

IN THE SUPREME COURT OF OHIO

Board of Education of the West Carrollton)
City Schools,)
)
 Appellee,)
)
 vs.)
)
 Montgomery County Board of Revision,)
 Montgomery County Auditor, and the)
 Tax Commissioner of the State of Ohio,)
)
 Appellees,)
)
 and)
)
 GE Capital Franchise Finance Corporation,)
)
 Appellant,)
)
 and)
)
 Spirit Master Funding III, LLC.)

Case No. 08-2059

Appeal from the Ohio
Board of Tax Appeals

BTA Case No. 2006-K-1741

NOTICE OF APPEAL GE CAPITAL FRANCHISE FINANCE CORPORATION

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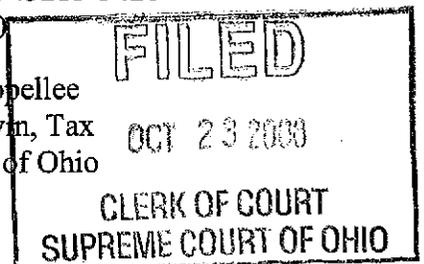
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IN THE SUPREME COURT OF OHIO

Board of Education of the West Carrollton City Schools,)	Case No. _____
)	
Appellee,)	
)	
vs.)	
)	
Montgomery County Board of Revision, Montgomery County Auditor, and the Tax Commissioner of the State of Ohio,)	Appeal from the Ohio Board of Tax Appeals
)	
Appellees,)	BTA Case No. 2006-K-1741
)	
and)	
)	
GE Capital Franchise Finance Corporation,)	
)	
Appellant,)	
)	
and)	
)	
Spirit Master Funding III, LLC ¹ .)	

NOTICE OF APPEAL GE CAPITAL FRANCHISE FINANCE CORPORATION

Appellant GE Capital Franchise Finance Corporation hereby gives notice of an appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Ohio Board of Tax Appeals, journalized in case number 2006-K-1740 and decided on September 23, 2008.

A true copy of the Decision and Order of the Ohio Board of Tax Appeals being appealed is attached hereto and incorporated herein by reference as Exhibit A.

¹ The present case involves the January 1, 2005 lien date value of the subject property. After that date the property was sold to Spirit Master Funding III, LLC. This Appellee is the current owner of the subject property. Consistent with the jurisdictional requirements, these owners are being joined to this appeal and are receiving notice thereof.

The appellant complains of the following errors in the Decision and Order of the Ohio Board of Tax Appeals:

ASSIGNMENT OF ERROR NO. 1:

The Decision and Order of the Board of Tax Appeals is unreasonable, unlawful and arbitrary because the Board of Tax Appeals erroneously and unjustifiably relied upon a sale-leaseback transaction to value the subject property when no evidence was introduced to establish that the sale-leaseback transaction reflected the fair market or true value of the property.

ASSIGNMENT OF ERROR NO. 2:

The Decision and Order of the Board of Tax Appeals is unreasonable, unlawful and arbitrary because the Board of Tax Appeals erroneously and unjustifiably found the Property Owner did not provide sufficient evidence to rebut the presumption that the sale price was the best evidence of value.

ASSIGNMENT OF ERROR NO. 3:

The Decision and Order of the Board of Tax Appeals is unreasonable, unlawful and arbitrary because the Board of Tax Appeals erroneously and unjustifiably rejected the finding of the Montgomery County Board of Revision that the Property Owner had effectively rebutted the presumption that the transfer in question was the best evidence of value.

ASSIGNMENT OF ERROR NO. 4:

The Decision and Order of the Board of Tax Appeals is unreasonable, unlawful and arbitrary because the Board of Tax Appeals erroneously and unjustifiably found that the Board of Education had sustained their burden of proof when they failed to present any evidence before the Board of Tax Appeals to overcome the Appellant's burden of proof after the Property Owner had met its burden to rebut the acceptance of the sale price by establishing that the transfer in question was a sale-leaseback and therefore, without further inquiry, does not represent the best evidence of value.

ASSIGNMENT OF ERROR 5:

The Decision and Order of the Board of Tax Appeals is unreasonable, unlawful, and arbitrary because the Board relies on a sale-leaseback transaction which does

not meet the requirements of an arm's length transaction and can only reflect the subject property's value in use rather than in exchange as required by Article XII, Section 2 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

ASSIGNMENT OF ERROR NO. 6:

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

Appellants request that the Court reverse the unreasonable and unlawful decision of the Board of Tax Appeals and affirm the decision of the Montgomery County Board of Revision retaining the Auditor's value for the subject property.

Respectfully submitted,

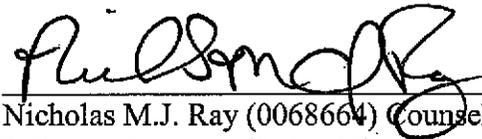


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CORPORATION

**PROOF OF SERVICE UPON
OHIO BOARD OF TAX APPEALS**

This is to certify that the Notice of Appeal of GE Capital Franchise Finance Corporation was filed with the Ohio Board of Tax Appeals, State Office Tower, 24th Floor, 30 East Broad Street, Columbus, Ohio as evidenced by its date stamp as set forth hereon.



Nicholas M.J. Ray (0068664) Counsel of Record
J. Kieran Jennings (0065453)

COUNSEL FOR APPELLANT
GE CAPITAL FRANCHISE FINANCE
CORPORATION

CERTIFICATE OF SERVICE

This is to certify that on this 23rd day of October 2008, a copy of the Notice of Appeal and a copy of the Demand to Certify Transcript were sent via certified mail to Mark H. Gillis, Rich Crites & Dittmer, LLC 300 East Broad Street, Suite 300, Columbus, OH 43215, Counsel for Licking Heights Local School District, Laura Mariani, Montgomery County Assistant Prosecuting Attorney, 301 W. Third Street, Dayton, OH 45422, Counsel for Montgomery County Auditor and Montgomery County Board of Revision, Nancy Rogers, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, OH 43215-3428, Counsel for the Tax Commissioner of Ohio, and Spirit Master Funding III, LLC, c/o CT Corporation System, 1300 East 9th Street, Cleveland, OH 44114.



Nicholas M.J. Ray (0068664) Counsel of Record
J. Kieran Jennings (0065453)

COUNSEL FOR APPELLANT
GE CAPITAL FRANCHISE FINANCE
CORPORATION

OHIO BOARD OF TAX APPEALS

Board of Education of the West Carrollton)
City Schools,)
)
Appellant,)
)
vs.)
)
Montgomery County Board of Revision,)
the Montgomery County Auditor, and GE)
Capital Finance Franchise Corporation,)
)
Appellees.)

CASE NO. 2006-K-1741
(REAL PROPERTY TAX)
DECISION AND ORDER

APPEARANCES:

- For the Appellant - Rich, Crites & Dittmer, LLC
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- For the County Appellees - Mathias H. Heck, Jr.
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- For the Appellee Property Owner - Siegel, Siegel, Johnson & Jennings Co., L.P.A.
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Entered September 23, 2008

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

EXHIBIT A

Through the present appeal,¹ appellant, the Board of Education of the West Carrollton City Schools, challenges a decision of the Montgomery County Board of Revision (“BOR”) in which it determined the value of the subject real property for ad valorem tax purposes for tax year 2005. The property in issue, located in the city of West Carrollton taxing district, is improved for use consistent as a drive-through style restaurant, in this instance a Taco Bell. The property appears in the records of the Montgomery County Auditor (“auditor”) as parcel numbers K48-1-10-39 and K48-1-10-40.

For tax year 2005, the auditor assessed the subject property consistent with the following values:

Parcel No. K48-1-10-39

	<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>
Land	\$47,520	Land	\$16,630
Building	\$ -0-	Building	\$ -0-
Total	\$47,520	Total	\$16,630

Parcel No. K48-1-10-40

	<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>
Land	\$ 61,870	Land	\$ 21,650
Building	\$233,160	Building	\$ 81,610
Total	\$295,030	Total	\$103,260

Appellant instituted these proceedings by filing a complaint with the BOR seeking an increase in the subject’s value, attaching in support copies of a real property

¹ We note the BOR apparently initially issued its decision letter to appellant on September 28, 2006, referencing only one of the two parcels discussed herein. Less than thirty days thereafter, i.e., October 12, 2006, a second decision letter was apparently issued identifying both parcels. The appellees have not challenged the timeliness of appellant’s appeal, filed with this board on October 31, 2006, nor do we find any jurisdictional deficiency in this regard. Cf. *State ex rel. Borsuk v. Cleveland* (1972), 28 Ohio St.2d 224, paragraph one of the syllabus (“An administrative board or agency, including a municipal civil service commission, has jurisdiction to reconsider its decisions until the actual institution of a court appeal therefrom or until expiration of the time for appeal, in the absence of specific statutory limitation to the contrary.” See, also, *Hal Artz Lincoln-Mercury, Inc. v. Ford Motor Co.* (1986), 28 Ohio St.3d 20, paragraph three of the syllabus.

conveyance fee statement and limited warranty deed evidencing the transfer of the property approximately eight months after tax lien date. Although the limited warranty deed referred to the transfer of the property “in consideration of \$10.00 and other good and valuable consideration,” the conveyance fee statement indicated that on or about July 21, 2005, “The Twins Group, Inc.” sold the subject property to appellee “GE Capital Franchise Finance Corporation”² (“GE Capital”) for a total consideration of \$1,165,389. Upon the filing of this document with the auditor’s office, conveyance and transfer fees were paid in the amount \$2,330. In response, GE Capital filed a complaint with the BOR pursuant to R.C. 5715.19(B) requesting the auditor’s value be retained. As support for its position, GE Capital’s counsel submitted an affidavit of the chief executive officer of the former owner of the property, i.e., Twins Group, and unexecuted and undated copies of a sale-leaseback agreement and a lease between those two entities and a third one identified as “Twins Development – Dayton, L.L.C.” Only counsel for appellant and GE Capital appeared at hearing before the BOR and, ultimately, the BOR issued its decision retaining the auditor’s values, with the present appeal ensuing.

Although the parties were accorded an opportunity to amplify the evidentiary record through a hearing before this board, they waived such opportunity and instead elected to submit the matter upon the existing record and their respective legal arguments. Accordingly, we proceed to consider this matter upon appellant’s notice of appeal, the statutory transcript certified by the BOR, and the parties’ written briefs.

² The limited warranty deed identifies the grantee slightly differently, i.e., “GE Capital Finance Franchise Corporation,” the name which was referenced on appellant’s complaint and the entry of appearance filed by counsel on its behalf.

“While a determination of the true value of real property by a board of revision is entitled to consideration by the BTA, such determination is not presumptively valid.” *Amsdell v. Cuyahoga Cty. Bd. of Revision* (1994), 69 Ohio St. 3d 572, 574. See, also, *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493, 495; *Cambridge Arms, Ltd. v. Hamilton Cty. Bd. of Revision* (1994), 69 Ohio St.3d 337, 338. Nevertheless, “[w]hen cases are appealed from a board of revision to the BTA, the burden of proof is on the appellant, whether it be a taxpayer or a board of education, to prove its right to an increase [in] or decrease from the value determined by the board of revision.” *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564, 566.

Where parties elect to waive hearing before this board, we are obligated to independently review the record developed before the county board of revision. As noted by the court in *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13:

“The parties herein apparently waived presentation of further evidence and agreed that only the evidence presented to the BOR was to be considered by the BTA. The situation faced by the BTA in this case is analogous to that faced by the common pleas court in *Black v. Cuyahoga Cty. Bd. of Revision* (1985), 16 Ohio St. 3d 11 ***. The court in *Black* had before it an appeal from a board of revision under R.C. 5717.05, the alternative appeal provision to R.C. 5717.01. The only evidence before the common pleas court was the statutory transcript from the board of revision. We stated in *Black* that the common pleas court was not required to hold an evidentiary hearing or a trial *de novo*, but that the common pleas court ‘has a duty on appeal to independently weigh and evaluate all evidence properly before it. The court is then required to make an independent determination concerning the valuation of the property at issue. The court’s review of the

evidence should be thorough and comprehensive, and should ensure that its final determination is more than a mere rubber stamping of the board of revision's determination.' *Id.* at 13-14 ***. Our conclusion in *Black* was that R.C. 5717.05 'contemplates a *decision de novo*.' (Emphasis *sic.*) *Id.* at 14 ***.

"The duty of both the BTA and the common pleas court upon an appeal is to 'determine the taxable value of the property.' See R.C. 5717.03 and 5717.05. We find that the BTA in this case is required to meet the standard enunciated in *Black*. Thus, if the only evidence before the BTA is the statutory transcript from the board of revision, the BTA must make its own independent judgment based on its weighing of the evidence contained in that transcript." *Id.* at 15. (Parallel citations omitted.)

R.C. 5713.03 imposes certain requirements upon county auditors, including the following:

"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 ***. *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. ****" (Emphasis added.)

Accordingly, the best evidence of the true value of real property is its transfer through an actual, recent, arm's-length sale. See, e.g., *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979; *St. Bernard Self-Storage LLC v. Hamilton Cty. Bd. of Revision*, 115 Ohio St.3d 365, 2007-Ohio-5249; *Pingue v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St.3d 62; *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.

We have previously held that evidence of a sale exhibited through a deed and/or conveyance fee statement, not otherwise controverted, constitutes competent and probative evidence of a property's value for tax purposes. *Poley v. Montgomery Cty. Bd. of Revision* (Sept. 24, 2004), BTA No. 2003-M-1784, unreported; *Clearview Bd. of Edn. v. Lorain Cty. Bd. of Revision* (May 1, 1998), BTA No. 1996-M-1192, unreported; *Bounds v. Butler Cty. Bd. of Revision* (Aug. 7, 1992), BTA No. 1990-M-838, unreported. The appellees provided neither the BOR nor this board with competent and probative evidence suggesting volatile market conditions arose between tax lien date and the sale date, nor that would cause us to conclude it was a sham transaction or involved related parties. See *South Euclid-Lyndhurst City School Dist. Bd. of Edn v. Cuyahoga Cty. Bd. of Revision* (May 13, 2005), BTA No. 2003-G-1041, unreported.

The BOR did not disclose the basis for its rejection of the sale evidence presented in this case. We can therefore only presume it accepted GE Capital's argument, supported via an ex parte affidavit and copies of undated/unexecuted contracts, that the parties were sufficiently related so as to render the sale price unrepresentative of its market value. However, we accord little value to an affidavit of an individual who did not testify before either the BOR or this board. See *Am. Dist. Telegraph Co. v. Porterfield* (1968), 15 Ohio St.2d 92 (holding the Board of Tax Appeals did not unreasonably or unlawfully exclude evidence in the form of affidavits because there was no opportunity for cross-examination). See, also, *Raskin v. Limbach* (Feb. 2, 1988), BTA No. 1986-F-28,

unreported, at 11, fn. 1 (“We generally regard affidavits of the type herein submitted, as simply voluntary, *ex parte* declarations, primarily self-serving in nature, and while submitted under oath, made without notice to the adverse party, and, since the affiant never appears, there is no opportunity for cross-examination. Naturally, these characteristics substantially reduce the weight accorded thereto, rendering such material of little probative value.”). Other than counsel, whose statements clearly do not constitute competent evidence upon which we may rely, no one appeared to authenticate or testify to the undated, unexecuted contractual agreements submitted to the BOR. See, e.g., *Corporate Exchange Bldgs. IV & V, L.P. v. Franklin Cty. Bd. of Revision* (1998), 82 Ohio St.3d 297, 299; *Hardy v. Delaware Cty. Bd. of Revision*, 106 Ohio St.3d 359, 2005-Ohio-5319, at ¶13.

The Supreme Court has acknowledged certain on-going business relationships between a seller and buyer of property, such as a sale-leaseback arrangement, may call into question the utility of a sale price in determining such property’s value. See, e.g., *S. Euclid/Lyndhurst Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1996), 74 Ohio St.3d 314; *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 112 Ohio St.3d 309, 2007-Ohio-6; *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, ¶30, fn. 4 (“Consistent with *S. Euclid*, a sale-leaseback may not furnish an arm’s-length sale price. Namely, even if the contract as a whole is entered into at arm’s length, the existence of a sale element and a leaseback element in the same contract may deprive both of those elements of their arm’s-length character, because the existence of the one element makes the otherwise unrelated parties related with respect to the other element.”). However, the existence of such an arrangement in this instance and

whether it would fall within the limited circumstances contemplated by the court would require this board to engage in speculation which we decline to do. See, generally, *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15.

Upon consideration of the existing record, we conclude appellant, through the presentation of documentation supporting a sale of the subject near tax lien date, satisfied its initial burden of proving the subject's value and that GE Capital failed to rebut such evidence. *Berea City School Dist. Bd. of Edn.*, supra; *Cummins Property Servs.*, supra; *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 118 Ohio St.3d 45, 2008-Ohio-1588, ¶8 (“Under *Berea*, such a sale price is deemed to be the value of the property, and the only rebuttal lies in challenging whether the sale was sufficiently recent and genuinely at arm's length between a willing buyer and a willing seller.”); *Rhodes v. Hamilton Cty. Bd. of Revision*, 117 Ohio St.3d 532, 2008-Ohio-1595. See, also, *Bd. of Edn. of the Kettering City Schools v. Montgomery Cty. Bd. of Revision*, BTA No. 2006-H-1740, announced this date.

Accordingly, it is the decision of the Board of Tax Appeals that as of January 1, 2005 the total true and taxable values of the subject property are \$1,165,390, rounded, and \$407,890, respectively,³ allocated as follows:

³ No evidence was presented regarding the manner by which the sale price could be allocated between the subject parcels or the separate land and improvement components of which they are comprised. See, generally, *Polaris Amphitheater Concerts, Inc. v. Delaware Cty. Bd. of Revision*, 118 Ohio St.3d 330, 2008-Ohio-2454. Accordingly, we have elected to employ the same percentage distribution as reflected in the auditor's original valuation, rounding to the nearest \$10 where appropriate. Cf. R.C. 5715.26(A)(1). See, also, *Consolidation Coal Co. v. Noble Cty. Bd. of Revision* (June 30, 1988), BTA Nos. 1985-D-291, et al.,

Parcel No. K48-1-10-39

	<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>
Land	\$163,150	Land	\$57,100
Building	<u>\$ -0-</u>	Building	<u>\$ -0-</u>
Total	\$163,150	Total	\$57,100

Parcel No. K48-1-10-40

	<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>
Land	\$ 209,770	Land	\$ 73,420
Building	<u>\$ 792,470</u>	Building	<u>\$277,370</u>
Total	\$1,002,240	Total	\$350,790

It is therefore the order of this board that the Montgomery County Auditor list and assess the subject property in conformity with the decision as announced herein.

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Footnote contd.
unreported; *Litteral v. Montgomery Cty. Bd. of Revision* (June 11, 2004), BTA No. 2003-J-2057, unreported; *Walker v. Montgomery Cty. Bd. of Revision* (July 16, 2004), BTA No. 2003-J-1641, unreported.