ORIGINAL

IN THE SUPREME COURT OF OHIO 11-2053

BEECHWOOD II, L.P., Appellant,	:	On Appeal from the Clermont County Court of Appeals, Twelfth Appellate District
vs.	:	
CLERMONT COUNTY BOARD OF REVISION, et al.,	:	Court Of Appeals Case No.: CA2011-04-033
Appellees.	:	Supreme Court Case No. 2009-K-1852

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT BEECHWOOD II, L.P.

Jonas J. Gruenberg (0018718)
Sasha Alexa M. VanDeGrift (0080800)
COOLIDGE WALL CO., L.P.A.
33 W. First Street, Suite 600
Dayton, OH 45402
Phone: (937) 223-8177
Fax: (937) 223-6705
E-mail: gruenberg@coollaw.com
E-mail: vandegrift@coollaw.com

Attorneys for Appellant Beechwood II, L.P.

David C. DiMuzio, Esq.
810 Sycamore Street, Sixth Floor
Cincinnati, OH 45202
Phone: (513) 338-1990
Fax: (513) 263-9010
E-mail: legaltrial@yahoo.com

Attorney for Appellee
West Clermont Local School District
Board of Education

Allen L. Edwards, Esq.
Clermont County Prosecutor's Office
Civil Division
101 East Main Street
Batavia, OH 45103

Attorney for Defendants-Appellees
Clermont County Board of Revision
and Clermont County Auditor

FILED
DEC 08 2011
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

APPENDIX i

TABLE OF AUTHORITIES ii

EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT GENERAL INTEREST AND RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION 1

STATEMENT OF THE CASE AND THE FACTS 2

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW 5

PROPOSITION OF LAW NO. 1: A recent arm's length sale price as listed in a conveyance form is not reliable evidence of value for low income tax credit eligible property when the subject credits and restrictions were created after the sale closed. 5

PROPOSITION OF LAW NO. 2: When presented with a combined sale of real estate and the opportunity to qualify for federal low income housing tax credits, a board of revision must subtract the value of the tax credits from the purchase price to find the portion of the purchase price attributable to the real estate. 8

PROPOSITION OF LAW NO. 3: After an owner of a low income housing tax credit eligible property demonstrates that the Auditor's value is unreliable, the Auditor is required to present evidence justifying its valuation or the board of revision must reduce the real estate's valuation. 11

CONCLUSION 12

CERTIFICATE OF SERVICE 14

APPENDIX

Appx. Page

Decision and Judgment of the Clermont County Court of Appeals 1
(October 24, 2011)

Decision/Entry of the Clermont County Court of Common Pleas Appeal 14
(April 1, 2011)

TABLE OF AUTHORITIES

Cases

AP Hotels of Ill., Inc. v. Franklin Cty. Bd. of Revision, 118 Ohio St.3d 343, 2008-Ohio-2565, 889 N.E.2d 115 12

Bd. of Educ. of Norwood City Sch. Dist. v. Hamilton Cty. Bd. of Revision (Mar. 4, 2011), No. 2010-M-24, 2011 Ohio Tax LEXIS 464 11

Bd. of Educ. v. Franklin Cty. Bd. of Revision, 118 Ohio St.3d 45, 2008-Ohio-1588, 885 N.E.2d 934 5

Berner v. Sodders, Clark App. No. 2010 CA 40, 2010-Ohio-4914 11

Buck Storage, Inc. v. Bd. of Revision (Clark Cty.), 172 Ohio App.3d 250, 2007-Ohio-2964, 874 N.E.2d 829 11

Cummins Prop. Servs. v. Franklin Cty. Bd. of Revision, 117 Ohio St.3d 516, 2008-Ohio-1473, 885 N.E.2d 222 6

Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision, 113 Ohio St.3d 281, 2007-Ohio-1948, 865 N.E.2d 22 11

Deane v. Miami Cty. Bd. of Revision (Dec. 12, 2003), B.T.A. No. 2003-N-560 6

Dublin City Sch. Dist. Bd. of Educ. v. Franklin Cty. Bd. of Educ., 80 Ohio St.3d 450, 1997-Ohio-327, 687 N.E.2d 422 11

Higbee Co. v. Cuyahoga Cty. Bd. of Revision, 107 Ohio St.3d 325, 2006-Ohio-2, 839 N.E.2d 385 9

Highland Crest Associates, L.L.C. v. Lucas County Board of Revision, Lucas App. No. L-10-1239, 2011-Ohio-2078 7

M.H. Murphy Dev. Co. v. Franklin Cty. Bd. of Revision (Dec. 3, 2004), B.T.A. No. 2003-R-1177 6

Muirfield Ass'n. v. Franklin Cty. Bd. of Revision (1995), 73 Ohio St.3d 710, 654 N.E.2d 110 6

New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision, 80 Ohio St.3d 36, 44, 1997-Ohio-360, 684 N.E.2d 312 6

Olentangy Local Schs. Bd. of Educ. v. Del. Cty. Bd. of Revision, 125 Ohio St.3d 103, 2010-Ohio-1040, 926 N.E.2d 302 ..... 8, 9

St. Bernard Self-Storage, L.L.C. v. Hamilton Cty. Bd. of Revision, 115 Ohio St.3d 365, 2007-Ohio-5249, 875 N.E.2d 85 8

Union Oil of Calif. v. Gahanna Jefferson Bd. of Educ. (Franklin Cty. 1987), 38 Ohio App.3d 66, 526 N.E.2d 309 9

Woda Ivy Glen L.P. v. Fayette Cty. Bd. of Revision, 121 Ohio St.3d 175, 2009-Ohio-762, 902 N.E.2d 984, ¶16 ..... 1, 2, 9, 12

Worthington City Schs. Bd. of Educ. v. Franklin Cty. Bd. of Revision, 124 Ohio St.3d 27, 2009-Ohio-5932, 918 N.E.2d 972 5

Other Authorities

J. William Callison, *Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit,* 19 S. Cal. Rev. L. & Social Justice 213, 240 (Spring 2010) 9

James A. Long, *The Low-Income Housing Tax Credit in New Jersey: New Opportunities to Deconcentrate Poverty Through the Duty to Affirmatively Further Fair Housing*, 66 N.Y.U. Ann. Surv. Am. L. 75, 85 (2010) 9

Joseph Rosenblum, *Assessing the Value of Affordability: Ad Valorem Taxation of Properties Participating in the Low Income Housing Tax Credit Program*, 2 J. Marshall Law School Fair & Affordable Housing Commentary 32, 33 (2006)) 9

EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT GENERAL INTEREST AND RAISES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves a matter of great general interest and raises a substantial constitutional question because it goes to the very heart of fair property taxation. Taxpayers are responsible to pay real estate taxes on the fair market value of their real property. Taxpayers are not responsible to pay real estate taxes for conditions on the land that artificially inflate the real estate's purchase price without respect to the value the parcel would have on the open market.

This case involves a low income tax credit housing project that is subject to just such an artificial inflation of its purchase price. Like many low income tax credit housing projects, Appellant Beechwood II, L.P.'s property (the "Property") is eligible for 10 years of federal tax credits because the project reserves a percentage of its units for low income families. In exchange for these federal tax credits, the Property is subject to a mandatory 15 year restrictive covenant that provides that the federal government may "claw back" the tax credits received if at any time the Property does provide the requisite number of units to low income families in the federal programs. Despite the restrictions, the tax credits have economic value independent of the real estate because the tax credits can be "syndicated" or purchased by passive investors.

This Court in *Woda v. Ivy Glen*, acknowledged that, because of these unique circumstances, low income tax credit housing projects are fundamentally different from other types of commercial and investment property. *Woda Ivy Glen L.P. v. Fayette Cty. Bd. of Revision*, 121 Ohio St.3d 175, 2009-Ohio-762, 902 N.E.2d 984, ¶16. This Court further opined in *Woda* that the law must prevent a parcel's participation in the federal low income tax credit housing programs "from unduly inflating the value of the property for tax purposes." *Woda Ivy Glen L.P.*, 2009-Ohio-762, ¶29.

The result this Court warned of in *Woda* has regrettably come to pass in this case. In 2008, Beechwood purchased the Property knowing of the tax credits' independent economic value, including the opportunity to participate in the federal low income tax credit program in the consideration. However, the restrictions and the tax credits became effective by the lien date, changing the nature of the Property. Yet, the Clermont County Board of Revision ("Board of Revision") used the $10,000,000.00 total sale price as the true value of the Property, without deducting the $2,500,000.00 value of the tax credits. That decision taxes Beechwood on the state level for a federal tax credit, not on the actual value the unencumbered real estate would have on the open market. That decision also undermines the critical social policy of encouraging more residential landlords to offer affordable housing units to low income families.

Therefore, Beechwood respectfully requests that this Court accept jurisdiction over the issue of whether the value of federal low income housing tax credits can be taxed by the State of Ohio as part of the fair market value of the underlying real estate. Once accepted for review, Beechwood respectfully requests that this Court reverse the Twelfth District Court of Appeals' Opinion, and hold that a county Auditor may not tax a low income tax credit housing project for the value of the federal tax credits it is entitled to receive, regardless of whether those tax credits are included in the total arm's length sale for the real estate.

STATEMENT OF THE CASE AND THE FACTS

On January 1, 2008, the Clermont County Auditor ("Auditor") valued the Property at $7,000,000.00. Board of Revision Hearing Transcript ("Tr.") at 5.[1] On May 8, 2008, Beechwood's primary owner, Lawler Wood Housing Inc., purchased the Property, multi-unit apartment complex in Union Township, Clermont County, Ohio. The Conveyance Form listed

[1] The West Clermont Local School District Board of Education (the "Board of Education") challenged that valuation, urging that the transfer price of the Property was $10,100,000.00, which was determinative of value. Tr. at 5. That matter is currently pending before the Board of Tax Appeals in Columbus.

the Purchase Price for the transaction as $10,100,000.00. The Purchase Price included the value of the real estate, as well as the value of the opportunity to obtain $2,500,000.00 in tax credits that the Property would be eligible for based on its operation within the parameters of the federal low income tax credit programs.

In 2009, despite the changes in the economy and the filing of the restrictive covenant, the Auditor assessed the Property at $10,100,000.00, relying on the Conveyance Form's indication that the transaction was an arm's length sale. The Auditor included the value of the federal tax credits associated with the Property's participation in the federal low income tax credit programs in the fair market value of the Property. If the value of the tax credits had not been improperly included, the fair market value of the Property would be $6,350,000.00.

Beechwood filed a Complaint Against Valuation for 2009, seeking a reduction in the fair market value from $10,100,000.00 to $6,350,000.00. Compl. ¶1. The Board of Education filed a Counter-Complaint, asking the Board of Revision to maintain $10,100,000.00 as the assessed fair market value.

The Board of Revision held a hearing on both the Complaint and the Counter-Complaint on June 29, 2010. At the hearing, Beechwood presented the testimony and appraisal of Cynthia Hatton Tepe, a licensed appraiser. Tr. at 6. Tepe testified that the rents for the Property are below market because the Property operates as a low income housing facility. Tr. at 7-8. Tepe's income approach analysis showed that the Property's profitability had decreased from 2007 to 2009. Appraisal at 38-39. In presenting its evidence, Beechwood emphasized that the dramatic negative change in the real estate market between mid-year 2008 and beginning of 2009 shows that the sale, although it occurred in 2008, is not reliable anymore because the marketplace conditions are not the same. Tr. at 7-9.

A representative for the Auditor indicated that he did not have any problems with the appraisal. Tr. at 12. Neither the Board of Education nor the Auditor presented any evidence at the hearing regarding the value of the Property. Because the parties had a dispute over what constitutes an arm's length sale, the Board of Revision adjourned the hearing to consider that and related issues before rendering an opinion. Tr. at 18-19, 21, June 29, 2010.

The Board of Revision reconvened the hearing on July 8, 2010. At the hearing, the Board of Revision found that because the sale occurred within six months[2] of the tax lien date the sale was the best evidence of value and discarded the appraisal, the effect of the tax credits, and the restrictions on the Property. The Board of Revision set the fair market value at $10,100,000.00, the value of the land and the tax credits.

Beechwood administratively appealed that decision to the Clermont County Common Pleas Court (the "trial court"). Both Beechwood and the School Board briefed whether the sale was the best evidence of value given changes in the marketplace and the conditions on the Property. Beechwood pointed out in its brief that the Property is now subject to the Restrictive Covenant, impacting the Property's ability to generate market rents. In addition, Beechwood presented the Auditor's own Comprehensive Annual Financial Report for the Year Ended December 31, 2009 ("2009 Annual Report"), which indicates that the average sales price for residential real estate dropped dramatically between 2008 and 2009, from $168,388.00 to $147,710.00. Id. This drop of $20,678.00 amounts to a 12% loss in property values between 2008 and 2009. Id. Beechwood presented this to show that the Auditor, a party to these proceedings, admits that the market changed substantially between the sale date and the lien date.

On April 1, 2011, the trial court adopted the Board of Revision's decision, setting the fair market value for the Property at $10,100,000.00. Decision at 13. The trial court did not allocate

[2] The sale and the tax lien date were actually eight months apart.

the portion of the $10,100,000.00 Purchase Price that represented the value of the tax credits. See, generally, Decision. The trial court did not consider the Auditor's Annual Report. Id. The trial court also did not consider the Restrictive Covenant's impact in the Property's value.

Beechwood appealed to the Twelfth District Court of Appeals. The Twelfth District affirmed the trial court's decision, relying on the School Board's case law indicating that an arm's length sale is the best evidence of value. The Twelfth District declined to separate the independent economic value of the federal tax credits in that sale price from the value of the Property as if unencumbered. It is from this decision that Beechwood seeks review.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: A recent arm's length sale price as listed in a conveyance form is not reliable evidence of value for low income tax credit eligible property when the subject credits and restrictions were created after the sale closed.

This Court should accept this case for review in order to determine whether a sale price for a low income tax credit eligible property reliably be the best evidence of fair market value when the right to the federal tax credits and the obligations under the restrictive covenants were not in place until after the sale closed. A sale price is only the best evidence of value if the sale was recent and was an arm's length transaction. *Bd. of Educ. v. Franklin Cty. Bd. of Revision*, 118 Ohio St.3d 45, 2008-Ohio-1588, 885 N.E.2d 934, ¶10.

In order for a sale to be sufficiently recent (read *reliable*) to be the best evidence of value, the sale must be both recent in time and represent stable market and property-specific conditions. Recency is an umbrella concept that "encompasses all factors that would....affect the value of the property." *Worthington City Schs. Bd. of Educ. v. Franklin Cty. Bd. of Revision*, 124 Ohio St.3d 27, 2009-Ohio-5932, 918 N.E.2d 972, ¶32. To that end, a board of revision should consider changes in the property's circumstances as well as the reasonableness of the length of

time relative to the tax lien date. *Cummins Prop. Servs. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, 885 N.E.2d 222, ¶35.

These factors vary depending on the property at issue. For example, where a property underwent significant zoning changes and construction, the sale price, although temporally "recent," was too unreliable to be the best evidence of value. *M.H. Murphy Dev. Co. v. Franklin Cty. Bd. of Revision* (Dec. 3, 2004), B.T.A. No. 2003-R-1177. See, also, *Deane v. Miami Cty. Bd. of Revision* (Dec. 12, 2003), B.T.A. No. 2003-N-560 (combination of improvements made between sale and tax lien date and passage of 47 months made sale not "recent"); *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision*, 80 Ohio St.3d 36, 1997-Ohio-360, 684 N.E.2d 312 (overruled to the extent that it provided for an appraisal to rebut an arm's length sale that satisfied the recency factors in *Cummins Prop. Servs. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, 885 N.E.2d 222, ¶35) (recency factors include "changes that have occurred in the market").

In this case, the Twelfth District erred by considering the Purchase Price the best evidence of value because of the inclusion of the federal tax credits in the Purchase Price and the recording of the Restrictive Covenant made the Purchase Price an unreliable measure of the fair market value of the unencumbered real estate. While the time period between the sale and the tax lien date is relatively short, only approximately eight months, the Property underwent two dramatic changes in circumstances, namely, the Property became eligible for federal low income housing tax credits and the Restrictive Covenant was recorded. These changes, however, do not reflect a change in the *unencumbered* value of the real estate. The case law is clear that real property is to be valued as if unencumbered. *Muirfield Ass'n. v. Franklin Cty. Bd. of Revision* (1995), 73 Ohio St.3d 710, 654 N.E.2d 110, 111.

For the 2009 tax year, the Auditor valued the Property $3,100,000.00 *more* than it valued the Property in 2008. The only evidence of anything changing vis-à-vis the Property was the evidence of the encumbrance and the federal tax credit eligibility. In order to follow the law and value the Property as if unencumbered, the Board of Revision should have disregarded the Purchase Price because it contains compensation for the encumbrance, rendering the sale an unreliable measure of the Property's true (unencumbered) value.

Likewise, when a taxpayer presented evidence to show that a $660,731 purchase price reflected both the value of the low income housing property and the value of a loan the seller paid off on the tax payer's behalf, the trial court abused its discretion by accepting the purchase price as the best evidence of value. *Highland Crest Associates, L.L.C. v. Lucas County Board of Revision*, Lucas App. No. L-10-1239, 2011-Ohio-2078, ¶26. It was an error for the trial court to disregard the tax payer's evidence that the purchase price "was manipulated by the parties to achieve certain goals of the federal agency, and did not reflect the true market value of the property." Id. The Sixth District Court of Appeals opined that "[w]hile the purchase price is generally the most accurate method to value property, the tax payer in this case has shown that it was not an accurate reflection of the market value of this particular property." Id. at ¶27.

This case is highly analogous to the situation in *Highland Crest.* Here, the Board of Revision completely ignored the fact that the tax credits and the effect of the recorded Restrictive Covenant cannot increase the value of the unencumbered real estate. The Twelfth District made the same, albeit understandable, mistake the trial court made: the Twelfth District treated the Purchase Price as reliable even though the tax credit eligibility and the recording of the Restrictive Covenant necessarily called into question whether **<u>any</u>** sale price occurring prior to those events could still accurately reflect the value of the unencumbered real estate.

By accepting this case for review, this Court could clarify whether federal low income tax credits and recorded use restrictions occurring after an arm's length sale call into question the reliability of the sale price as the best evidence of value, or whether the law will treat these unique circumstances as having no effect on a property's fair market value. Therefore, Beechwood respectfully requests this Court accept jurisdiction over this Proposition of Law, and ultimately reverse the Twelfth District's decision affirming the decisions that preceded it.

PROPOSITION OF LAW NO. 2: When presented with a combined sale of real estate and the opportunity to qualify for federal low income housing tax credits, a board of revision must subtract the value of the tax credits from the purchase price to find the portion of the purchase price attributable to the real estate.

This Court should accept jurisdiction of this appeal and review whether, like with a combined sale involving real property and a car dealership, print shop, or other business opportunity, a board of revision is required to allocate the portion of the purchase price attributable to the tax credit opportunity and the real estate, or whether the board of revision may decide that the entire purchase price is for real estate despite evidence to the contrary.

The sale in this case was, in essence, a bulk sale whereby Beechwood purchased the Property and the opportunity to complete the requirements necessary to participate in the federal low income tax credit housing program and receive the associated tax credits. See e.g. *St. Bernard Self-Storage, L.L.C. v. Hamilton Cty. Bd. of Revision*, 115 Ohio St.3d 365, 2007-Ohio-5249, 875 N.E.2d 85, ¶15. In a sale transferring more than just real estate, a question arises beyond the basic pronouncement of *Berea* that the sale price is the best evidence of value. Id.

Rather, when a board of revision is faced with a sale involving real estate and business opportunities, a board of revision must apportion what amount of the stated sale price pertains to the realty and what pertains to the business assets. Id.; *Olentangy Local Schs. Bd. of Educ. v. Del. Cty. Bd. of Revision*, 125 Ohio St.3d 103, 2010-Ohio-1040, 926 N.E.2d 302, ¶22; *Higbee*

Co. v. Cuyahoga Cty. Bd. of Revision, 107 Ohio St.3d 325, 2006-Ohio-2, 839 N.E.2d 385; *Union Oil of Calif. v. Gahanna Jefferson Bd. of Educ.* (1987), 38 Ohio App.3d 66, 526 N.E.2d 309. Thus, the board of revision should subtract the portion of the sale price reasonably attributable to the sale of the business opportunities to arrive at the portion of the sale price paid for the realty. *Olentangy Local Schs. Bd. of Educ.*, 2007-Ohio-5249, ¶22.

Low income housing tax credits are business opportunities with independent value that must be separated from the value of the real estate. See *Woda Ivy Glen,* 2009-Ohio-762, ¶16. In *Woda*, this Court explained that such credits are "typically enjoyed by one or more entities that become passive investors in a low-income housing development after the developer has formed a limited partnership or limited-liability company." Id., citing Joseph Rosenblum, *Assessing the Value of Affordability: Ad Valorem Taxation of Properties Participating in the Low Income Housing Tax Credit Program*, 2 J. Marshall Law School Fair & Affordable Housing Commentary 32, 33 (2006). Because low-income-housing tax credits offset federal income taxes on a dollar-for-dollar basis, they can have considerable investment value to taxpaying corporations and even to some individuals. See, J. William Callison, *Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit,* 19 S. Cal. Rev. L. & Social Justice 213, 240 (Spring 2010); James A. Long, *The Low-Income Housing Tax Credit in New Jersey: New Opportunities to Deconcentrate Poverty Through the Duty to Affirmatively Further Fair Housing*, 66 N.Y.U. Ann. Surv. Am. L. 75, 85 (2010).

As a result, this very Court has previously recognized that the law must prevent low income housing tax credits "from unduly inflating the value of the property for tax purposes." *Woda Ivy Glen L.P.*, 2009-Ohio-762, ¶29. Low income housing properties are fundamentally different because they are almost always subject to encumbrances to participate in low income

housing tax credit programs and, as such, require due attention be paid to market rents and the conditions placed on the property's use. Id.

In this case, Beechwood purchased *two* things in the sale, the Property and the opportunity to earn the tax credits. However, the Board of Revision allocated the entire purchase price to *one* item, namely, the Property, and allocates *nothing for the tax credits*. Not only does the record show that the tax credits have an independent value of at least $2,500,000.00, this Court and numerous law review articles have acknowledged that low income housing tax credits have independent value because they can be sold separate and apart from the real estate. The Board of Revision implicitly decided that the tax credits were either worth nothing or their value is inextricably linked to the value of the real estate, contrary to common sense, the case law, and the evidence. The Twelfth District justified upholding this decision by opining that the Conveyance Form did not allocate any portion of the Purchase Price to the tax credits. However, the Twelfth District pointed to no legal authority showing that the burden to conduct the allocation analysis rests on the taxpayer rather than on the Board of Revision.

By accepting this case for review, this Court could clarify whether a board of revision is required to allocate the portion of a sale price attributable to the value of federal low income housing tax credits or whether the board of revision may decide to adopt the unallocated sale price as the fair market value of the real estate. Therefore, Beechwood respectfully requests this Court accept jurisdiction over this Proposition of Law, and ultimately reverse the Twelfth District's decision affirming the decisions that preceded it.

PROPOSITION OF LAW NO. 3: After an owner of a low income housing tax credit eligible property demonstrates that the Auditor's value is unreliable, the Auditor is required to present evidence justifying its valuation or the board of revision must reduce the real estate's valuation.

This Court should accept jurisdiction of this appeal and review whether, once a taxpayer presents evidence showing that the sale price is not reliable or requires allocation, the auditor can support its initial valuation without presenting any evidence other than the conveyance statement already in the record. This Court has previously held that when the taxpayer presents evidence to the Board of Revision contradicting the auditor's valuation in whole or in part, and the auditor fails to adduce evidence in support of its valuation, the reviewing court errs in affirming the Board of Revision's determination. *Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision*, 113 Ohio St.3d 281, 2007-Ohio-1948, 865 N.E.2d 22, ¶27; *Bd. of Educ. of Norwood City Sch. Dist. v. Hamilton Cty. Bd. of Revision* (Mar. 4, 2011), No. 2010-M-24, 2011 Ohio Tax LEXIS 464, at *8. Where the record before the Board of Revision contains no evidence or testimony to support the BOR's valuation, the BOR's decision should be reversed. *Buck Storage, Inc. v. Bd. of Revision* (Clark Cty.), 172 Ohio App.3d 250, 2007-Ohio-2964, 874 N.E.2d 829, ¶12; *Berner v. Sodders*, Clark App. No. 2010 CA 40, 2010-Ohio-4914, ¶33.

These general rules have been applied in numerous cases. For instance, when a school district failed to present any evidence in support of its alleged value, the Ohio Supreme Court found that the BTA correctly adopted the taxpayer's value as the BTA was "without any other credible evidence." See, *Dublin City Sch. Dist. Bd. of Educ. v. Franklin Cty. Bd. of Educ.*, 80 Ohio St.3d 450, 454, 1997-Ohio-327, 687 N.E.2d 422. Likewise, this Court affirmed a decision reversing a board of revision's decision and reducing a motel's fair market value because the taxpayer presented evidence of the property's value, but the auditor and school board presented

no evidence. *AP Hotels of Ill., Inc. v. Franklin Cty. Bd. of Revision*, 118 Ohio St.3d 343, 2008-Ohio-2565, 889 N.E.2d 115, ¶19.

In this case, Beechwood presented evidence before the Board of Revision showing that the Conveyance Form accounted for the Property and the $2,500,000.00 tax credits, sufficient to rebut the presumption that the Purchase Price was the best evidence of value. As a result, the burden shifted to the Auditor and/or the School Board to present evidence *above and beyond the disputed Conveyance Form* to justify the Board of Revision using the Auditor's initial valuation as the Property's true value. However, Appellees presented no other evidence. Having presented nothing to meet their reciprocal burden, Appellees have not shown that $10,100,000.00 fairly and accurately represents the fair market value of the Property without inclusion of the tax credits and the encumbrances.

Despite that, the Board of Revision took the path of least resistance – adopting the Auditor and the School Board's value. In its Opinion, the Twelfth District created a schism in the law about the burden of proof that a party defending a tax valuation has, allowing a party to prevail with no additional evidence once a conveyance form is rebutted as the best evidence of value. By accepting this case for review, this Court could clarify whether a board of revision may affirm an auditor's initial valuation once the arm's length sale price has been rebutted as the best evidence of value, or if the auditor and/or school board must present additional evidence in order to meet their burden. Therefore, Beechwood respectfully requests this Court accept jurisdiction over this Proposition of Law, and ultimately reverse the Twelfth District's decision affirming the decisions that preceded it.

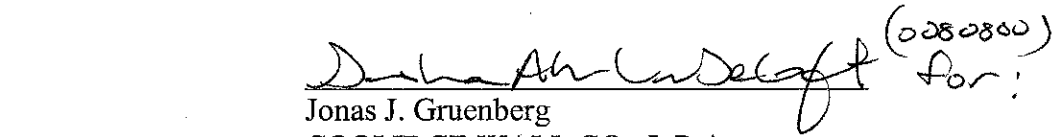
CONCLUSION

This case begs this Court to clarify if it meant what it said in *Woda*, specifically that low income housing tax credit properties are unique and must be protected from the artificial

inflation to their fair market value because of their participation in federal low income housing tax credit programs. Are federal low income housing tax credits so intimately tied to the underlying real estate that they ought to be included in a property's fair market value, or does the fact that such tax credits can be syndicated make them more like a business opportunity than a condition of the real estate? Should federal low income housing tax credit properties be valued as if unencumbered or with "due attention to market rents and the conditions placed on the property's use"? If this Court declines to answer these questions, boards of revision and lower courts will lack guidance as to whether federal low income tax credits should be taxed as real property or recognized as a separate asset. More importantly, investors will be reluctant to take risks on low income tax credit housing, thereby undermining the important social policy of making it economically feasible for apartment complexes to compete in the marketplace and still provide affordable housing to those in need. Therefore, Beechwood respectfully requests this Court accept jurisdiction over its Propositions of Law, and ultimately find that federal low income housing tax credits should not be taxed as if real estate.

Respectfully submitted,

Jonas J. Gruenberg, Counsel of Record



Jonas J. Gruenberg
COOLIDGE WALL CO., L.P.A.
33 W. First Street, Suite 600
Dayton, OH 45402
Phone: (937) 223-8177
Fax: (937) 223-6705
Email: gruenberg@coollaw.com

COUNSEL FOR APPELLANT
BEECHWOOD II, L.P.

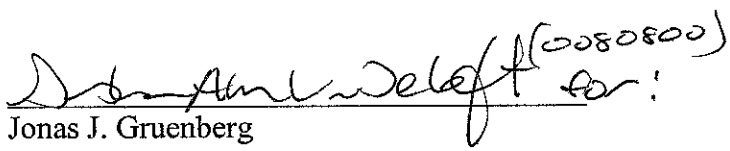
OF COUNSEL:
Sasha Alexa M. VanDeGrift (0080800)
COOLIDGE WALL CO., L.P.A.
33 W. First Street, Suite 600
Dayton, OH 45402
Phone: (937) 223-8177
Fax: (937) 223-6705
Email: vandegrift@coollaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Appellant's Memorandum in Support of Jurisdiction* was served on the following via regular U.S. Mail, postage prepaid, on this 8th day of December, 2011.

David C. DiMuzio, Esq.
1900 Kroger Building
1014 Vine Street
Cincinnati, OH 45202
Attorney for Appellee West Clermont Local School District Board of Education

Allen L. Edwards, Esq.
Clermont County Prosecutor's Office
Civil Division
101 East Main Street
Batavia, OH 45103
Attorney for Appellees Clermont County Board of Revision and Clermont County Auditor



Jonas J. Gruenberg

COUNSEL FOR APPELLANT
BEECHWOOD II, L.P.

w:\wdox\client\010086\00614\00559649.docx

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

BEECHWOOD II, L.P.,	:	
Appellant,	:	CASE NO. CA2011-04-033
	:	
- vs -		JUDGMENT ENTRY
	:	
CLERMONT COUNTY BOARD OF REVISION, et al.,	:	
	:	
Appellees.	:	

COURT OF APPEALS
FILED
OCT 24 2011
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

Robert A. Hendrickson, Presiding Judge

Robin N. Piper, Judge

Rachel A. Hutzel, Judge

RECEIVED
OCT 28 2011
BY:

EXHIBIT
Appx. 1

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

BEECHWOOD II, L.P.,	:	
Appellant,	:	CASE NO. CA2011-04-033
	:	OPINION 10/24/2011
- vs -		
CLERMONT COUNTY BOARD OF REVISION, et al.,	:	
Appellees.	:	

COURT OF APPEALS
FILED
OCT 24 2011
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010 CVF 01556

Coolidge Wall Co., L.P.A., Jonas J. Gruenberg, David P. Pierce, Sasha Alexa M. Van DeGrift, 33 West First Street, Suite 600, Dayton, Ohio 45402, for appellant

Donald W. White, Clermont County Prosecuting Attorney, Allen L. Edwards, 101 East Main Street, Batavia, Ohio 45103, for appellees, Clermont Cty. Bd. of Revision and Linda L. Fraley, County Auditor

David C. DiMuzio, 810 Sycamore Street, Sixth Floor, Cincinnati, Ohio 45202, for appellees, West Clermont Local School District Board of Edn.

PIPER, J.

{¶1} Appellant, Beechwood II, L.P., appeals a decision of the Clermont County Court of Common Pleas affirming the administrative decision of the Clermont County Board of

EXHIBIT
tabbies
Appx. 2

Revision (BOR) regarding a real property valuation for the 2009 tax year.

{¶2} On May 8, 2008, appellant purchased an apartment complex located at 4704 Beechwood Road in Clermont County for $10.1 million. At the time appellant purchased the property, it was valued by the county auditor at $7 million for the 2008 tax year. Due to the discrepancy in the auditor's value and the purchase price, the West Clermont Local School District Board of Education appealed the assessment to the BOR. At that time, the BOR found the value to be the sale price of $10.1 million. That determination is currently on appeal to the Board of Tax Appeals.

{¶3} In 2009, the auditor valued the property at the purchase price of $10.1 million. Following the auditor's assessment, appellant appealed to the BOR. At the BOR hearing, Cynthia Hatton Tepe, a certified general real estate appraiser, testified on behalf of appellant. Tepe testified that the appraised value of the property was $6.35 million, as of the tax date of January 1, 2009, based on restricted rents required to receive federal low income housing tax credits. Despite Tepe's testimony regarding the appraisal of the property, after seeking legal counsel, the BOR determined that in the event of a recent sale, the sale price was the best indication of value regardless of an appraisal and maintained the $10.1 million value.

{¶4} Appellant appealed the BOR's decision to the common pleas court. The common pleas court affirmed the decision of the BOR, finding that the May 2008 sale was recent and an arm's length transaction. The common pleas court determined that because of the recent and arm's length sale, the sale price of $10.1 million was the best reflection of the property's value.

{¶5} Appellant now appeals the common pleas court's affirmation of the $10.1 million valuation of the apartment complex and raises three assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED BY ADOPTING THE BOARD OF REVISION'S

EXHIBIT
tabbies
Appx. 3

DECISION AND APPLYING THE 2008 SALE PRICE AS THE BEST EVIDENCE OF VALUE BECAUSE THE SALE DOES NOT SATISFY THE RECENCY FACTORS SET FORTH IN THE CASE LAW TO MAKE IT THE BEST EVIDENCE OF VALUE."

{¶8} Assignment of Error No. 2:

{¶9} "THE TRIAL COURT ERRED BY ADOPTING THE BOARD OF REVISION'S DECISION, FAILING TO REDUCE THE TAXABLE VALUE OF THE PROPERTY BY THE AMOUNT OF THE PURCHASE PRICE THAT REPRESENTS THE VALUE OF THE TAX CREDITS."

{¶10} Assignment of Error No. 3:

{¶11} "THE TRIAL COURT ERRED BY ADOPTING THE BOARD OF REVISION'S DECISION, FAILING TO REDUCE THE TAXABLE VALUE OF THE PROPERTY BECAUSE THE APPELLEES FAILED TO REBUT BEECHWOOD'S EVIDENCE."

{¶12} The general rules of law regarding property valuation are found in R.C. 5713.03. This section states: "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 * * *. 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." In addition, the statute provides that when the above conditions of a recent and arm's length sale are met, the sale price is reflective of the true value, subject to two exceptions: "(A) The tract, lot, or parcel of real estate loses value due to some casualty; (B) An improvement is added to the property." R.C. 5713.03.

{¶13} The Ohio Supreme Court has held "when the property has been the subject of a recent arm's-length sale between a willing seller and a willing buyer, the sale price of the

EXHIBIT
tabbies
Appx. 4

property shall be 'the true value for taxation purposes.'" *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision,* 106 Ohio St.3d 269, 2005-Ohio-4979, ¶13, quoting R.C. 5713.03.[1] "Quite simply, the uniform rule is that property should be valued in accordance with an actual sale price where the criteria of the recency and the arm's-length character of the sale are satisfied. Where there is no such sale, the uniform rule envisions that an appraisal will be prepared * * *." *Cummins Property Serv., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, ¶25. When a recent and arm's-length sale is present, "such a sale price is deemed to be the value of the property, and the only rebuttal lies in challenging whether the elements of recency and arm's-length character between a willing seller and a willing buyer are genuinely present for that particular sale." Id. at ¶13.

{¶14} The sale price of realty may include items such as personal property or tax credits. See *Woda Ivy Glen Ltd. Partnership v. Fayette Cty. Bd. of Revision*, 121 Ohio St.3d 175, 2009-Ohio-762. On appeal from the BOR to the common pleas court, the court "must decide not only whether a proffered sale price satisfies the criteria of recency and arm's-length character, but also what amount of the stated sale price pertains to the realty." *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision*, 125 Ohio St.3d 103, 2010-Ohio-1040, ¶22. "[I]f the record clearly establishes that a portion of a sale price pertains to personal property, the BTA should subtract that portion from the stated sale price to arrive at the amount of consideration paid for the realty. The latter figure will then constitute the true value of the realty." Id.

{¶15} In this case, the common pleas court found that the sale was an arm's length transaction, and appellant does not challenge that determination on appeal. Nor does

1. An appeal from a BOR decision may be taken to the court of common pleas or to the board of tax appeals (BTA). R.C. 5717.05; R.C. 5717.01. Therefore, "the common pleas court and the BTA fulfill the same function when reviewing a decision of a board of revision, and BTA case law may be applied to the common pleas court proceedings in such appeals." *Murray & Co. Marina, Inc. v. Erie Cty. Bd. of Revision* (1997), 123 Ohio App.3d 166, 172.

EXHIBIT
tabbies
Appx. 5

appellant challenge the propriety of the valuation based on the statutory exceptions. Therefore, the rebuttal of the sale price as the proper valuation lies in determining what portion of the sales price pertains to realty and whether the sale meets the recency requirement.

{¶16} Regarding the standard of review, on appeal from the common pleas court to an appellate court, the appellate court will not reverse the lower court's decision regarding the valuation absent an abuse of discretion. *Black v. Bd. of Revision of Cuyahoga Cty.* (1985), 16 Ohio St.3d 11, paragraph one of the syllabus. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶17} For convenience of analysis, we will address appellant's second assignment of error first. In this assignment of error, appellant argues that the common pleas court erred in failing to reduce the taxable value of the property by the amount of the purchase price that represents the value of the tax credits.

{¶18} Appellant stated in his brief to the common pleas court that the property was eligible for tax credits of a value of approximately $2.5 million, and that the price for the tax credits was a restrictive covenant binding the property to operate as program-based low income housing for 15 years.

{¶19} Appellant accurately argues *Woda*, 2009-Ohio-762, allows for low income tax credits to be valued as separate from property. According to *Woda*, there is "ample reason to disregard them [tax credits] as constituting a part of the value of the realty to the extent that tax benefits are transferred apart from any transfer of the underlying fee interest in the property." *Woda* at fn. 4. However, "when real property is the subject of a sale and the sale involves an incidental transfer of tangible or intangible personal property, the proponent of allocating a portion of the sale price to assets other than the realty 'bears an initial burden of

EXHIBIT
tabbies
Appx. 6

showing the propriety of the allocation.'" *Olentangy* at ¶24, citing *St. Bernard Self-Storage, L.L.C. v. Hamilton Cty. Bd. of Revision*, 115 Ohio St.3d 365, 2007-Ohio-5249, ¶14.

{¶20} At the BOR hearing, appellant argued that the best way to value the property was "based on actual income and expense of the property, consistent with the Wood [sic] Ivy Glen case." Appellant's counsel stated: "We think we're far enough removed, the marketplace is what it is, so that now or effective January 1, 2009, we're valuing the real estate based upon market conditions and the operations. And the appraisal indicates what it would sell for as of that date in the marketplace and that should be the basis of the Board of Revision's valuation." The appraisal was conducted on a restricted rent basis, implying that the property qualified for the tax credit on January 1, 2009, the retrospective date of the appraisal. However, the appraisal does not indicate that a portion of the purchase price of the property went to purchase the tax credits.

{¶21} The following exchange took place between appellant's attorney and the certified general real estate appraiser at the BOR hearing:

{¶22} "Q. Cindy, just to kind of round out the look at value, did you consider if this property were not subject to the restrictions and based upon your knowledge of the marketplace do you have an opinion as to whether the net income obtainable from the property would be significantly different than what is being achieved?

{¶23} "A. It could be a little bit different because not subsidizing the expenses might be a little bit less.

{¶24} "Q. But not materially less?

{¶25} "A. No."

{¶26} This testimony may suggest that the tax credits were not intended to be transferred as part of the underlying interest in the real property, because income received by the property owner is similar whether or not the property is subject to restrictions based on

EXHIBIT
tabbies
Appx. 7

the receipt of low income housing tax credits with the appraisal value of $6.35 million based on these rents. However, our review of the record reveals this is the only portion of testimony that indicates the purchase price may have included something other than real property.

{¶27} Nor does the documentary evidence provide any indication of a transfer of tax credits. Line 7f on the conveyance fee statement states: "Consideration for real property on which fee is to be paid (7d minus 7e).....$10,100,00.00." Line 7e on the conveyance fee statement states: "Portion, if any, of total consideration paid for items other than real property.....$0."

{¶28} Given the lack of evidence showing that a portion of the sales price went to purchase the tax credits, we find that the comon pleas court did not abuse its discretion by failing to reduce the purchase price by the tax credits. See *Olentangy*, 2010-Ohio-1040 at ¶24.

{¶29} Accordingly, appellant's second assignment of error is overruled.

{¶30} In its first assignment of error appellant argues the common pleas court erred by using the 2008 sale price as the best evidence of value because the sale does not satisfy the recency factors set forth in the case law to make it the best evidence of value.

{¶31} In its third assignment of error appellant argues that the common pleas court erred by failing to reduce the taxable value of the property because the appellees failed to rebut appellant's evidence.

{¶32} Because they are related, we will address these assignments of error together.

{¶33} Appellant concedes that only a short period of time passed between the sale and the tax lien date. However, in the first assignment of error appellant argues that three items made the sale price unreliable for valuation for tax purposes: "1) [the] influence of the tax credits on the price, 2) the effect of the recorded Restrictive Covenant, and 3) the changes in the marketplace * * *." In the third assignment of error, appellant argues that it

EXHIBIT
tabbies
Appx. 8

presented evidence sufficient to rebut the presumption that the purchase price was the best evidence.

{¶34} "The reasonableness of the length of time - sometimes expressed as whether the sale was 'recent' relative to the tax lien date - encompasses all factors that would, by changing with the passage of time, affect the value of the property." *Cummins*, 2008-Ohio-1473 at ¶35. Relevant factors include "general developments in the marketplace" and "conditions that are specific to the property itself." Id.

{¶35} In order to determine whether the common pleas court abused its discretion in finding the sale recent, we must first address the proper function of the court in regard to a BOR decision. According to R.C. 5717.05, "[t]he court may hear the appeal on the record and the evidence thus submitted, or it may hear and consider additional evidence." The court must make an independent judgment on the taxable value of the property based on the evidence, but is not required to conduct a de novo trial. *Black*, 16 Ohio St.3d at 13-14. However, the common pleas court's review should be "more than a mere rubber stamping of the board of revision's determination." Id.

{¶36} "The initial burden on a party presenting evidence of a sale is not a heavy one, where the sale on its face appears to be recent and at arm's length." *Cummins* at ¶41. The "presentation of basic evidence of the sale and the sale price such as the conveyance-fee statement usually suffices to place a burden on the owner to rebut that the sale price is the value." *N. Royalton City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 129 Ohio St. 3d 172, 2011-Ohio-3092, ¶11.

{¶37} R.C. 5715.19(G) provides: "A complainant shall provide to the board of revision all information or evidence within the complainant's knowledge or possession that affects the real property that is the subject of the complaint. A complainant who fails to provide such information or evidence is precluded from introducing it on appeal to the board of tax appeals

or the court of common pleas, except that the board of tax appeals or court may admit and consider the evidence if the complainant shows good cause for the complainant's failure to provide the information or evidence to the board of revision."

{¶38} It is undisputed that the conveyance fee statement was included in the record reflecting a purchase price of $10.1 million in May 2008. This presentation of such facial evidence is enough to establish the presumption that the sale price is the value of the property.

{¶39} Appellant contends that it presented sufficient evidence to rebut this presumption. The only evidence presented by appellant at the BOR hearing was the testimony of a certified general real estate appraiser and the appraisal.

{¶40} Regarding the changes in the marketplace, while conceding that the Clermont County Auditor's 2009 Annual Report was not in evidence before the BOR, appellant asked the common pleas court to take judicial notice of the report. The common pleas court declined to consider the report because it was not before the BOR. However, the common pleas court found that even considering the report, appellant did not provide "sufficient evidence to rebut the recency of the voluntary sale of the subject multifamily property for a properly negotiated price in 2008." The common pleas court also found that if appellant "wished to place evidence in the record regarding any market changes or other considerations it wanted the Board of Revision to consider in making its decision, it could have done so at that hearing."

{¶41} Because appellant did not present evidence pertaining to changes in the marketplace at the BOR hearing, but could have presented such evidence, we cannot say the common pleas court upon review abused its discretion in not allowing additional evidence. Nor can we say the common pleas court abused its discretion in finding the recent sale to be the value of the property.

{¶42} Concerning conditions specific to the property itself, appellant presented evidence regarding the valuation of the property subject to an encumbrance with the benefit of the low income housing tax credits in an appraisal. Generally, real property is to be valued as if unencumbered. *Muirfield Assn. v. Franklin Cty. Bd. of Revision* (1995), 73 Ohio St.3d 710, 711. While the effect of low income housing tax credit use restrictions must be taken into account when appraising a property according to *Woda*, 2009-Ohio-762, *Woda* did not concern a recent sale. *Woda* at ¶14, 30.

{¶43} It is unclear from the record if the restrictive covenant was in place at the time of the sale.[2] In any event, receiving the tax credits is dependent upon the restrictive covenant in regard to low income housing, and therefore, we will analyze the restrictive covenant and tax credits together.

{¶44} Appellant argues that "the Restrictive Covenant did not exist on the Property when the Auditor valued the Property at $7,000,000.00 in 2008." Appellant also states: "The Purchase Price included the value of the real estate, as well as the value of the opportunity to obtain $2,500,000.00 in tax credits that the Property was eligible for based on its operation within the parameters of the Government Programs." If the low income housing tax credit use restrictions were not in place at the time of the sale, then appellant's argument lacks merit because the property would have been unencumbered property at the time of the sale, and the sale price is reflective of its value. There is no evidence in the record as to what

2. The common pleas court quoted the "Administrate Appellate Brief of Appellant Beechwood II, L.P." in its decision/entry, stating: "When Beechwood purchased the Property, the Property was compliant with some, but not all, of the federal subsidized housing programs. Beechwood had to arrange for some improvements to be made in order for the Property to qualify for the tax credits. Once those improvements were put in place, the Property was eligible for tax credits with a value of approximately [$]2,500,000. The price for those credits was a restrictive covenant binding the Property to operate as program-based low income housing for 15 years." Appellant states in his brief to this court that "the Board of Revision should have disregarded the Purchase Price because it contains compensation for the encumbrance, rendering the sale an unreliable measure of the Property's true (unencumbered) value." Neither the actual date of the restrictive covenant nor the restrictive covenant itself is cited in the record.

EXHIBIT
tabbies
Appx. 11

"improvements" appellant may have made to qualify for the tax credits. We cannot say the common pleas court abused its discretion in holding that the addition of low income housing tax credits and the restrictive covenant did not take the facts of this case outside of the Ohio Supreme Court's holding in *Berea*, 2005-Ohio-4979, that the sale price is the true value for tax purposes in the event of a recent and arm's length sale.

{¶45} Even if the restrictive covenant was in place at the time of the sale, the common pleas court did not abuse its discretion in determining the sale price was the correct value. The Ohio Supreme Court in *Cummins* stated: "We hold that we erred in *New Winchester* [*New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision*, 80 Ohio St. 3d 36, 1997-Ohio-360] when we authorized the use of appraisals to adjust the price set in a recent, arm's-length transaction. To do so places the cart (appraisal) before the horse (an actual arm's-length sale). As we explained more than 40 years ago, the best method of determining value is an actual sale of the property, but because such information is not usually available, an appraisal becomes necessary. *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 412, 25 O.O.2d 432. When value is determined by appraisal, 'the various methods of evaluation, such as income yield or reproduction cost, come into action,' but the goal of the appraisal is 'to determine the amount which such property should bring if sold on the open market.' Id." *Cummins* at ¶23.

{¶46} With this in mind, the Ohio Supreme Court held in *Cummins* that a deed restriction did not take the facts outside of the general rule that the sale price is reflective of true value as articulated in *Berea*, 2005-Ohio-4979. Id. at ¶24.

{¶47} The common pleas court stated in its decision/entry in reference to *Cummins*: "The court revisited its ruling in the *New Winchester* case (wherein a recent sale price was adjusted due to subsidies provided for government housing) and stated that to use appraisals when there was a recent arm's length sale was an error."

EXHIBIT
tabbies
Appx. 12

{¶48} With the arm's length sale, we cannot say the common pleas court abused its discretion in not taking into account the restrictive covenant or the tax credits in making its valuation and determining the sale recent.

{¶49} Appellant's first and third assignments of error are overruled.

{¶50} Judgment affirmed.

HENDRICKSON, P.J., and HUTZEL, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/ROD/documents/. Final versions of decisions are also available on the Twelfth District's web site at: http://www.twelfth.courts.state.oh.us/search.asp

EXHIBIT
tabbies
Appx. 13

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

BEECHWOOD II, LP	:	
Appellant	:	**CASE NO. 2010 CVF 01556**
vs.	:	**Judge McBride**
CLERMONT COUNTY BOARD OF REVISION, et al.	:	
	:	**DECISION/ENTRY**
Appellees	:	

Coolidge Wall Co., L.P.A., Jonas J. Gruenberg and Sasha Alexa M. VanDeGrift, attorneys for the appellant Beechwood II, LP, 33 W. First Street, Suite 600, Dayton, Ohio 45402.

Clermont County Prosecutor's Office, Civil Division, Allan L. Edwards, Assistant Prosecuting Attorney for the appellees Clermont County Board of Revision and Linda Fraley, Clermont County Auditor, 101 East Main Street, Second Floor, Batavia, Ohio 45103.

David C. DiMuzio, Inc., David C. DiMuzio, attorney for the appellee West Clermont Local School District Board of Education, 1900 Kroger Building, 1014 Vine Street, Cincinnati, Ohio 45202.

This cause is before the court for consideration of an administrative appeal from the decision of the Clermont County Board of Revision filed by the appellant Beechwood II, LP (hereinafter "Beechwood").

EXHIBIT
tabbies
Appx. 14

The court scheduled and held a hearing on the appeal on February 18, 2011. At the conclusion of that hearing, the court took the issues raised by the appeal under advisement.

Upon consideration of the appeal, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT AND PROCEDURAL BACKGROUND

The appellant Beechwood is the owner of the subject property located at 4704 Beechwood Road, Clermont County, Ohio. Beechwood purchased this property on May 8, 2008 for a sale price of $10,100,000.[1] The conveyance fee statement indicates that this was an "arms length transaction."[2] According to the Beechwood appellate brief:

> "When Beechwood purchased the Property, the Property was compliant with some, but not all, of the federal subsidized housing programs. Beechwood had to arrange for some improvements to be made in order for the Property to qualify for the tax credits. Once those improvements were put in place, the Property was eligible for tax credits with a value of approximately 2,500,000. The price for those credits was a restrictive covenant binding the Property to operate as program-based low income housing for 15 years."[3]

The subject property was originally valued at approximately $7,000,000 for the 2008 tax year. The appellee West Clermont Local School District Board of Education appealed that assessment and the property was valued at $10,100,000, the price of the

---

[1] Transcript of Hearing, filed Aug. 25, 2010, Exhibit I and Brief of Clermont County Board of Revision, Exhibit A

[2] Brief of Clermont County Board of Revision, Exhibit A.

[3] Administrate Appellate Brief of Appellant Beechwood II, L.P. at pg. 10.

EXHIBIT
tabbies
Appx. 15

2008 sale, and that determination is currently on appeal to the Board of Tax Appeals. The Clermont County auditor then valued the property at $10,100,000 for the 2009 tax year, which Beechwood appealed to the Clermont County Board of Revision. The Board of Revision, after holding a hearing and consulting with its counsel, upheld the $10,100,000 valuation.[4] Beechwood now appeals that decision to this court.

LEGAL ANALYSIS

" 'R.C. 5717.05 does not require a trial de novo by courts of common pleas on appeals from decisions of county boards of revision. The court may hear the appeal on the record and evidence thus submitted, or, in its discretion, may consider additional evidence. The court shall independently determine the taxable value of the property whose valuation or assessment for taxation is complained of, or, in the event of discriminatory valuation, shall determine a valuation that corrects such discrimination. The judgment of the trial court shall not be disturbed absent a showing of abuse of discretion.' "[5]

Pursuant to R.C. 5713.03:

> "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 and the current agricultural use value of land valued for tax purposes in accordance with section 5713.31 of the Revised Code, in every district, according to the rules

[4] Transcripts of hearings June 29, 2010 and July 8, 2010, filed Aug. 25, 2010.
[5] *Wellington Square, LLC v. Clark Cty. Aud.* (June 25, 2010), 2nd Dist. No. 2009-CA-87, 2010-Ohio-2928, ¶ 26, quoting *Black v. Bd. of Revision of Cuyahoga Cty.* (1985), 16 Ohio St.3d 11, 475 N.E.2d 1264, paragraph one of the syllabus.

EXHIBIT
tabbies
Appx. 16

> prescribed by this chapter and section 5715.01 of the Revised Code, and in accordance with the uniform rules and methods of valuing and assessing real property as adopted, prescribed, and promulgated by the tax commissioner. * * * 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. However, the sale price in an arm's length transaction between a willing seller and a willing buyer shall not be considered the true value of the property sold if subsequent to the sale:
>
> (A) The tract, lot, or parcel of real estate loses value due to some casualty;
>
> (B) An improvement is added to the property. * * * "

In 2005, the Ohio Supreme Court issued its decision in *Berea City School Dist. Bd. of Education v. Cuyahoga County Bd. of Revision* (2005), 106 Ohio St.3d 269, 834 N.E.2d 782. That case involved a parcel of property which contained two buildings, both of which were encumbered by long-term leases.[6] The entire property (encumbered by the leases) was purchased in 1996 for $2,600,000.[7] After the property was valued for tax purposes at $2.6 million for the 1997 tax year, the school district appealed arguing that said valuation did not reflect the rental potential of the property.[8] The Board of Tax Appeals, relying on the holding of *Alliance Towers Ltd. v. Stark Cty. Bd. of Revision* (1988), 37 Ohio St.3d 16, 523 N.E.2d 826, held that the property must be valued as

---

[6] *Berea City School Dist. Bd. of Education v. Cuyahoga County Bd. of Revision* (2005), 106 Ohio St.3d 269, 834 N.E.2d 782, at ¶¶ 1-3.
[7] Id. at ¶ 4.
[8] Id. at ¶ 5.

EXHIBIT
tabbies
Appx. 17

unencumbered by the two leases and adopted a valuation premised on an actual-rent approach.[9]

In its decision in *Berea*, the Ohio Supreme Court noted that for many years a recent arm's length sale of property evidenced its true value.[10] Then, in the case of *Ratner v. Stark Cty. Bd. of Revision* (1986), 23 Ohio St.3d 59, 491 N.E.2d 680, the court changed that bright-line rule to allow the review of independent appraisals, even when there had been a recent arm's length sale.[11] With the *Berea* decision, the court overruled its holding in *Ratner* and held that "* * * when the property has been the subject of a recent arm's-length sale between a willing seller and a willing buyer, the sale price of the property shall be 'the true value for taxation purposes.' "[12] Therefore, because the property at issue in *Berea* had been subject to an arm's length sale in 1996, its valuation for the 1997 tax year was determined to be the 1996 sale price.[13]

In discussing its holding, the court, citing the *Alliance Towers* case amongst others, noted that "[w]hile we recognize that several of our decisions have permitted the BTA to consider market rental value of commercial real property as an indicator of the true value of the property, none of those cases involved a recent arm's-length sale of the property between a willing seller and a willing buyer."[14]

---

[9] Id. at ¶ 5.
[10] Id. at ¶¶ 9-10.
[11] Id. at ¶¶ 11-12.
[12] Id. at ¶ 13.
[13] Id.
[14] Id. at ¶ 14.

EXHIBIT
tabbies
Appx. 18

" 'At the very heart of *Berea* lies the rejection of appraisal evidence of the value of the property whenever a recent, arm's-length sale price has been offered as evidence of value.' "[15]

In *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2008), 118 Ohio St.3d 45, 885 N.E.2d 934, the court reiterated its holding in *Berea* and noted that, under *Berea*, the sale price of a recent arm's length transaction " * * * 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."[16] The court held that it was uncontroverted that "the parties are unrelated, that the sale was recent, that they acted in their self-interest and without compulsion and duress* * * " and, as result, the sale was a recent arm's length transaction and was used in correctly valuing the subject property.[17] The appellant argued that the existence of a voluntary easement took the facts of the *Dublin* case outside of the *Berea* holding, but the court rejected that argument and found that a voluntary deed restriction did not make a sale price unreflective of the value of the property.[18]

In *Cummins Property Services, LLC v. Franklin Cty. Bd. of Revision* (2008), 117 Ohio St.3d 516, 885 N.E.2d 222, 2008-Ohio-1473, the court also held that a deed restriction did not take the facts of that case outside the *Berea* holding.[19] The appellant

---

[15] *W. Chester Pointe Properties, LLC v. Butler Cty. Bd. of Revision* (Nov. 2, 2009), 12th Dist. No. CA2009-04-100, 2009-Ohio-5809, ¶ 7, quoting *Cummins Property Services, LLC v. Franklin Cty. Bd. of Revision* (2008), 117 Ohio St.3d 516, 885 N.E.2d 222, 2008-Ohio-1473, ¶ 13.
[16] *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2008), 118 Ohio St.3d 45, 885 N.E.2d 934, at ¶ 8.
[17] Id. at ¶ 9.
[18] Id. at ¶ 12.
[19] *Cummins*, supra, 117 Ohio St.3d 516 at ¶ 18.

EXHIBIT
tabbies
Appx. 19

in the case at bar argues that the following discussion in the *Cummins* case "* * * heavily implies that in situations like *Alliance Towers* where other issues (like the value of subsidized housing) impugn the reliability of an arm's length sale for property with low income housing programs, a recent arm's length sale might not be the best evidence of value":

> "In *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36, 684 N.E.2d 312, we confronted a situation in which a landlord purchased government-subsidized housing. Among other things, we agreed with the owner's assertion that the subsidies and their effect on the value of the real property must be disregarded. * * * Our reasoning was that the syllabus rule cited above from *Alliance Towers* must be applied to cases where a recent, arm's-length sale price was utilized, because failing to do so would violate constitutionally required uniformity. * * *
>
> This case calls for us to revisit that ruling, because it cannot be reconciled with *Berea.* We hold that we erred in *New Winchester* when we authorized the use of appraisals to adjust the price set in a recent, arm's-length transaction. To do so places the cart (appraisal) before the horse (an actual arm's-length sale). As we explained more than 40 years ago, the best method of determining value is an actual sale of the property, but because such information is not usually available, an appraisal becomes necessary. * * * When value is determined by appraisal, 'the various methods of evaluation, such as income yield or reproduction cost, come into action,' but the goal of the appraisal is 'to determine the amount which such property should bring if sold on the open market.' The legislature reinforced these points through the 1976 enactment of the now familiar language at R.C. 5713.03 * * *.
>
> The primacy of the sale price mandated by the statute and endorsed in *Park Inv. Co.* and *Berea* simply cannot be reconciled with the contention that an actual sale price must be adjusted because the legal fee interest is subject to encumbrances. Because the legal fee interest in real property is so often subject to some type of encumbrance, one could as a practical matter rarely utilize the sale price to

EXHIBIT
tabbies
Appx. 20

> determine value if the fee interest had to be valued as though the encumbrances did not exist.
>
> Finally, our decision in this case does not raise a constitutional uniformity issue, and to the extent we expressed a contrary holding in *New Winchester,* we overrule it. Quite simply, the uniform rule is that property should be valued in accordance with an actual sale price where the criteria of the recency and the arm's-length character of the sale are satisfied. Where there is no such sale, the uniform rule envisions that an appraisal will be prepared, and constitutional uniformity does not prohibit the differential treatment of encumbrances when property is being appraised in materially different contexts.
>
> For example, the appraisal of subsidized housing in *Alliance Towers,* 37 Ohio St.3d 16, 523 N.E.2d 826, raised the issue of how government subsidies affected the value of the realty, and how prospective buyers would view the subsidy in determining what they would be willing to pay for the property. In *Muirfield,* 73 Ohio St.3d 710, 654 N.E.2d 110, a parcel owned by an association of property owners was subject to easements owned by those same property owners. Arriving at an appraised value of such a parcel presented significant challenges, given the common ownership and the easements, and the manner in which the surrounding owners currently realized the value of the parcel at issue through those easements. But no such complexity afflicts a case like the present one; here, a recent sale was presented, and no evidence impugned its arm's-length character. The sale price in such a situation becomes the measure of the value of the property."[20]

The court does not read the above discussion in *Cummins* as supporting the appellant's position. If there is no recent arm's length transaction, then appraisals must be used to determine the value of the subject property. This was the case in *Alliance Towers*, supra, a case upon which the appellant relies heavily. However, such appraisal evidence and different methods of valuation only come into play when there is not a recent arm's length sale. The court revisited its ruling in the *New Winchester* case

[20] Id. at ¶¶ 22-26.

EXHIBIT
tabbies
Appx. 21

(wherein a recent sale price was adjusted due to subsidies provided for government housing) and stated that to use appraisals when there was a recent arm's length sale was an error.

The appellant cites several cases in support of its contention that the sale price should not be used to determine the value of the property in the present case due to the presence of federal tax credits, including *Alliance Towers*, supra; *Delhi Estates v. Hamilton Cty. Bd. of Revision* (1994), 68 Ohio St.3d 192, 625 N.E.2d 594; and *Colonial Village Ltd. V. Washington Cty. Bd. of Revision* (2009), 123 Ohio St.3d 268, 915 N.E.2d 1196. However, while all of these cases did involve low income housing projects or other tax credits, two of those cases were decided prior to *Berea* and the case which was decided after *Berea* (*Colonial Village*) did not indicate that any recent sale was being disregarded in favor of valuing the property based on the income approach; instead, the record is devoid of any recent arm's length sale in that case.

The appellant also cites the case of *Woda Ivy Glen Ltd. Partnership v. Fayette Cty. Bd. of Revision* (2009), 121 Ohio St.3d 175, 902 N.E.2d 984. In that case, parcels containing single-family homes were developed pursuant to the federal low-income housing tax credit.[21] The county auditor used a cost-based valuation for the property which was challenged by the property owner who argued that, because the federal tax subsidy induced the developer to spend more than he would have in pure market conditions, a cost-based valuation was improper.[22] However, as with the other cases cited in the above paragraph, there was no sale of the property in the *Woda Ivy* case.

---

[21] *Woda Ivy Glen Ltd. Partnership v. Fayette Cty. Bd. of Revision* (2009), 121 Ohio St.3d 175, 902 N.E.2d 984, at ¶ 1.
[22] Id. at ¶ 3.

EXHIBIT
tabbies
Appx. 22

This was not a case wherein a recent sale was set aside in favor of an alternate method of valuation or where the sale price-based value of property was reduced as to the amount of a tax credit and, therefore, *Woda Ivy* does not address the issues raised in the case at bar.

While the court understands the appellant's legal and factual arguments presented in the present appeal on these issues, the court does not believe that it can deviate from the Ohio Supreme Court's holding in *Berea*. Furthermore, it should be the Ohio Supreme Court, or the legislature, rather than this court, which undertakes to carve out any exception to the holding in *Berea* for sales of properties which include various federal tax credits. The court does not find, as the law presently stands, that such an exception exists.

"An arm's-length transaction possesses three primary characteristics. '[I]t is voluntary, *i.e.,* without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest.' 'The absence of even a single one of these factors is sufficient to demonstrate that a transaction was not conducted at arm's length.' "[23]

" '[A] rebuttable presumption exists that the sale has met all the requirements that characterize true value.' The initial burden on a party presenting evidence of a sale is not a heavy one, where the sale on its face appears to be recent and at arm's length."[24]

---

[23] *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2007), 112 Ohio St.3d 309, 859 N.E.2d 540, ¶ 13, quoting *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Ohio St.3d 23, 25, 546 N.E.2d 932; and *Kroger Co. v. Hamilton Cty. Bd. of Revision* (1993), 67 Ohio St.3d 145, 147, 616 N.E.2d 877.

[24] *Cummins*, supra, 117 Ohio St.3d 516, ¶ 41, quoting *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325, 327, 677 N.E.2d 1197.

EXHIBIT
tabbies
Appx. 23

A party "* * * as the proponent of using a sale price to value real property, typically makes a prima facie case when it presents a recent conveyance-fee statement along with a deed to evidence the sale and the price."[25] While it does not appear that a deed was presented in the record, the conveyance fee statement was presented and none of the parties dispute the fact that it reflects the sale price of the property in May 2008.

In the case at bar, the property at issue was sold in May 2008 for $10,100,000. The conveyance fee statement indicates that this was an arms length transaction. The sale appears to have been voluntary, between a willing buyer and a willing seller. There is no evidence to the contrary and no evidence of any compulsion or duress. The sale occurred on the open market not, for instance, at a forced foreclosure sale. The appellant has not presented any evidence to contradict these findings. As a result, the court finds that the May 2008 sale was an arm's length transaction.

As to the recency of the sale date to the tax year at issue, the sale took place in May 2008 and the tax year at issue is 2009. Therefore, only approximately eight months passed between the sale date and January 2009.

To be used to value real property for tax purposes, the sale should be held "within a reasonable length of time, either before or after the tax lien date.' "[26] "The reasonableness of the length of time- sometimes expressed as whether the sale was 'recent' relative to the tax lien date- encompasses all factors that would, by changing

---

See, also, *Olentangy Local School Bd. of Edn. v. Delaware Cty. Bd. of Revision* (2010), 125 Ohio St.3d 103, 926 N.E.2d 302, ¶ 14.

[25] *FirstCal Indus. 2 Acquisitions, LLC v. Franklin Cty. Bd. of Revision* (2010), 125 Ohio St.3d 485, 929 N.E.2d 426, ¶ 23.

[26] Id. at ¶ 35.

EXHIBIT
tabbies
Appx. 24

with the passage of time, affect the value of the property[,]" including general developments in the marketplace.[27]

In arguing that the sale at issue does not meet the recency requirement, the appellant requests that this court take judicial notice of the Clermont County Auditor's 2009 Annual Report[28], which was not presented in the proceeding below. Even if the court considers the Auditor's report, the court finds that it does not sufficiently rebut the finding that the 2008 sale was recent. The one-page report demonstrates a decline in the average sale prices of residential properties. The court does not find this to be sufficient evidence to rebut the recency of the voluntary sale of the subject multifamily property for a properly negotiated price in 2008.

Furthermore, the court, after examining the transcript of the record below, denies the appellant's request to present additional evidence to the court on these issues. At the hearing on June 29, 2010, Beechwood was permitted to present the testimony of an appraiser to set forth an alternate theory of valuing the property. If Beechwood wished to place evidence in the record regarding any market changes or other considerations it wanted the Board of Revision to consider in making its decision, it could have done so at that hearing. The court sees no reason to allow the appellant another opportunity to present additional evidence at this stage.

The court finds that the $10,100,000 sale price of the property accurately reflects the value of the property and that the May 2008 sale was recent and was an arm's length transaction. Therefore, the decision of the Board of Revision shall be affirmed.

---

[27] Id.
[28] Appellant's Brief, Exhibit A.

EXHIBIT
tabbies
Appx. 25

CONCLUSION

The decision of the Clermont County Board of Revision valuing the subject property for taxation purposes at $10,100,000 is hereby affirmed.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/e-mail to all counsel of record on this 1st day of April 2011.

_____
Tammy Merz

EXHIBIT
tabbies
Appx. 26