ORIGINAL

IN THE SUPREME COURT OF OHIO

BEECHWOOD II, L.P.	:	Case No. 11-2053
Appellant,	:	
vs.	:	On Appeal from the Clermont County Court of Appeals, Twelfth Appellate District
CLERMONT COUNTY BOARD OF REVISION, et al.,	:	
Appellees.	:	Court of Appeals Case No. CA2011-04-033

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE WEST CLERMONT LOCAL SCHOOL DISTRICT, BOARD OF EDUCATION

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I. EXPLANATION OF WHY THIS CASE IS NOT A CASE OF GREAT GENERAL INTEREST AND DOES NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

Contrary to Appellant's arguments, this case is not a case of great general interest and it does not raise a substantial constitutional question; it is simply a sale case. The facts in this case fall comfortably within the well-established law starting with Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (2005), 106 Ohio St.3d 269, wherein the Court affirmed that the best evidence of value is a recent, arm's-length transaction, and Berea's progeny (Cummins Property Serv., L.L.C. v. Franklin Cty. Bd. of Revision (2008), 117 Ohio St.3d 516; Bd. of Edn. of Dublin City Schools v. Franklin Cty. Bd. of Revision (2008), 118 Ohio St.3d 45; and Rhodes v. Hamilton Cty. Bd. of Revision (2008), 117 Ohio St.3d 532)), wherein the Court again affirmed the use of an arm's-length transaction as true value in cases where the property was encumbered by deed restrictions or long-term leases.

If Appellant is correct that a deduction should have been made from the sale price for non-realty (i.e. federal low income housing tax credits), the law is well-settled that Appellant, as the party seeking an allocation, had the burden of proving the propriety of the allocation. Put simply, Appellant did not make its case. There is no evidence in the record to support Appellant's assertion that $2,500,000 should be allocated for tax credits. Appellant could have put evidence in the BOR record concerning the sale, but failed to do so. CASA 94, L.P. v. Franklin Cty. Bd. of Revision (2000), 89 Ohio St.3d 622. The BOR, Common Pleas Court and Twelfth Appellate District all agreed that this was simply a sale case and the value of the subject property should be the May 2008 sale

price of $10,100,000. We respectfully request that this Court deny jurisdiction because there is nothing new or unique about this case that warrants the Court's time.

II. COUNTER-STATEMENT OF THE CASE AND THE FACTS.

Appellant Beechwood II, L.P. ("Beechwood") purchased the subject property, a multi-family apartment complex, on May 8, 2008 for a sale price of $10,100,000. (See Complaint). The apartment complex is located at 4704 Beechwood Road, Cincinnati, Ohio 45244 and is identified by the Clermont County Auditor as parcel number 413111A089. (Id.) Beechwood, through counsel Jonas Gruenberg, filed an Original Complaint contesting the valuation of the subject property for tax year 2009. (Id.) Beechwood sought a reduction from the Auditor's value of $10,100,000 to a value of $6,350,000. (Id.) The Complaint indicated that a sale took place on May 8, 2008 for $10,100,000. (Id.)

Appellee West Clermont Local School District, Board of Education, ("BOE") filed a Counter-Complaint indicating that there was insufficient evidence to support a decrease of the Auditor's current value of $10,100,000. (See Counter-Complaint.)

At the hearing before the Clermont County Board of Revision ("BOR"), Beechwood presented an appraisal by Cynthia Hatton Tepe, a licensed real estate appraiser, in support of its requested value. (Tr.[1] at 6-9.) Tepe's testimony was limited to her appraisal. (Id.) Specifically, Tepe testified regarding her income approach, which was based primarily on only one year--2009, which Tepe called the "first stabilized year of operation" at the subject property due to the change in ownership and renovation in 2008. (Tr. at 7.) Tepe did not testify regarding the May 2008 sale of the subject property for $10.1 million or the $2.5 million in tax credits that were allegedly related to the

[1] All references to "Tr." refer to the Board of Revision June 29, 2010 Transcript.

transaction. (Tr. at 6-9.) Tepe did not comment on the market conditions in 2008 or 2009. The only reference to "a change in market conditions" came from Mr. Gruenberg, who opined in his opening and closing statements that there had been a "deterioration of the marketplace." (Tr. at 13.) No witness testimony or documentary evidence was submitted to support counsel's assertion.

A representative from the Auditor's office, Jack Trainor, testified that while he did not "have any problems" with Tepe's appraisal, he recommended a "no change" in value because there had been a recent, arm's-length sale of the subject property[2]. (Tr. at 12-13.)

The BOR reconvened on July 8, 2010, after consulting with its counsel, and determined unanimously that the recent sale of the subject property was the best indication of value regardless of the appraisal. (July 8, 2010 BOR Tr. at 2.)

Beechwood appealed the BOR's decision to the Clermont County Court of Common Pleas. Beechwood asked the common pleas court to consider additional evidence, the Clermont County Auditor's 2009 Annual Report, which the court declined because it was not presented before the BOR. (Appx[3]. at 12.) The court also stated that the Report's content was not sufficient to rebut the presumption that a recent, arm's-length sale occurred. (Id.) The common pleas court affirmed the decision of the BOR, finding that the May 2008 sale was recent and an arm's-length transaction. (Appx. at 26.)

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[2] The May 2008 sale of the subject property had been considered by the BOR the previous year when the BOE filed an Original Complaint (for tax year 2008) to increase the value to the sale price based on a conveyance fee statement showing the transfer of the subject property in arm's-length transaction for $10,100,000. The BOR considered the sale and its circumstances and voted to increase the value to the sale price of $10.1 million. Beechwood appealed that decision to the Board of Tax Appeals, where it is still pending.

[3] "Appx." refers to the Appendix to Memorandum in Support of Jurisdiction of Appellant Beechwood II, L.P.

Beechwood appealed the common pleas decision to the Twelfth District Court of Appeals. (Appx. at 2.) The Twelfth District affirmed the common pleas court's decision based on R.C. 5713.03 and this Court's precedent that an arm's-length sale is the best evidence of value. (Appx. at 13.)

III. LAW AND ARGUMENT

Proposition of Law No. 1: A party opposing the use of a recent, arm's-length sale has the burden of proving that circumstances have changed such that the sale price is no longer reflective of the property's true value.

"When a single parcel is the subject of a recent, arm's-length sale, the sale price 'shall be the true value for taxation purposes.'" Cummins, supra (quoting Berea City School Dist. Bd. of Educ. v. Cuyahoga Cty. Bd. of Revision (2005), 106 Ohio St.3d 269)). It is undisputed that Beechwood purchased the subject property in May 2008 and, as the owner, submitted a conveyance fee statement setting forth the total consideration paid for real property as $10,100,000. This court has acknowledged that the school board, 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. Olentangy Local Schools Bd. of Educ. v. Delaware Cty. Bd. of Revision (2010), Slip Op. 2010-Ohio-1040. In such cases, the "basic documentation" of the sale, such as a conveyance fee statement, invokes "a rebuttable presumption" that the sale has met all the requirements that characterize true value. North Royalton City School Dist. Bd. of Educ. v. Cuyahoga Cty. Bd. of Revision, Slip Opinion No. 2011-Ohio-3092. The burden of proof is on the party seeking to negate the sale by proving that Berea does not apply. Dublin, supra.

In support of its request for a reduction for tax year 2009, Beechwood argues that the conveyance fee statement was "not reliable evidence of value" because tax credits

and rent restrictions were allegedly created after the May 2008 sale. (Appellant's Memorandum in Support of Jurisdiction at 5.) Beechwood is essentially arguing that the sale price should not be used to determine the property's value for 2009 because the sale was no longer "recent" due to the implementation of tax credits and rent restrictions.

The undisputed evidence is that the May 2008 sale meets the criteria for recency in terms of proximity to the tax lien date and changes in the marketplace. First, a sale only eight months removed from the tax lien date is "recent" according to this Court. See Olentangy, supra; FirstCal Indus. 2 Acquisitions, L.L.C. v. Franklin Cty. Bd. of Revision (2010), 125 Ohio St.3d 485 (the sale should be held within a reasonable length of time, either before or after the tax lien date). Second, Beechwood failed to produce *any evidence* before the BOR to show that the subject property's circumstances changed since the time of sale in such a way as to affect the property's value. North Royalton, Id. at 8, ¶21 (emphasis added.) Mr. Gruenberg's opinion in his opening statement that the sale was not arm's-length because the purchaser received approximately $2,500,000 in tax credits is not evidence. (Tr. at 5.) There was no evidence (witness testimony or documentary evidence) presented regarding the federal low income housing tax credits or the restrictive covenant. Beechwood's only testifying witness, appraiser Tepe, did not address the arm's-length nature of the sale or the tax credits. (Tr. at 6-9.) Furthermore, the only reference to "a change in the market" came from Mr. Gruenberg. He opined in his closing statement that there was "a continuing deterioration of the marketplace." (Id. at 13.) No evidence was introduced to support this assertion either.

Appellant's assertion that the decision in Highland Crest Assoc., L.L.C. v. Lucas Cty. Bd. of Revision (2011), Lucas App. No. L-10-1239, 2011-Ohio-2078, ¶26, is

"highly analogous" is misplaced. In that case, appellant property owner presented overwhelming evidence to establish that the sale price did not reflect the true market value of the property. The property owner submitted the closing statement, the affidavit of the seller, the testimony of the attorneys involved in the transaction, a consent judgment entry for a previous tax year and an appraisal of the property. In sharp contrast, in this case, Beechwood presented no evidence through witness testimony or documentary evidence to support its assertion that the sale was no longer recent, or reliable, because circumstances had changed since the sale and thereby affected the value.

Beechwood, as the party opposing the recency/reliability of the sale, had the burden of proving the existence of factors that affected the value of the property. Beechwood failed to present any evidence that the tax credits and rent restrictions existed and affected the value of the subject property. The BOR, Common Pleas Court and Twelfth Appellate District aptly noted this lack of evidence and this Court should deny jurisdiction because the law is well-settled that the party opposing the sale price bears the burden of proving that the sale was not arm's-length.

> Proposition of Law No. 2: It is well-established law that the proponent of an allocation of a sale price bears the initial burden of showing the propriety of the allocation.

In St. Bernard Self-Storage, L.L.C. v. Hamilton Cty. Bd. of Revision (2007), 115 Ohio St.3d 365, the Court held that the proponent of an allocation of a sale price bears the initial burden of showing the propriety of the allocation. See also FirstCal Indus. 2 Acquisitions, L.L.C. v. Franklin Cty. Bd. of Revision (2010), 125 Ohio St.3d 485 (court noted that FirstCal, as the purchaser of the property, was in the unique position of

knowing how the allocation was made and was best able to access the pertinent documentation).

Beechwood erroneously asserts that the BOR "must subtract the value of the tax credits from the purchase price." This assertion puts the cart before the horse. It was Beechwood's burden, not the BOR's, to prove that an allocation should have been made for tax credits. There is no evidence in the record to conclude that the purchase price may have included something other than real property. There was no testimony at the BOR hearing regarding when the tax credits were received or how much was received or when the Restrictive Covenant was recorded. Beechwood could have put evidence in the record regarding the alleged tax credits, but it failed to do so. CASA 94, supra.

The undisputed evidence in the record is that line 7f of the conveyance fee statement states: "Consideration for real property on which fee is to be paid (7d minus 7e).....$10,100,000." (Appx. at 8.) Line 7e states: "Portion, if any, of total consideration paid for items other than real property.....$0." (Id.)

Based on the lack of evidence, Beechwood did not meet its burden of proving that a portion of the sale price should be allocated for tax credits. Like FirstCal, Beechwood was in the unique position of knowing how the purchase price was allocated and should have set forth affirmative evidence regarding the tax credits.

Proposition of Law No. 3: Once a prima facie case of an arm's-length sale has been made, the party opposing the sale has the burden to demonstrate why the sale did not reflect the property's value.

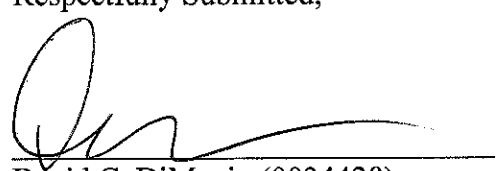
It is well-established that the party opposing a recent, arm's-length sale has the burden of negating the sale. Berea, supra; Cummins, supra. As previously explained,

Beechwood, the party opposing the May 2008 sale, had the burden of showing that the sale price was not reliable or required allocation. Contrary to Appellant's assertions, that burden never shifted in this case. Beechwood did not present evidence pertaining to the $2.5 million tax credits. Statements made by counsel on behalf of its client (in the opening and closing statements) are not "evidence." Tepe, the only testifying witness, did not address the tax credits. (Tr. at 6-9.) Therefore, there was no burden shifting in the case and the decisions of the BOR, Common Pleas Court and Twelfth Appellate District should be affirmed because Beechwood failed to rebut the presumption that the May 2008 was valid.

IV. CONCLUSION

This case is a sale case and the law in this area is well-settled. There is nothing new or unique about Appellant's arguments because similar arguments have been made in the long line of precedent coming from the Court. Appellant failed to rebut the presumption that the May 2008 was an arm's-length transaction and Appellant failed to show that a portion of that purchase price should have been allocated for non-realty. We respectfully request that the Court deny jurisdiction since this case is not a case of great general interest and it does not raise a substantial constitutional question.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of Appellee West Clermont Local School District, Board of Education's Memorandum in Opposition to Jurisdiction was sent by ~~Certified~~ Reg. Mail, postage prepaid, to counsel for all parties on this 5 day of January 2012 to:

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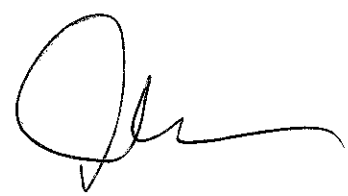

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