ORIGINAL

IN THE SUPREME COURT OF OHIO

Meijer Stores Limited Partnership,	:	
Appellant,	:	Case No. 2008-1248
v.	:	
Franklin County Board of Revision, et al,	:	
Appellees.	:	Appeal from the Ohio Board of Tax Appeals Case No. 2005-T-441 and 443

MEMORANDUM OF APPELLEE BOARD OF EDUCATION OF THE LICKING HEIGHTS LOCAL SCHOOL DISTRICT IN OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION

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MEMORANDUM OF APPELLEE BOARD OF EDUCATION IN OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION

Now comes the Appellee Board of Education of the Licking Heights Local School District in opposition to Appellant's motion for reconsideration. Meijer's motion is completely frivolous, nonsensical in many respects, pretentious, and insulting (Meijer refers to part of this Court's decision as being "absurd" and to another part as "shocking[]," and accuses this Court of acting as an "expert witness," which is utter nonsense), and the Motion primarily reargues all of the basic claims set forth in its Merit Brief. Meijer's Motion for Reconsideration fully deserves to be denied by this Court. Appellee has filed herewith a motion for sanctions against Appellant.[1]

1. Failure to Address Arguments.

Appellant Meijer first claims that this Court failed to address "all arguments made by Appellant" (Appellant's Motion, p. 1); that it failed to consider and address its "assignments of error" (Motion, p. 2); and that it ignored Meijer's "irrefutable Assignment[s] of Error" (Appellant's Motion, p. 4).

All of these claims are both frivolous and entirely inaccurate, and appear to be the result of the fact that whoever wrote Meijer's Motion for Reconsideration apparently failed to read both Meijer's own merit brief and this Court's decision. In fact, Meijer's Merit Brief specifically failed to address any of the seven designated "assignments of error" set forth in its notice of appeal from the BTA, and instead addressed the issues it wished to raise under four section headings. With respect to assignments of error 1 through 4 in its notice of appeal, which Meijer claims this Court failed to address, Meijer states in its Motion, that "[s]pecifically, Assignments

[1] Meijer also filed an equally frivolous motion for reconsideration following this Court's decision in the first Meijer case, which was denied by this Court. See Reconsideration Docket, April 24, 1996 Case No. 95-510, *Meijer, Inc. v. Montgomery Cty. Bd. of Revision (Meijer, Inc. v. Montgomery Cty. Bd. of Revision* (1996), 75 Ohio St.3d 181, 661 N.E.2d 1056, 1996-Ohio-223.

of Error 1 through 4 address errors with Mr. Koon's appraisal ***" (Meijer's Motion, p. 3). The heading of Section 1 of Meijer's Merit Brief claims that Lorms' appraisal constituted "competent and probative evidence" of the true value of the property (Meijer's Merit Brief, p. 3). The heading of Section 2 of Meijer's Merit Brief claims that Mr. Koon's appraisal "does not constitute competent and probative evidence" and could not be relied on by the BTA (Meijer's Merit Brief, p. 12). According to Meijer's Merit Brief, these two claims address "Assignments of Error 1, 2, 3 and 4" (Meijer's Merit Brief, p. 3 and p. 12). The assignments of error in question deal with the claim that first generation leases and sales cannot be used to value the Meijer property because the sales do not reflect "obsolescence" (Assignment of Error No. 1); the properties are not "comparable" to Meijer's property (Assignment of Error No. 2) and lack any "element of comparability" (Assignment of Error No. 3); and because the "lease transactions" in question "do not meet the accepted definition of market leases" (Assignment of Error No. 4).

Even at this late date, Meijer still appears to be unable to understand that all of its factual objections to Mr. Koon's appraisal, and all of its pretentious claims concerning the merits of Mr. Lorms' appraisal, that are specifically set forth in its "Assignments of Error 1, 2, 3 and 4" of its notice of appeal, were factual and appraisal issues decided by the BTA and that this Court does not act as a "super-BTA." This Court specifically addressed all of these factual appraisal issues in paragraphs 17 to 20 of its Decision under the clear heading that "Meijer has not met its burden to show an abuse of discretion by the BTA." Paragraph 20 of this Court's Decision specifically states as follows:

"Meijer also specifies a number of alleged deficiencies in Koon's appraisal and testimony. But determining the probative value of an appraiser's testimony lies within the competence of the BTA, and we will defer to the BTA's rejection of Meijer's contention in this regard."

The Court then specifically addressed and rejected these claims as legal issues in Paragraphs 22, 23, and 24 of its Opinion, and this Court specifically noted in Paragraph 23: "Moreover, by drawing the distinction between 'fee simple" and 'leased fee,' Meijer predicates its argument on a legal premise that our cases have rejected."

Meijer acknowledges (but only "arguably" so) that this Court addressed "Assignment of Error 5 in its Decision (Motion, p. 3). Meijer's Assignment of Error No. 6 in its notice of appeal claims that the BTA's valuation of its property constituted a "value in use" and Assignment of Error No. 7 makes reference to a violation of the "uniform rule" of Article XII, Section 2 of the Ohio Constitution. Paragraphs 24, 25, and 26 of this Court's Opinion specifically addressed and decided all of Meijer's "value in use" claims. The Table of Authorities in Meijer's Merit Brief makes no reference to Article XII, Section 2 of the Ohio Constitution and Meijer only referred to this provision on page 27 of its Merit Brief in the specific context of its "value in use" claims.

It should have been clear to Meijer that this Court fully addressed and decided all of the appraisal-related and legal issues raised by Meijer in its notice of appeal and Merit Brief.

Finally, as indicated above, Meijer's Merit Brief failed to specifically identify and specifically address, as such, any of the seven designated "assignments of error" set forth in its notice of appeal from the BTA, but rather lumped them together under the four section headings of its brief that apparently served as its propositions of law; and for this reason Appellant waived or "abandoned " any right to object to the manner in which this Court addressed the issues raised in this appeal. Rule VI, Section 2(B)(4) of this Court's Rules require a merit brief to set forth: "(4) An argument, headed by the proposition of law that appellant contends is applicable to the facts of the case and that could serve as a syllabus for the case if appellant prevails. See *Drake v.*

Bucher (1966), 5 Ohio St.2d 37, 39, 213 N.E.2d 182, 184. If several propositions of law are presented, the argument shall be divided with each proposition set forth as a subheading."

In *E. Liverpool v. Columbiana Cty. Budget Comm.*, 116 Ohio St.3d 1201, 2007-Ohio-5505, this Court stated in denying a motion for reconsideration based on a claim that this Court failed to consider an argument that "East Liverpool never pressed this argument in its briefs, and under our precedent it is therefore 'deemed to be abandoned.' *Household Fin. Corp. v. Porterfield* (1970), 24 Ohio St.2d 39, 46, 53 O.O.2d 22, 263 N.E.2d 243." By failing to specifically identify and specifically address each specific assignment of error, Meijer abandoned the claim that the assignments of error had to be specifically addressed by this Court. Otherwise, this Court, as Appellee had now done in preparing this memorandum, would have search through all 42 pages of Meijer's Merit Brief to find sentences or paragraphs that correspond to its seven original assignments of error, so that each could be addressed and decided. If Meijer does not comply with the Rules, it cannot claim the benefit of the Rules.

2. Accusation That This Court Acted As An "Expert Witness.

Meijer's second claim in its Motion for Reconsideration is that this 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" in connection with this Court's reliance on *Dinner Bell Meats, Inc. v. Cuyahoga Cty. Bd. of Revision* (1984), 12 Ohio St.3d 270, 271, 12 OBR 347, 466 N.E.2d 909; and Meijer contemptuously rejects this Court reference to its property as a "special purpose property" (Motion, p. 4). These claims are silly.

As this Court noted in paragraph 7 of its Decision, Meijer's own appraiser, Robin Lorms testified that the Meijer store "would not be easily adaptable to the needs of a potential buyer" and that "most potential buyers would be hard-pressed to utilize such a large space" and "would

probably have to significantly renovate or even tear down the existing structure in order to use the property." Meijer's property clearly is a "special purpose property" under Lorms' own standards! Meijer then proceeds to attack this Court's holding in *Dinner Bell Meats*, supra, which is set forth in paragraph 25 of its Opinion, that Ohio law allows appraiser to "consider[] the utility of the properties in conjunction with the highest and best use of the property" (and in this case, both appraiser's agreed that Meijer's current use of the property is the "highest and best use of the property), and Meijer attacks the principle stated by this Court in the same paragraph that:

"In so holding, we acknowledged that the present use of a property may be considered when 'a building in good condition [is] being used currently and for the foreseeable future for the unique purpose for which it was built'; otherwise, 'the owner of a distinctive, but yet highly useful, building [would be able] to escape full property tax liability.'"

Indeed, it is clear that Meijer wishes to financially benefit from the use of a brand new "distinctive, but yet highly useful building" and "escape full property tax liability", that is, to pay less than its fair share of real estate taxes and at the same time to shift the burden of taxation to other less well-off retailers with which it competes.

Meijer offers no intelligible arguments to support its claims in this section of its Motion and provides no reasoning to support a claim that *Dinner Bell Meats*, supra, should be reversed. Instead, it makes claims not supported by the record and which do not appear to make any sense concerning special purpose properties (Motion, p. 5) and it repeats the same arguments set forth on page 28 to 31 of its Merit Brief (where it used the example of a "manufacturing" plant instead of the example of a "custom-built home" found in its Motion, at pages 5 and 6).

3. Improper Reliance on First-Generation Transactions.

Meijer's third claim in its Motion for Reconsideration is, once again, the tired, repetitious, and previously decided claim that comparable sales of first-generation properties that may be subject to a lease cannot be used to value its property (Motion, p. 7), coupled with the additional claims that this Court's holding was "absurd" (Motion, p. 11); that Appellee's position on this issue was "absurd" (Motion, p. 10); that this Court's decision was both "misguided" (Motion, p. 11) and "illogical" (Motion, p. 11); that this Court wrongly rejected the "overwhelming logic" of Meijer's position (Motion, p. 11); and that this Court "adopt[ed] a position so outside mainstream valuation theory so as to be unrecognizable as even a minority position" (Motion, p. 12).

Quite incredibly, Meijer claims that this issue was "ignored by the Court" (Motion, p. 8), despite the fact that this Court specifically addressed this issue in paragraphs 21, 22, and 23 of its Opinion under section heading B, which states that "Meijer's specific legal objections to the BTA's decision have no merit." On page 8 and 9 of its Motion, Meijer once again claims that its brand new store has to be valued for real property tax purposes using the sale of the abandoned, vacant, and dilapidated Big K store at Mill Run, which has been vacant for many years and which apparently cannot even be used for the same "highest and best use" as the Meijer store. This part of its Motion simply repeats ad nauseam the exact same arguments made on pages 32 to 36 of its Merit Brief. This claim was rejected by the BTA and by this Court in paragraphs 17 to 20 of its Opinion. The abandoned and vacant Big K store is not comparable to the Meijer store in either a physical or an economic sense. Likewise, the abandoned Big K store is not comparable in any sense to the Lowe's store referred to by Meijer in its Motion (pp 8-9: this same very discussion and comparison is set forth in Meijer's Merit Brief at pages 35 and 36).

Meijer also repeats the claim made in its Merit Brief that Sam Koon's appraisal of its property was based on the "business success of the owner or tenant," which is simply another misrepresentation of Koon's appraisal (Motion, p. 10). This issue was fully addressed by Meijer in its Meijer's Merit Brief on pages 2, 16, 28.

Meijer ridiculously claims that this Court's decision will have a "devastating impact on business" (Motion, p. 10). This is the same claim it made in the first *Meijer* decision (*Meijer, Inc. v. Montgomery Cty. Bd. of Revision* (1996), 75 Ohio St.3d 181, 661 N.E.2d 1056, 1996-Ohio-223, in which the BTA and this Court rejected the very same arguments made by Meijer in the present appeal. Meijer does not explain how it managed to increase its business, expand the number of properties it has, and successfully capture a significant part of the Ohio retail market between 1995 and today under conditions that its claims would have a "devastating impact" on its business.

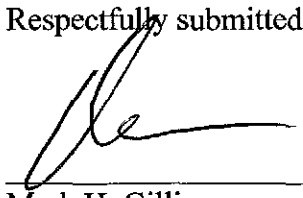
4. Meijer's Demand For A Remand.

In the last section of its Motion (p. 12), Meijer now claims that the BTA failed to consider "the necessary issues or fully support its opinion" and that the appeal should have been "remanded" to the BTA. This is complete nonsense. The two cases cited by Meijer, *Woda Ivy Glen Ltd. Partnership v. Fayette Cty. Bd. of Revision*, 121 Ohio St.3d 175, 2009-Ohio-762 and *HealthSouth Corp. v. Levin*, 121 Ohio St.3d 282, 2009-Ohio-584, are not even remotely relevant to Meijer's claim. The simple fact is that Meijer never asked for a remand in its Merit Brief, and Meijer never claimed that the BTA had "failed to consider the necessary issues or fully support its opinion."

CONCLUSION

For the reasons set forth herein, this Court is respectfully requested to deny Meijer's Motion for Reconsideration.

Respectfully submitted,



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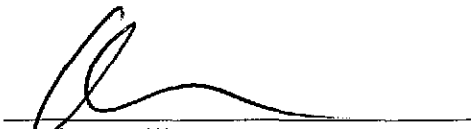
CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing memorandum was served upon Nicholas M.J. Ray, 3001 Bethel Road, Suite 208, Columbus, Ohio, 43220, William J. Stehle, 373 South High Street, 20th Floor, Columbus, Ohio 45215, and Richard Cordray, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215 by regular U.S. mail, postage prepaid, this 11 day of August, 2009.



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