapidly increasing value over a three-year period." H.R. at 114-116. Referring to his previous appraisal for these prior years, Nash said he had valued the subject's shell building during renovation at a low $23 a square foot. He opined "You can't build a shell for $23 a square foot, even a warehouse shell." Id. at 118. By the tax lien date in 2001, the subject's $300,000 renovation was complete, the day care facility had recently opened, but the surrounding properties were still undergoing renovation. Id.; Appellee's Ex. F at 17, 22, 27, 32. Nash testified that by 2002 construction was complete and the subject and its surrounding properties were fully operational. Id.

Other than Nash's appraisal reports for prior years, the property owner did not offer any evidence but chose to primarily rely on its cross-examination of Nash to establish that his appraisal did not constitute competent, probative, and credible evidence of value of the subject.

In reviewing the appraisal evidence before us, this board may accept all, part, or none of an appraiser's opinion of value. *Witt Co. v. Hamilton Cty. Bd. of Revision* (1991), 61 Ohio St.3d 155; *Fawn Lake Apts. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 609. Further, we have often acknowledged that the appraisal of real property is not an exact science, but is instead an opinion, the reliability of which depends upon the basic competence, skill and ability demonstrated by the appraiser. *Cyclops Corp. v. Richland Cty. Bd. of Revision* (May 30, 1985), BTA No. 1982-A-566, et seq., unreported.

At the outset, we note Nash's current appraisal report is an update of the previous report he prepared and presented to this board regarding the subject's 2002 value. Cf. Appellant's Ex. 1; Appellee's Ex. F. In fact, with regard to his income approach, Nash made no changes to his analysis, utilizing the same six rental comparables that we previously rejected as unreliable support for his conclusion.[2]

We were also previously critical of his sales comparison approach, noting numerous deficiencies with the information presented. Some of these prior

[2] Id. at 45 and 37, respectively. See, also, *Olmsted Falls Bd. of Edn.*, supra ("*** we have very little other information on the comparables, including, e.g., location in comparison to the subject, age, capacity, condition, etc., and there are no photographs of the comparables utilized. Further, Mr. Nash has no support in his report from the market for the vacancy/credit loss, expense, and capitalization rate figures he used. Without evidence in the record to support his conclusions, we must question the reliability of the information contained in his income approach to value.").

shortcomings remain unaddressed in this report, such as the lack of interior photos or interior inspections of the subject or comparables. However, despite these omissions, this time Nash does provide the specific adjustments he made to the comparable sales regarding location, age, size, condition, and land-to-building ratio to arrive at his final value. In addition, he provides more information regarding individual comparables, which include five different sales of comparable properties not previously utilized. Given the record, we find the net adjustments made to these comparables reasonable. Finally, Nash took into account the surrounding parcels when determining value. Thus, while imperfect, we find Nash's sales comparison approach to be credible, competent evidence that reasonably reflects the value of the subject property as of the tax lien date.

Moreover, while we will not rely on Nash's income approach, we find his separate land value to be probative evidence that supports his opinion of value. Finally, we find his testimony regarding the subject's renovation costs and the dramatic transition that the subject and surrounding parcels experienced to be credible evidence that also supports his conclusion of value. Accordingly, based on the foregoing, we find that Nash's report and testimony constitute sufficient, probative evidence of the subject's value.

We conclude that the BOE has satisfied its burden of persuasion and has come forward with competent and probative evidence that the value for the subject property was $1,200,000 for tax year 2003. *Cleveland*; *Springfield*; and *Mentor Exempted*, supra. Where we determine that an appellant has come forward with

competent and probative evidence of value, the appellees have a corresponding burden to present evidence that this board must review to determine whether it is competent and probative in rebutting the appellant's evidence. *Westhaven, Inc. v. Wood Cty. Bd. of Revision* (1998), 81 Ohio St.3d 67, 70; *Springfield* and *Mentor Exempted*, supra. Failure of an appellee to present rebuttal evidence may, on our finding that the appellant has presented credible and probative evidence, result in our adoption of the appellant's evidence as the subject property's true value. *Mentor Exempted*, supra.

As we have previously stated, the appellees have elected not to provide us with any competing market information that could allow us to come to a different conclusion regarding the subject's value. Moreover, our review of the transcript certified to this board by the county auditor discloses no other probative evidence on which we may base an opinion of value.

Thus, on review of the BOE's appraisal report, we find that the appellants have offered sufficient, probative evidence of the subject's value. Accordingly, based upon the preponderance of evidence currently before this board, we have determined the value of the subject property, as of January 1, 2003, as follows:

	TRUE VALUE	TAXABLE VALUE
LAND	$ 190,000	$ 66,500
BUILDING	1,010,000	353,500
TOTAL	$1,200,000	$420,000

It is the decision and order of the Board of Tax Appeals that the Cuyahoga County Auditor shall list and assess the subject property in conformity with

this decision. It is further ordered that this value be carried forward in accordance with the law.

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EXHIBIT "B"

ASSIGNMENT OF ERRORS

ASSIGNMENT OF ERROR NO. 1

The Board of Tax Appeals was estopped by its prior decision(s) from accepting Timothy C. Nash's opinion of value in this appeal, its decision and order is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 2

The Board of Tax Appeals decision and order conflicts with its prior decision and order rejecting Timothy C. Nash's appraisal of the property for the tax years 2000, 2001 and 2002.

ASSIGNMENT OF ERROR NO. 3

The Board of Tax Appeal decision and order is unreasonable and unlawful because there is no evidence in the Record to support a 370% increase in the value of the property between January 1, 2002, and the tax lien date in this appeal of January 1, 2003.

ASSIGNMENT OF ERROR NO. 4

The Board of Tax Appeals decision and order finding value based upon the appraisal of Timothy C. Nash is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 5

The Board of Tax Appeals finding that Mr. Nash's net adjustments to the sales in his sales comparison approach were reasonable, is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 6

The Board of Tax Appeals finding that Mr. Nash's sales comparison approach was credible and competent evidence is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 7

The Board of Tax Appeals finding that testimony regarding renovation costs and the transition of the subject and surrounding parcels constituted credible evidence of the value of Appellant's property is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 8

The Board of Tax Appeals decision and order is not supported in the Record and is unreasonable and unlawful.

ASSIGNMENT OF ERROR NO. 9

The Board of Tax Appeals abused its discretion, acted unreasonably, unlawfully and arbitrarily in its decision and order.

ASSIGNMENT OF ERROR NO. 10

The decision and order of the Board of Tax Appeals is unreasonable and unlawful and is contrary to the laws of Ohio and the Ohio Consitutition.

ASSIGNMENT OF ERROR NO. 11

The Decision and Order of the Board of Tax Appeals violates Article XII, Section 2 Ohio Constitution that property should be taxed by uniform rule according to value.

ASSIGNMENT OF ERROR NO. 12

The Decision and Order of the Board of Tax Appeals violates the right of "equal protection" under Article 1, Section 2 and Article II, Section 26 Ohio Constitution and Amendment XIV, Section 1 United States Constitution in that it treats the Appellant different from other property owners for purposes of taxation.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing NOTICE OF APPEAL was mailed via Certified United States Mail, postage prepaid, to Timothy Kollin, Assistant Prosecuting Courts Tower – 8th Floor, 1200 Ontario Street, Cleveland, Ohio 44113, Attorney for Appellees, Cuyahoga County Board of Revision and Cuyahoga County Auditor; John P. Desimone, Kolick & Kondzer, 24500 Center Ridge Road, #175, Westlake, Ohio 44145, Attorney for Appellee Olmsted Falls Board of Education and The Ohio Attorney General, State Office Tower, 17th Floor, 30 East Broad Street, Columbus, Ohio 43215-3428, Attorney for Appellee Tax Commissioner of the State of Ohio on this 27th day of May 2008.

Todd W. Sleggs, Esq. (0040921)

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