

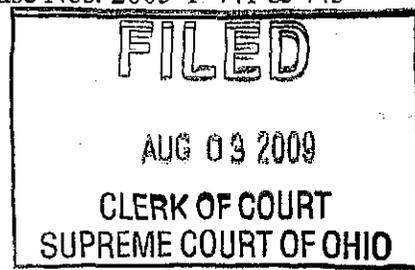
IN THE SUPREME COURT OF OHIO

Meijer Stores Limited Partnership, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 Franklin County Board of Revision, )  
 Franklin County Auditor, Licking Heights )  
 Local School District, and the Tax )  
 Commissioner of the State of Ohio, )  
 )  
 Appellees, )  
 )  
 and )  
 )  
 Marvin J. & Ursula F. Siesel, Shops at )  
 Waggoner LLC, and Fifth Third Bank, )  
 )  
 Appellees. )

Case No. 2008-1248

Appeal from the Ohio Board of Tax Appeals

BTA Case Nos. 2005-T-441 & 443



MOTION FOR RECONSIDERATION

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Appellant,	)	
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vs.	)	
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Franklin County Board of Revision,	)	Appeal from the Ohio
Franklin County Auditor, Licking Heights	)	Board of Tax Appeals
Local School District, and the Tax	)	
Commissioner of the State of Ohio,	)	
	)	
Appellees,	)	BTA Case Nos. 2005-T-441 & 443
	)	
and	)	
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Marvin J. & Ursula F. Siesel, Shops at	)	
Waggoner LLC, and Fifth Third Bank,	)	
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Appellees.	)	

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**MOTION FOR RECONSIDERATION**

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Now comes Appellant, Meijers Stores Limited Partnership, and requests that the Supreme Court of Ohio reconsider its decision issued on July 22, 2009 in the above-styled case. In summary, the reasons for this change are (1) the failure of the Ohio Board of Tax Appeals (“BTA”) and now the Ohio Supreme Court to fully consider and address all the arguments raised by the Appellant thereby denying the Appellant its right to due process under the law<sup>1</sup>; (2) the decision of the Court is not supported by the record in this case and the Court’s attempt to act as an expert in this case is not supported by the record or basic valuation methodology and logic—specifically, the simple fact that the use value varies from the market value for a property does not make it a special purpose property when a market exists for the property; (3) the decision of

the Court is not supported by the record in this case and the Court's attempt to act as an expert in this case is not supported by the record or accepted valuation methodology and logic— specifically, leases of properties not yet in existence but to be built and subsequent sales of those property subject to those leases are not comparable to what a currently owner-occupied property would sell for on the open market; and (4) the decision of the Court is inconsistent with even the most recent decisions of this Court reviewing decisions of the BTA and risk not only denying Appellate its right to due process but also its right to equal protection under the law.

**THE FAILURE OF FIRST THE BTA AND THEN THIS COURT TO CONSIDER AND ADDRESS THE ISSUES AND ASSIGNMENTS OF ERROR RAISED BY THE APPELLANT DENIES THE APPELLANT OF ITS DUE PROCESS RIGHTS UNDER THE LAW.**

While it is understandable, as indicated by Chief Justice Moyer at oral argument, that the instant case is not the type that the Court would otherwise choose to accept, the Appellant in this case is entitled to no less consideration than litigants in other cases that the Court may prefer to hear. In fact, as the only appellate level court to review this decision the Appellant deserves the Court's close attention to the errors raised and, when as is the case here, the trial court refuses to address the issues raised below, the court system of the State of Ohio fails the Appellant by not even addressing such issues one time before a final decision.

Property Owners, Taxpayers and the Citizens of Ohio deserve better than the treatment afforded to Meijer in the present case. While not every litigant wins its arguments heard before Ohio courts each, at a minimum, deserves to have its arguments addressed. Although Meijer properly demonstrated legal errors in the appraisal prepared by Mr. Koon in its brief to the BTA

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<sup>1</sup> While re-arguing these issues is not permitted by Rule of Practice XI, §2, the arguments not addressed by either the BTA, Ohio Supreme Court or both are set out in detail below along with why the Court's decision does not address these issues.

the BTA, in accepting Mr. Koon's value in one paragraph, failed to refute or even consider any of the Appellant's arguments.

One need only look at the facts of another recent decision of this Court to see the level of analysis that should be undertaken by the BTA. In *Olmsted Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*<sup>2</sup>, the Court summarizes the substantial analysis undertaken by the BTA in evaluating the various appraisals presented over the years of that case. Such analysis can be found in the present case of Mr. Lorms' appraisal, but there is no analysis of the legal issues raised concerning Mr. Koon's appraisal. This Court should not endorse this deviation from standard BTA procedure and fundamental rights of due process. The BTA must address the arguments presented to it for due process to occur.

Shockingly, this Court apparently deemed it unnecessary to address each Assignment of Error raised by the Appellant. In its appeal the Appellant raised seven Assignments of Error. Arguably, only Assignment of Error 5 was addressed by the Court but the Court specifically fails to consider the other arguments. Specifically, Assignments of Error 1 through 4 address errors with Mr. Koon's appraisal which were also ignored by the BTA.

As noted above, the Ohio Supreme Court serves the role of the only appellate review in this case. While it is true that the Court will not serve as a super-BTA and overturn its factual determinations unless they are clearly erroneous, as discussed below, when raised on appeal, the Court must determine whether the BTA opinion fully considered all of the issues presented in the case and that the opinion supports the BTA's final conclusion. The failure of the BTA to do that in this case and then this Court's failure to properly consider all of the Assignments of Error raised by the Appellant deny Appellant its right to due process under the law.

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<sup>2</sup> (2009), 122 Ohio St.3d 134.

**THE COURT'S DECISION IS NOT SUPPORTED BY THE RECORD IN THIS CASE. A VARIATION BETWEEN THE VALUE IN USE TO ONE TENANT AND THE MARKET VALUE OF THE PROPERTY DOES NOT MAKE A PROPERTY A SPECIAL PURPOSE PROPERTY.**

Furthermore, besides ignoring the Appellant's detailed, irrefutable Assignments of Error, and failing to direct the BTA to consider all of the issues raised by Appellant below, this Court created its own record. For reasons that are unclear, the Court acted as its own expert witness and reached conclusions that are not supported by the record in this case and are contrary to both accepted valuation methodology and logic.

Would the Court feel as free to play the role of expert witness in cases involving disciplines outside of the appraisal profession? When presented with conflicting medical testimony, would the Court ignore such testimony and render its own diagnosis? If a patient from a 1996 case had similar symptoms as a patient from a case currently before the Court, would the Court look to the prior case to render its own diagnosis or would it look to the testimony of the experts found in the record of the current case? Perhaps medical understanding has advanced in the last thirteen years. The Court's characterization of the subject property as special purpose is entirely at odds with the record in this case and reliance on the 1996 *Meijer*<sup>3</sup> decision is clearly misplaced.

There is absolutely no evidence in the record that supports the conclusion on which the Court's decision was based, that the subject property is a special purpose property. Even if a property has a use value that is more than its market value that does not make the property a special purpose property. In fact, both appraisers in this case prepared and then disregarded the cost approach to valuing the property which would be used if the property, in fact, was a special purpose property. Additionally, the Appellee argued before the BTA for the use of the cost

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<sup>3</sup> 75 Ohio St. 3d 181.

approach and such argument (the BOE's argument was actually addressed by the BTA) was specifically rejected.

Special purpose properties are designated as such due to a limited market for their sale. Such is clearly not the case with big box properties. Both appraisers testified to a number of second generation sales and rentals in their appraisal reports. These certainly do not represent all such transactions in the State and provide evidence of a market for the sale of the property. Ohio Revised Code section 5713.03 provides that property should be valued "in accordance with the uniform rules and methods of valuing and assessing real property as adopted, prescribed, and promulgated by the tax commissioner." Accordingly the tax commissioner has adopted rule 5703-25-05 which indicates that when the property has not been subject to a recent sale "[the terms] "true value in money" or "true value" means . . .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." As evidenced by both appraisers inclusions of second generation sales, there is such a market in this case.

There is no evidence that the subject property is a special purpose property. The value of a property to the entity it was specifically designed for frequently does not correlate to its market value. However, Ohio law still mandates the taxation of the property based upon the price it would sell for in the open market.<sup>4</sup> An easy example is the case of a custom-built home. How does one make all of the choices that come with building a house? Should the owner build the house so that when it is later sold the maximum selling price would be obtained? If you are a builder, perhaps. If you are the owner who is going to live in the property, perhaps not. Would

Shaquille O'Neal spend additional money on high ceilings? Would Michael Phelps spend the money on an indoor pool? Would Perry Mason pay for wheelchair access? This is not a unique situation that only applies to the subject property and other properties like it.

Perhaps each would pay for what is useful to them, but in determining the market value of those houses, what they spent on those items would be irrelevant. The question would be, what would the rest of the market pay? If the answer is "less than it cost to build", then those houses would suffer from obsolescence even though the user spent money to build those things in. There is still a market for such property; however, the house is not a special purpose property. (Such is the case with the subject property.) Why would anybody spend the money then? Perhaps the house was not built to maximize its sale price but rather to maximize the utility to the user. This doesn't mean that there isn't a market for the property just that it will vary from the costs paid by the original resident for whom the home was built.

Similarly, retailers build stores to maximize their value in selling goods, not to maximize the value if they have to sell the real estate. Mr. Lorms addresses this in his appraisal and it is fully briefed by the Appellant. That does not mean the store is not worth the costs of construction to the Appellant based on retail sales expected to be generated, but, again, that is not the issue. What would the rest of the market pay for land and improvements designed for a particular user? The Court, the Appellant, and the Appellees all know what Meijer would pay to construct the property. So it would be no surprise if, as the Court suggests, Meijer would be willing to enter a long-term lease for a building yet to be constructed based on its cost of construction. Again, that is not the issue. Would it follow that if Meijer entered into a below market lease, that the price realized upon sale would be its value?

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<sup>4</sup> As discussed below, the suggestion by the Court that the subject property could sell with Meijer still occupying the property in a sale-leaseback transaction opens this Court to severe ridicule. Such a transaction is not an open-market

The lease rate paid by the user the property was specifically designed for merely reflects the value to the user, not the market. The issue is - what would the market pay for the property if Meijer sold it? That answer is nowhere to be found in the Appellee's appraisal or the decision of the BTA. Once constructed, there is also no basis for concluding that in the market Meijer would pay any more than anyone else for the property.

**THE COURT'S DECISION IS NOT SUPPORTED BY THE RECORD IN THIS CASE. LEASES OF PROPERTIES NOT YET IN EXISTENCE AND SALES OF PROPERTIES SUBJECT TO THOSE LEASES DO NOT REFLECT WHAT AN OWNER-OCCUPIED PROPERTY WOULD SELL FOR ON THE OPEN MARKET. RELIANCE ON THESE TRANSACTIONS IS CLEARLY MISPLACED AND TO SUGGEST THAT A SALE-LEASEBACK TRANSACTION WOULD BE USED TO VALUE PROPERTY IS ABSURD.**

Essentially, the Appellee's appraisal and the BTA decision indicate that the subject property was comparable to other properties subject to first generation sales and leases for not yet built stores and not comparable to the sale or lease of existing properties sold or leased to the second user—even though the only potential arm's length transaction for the subject property would involve a lease or sale to a second user. As the record demonstrates, these first generation leases are signed before construction and reflect the lease of a property not yet built (i.e., stores not yet in existence). The sale is then reflective of that lease. The subject property is already built (i.e., in existence) and owner-occupied. To compare it to first generation transactions is an element of comparability nowhere to be found in the Appraisal of Real Estate or supportable by any sound legal reasoning.

The Appellant refuted the use of such transactions relied upon by Mr. Koon by the testimony of Mr. Lorms, reference to Appraisal theory and by effectively refuting each of the first generation, leased before they were built, comparables utilized by Mr. Koon in briefs before

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transaction and the initial sale-leaseback has none of the requirements of an arm's length transaction.

both the BTA and this Court. Again, the BTA failed to address any of these significant legal errors in Mr. Koon's valuation and when Appellant looked to this Court for, at the bare minimum, a remand and instruction to the BTA that it must at least address the arguments and concerns raised by the Appellant, the Appellant was essentially told that its issues are not worthy of the Court's time.

Since this issue was ignored by the Court, the Appellant is summarizing the argument presented to the Court here. The easiest way to disprove such an adjustment is to look at the sales of the former Kmart on Mill Run and the Lowe's on Brice Road. The former Kmart is 121,000 square feet, was built in 1994, and is located on Mill Run in Hilliard. It sold on August, 2005 for \$47.93 per foot. The Lowe's on Brice Road in Columbus is 128,000 square feet and was built in 1995. It sold in April, 2005 for \$81.63 per foot. At the time of sale, the Brice Road store was subject to a long-term lease with Lowe's. These properties are practically identical in age, size, location, and the time-frame when they sold.

Essentially, the Appellant's appraiser believes that the Mill Run property and others similarly situated are comparable to the subject for determining fee simple value. The Appellee's appraiser, on the other hand, testified that the Brice Road property and others similarly situated where the leased fee interest was sold are comparable to the subject property. Most importantly, both the Appellee's appraiser and the BTA found that the Brice Road Lowe's and others like it represent better comparables because they are still occupied by their first tenants who pay rent based on a lease for a property to be constructed and rejected the Appellant's comparables of existing stores available for purchase and use because they are not occupied by their first tenants.

The reason the BTA indicates it did so and the "logic" endorsed by this Court was because the continued occupancy by the first tenant of a comparable (e.g. Lowe's on Brice Road)

confirms that it is a good location while the departure of the first tenant from a comparable property (e.g. Kmart in Mill Run) confirms that it is a bad location. This is an unequivocally false assumption based entirely on a single premise - if the real estate is good, the store will stay open and if the real estate is bad, the store will close. Further, that assumption is unsupported in the record.

The Court's expert opinion related to the sales of closed location is contrary to the testimony in this case and has been repeatedly rejected by the BTA.<sup>5</sup> When stores close, there are multiple possibilities that might drive the decision. The Appellant would submit that rather than the real estate failing, another possible reason why a store might close is that the tenant's business failed, incidental to its location. For example, Ames, Kmart, Builder's Square, and Incredible Universe, to name a just a few, have all filed for bankruptcy. Do the bankruptcy filings by these tenants tell us anything at all about the stores they previously occupied? These aren't successful retailers with all bad real estate. These are unsuccessful retailers with some good real estate and some bad real estate.

Whether the real estate these failed retailers occupy is good or bad is not determined by the fact that they no longer occupy their stores and those stores thus become "second generation", but by corroborating evidence in the market. One of the best ways to determine whether a closure is a function of the real estate or a failed user is to determine whether there are other retailers in the same area who continue to thrive or if other retailers are also leaving the market. In the case of the Kmart in Mill Run, for example, Lowe's, Target, and Home Depot

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<sup>5</sup> See, *Lowes Home Centers, Inc. v. Fairfield Cty. Bd. of Revision* (May 27, 2008), BTA Case No. 2006-R-801, *unreported*; *Board of Edn. of the Columbus City Schools v. Franklin Cty. Bd. of Revision* (July 28, 2006), BTA Case No. 2005-V-211, *unreported* (a Target store); *Meijer Stores L. P. v. Montgomery Cty. Bd. of Revision* (October 14, 2005), BTA Case No. 2003-A-2160, *unreported*; *Agree L. P. v. Wood Cty. Bd. of Revision* (September 23, 2005), BTA Case No. 2003-T-1205, *unreported* (a K-Mart store); *Meijer Stores L. P. v. Wood Cty Bd. of Revision* (July 15, 2005), BTA Case No. 2003-A-1204, *unreported*; *Wal-Mart Real Estate Business Trust v. Fulton*

continue to apparently succeed at this same location. Similarly, in the case of the former Ames locations relied upon as comparables by the Appellant's appraiser, the buyers were Target and Home Depot. The Appellant would submit that neither Target nor Home Depot would be likely to buy into a location that has already failed another user. The more likely scenario would clearly be that the user failed, not the location. This is further supported by the testimony of Mr. Lorms.

Conversely, in the case of the Brice Road property occupied by Lowe's and relied upon as a comparable by the Appellee, the Appellant would submit that reasons other than the continued vitality of a location might drive the decision of a user to stay open. Again, the Appellant would submit that the surrounding market offers the best corroboration. On the Brice Road corridor, for example, both Meijer and Target have closed their stores.

The overwhelming absurdity of the Appellee's position can be illustrated in a brief hypothetical. Recall that the former Kmart on Mill Run is located next to a Lowe's store. According to the approach taken by the Appellee's appraiser, if he were assigned to appraise the Lowe's at Mill Run, the Brice Road sale would be a good comparable while the former Kmart right next door would not be. This is nonsense and cannot be the kind of approach adopted by this Court.

The Court's decision will have a devastating impact on businesses in the State of Ohio if such opinion of this Court is allowed to stand. The recently enacted Commercial Activity Tax ("CAT") has had a more significant impact on retailers given that it is tied to gross sales. Real property taxes, before this Court's decision, were *not* a function of the business success of the owner or tenant but that is exactly what this Court has endorsed in this case in adopting the use

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*Cty. Bd. of Revision* (July 15, 2005), BTA Case No. 2003-T-913, *unreported*; and *Auction Properties Inc. v. Columbiana County Board of Revision* (Mar. 5 2004), BTA Case No. 2003-G-183, *unreported* (a Wal-Mart store).

of first generation sales to value the subject property. This decision will increase costs for Ohio businesses in an economic climate where such costs are not easily absorbed or passed on to the residents of the State of Ohio.

The Court makes one attempt to address the overwhelming logic of the Appellant's position that the price at which an owner-occupied property would lease or sell would be to a second user by the Court's absurd suggestion that the current owner-occupant could always enter into a sale-leaseback transaction. Appellant is aware of no court in this country and no basis in valuation methodology or theory which would consider a sale-leaseback transaction to be an open market, arm's length transaction. To suggest that such a transaction would be the basis for valuing the property is illogical. Even in this Court's *AEI Net Lease Income and Growth Fund v. Erie Cty. Bd. of Revision*<sup>6</sup> decision, the Court only endorsed the use of the second transfer of a property subject to a sale-leaseback lease and not the use of an actual sale-leaseback transaction to value the property. For the highest court in Ohio to suggest that an original sale-leaseback transaction would be a potential basis for valuing property is misguided.

To believe in the Appellee's case one must believe many things that do not seem credible, including the belief that the real estate on Brice Road is worth 70% more than practically identical real estate on Mill Run. The Appellant submits that it is almost impossible for any reasonable person to believe that the Brice Road real estate is worth 70% more than Mill Run real estate. To believe in the Appellee's case, the Court would also have to conclude that their appraiser got it right and the Editors of the Appraisal Journal, the pre-eminent professional publication, when presented with the identical issues, got it wrong. (See Appellant's Reply Brief) To believe in the Appellee's case, the Court would have to conclude that the Wisconsin

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<sup>6</sup> (2008), 119 Ohio St. 3d 563.

Supreme Court, which this Court has repeatedly cited with approval<sup>7</sup> since the Court's decision in *Berea City School Dist. Bd. of Educ. v. Cuyahoga County Bd. of Revision*<sup>8</sup>, got it wrong when presented with the identical issues as noted in Appellant's Reply Brief.<sup>9</sup> To believe in the Appellee's case, the Court would need to apparently be prepared to adopt a position so outside mainstream valuation theory so as to be unrecognizable as even a minority position.

Conversely, to believe in the Appellant's case, one must believe that the Editors at the Appraisal Journal, disinterested in the instant case, and the pre-eminent authority in the United States related to issues of valuation, are right. To believe in the Appellant's case, one must believe that the wisdom of the Wisconsin Supreme Court did not end with the cases previously cited by this Court with approval, but continues in the *Walgreens* decision. Finally, to believe in Appellant's case one need only follow Ohio law and ask what would the subject property sell for on the open market where the current owner-occupant would be the seller and *not* the buyer.

**THE DECISION OF THE COURT IS INCONSISTENT WITH EVEN THE MOST RECENT DECISIONS OF THIS COURT REVIEWING DECISIONS OF THE BTA. THE DECISION OF THE COURT DENIES APPELLANT'S RIGHT TO EQUAL PROTECTION UNDER THE LAW.**

In two recent decisions of this Court, the Court has concluded that the BTA failed to consider the necessary issues or fully support its conclusion in its opinion and has remanded the case to the BTA with instructions to clarify the issue. Given the potential denial of Appellant's right to due process under the law, such treatment is appropriate in this case.

In *Woda Ivy Glen Ltd. Partnership v. Fayette Cty. Bd. of Revision*<sup>10</sup>, this Court found that the BTA had failed to address the impact of the use restrictions on a low-income housing tax

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<sup>7</sup> See, for example, *AEI Net Lease Income and Growth Fund v. Erie Cty. Bd. of Revision* (2008), 119 Ohio St. 3d 563 and *Cummins Property Services, L.L.C. v. Franklin County Bd. of Revision* (2008), 117 Ohio St.3d 516.

<sup>8</sup> (2005), 106 Ohio St.3d 269.

<sup>9</sup> *Walgreen Co. v. City of Madison* (2008), 752 N.W.2d 687.

<sup>10</sup> (2009), 121 Ohio St. 3d 175.

credit property and remanded the case to the BTA for further consider of that issue. In *HealthSouth Corp. v. Levin*<sup>11</sup>, this Court found that the BTA's opinion had failed to fully support the basis for its findings of fact, essentially not considering the oral objections raised by the counsel for the tax commissioner, and remanded the case to the BTA with instructions to fully consider and address the objections raised but not addressed by the BTA. This present case is not different from the *HealthSouth* case and property owners and taxpayers deserve the same treatment from the Court's review as is extended to the State of Ohio. If not, not only are Appellant's right to due process denied but also equal protection under the law.

It is certainly not the intention of the Court, but the unfortunate fact of the Court's current decision is extreme disparate treatment. If the State of Ohio disagrees with a BTA decision because the BTA failed to address an oral objection it raised at trial but then did not file a brief, this Court listens and sends the case back to the BTA so that due process is served. If, however, a property owner objects because the BTA failed to consider valid arguments briefed before the Board, this Court ignores this failure and the property owner is denied the due process afforded to the State. Equal protection demands equal treatment of the parties.

### **CONCLUSION**

Property Owners, Taxpayers and the Citizens of Ohio deserve better than the treatment afforded to Meijer in the present case. While not every litigant wins its arguments heard before the courts of Ohio, each, at a minimum, deserves to have its arguments addressed by the court or tribunal when they are properly presented. Meijer properly raised valid objections to the appraisal prepared by Mr. Koon in its brief to the BTA and the BTA, in accepting Mr. Koon's value in one paragraph, did not address even one of those objections.

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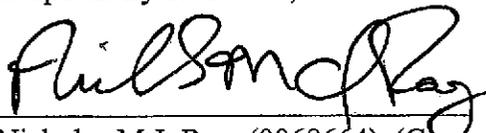
<sup>11</sup> (2009), 121 Ohio St. 3d 282.

The Ohio Supreme Court is acting as the only appellate review of the trial court's failure in this case and, unfortunately, Appellant has received the same treatment from this Court. If the appellate record and decision do not allow this Court to analyze the trial court's decision then, like it did in the *HealthSouth* decision, the Court needs to remand the matter to the BTA for a more complete analysis of the issues. Failure to do so denies the Appellant its due process right to an appellate review of the trial court's action and denies Appellant the same treatment extended to the State of Ohio when it questioned a BTA decision and therefore denies Appellant its right to equal protection under the law.

Furthermore, as detailed above, the Court's decision fails to address each of the Assignments of Error raised by the Appellant in its appeal. Finally, the Court's approach of substituting its own expert opinion on the valuation questions presented is not supported by the record in this case.

For each of the foregoing reasons, the Appellant respectfully requests that this Court reconsider its previous decision in this matter, correct its decision to accurately reflect the actual record in this case and remand the case to the BTA with instructions that such board is instructed to provide the Appellant with its right to due process and have its arguments considered by the BTA.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that on this 3<sup>rd</sup> day of August 2009, a copy of the Motion for Reconsideration was sent via facsimile and ordinary, first class, United States Postal Service mail, postage prepaid, to:

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