

IN THE SUPREME COURT OF OHIO

FILED/RECEIVED
BOARD OF TAX APPEALS

12-0725

HIN, LLC,

Case No. _____

Appellant 2012 APR 26 PM 12:33

vs.

Cuyahoga County Board of Revision,
the Cuyahoga County Fiscal Officer,
the Bedford Board of Education, and
the Tax Commissioner of Ohio,

Appeal from the Ohio
Board of Tax Appeals

BTA Case No. 2008-K-2386

Appellees.

NOTICE OF APPEAL OF HIN, LLC

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TAX COMMISSIONER

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HIN, LLC,)	Case No. _____
)	
Appellant,)	
)	
vs.)	
)	
Cuyahoga County Board of Revision,)	Appeal from the Ohio
the Cuyahoga County Fiscal Officer,)	Board of Tax Appeals
the Bedford Board of Education, and)	
the Tax Commissioner of Ohio,)	
)	BTA Case No. 2008-K-2386
Appellees.)	

NOTICE OF APPEAL OF HIN, LLC

Appellant, HIN, LLC, hereby gives notice of an appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Ohio Board of Tax Appeals (“BTA”) in the case of *HIN, LLC v. Cuyahoga Cty. Bd. of Revision, et al.*, journalized in case number 2008-K-2386 which was decided on March 27, 2012. A true copy of the decision is attached hereto and incorporated herein by reference as Exhibit A.

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

ASSIGNMENT OF ERROR NO. 1:

The Board of Tax Appeals acted unreasonably and unlawfully, and abused its discretion, when it failed to find that the presumption accorded the deed and conveyance fee statement was rebutted by the Taxpayer’s evidence.

ASSIGNMENT OF ERROR NO. 2:

The Board of Tax Appeals acted unreasonably and unlawfully, and abused its discretion, by neglecting to value the fee simple estate as if unencumbered of the subject property, in contravention of established case law.

ASSIGNMENT OF ERROR NO. 3:

The Board of Tax Appeals acted unreasonably and unlawfully, and abused its discretion, by failing to properly evaluate, review, and consider the lease of the subject property in its Decision and Order.

ASSIGNMENT OF ERROR NO. 4:

The Board of Tax Appeals acted unreasonably and unlawfully, and abused its discretion, when it failed to find that the lease caused the extreme variation in the sale price from 2003 to 2004.

ASSIGNMENT OF ERROR NO. 5:

The Board of Tax Appeals acted unreasonably and unlawfully, and abused its discretion, by manifestly refusing to consider or acknowledge other facts and circumstances that indicated that the April 2004 sale is not recent or relevant.

ASSIGNMENT OF ERROR NO. 6

The Board of Tax Appeals acted unreasonably and unlawfully, and abused its discretion, by failing to find that the Taxpayer presented competent and probative evidence to establish value for tax years 2007 and 2008.

ASSIGNMENT OF ERROR NO. 7:

The Board of Tax Appeals acted unreasonably and unlawfully, and abused its discretion, when it failed to find that the Taxpayer's appraisal evidence constituted competent and probative evidence of the value of the subject property.

ASSIGNMENT OF ERROR NO. 8:

The Board of Tax Appeals acted unreasonably and unlawfully, and abused its discretion, when it failed to find that the Taxpayer met its burden of proof, when the record contained reliable and probative evidence to support the Taxpayer's value of the subject property.

ASSIGNMENT OF ERROR NO. 9:

The Board of Tax Appeals acted unreasonably and unlawfully, and abused its discretion, by finding that the Board of Education's evidence constituted competent and probative evidence of value for the subject property.

ASSIGNMENT OF ERROR NO. 10:

The Board of Tax Appeals acted unreasonably and unlawfully, and abused its discretion, by manifestly refusing to consider or acknowledge the expert testimony of Mr. Robert Weiler, which supported the Taxpayer's arguments and evidence that rebutted the sale price.

ASSIGNMENT OF ERROR NO. 11:

The Board of Tax Appeals acted unreasonably and unlawfully, and abused its discretion, by manifestly refusing to consider or acknowledge the expert testimony of Mr. Roger Ritley, which supported the Taxpayer's arguments and evidence that rebutted the sale price.

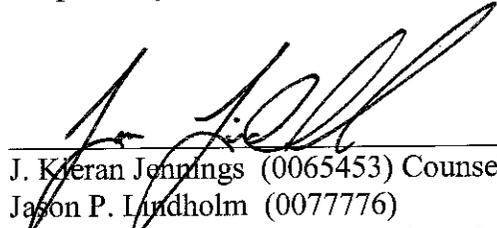
ASSIGNMENT OF ERROR NO. 12:

The Board of Tax Appeals acted unreasonably and unlawfully, and abused its discretion, by mischaracterizing and misinterpreting, and incorrectly relying upon, *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 381, 2010-Ohio-687, *AEI Net Lease Income & Growth Fund v. Erie Cty. Bd. of Revision*, 119 Ohio St.3d 563, 2008-Ohio-5203, and *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473 in its Decision and Order.

ASSIGNMENT OF ERROR NO. 13:

The Decision and Order of the Board of Tax Appeals is unreasonable, unlawful, and an abuse of discretion because, in refusing to consider the expert testimony of the Taxpayer's two expert witnesses, the Board of Tax Appeals violated the Taxpayer's right to due process of law and equal protection under the Fifth and Fourteenth Amendments of the Constitution of the United States of America, and Article I, Section 2 of the Ohio Constitution, and violates the Taxpayer's right to due course of law under Article I, Section 16 of the Ohio Constitution.

Respectfully submitted,

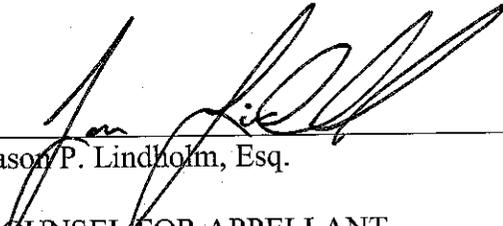


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HIN, LLC

PROOF OF SERVICE UPON
OHIO BOARD OF TAX APPEALS

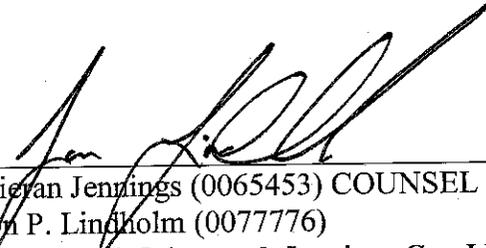
This is to certify that the Notice of Appeal of HIN, LLC was filed with the Ohio Board of Tax Appeals, State Office Tower, 24th Floor, 30 East Broad Street, Columbus, Ohio as evidenced by its date stamp as set forth hereon.



Jason P. Lindholm, Esq.
COUNSEL FOR APPELLANT,
HIN, LLC

CERTIFICATE OF SERVICE

This is to certify that on this 26th day of April 2012, a copy of the Notice of Appeal was sent via certified mail to: John Desimone, Esq., Kolick & Kondzer, 24500 Center Ridge Road, Suite 175, Westlake, OH 44145-5697, Attorney for the Bedford Board of Education, Sandra Curtis-Patrick, Esq., Cuyahoga County Assistant Prosecuting Attorney, 1200 Ontario Street, 8th Floor Cleveland, OH, 44113, Attorney for the Cuyahoga County Board of Revision and Cuyahoga County Fiscal Officer; and Michael DeWine, Ohio Attorney General, 30 East Broad Street, 17th Floor, Columbus, OH 43215-3428, Attorney for the Ohio Tax Commissioner.



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HIN, LLC

sexennial reappraisal.¹ We decide this matter upon the transcript certified by the BOR pursuant to R.C. 5717.01, the evidence presented during this board's hearing, and the written argument submitted on behalf of appellant and the appellee Bedford Board of Education ("BOE").

The subject property is comprised of approximately 34½ acres of land which is improved with a two-story office building with supporting parking, drives, landscaping, etc. The Cuyahoga County Fiscal Officer, formerly the auditor, had originally assessed the property for ad valorem taxation, as of January 1, 2006, as follows:

	<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>
Land	\$1,743,100	Land	\$ 610,100
Building	<u>\$6,256,900</u>	Building	<u>\$2,189,900</u>
Total	\$8,000,000	Total	\$2,800,000

Appellant filed a complaint with the BOR pursuant to R.C. 5715.19(A) seeking a reduction in the property's valuation to \$5,000,000, citing to "[r]ecent sales of comparable properties. Physical economic, functional depreciation or obsolescence. Economic valuation based on gross or net income." The BOE filed a countercomplaint, as permitted by R.C. 5715.19(B), requesting that the assessed values be retained. Before the BOR, the parties did not present the testimony of any witnesses regarding the property or its value, instead offering evidence of two sales, the first having occurred in December 2003 when the subject property,

¹ We note that in both its complaint filed with the BOR and its notice of appeal filed with this board, appellant challenges the common level of assessment used in calculating taxable value, asserting it was less than thirty-five percent of true value. Although it was represented evidence would be presented in support of this contention, no such evidence has been provided and therefore this issue will not be further addressed. See, generally, *Columbus Bd. of Edn. v. J.C. Penney Properties, Inc.* (1984), 11 Ohio St.3d 203; *Wolf v. Cuyahoga Cty. Bd. of Revision* (1984), 11 Ohio St.3d 205, 207. See, also, *Black v. Cuyahoga Cty. Bd. of Revision* (1985), 16 Ohio St.3d 11, 16-17; *J.C. Penney Properties, Inc. v. Franklin Cty. Bd. of Revision* (Aug. 27, 1992), Franklin App. Nos. 91AP-872, et seq., unreported, motion to certify overruled, (1993), 66 Ohio St.3d 1496; *State ex rel. Columbus Bd. of Edn. v. Thompson* (Oct. 19, 1989), Franklin App. No. 89AP-60, unreported.

along with a 2+ acre parcel, was acquired by JBK Cuyahoga Holdings L.L.C. for \$4,900,000. In April 2004, the subject property was sold to appellant for \$7,400,000. The BOR accepted the latter sale as the basis upon which to reduce the subject's value as of tax lien date:

	<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>
Land	\$1,743,100	Land	\$ 610,100
Building	<u>\$5,656,900</u>	Building	<u>\$1,979,900</u>
Total	\$7,400,000	Total	\$2,590,000

Dissatisfied with the BOR's determination, appellant appealed to this board, arguing that the subject should be granted a further reduction in value, asserting at the time of its appeal that the value should be \$4,900,000.

"When cases are appealed from a board of revision to the BTA, the burden of proof is on the appellant, whether it be a taxpayer or a board of education, to prove its right to an increase [in] or decrease from the value determined by the board of revision." *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564, 566. Pertinent to the facts before us, R.C. 5713.03 recognizes the utility of a sale in establishing the value of real property for purposes of ad valorem taxation:

"The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the true value of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon ***. *In determining the true value of any tract, lot, or parcel of real estate under this section, if such tract, lot or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor shall consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes. *****" (Emphasis added.)

This statute reflects the General Assembly's codification of *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 412, in which the Supreme Court

held that “[t]he best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so. This, without question, will usually determine the monetary value of the property.” See, also, *Conalco Inc. v. Monroe Cty. Bd. of Revision* (1977), 50 Ohio St.2d 129, paragraph one of the syllabus (“The best evidence of the ‘true value in money’ of real property is an actual, recent sale of the property in an arm’s-length transaction.”); *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, at ¶16 (“Pursuant to R.C. 5713.03, the sale price in a recent arm’s-length transaction between a willing seller and a willing buyer shall be considered the true value of the property for taxation purposes.”).

In *Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 124 Ohio St.3d 27, 2009-Ohio-5932, the Supreme Court held that this board is “justified in viewing the conveyance-fee statement and the deed that the school board had presented to the BOR as constituting a prima facie showing of value.” *Id.* at ¶28 (citing *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13). No one has suggested that the April 2003 sale was a “sham transaction,” involved related parties, or was a situation in which either party to the sale was acting under duress. Rather, appellant insists that we disregard the sale upon which the BOR relied in establishing value, asserting that the increase in sale amounts that occurred between December 2003 and April 2004, i.e., \$4,900,000 and \$7,400,000, was exclusively attributable to the occupancy of the property by a long-term, creditworthy tenant, i.e., U.S. Bank. Appellant argues that “[t]he only reasonable conclusion that can be inferred from this information is that **the difference in the two sale prices was**

due exclusively to the lease contract, which is an intangible asset, and the corresponding existence of a leasehold interest.” Appellant’s brief at 7. (Emphasis sic.) As a result, appellant advocates that we disregard the April 2004 sale and instead base value upon the appraisal evidence submitted on its behalf at our hearing.

Both this board and the Supreme Court have considered the aforementioned sales of the subject property when establishing its value for tax year 2004, and we need not belabor the point beyond referring to two passages from the court’s decision in *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 481, 2010-Ohio-687:

“The record here supports the conclusion that an arm’s-length sale occurred between a willing seller and a willing buyer in December 2003 and that the higher sale price for the property obtained in April 2004 resulted from the serendipity of HIN’s purchase, as HIN contemplated a 1031 exchange and specifically sought a property with a triple net lease. Thus, the facts here are not contrived nor do they suggest any effort by the parties to manipulate the sale to derive a favorable tax result. These are two separate arm’s-length transactions, and nothing in the record suggests otherwise.” Id. at ¶28.

As a result of the preceding finding, the court reasoned that:

“When a property has been the subject of two arm’s-length sales between a willing seller and a willing buyer within a reasonable length of time either before or after the tax lien date, the sale occurring closer in time to the tax lien date establishes the true value of the property for taxation purposes.” Id. at paragraph one of the syllabus.

While appellant advocates that the sale amount is actually a reflection of the value of the leasehold interest, the Supreme Court considered and rejected an analogous position in *AEI Net Lease Income & Growth Fund v. Erie Cty. Bd. of Revision*, 119 Ohio St.3d 563, 2008-Ohio-5203:

“Specifically, the fact that the property is encumbered by a long-term lease does not by itself establish that the sale price must be adjusted to arrive at true value. In *Rhodes [v. Hamilton Cty. Bd. of Revision]*, 117 Ohio St.3d 532, 2008-Ohio-1595], we relied on *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, *** in which we noted that the encumbrance of real property typically reflects an owner’s attempt to realize its value. *Id.* at ¶27. To the extent that an existing long-term lease generates revenue above or below market, the existence of the lease will tend to increase or decrease the value of the fee interest in the property. *Rhodes* exemplifies this principle when the long-term lease is an above-market lease, while the exemplary case for a below-market long-term lease is *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, ***. See *Cummins*, ¶¶16, 27.” *Id.* at ¶13. (Parallel citations omitted.)

The court then proceeded to explain the circumstances to which its decision in *Cummins Property Servs.*, supra, was limited, ultimately “reject[ing] the contention that the existence of a long-term lease resulting from a sale-leaseback makes the subsequent sale price not indicative of true value.” *Id.* at ¶17. In reaching this conclusion, the court commented:

“In *Cummins*, we held as a general matter that the effect of encumbrances on the sale price of the fee interest did not make that sale price unreflective of the true value of the property. We predicated our holding in part on the observation that encumbering the property constituted an owner’s method of realizing the value of the property. *Cummins*, ¶27. In that context, we hypothesized a situation in which a sale price might not be determinative of value if the contract creating the encumbrance was not entered into at arm’s length, and we pointed to a sale-leaseback as having potential to present such a situation. *Cummins*, ¶30.

“But additional language in *Cummins* clarifies that the sale-leaseback situation in this case does not raise such concerns. In *Cummins*, we relied on the Wisconsin Supreme Court’s decision in *Darcel, Inc. v. Manitowoc Bd. of Review* (1987), 137 Wis.2d 623, *** which stated that “[s]ale-leaseback situations, for instance, may be undertaken with terms to avoid property tax and might not be entered at arms-length.” *Cummins*, ¶30, quoting

Darcel, at 631. Thus, the concern associated with sale-leaseback transactions lies in collusion between the parties to depress property value for tax purposes. No evidence in the present case suggests that such collusion existed – indeed, the transaction in this case actually increased the property value by providing for a stream of elevated rent payments.

“Finally, AEI’s citation of footnote 4 in *Cummins* is unavailing. In the footnote, we noted that ‘a sale-leaseback may not furnish an arm’s-length sale price.’ 117 Ohio St.3d 516, 2008-Ohio-1473, *** ¶30. We simply did not address the separate question presented in this case: whether the sale price *in a subsequent sale* from the purchaser in the sale-leaseback determines the value of the property.

“At oral argument, AEI’s counsel hypothesized a situation in which the parties to a sale-leaseback might artificially lower property value: a property would subsequently sell for less if, in a previous sale-leaseback, the parties had agreed to a low sale price and concomitantly low rent. But the below-market nature of such a sale-leaseback would inevitably raise serious questions about the arm’s-length character of the sale-leaseback as a whole. Agreeing to a low sale price and low rent does not allow either party to that deal to realize the value of the realty, and as a result, the parties to such a transaction would likely not qualify as ‘typically motivated’ for purposes of establishing the sale-leaseback as an arm’s-length transaction. See *Cummins*, 117 Ohio St.3d 516, 2008-Ohio-1473, *** ¶31; *Rhodes v. Hamilton Cty. Bd. of Revision*, 117 Ohio St.3d 532, 2008-Ohio-1595, *** ¶10. Specifically, a purchaser in a sale-leaseback who encumbered the property at a plainly below-market rent would not be looking to realizing an optimal value for the realty. By stark contrast, the purchaser in a sale-leaseback like that at issue in this case is plainly maximizing value for the realty itself.” *Id.* at ¶¶19-20, 24-25. (Parallel citations omitted and emphasis sic.)

Accordingly, in this instance, where there exists an arm's-length sale, recent to the 2006 tax lien date,² it is inappropriate to consider the alternative evidence of value offered by appellant. See, generally, See *Pingue v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St.3d 62, 64 ("It is only when the purchase price does not reflect the true value that a review of independent appraisals based upon other factors is appropriate."). Accordingly, we find the best evidence of the subject's value as of January 1, 2006, to be the price for which it transferred eighteen months prior. Although appellant offered additional appraisals for the two subsequent years within the same interim period as the year for which the underlying complaint was filed,³ we are unpersuaded that the value established by the aforementioned April 2004 sale should not apply with equal force throughout the interim period. Indeed, such conclusion is supported by appellant's appraiser's testimony regarding only minor changes in the marketplace during the intervening years and his own reliance upon sales and leases of other properties occurring in, prior to, and after 2004.

Accordingly, it is the decision of the Board of Tax Appeals that the best evidence of the subject's value as of January 1, 2006, as well as the two other years within the interim period, was as the BOR had determined, the amount for which the property transferred

² We acknowledge that whether a sale is sufficiently "recent" or too "remote" from tax lien date to qualify as the "best evidence" of value is not decided exclusively upon temporal proximity. *Worthington City Schools Bd. of Edn.*, at ¶32. However, it remains the burden of a party contesting the utility of a sale to rebut the presumptions to be accorded it. See, e.g., *Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325. See, generally, *HK New Plan Exchange Property Owner II, L.L.C. v. Hamilton Cty. Bd. of Revision*, 122 Ohio St.3d 438, 2009-Ohio-3546 (value based upon sale occurring twenty-four months prior to tax lien date); *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059 (reversing this board's decision and ordering that the property's taxable value as of January 1, 2002 be based upon its sale which occurred in October 2003, twenty-two months after tax lien date).

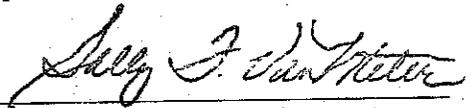
³ In *Hotel Statler v. Cuyahoga Cty. Bd. of Revision* (1997), 79 Ohio St.3d 299, 304, fn. 1, the Supreme Court "decline[d] to address the issue of whether the BTA has the authority to determine different values for succeeding years in the same triennium in this case, where no competent, probative evidence supporting different valuations was offered."

in April 2004. It is therefore the order of this board that the property be valued as follows as of January 1, 2006:

	<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>
Land	\$1,743,100	Land	\$ 610,100
Building	<u>\$5,656,900</u>	Building	<u>\$1,979,900</u>
Total	\$7,400,000	Total	\$2,590,000

It is the order of this board that the Cuyahoga County Fiscal Officer list and assess the subject property in conformity with our decision as announced herein and that such values be carried forward according to law.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.


Sally F. Van Meter, Board Secretary