

**IN THE SUPREME COURT OF OHIO**

<b>Board of Education of the Dublin City Schools,</b>	:	
	:	
<b>Appellee.</b>	:	<b>Case No. 2012-1432</b>
<b>v.</b>	:	
	:	
<b>Franklin County Board of Revision, Franklin County Auditor, Tax Commissioner of the State of Ohio,</b>	:	<b>Appeal from the Ohio Board of Tax Appeals</b>
	:	
<b>Appellees,</b>	:	<b>BTA Case Nos. 2009-Q-1282 through 1301,</b>
<b>and</b>	:	<b>and 2009-Q-1408</b>
	:	
<b>East Bank Condominiums II, LLC,</b>	:	
	:	
<b>Appellant.</b>	:	

**MERIT BRIEF OF APPELLANT EAST BANK CONDOMINIUMS II, LLC**

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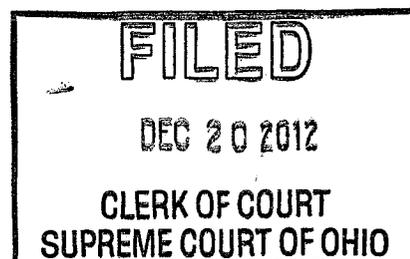
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I.

## INTRODUCTION

*“The burden of proof to show that the valuation determined by a board of revision is in error resides with the party filing the appeal at the BTA. The appellant before the BTA must present competent and probative evidence to prove that the value that he or she proffers is correct.”*

[DAK, PLL v. Franklin Cty. Bd. of Revision, 105 Ohio St. 3d 84, 87 (2005) (emphasis added).]

Under this Court’s precedent, it is a foregone conclusion that the property owner will prevail where (a) before the Board of Revision (the “BOR”) the property owner submits competent evidence of valuation and the governmental agency elects not to offer any evidence; (b) the BOR rules in favor of the property owner; and (c) then before the Board of Tax Appeals (“BTA”) the governmental agency, proceeding as the appellant, once again affirmatively elects not to offer any valuation evidence. Numerous cases have made this clear.

Yet, we are proceeding before this Court now because, unfortunately, just the exact opposite occurred before the BTA. Appellant East Bank Condominiums II, LLC (“East Bank”) properly proceeded before the BOR, offering both lay and expert testimony. The Board of Education of the Dublin City Schools (“BOE”) offered no evidence, let alone any to counter East Bank’s submission. The BOR ruled in East Bank’s favor. Before the BTA, the BOE once again offered nothing, other than to rely upon the record and the proceedings before the BOR, where it had failed to make any form of evidentiary submission. Again, under Ohio law, and given BOE’s evidentiary failings, this matter becomes the proverbial “open and shut case.”

But the BTA rejected East Bank’s evidentiary submissions, both before the BOR and the BTA itself, and summarily rejected the BOR’s decision. It then ignored the BOE’s absolute failure of proof and then adopted a valuation for the subject properties lacking any evidentiary foundation whatsoever. Indeed, the BTA simply reverted to the Auditor’s original valuation.

The subject properties are 21 unfinished condominium units, which collectively comprise a single economic unit. Each unit is approximately 50 percent completed and, given the economy, has sat idle. The BTA reinstated the Auditor's valuation of \$8,139,300, which is based upon these units being completely finished and then absorbed (or sold) into the market. But that is not reality. Rather, it is a hypothetical valuation completely detached from market realities and specifically the status of these units on the taxable date.

While as explained below, the BTA has clearly erred as a matter of law in numerous respects in reaching its value, this Court need look no further than the BOR's decision for how to value an incomplete single economic unit condominium building. The BOR appropriately valued the units as only partially finished and then applied a conservative bulk sale discount. Applying this approach, the BOR correctly valued the units in their current state on the tax date at \$3,100,000, which was, coincidentally, \$100,000 more than an arm's length offer received by East Bank for the purchase of the 21 units. This is in stark contrast to the BTA's decision valuing these same half-completed units with no buyers as fully complete turn-key condominiums in optimal real estate conditions.

As set forth below, the BTA's decision in this case is in multiple respects unreasonable and is premised upon an incorrect standard. Accordingly, it should be reversed and the BOR's valuation reinstated.

## **II. STATEMENT OF THE FACTS AND PROCEEDINGS**

### **A. The East Bank Condominium Development.**

In 2006, East Bank Condominiums II, LLC ("East Bank") acquired the underlying land located just east of Riverside Drive and south of West Case Road and began developing a 1.932 acre condominium project. East Bank's acquisition price of the land was \$550,000, which

equated to \$19,643 for each of the 28 anticipated units. [BTA Hearing Ex. 2, Horner App. II at 3; Appx. 103.]<sup>1</sup>

The 28 units are all contained in a single four-story building, the lowest level being parking with three levels of condominiums above. [BTA Tr. at 12; Appx. 232.] Importantly, to obtain a single occupancy permit for any unit in the building, East Bank was required to build out the entire building, including all utilities and mechanicals. However, East Bank otherwise left each unsold unit in a drywalled or “white box” state, meaning it was essentially a shell of a unit and could not be sold to an end consumer without substantial construction. [*Id.* at 13-15; Appx. 232-233.] Thus, the unfinished units lacked such basic elements as finished floors, cabinets, and bathroom fixtures. [BTA Tr. 24-25, 46; Appx. 235, 241.] From a construction progress standpoint, the vast majority of the “white box” units were 50% completed while two were 60% complete and two others were 80% complete. [Appx. 146-187.]

**B. As Of January 1, 2008, Only Three Units Had Been Sold And East Bank Considered Selling The Entire Project To Developers.**

Unfortunately, due to an overall decline in the condominium market in 2007, the sale of unfinished units at the East Bank project did not progress quickly. By January 1, 2008, the tax lien date applicable to this action, only three of the 28 units had been sold and actually delivered to an end user. [BTA Tr. at 26; Appx. 236.] East Bank had completed but not sold four of the units, with the remaining 21 units remaining in a rough drywall stage (the “Unfinished Units”).

Due to its inability to sell the units, East Bank internally considered selling all of the Unfinished Units to another developer. [*Id.* at 16; Appx. 233.] In fact, East Bank received multiple arm’s length offers from developers in the \$1,500,000 to \$3,000,000 range. [*Id.* at 16-

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<sup>1</sup> The Horner appraisal was submitted into evidence at both the BOR and BTA and is attached as Appx. 78. The excerpts of the BTA transcript cited herein are attached as Appx. 229. The transcription of the BOR’s audio recording is attached as Appx. 66.

18; Appx. 233-234.] The negotiations never resulted in a transaction as the offered prices developers were willing to pay would not satisfy the outstanding financing which East Bank has secured before the decline of the condominium market.<sup>2</sup> [Id. at 18; Appx. 234.]

As of January 1, 2008, the Franklin County Auditor appraised the market value of the 21 Unfinished Units as \$8,139,300 (“Auditor’s Value”), a value which actually exceeded the entire value of the project had it been completed.

**C. East Bank Challenges The Valuation At The Board Of Revision, Which Appropriately Valued The Unfinished East Bank II Property At \$3,100,000.**

Thereafter, East Bank proceeded before the BOR to contest the Auditor’s Value for the Unfinished Units. No challenge was made as to the completed units. [BTA Tr. at 27; Appx. 236.]

As part of the evidence offered before the BOR, East Bank presented the appraisal and expert testimony of appraiser Tom Horner. [BTA Tr. at 38-49; Appx. 239-241.] Mr. Horner’s appraisal determined that because of the deteriorated housing market, the highest and best use for the project involves “use as a condominium development, with future construction dictated by demand, and the flexibility to lease units in the interim to help off-set holding costs.” [Horner App. II at 3; Appx. 128.] To value the Unfinished Units, Mr. Horner considered all of the traditional valuation methods (cost, sales comparison, and income capitalization) and determined the applicable method was a hybrid analysis involving three steps: (1) develop the retail value estimated upon comparable sales; (2) adjust the total income received from the comparable sales for owner-paid expenses and profit; and (3) adjust the resulting net operating income to reflect

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<sup>2</sup> East Bank considered all options as a result of the market, including the sale of the units to investors. In fact, East Bank ultimately sold multiple units to investors to use as rentals. [BTA Tr. at 22; Appx. 235.]

time-value of money during the sell-out period. [Horner App. IV at 2; Appx. 130.]<sup>3</sup> Mr. Horner opined this method provided the most accurate true market value as it takes into account that the units are not complete, significant cost will be incurred in completing and selling the units, and the expected time and risk associated with disposing of the Unfinished Units.

The BOE elected to offer no evidence before the BOR, expert or otherwise, as acknowledged by the Board of Revision representative for the County Auditor: “We were given no additional information on behalf of the county complainant school board in this matter....” [BOR Decision, Appx. 76.] After evaluating the evidence, the BOR determined East Bank’s evidence to be credible, competent and probative and valued the Unfinished Units at \$3,100,000. Specifically, the BOR “recognize[d] Mr. Horner as being an expert in the area of real estate appraisal...[and] that page two of his report are the specific allocations to each of the parcels....”

Id.

Nevertheless, the BOE appealed the BOR’s determination to the BTA.

**D. The Board Of Tax Appeals Ignores The Evidence Presented Before It And The Decision Of The Board Of Revision In Valuing The Unfinished East Bank Property At The Unsupported Auditor’s Value.**

Before the BTA, East Bank again offered evidence, including testimony, and the BOE again failed to offer any evidence, merely relying “upon the Statutory Transcript.” [BTA Tr. At 9, Appx. 231.] The BOE instead relied upon the BTA’s decision in M/I Homes of Cincinnati, LLC v. Warren Cty. Bd. Of Revision, 2010 WL 3724159 (Ohio Bd. Tax App., Sept. 21, 2010) (“M/I Homes”), and argued that a bulk sale discount was inappropriate.

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<sup>3</sup> Mr. Horner also considered the cost approach but determined that construction costs were sunk cost which are not representative of value. [BTA Tr. at 58.]

On July 24, 2012, the BTA issued its decision. It first acknowledged that at the BOR, East Bank presented testimony of two witnesses and an expert report from appraiser Tom Horner which collectively confirmed the \$3,100,000 valuation adopted by the BOR. The BTA next acknowledged and found there was a “lack of any evidence to the contrary on behalf of the BOE.” [BTA Dec. at 10; Appx. 35.]

Notwithstanding the evidentiary record, the BTA reinstated the unsubstantiated Auditor’s Value—a value \$5,000,000 more than the value placed on the Unfinished East Bank II Property at the BOR. It did so by: (1) valuing Unfinished Units at a hypothetical completed status instead of its actual incomplete status and (2) by finding dispositive the BTA’s decision in M/I Homes.

Thus, even though the BTA acknowledged that the only evidence before it supported a finding that the units were unfinished and would have taken in excess of \$1,000,000 to complete, the BTA adopted the Auditor’s Value, nearly tripling the value of East Bank. [BTA Dec. at 14; Appx.-37 Horner App. IV at 5; Appx. 134.] In doing so, the BTA has ignored the law, reality, and, most importantly, the evidence in the record. Accordingly, this Court must reverse the BTA’s judgment.

### **III. LAW AND ARGUMENT**

#### **ASSIGNMENT OF ERROR NO. 1:**

The Board Of Tax Appeals’ Decision And Order Is Unlawful And Unreasonable As A Matter Of Law By Reverting To The Auditors Value When No Evidence Was Introduced Before The Board Of Tax Appeals Supporting The Auditor’s Value.

## ASSIGNMENT OF ERROR NO. 2

The Board Of Tax Appeals' Decision And Order Is Unlawful And Unreasonable As The Board Erred As A Matter Of Law By Not Applying The Correct Burden Of Proof At The Board of Tax Appeals.

**A. The BTA's Decision Must Be Reversed If It Is Either Unreasonable Or Unlawful.**

This Court reviews decisions of the BTA under a “reasonable and lawful” standard. Global Knowledge Training, LLC v. Levin, 127 Ohio St. 3d 34, 36 (2010). Applying this standard, this Court has consistently held that it “will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion.” Id. See also Bd. of Edn. of Gahanna-Jefferson Local School Dist. v. Zaino, 93 Ohio St. 3d 231 (2001) (reversing the BTA’s decision as unreasonable and unlawful due to the BTA’s improper interpretation and application of statutory provisions).

This Court has also reversed as unreasonable and unlawful BTA decisions in which the ultimate fact is not supported by the basic facts in the record. See Columbus City School Dist. Bd. of Edn. v. Zaino, 90 Ohio St. 3d 496, 498-99 (2001) (reversing the BTA’s decision as “unreasonable and unlawful” because “the BTA’s inference of ultimate fact ... is not supported by the basic facts”); Ace Steel Baling, Inc. v. Porterfield, 19 Ohio St. 2d 137, 142 (1969) (holding that the reasonableness of the “decision of the [BTA] derived from an inference of ultimate fact ... is a question appropriate for judicial determination”). Accordingly, when the record relied upon by the BTA is devoid of any probative evidence supporting its decision, the BTA’s decision is unreasonable and unlawful and must be reversed. See, e.g., Consolidation Coal Co. v. Porterfield, 25 Ohio St. 2d 154, 159 (1971) (“The decision of the Board of Tax Appeals, being unsupported by any probative evidence of record, is unreasonable and unlawful and must be reversed.”).

Finally, where the BTA rejects uncontradicted evidence, the BTA's decision is not entitled to deference and supports a finding that its decision is unreasonable and unlawful. SFZ Transp., Inc. v. Limbach, 66 Ohio St. 3d 602, 605-06 (1993) (reversing the BTA's decision because the "BTA's rejection of this uncontradicted data in determining the primary use of the equipment is not the sort of weighing of evidence or determination of credibility to which we must defer"). See also The Chapel v. Testa, 129 Ohio St. 3d 21, 27 (2011) ("Because the denial of the exemption claim by the commissioner and the BTA rests upon legal error, the BTA's decision must be reversed.").

As set forth below, the BTA's decision in this case is in multiple respects unreasonable and premised upon an incorrect standard. Accordingly, it should be reversed.

**B. The BTA Unlawfully And Unreasonably Shifted The Burden Of Proof To East Bank—Even Though East Bank Was The Appellee.**

As a threshold matter, the BTA failed to hold the BOE to its burden of proof and indeed improperly shifted to East Bank the burden of proof. So let's be clear given the significance of this point: East Bank's burden *before the BOR* was to prove, by competent evidence that the Unfinished Property had been overvalued or it was entitled to a reduction in value. See LCL Income Properties v. Rhodes, 71 Ohio St. 3d 652, 653 (1995) (explaining that "the primary obligation of a property owner who challenges a real property valuation . . . [is] to sustain the burden of proving that the property has been overvalued"); Cincinnati v. Hamilton Cty. Bd. of Revision, 69 Ohio St. 3d 301, 303 (1994) (describing the burden as proving a "right to reduction in value by competent evidence").

Once East Bank offered such evidence and the BOR ruled in its favor, the burden fell upon the BOE, as the appellant, to prove both that the BOR erred and the true value of the Unfinished Property:

The burden of proof to show that the valuation determined by a board of revision is in error *resides with the party filing the appeal at the BTA*. The appellant before the BTA must present competent and probative evidence to prove that the value that he or she proffers is correct.

[DAK, PLL v. Franklin Cty. Bd. of Revision, 105 Ohio St. 3d 84, 87 (2005) (emphasis added).]

Accord: W.R. Manley Co. v. Hancock Cty. Bd. of Revision, 1990 WL 269795, \*4 (Ohio Bd. Tax. App. Nov. 30, 1990) (“Appellant bears the burden of establishing in this proceeding before the Board of Tax appeals a true value different from that established from the Board of Revision.”); Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision, 90 Ohio St. 3d 564, 566 (2001) (“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...”). Stated otherwise, BOE had the affirmative “burden of persuasion as to the proper value of the subject properties.” Bd. of Edn. of the Westerville City School Dist. v. Franklin Cty. Bd. of Revision, 2002 WL 1840506, \*1 (Ohio Bd. Tax. App. Aug. 9, 2002).<sup>4</sup>

This point is (or at least should have been) uncontroverted. Even the BTA specifically acknowledged this in its decision: “it is incumbent upon an appellant [here BOE] challenging the decision of the board of revision to come forward and offer evidence which demonstrates its right to the value sought.” [BTA Dec. at 10.] The problem is that the BTA then proceeded to ignore this fundamental proposition. BOE failed to provide *any evidence* of value to the BTA. Instead, BOE confined its evidentiary submission to the statutory transcript:

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<sup>4</sup> Since the BOE made no effort to satisfy its evidentiary burden, East Bank was under no obligation to defend BOR’s valuation of the Unfinished Property. See The Toledo Trust Co. v. Erie Cty. Bd. of Revision, 2009 WL 1999916, \*7 (Ohio Bd. Tax. App. June 30, 2009) (explaining that since “the appellant did not meet its evidentiary burden, such burden has not shifted to the...appellees to support and/or defend the value the...BOR placed upon the subject property”). Nevertheless, East Bank presented to the BTA additional appraisal testimony and testimony of offers made by developers for the purchase of the Unfinished Units—evidence which further confirmed the BOR’s \$3,100,000 valuation.

Ms. Fox: On behalf of the Appellant we intend to rely upon the Statutory Transcript. We do not have any additional evidence to present today other than what may come out during cross-examination.

[BTA Tr. at 9; Appx.-231 (emphasis added).]

Zero plus zero equals zero. In the first instance, BOE elected not to offer any evidence before the BOR. In the second instance, BOE failed to elicit any evidence on cross-examination before the BTA to satisfy its burden. Thus, when the BOE proceeded to rely solely upon the Statutory Transcript, the sum total of BOE's evidentiary submission equaled zero.

Tellingly, however, BTA accorded no significance to the BOE's complete failure of proof. To the contrary, the BTA's decision is replete with examples of the BTA impermissibly placing the burden upon East Bank—the appellee. See BTA Dec. at 15-16; Appx.-233 (“we find that the appellee property owner failed to present competent and probative evidence”); id. (“no evidence has been provided as to the completion percentage of each unit”); id. at 14 (“There is not evidence, however, that the cost to finish each unit estimated by the property owner conforms to market costs.”); id. at 13 (discussion of BTA's repeated critique of the sufficiency and/or weight of East Bank's evidence).

In doing so, BTA unlawfully shifted the burden of proof, and for this reason alone its decision should be reversed and BOR's valuation reinstated.

**C. As A Matter of Law, The BOE's Failure To Offer Evidence, Let Alone Satisfy Its Burden, Precluded The BTA From Reinstating The Auditor's Inflated Value.**

The BOE's failure to offer any evidence supporting the Auditor's Value was as a matter of law fatal to its appeal. Equally improper was BTA's decision to then to simply “revert to the Auditor's Value.” This Court's precedent makes this clear:

[W]hen the evidence presented to the board of revision or the BTA contradicts the auditor's determination in whole or in part, and when no

*evidence has been adduced to support the auditor's valuation, the BTA may not simply revert to the auditor's determination.* Whenever it does so, the BTA is acting unlawfully by making a finding of value that is affirmatively contradicted by the only evidence in the record.

[Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision, 113 Ohio St. 3d 281, 288-89 (2007) (emphasis added).]

On point is Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, 115 Ohio St. 3d 449 (2007). There, an owner of a strip shopping mall contested the auditor's \$3,000,000 valuation of the mall containing a number of individual stores. Upon the owner's presentation of a written opinion of value, the BOR reduced the value to \$1,500,000. Id. at 450. At the BTA, the BOE (as the appellant) failed to present appropriate expert testimony. The "BTA found no stated explanation for the BOR's adjustment and reinstated the auditor's determination as the default value." Id. at 452. This Court, however, reversed the reinstatement of the Auditor's value, which "was not justified, because the taxpayer had presented evidence contrary to the auditor's determination to the board of revision." Id.

In sum, the burden at the BTA was the BOE's and its failure to satisfy that burden required the BTA to uphold the BOR's determination of value. The BTA's refusal to do so and its reversion back to the Auditor's unsupported value was unlawful and reversible error. This is yet a second independent basis for reversal.

### ASSIGNMENT OF ERROR NO. 3:

The Board Of Tax Appeals' Decision And Order Is Unlawful As It Erred As A Matter Of Law By Misapplying The Board Of Tax Appeals' Decision In M/I Homes of Cincinnati v. Warren Cty. Board of Revision, 2010 WL 3724159 (Bd. of Tax App., Sept. 21, 2010) ("M/I Homes") To Preclude The Use Of Bulk Discount Factors For East Bank.

ASSIGNMENT OF ERROR NO. 4:

The Board Of Tax Appeals' Decision And Order Is Unreasonable And Unlawful Where The Board Of Tax Appeals Erred As A Matter Of Law By Not Valuing The Parcels As A Single Economic Unit.

Confronted with BOE's obvious failure of proof, BTA had little choice but to confine its analysis to a criticism of the un rebutted evidence submitted by East Bank and to cite its decision in M/I Homes as somehow dispositive. In doing so, BTA erred in numerous respects.

First, BTA effectively concluded that its decision in M/I Homes absolutely prohibits the use of a bulk discount in valuing properties. In doing so, BTA overstated its own precedent. Indeed, a fair reading of the M/I Homes decision reveals that, not surprisingly, the ultimate case conclusion was compelled by the specific facts (or lack thereof) presented. Finding the factual elements necessary to support an argument for a bulk discount lacking, the BTA rejected the expert opinion offered by the property owner supporting a bulk discount: "This board is not required to adopt the testimony of any witness, but is instead vested with wide discretion to determine the weight and credibility to be accorded evidence. In this instance, we reverse the determination of the BOR, in reliance upon Koon's opinion . . . as the best evidence of the subject's value." M/I Homes, at \*8 (citation omitted). Stated otherwise, the BTA ultimately disagreed with the expert's opinion given the unique circumstances of this case, and found that the evidence was otherwise lacking to support application of a bulk sales discount.

We submit it is readily evident that given the myriad unique circumstances impacting the valuation of real property, the M/I Homes decision cannot be read as adopting a "bright-line" prohibition against consideration of bulk sale discounts. Nor could it since any such reading would run afoul of this Court's precedent. This Court previously approved the application of a

bulk sale discount.<sup>5</sup> In Pingue v. Franklin Cty. Bd. of Revision, 87 Ohio St. 3d 62 (1999), this Court confirmed that bulk sales are appropriate evidence of true market value. There, Pingue acquired 44 units for \$57,500 per unit when the “market” might have yielded \$74,000 per unit. This Court held that the bulk sale was competent, probative, and credible evidence of value because “[h]ad the seller been able to sell each condominium for \$74,000 per unit, common sense dictates that the seller would have done so. However, the seller had to discount the price in order to sell all forty-four units at the same time.” Id. at 65. Similarly, the bulk-sale approach to value was likewise found applicable in Greenwood Homes, Inc. v. Regions Bank, 302 Ga. App. 591 (2010), where the court found that the use of a discounted cash flow analysis based upon bulk sales was appropriate due to the “depressed demand in the real estate market.” Significantly, seven investor sales did occur in 2009. The sales of unfinished units to investors were made possible only by providing a discounted purchase price. [BTA Tr. at 22; Appx. 235.]

Second, the instant case is readily distinguishable from M/I Homes:

- MI Homes owned 29 individual vacant subdivision lots, whereas East Bank owns a single economic unit containing 21 unfinished units. The 21 units which comprise the Unfinished Units are contained in a single building, the units all share the same infrastructure which was required to be finished prior to obtaining a single certificate of occupancy, and “are owned by one owner” who can “only sell all units at one time to one investor.” [BOR Tr. at 4, Appx.-69.]
- MI Homes appealed to the BTA and thus bore the burden of proof—a burden BTA found MI Homes had not satisfied under the specific facts of that case. In contrast, here the burden of proof rested upon the BOE as the appellant.

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<sup>5</sup> This is not only true in Ohio but in other jurisdictions. In Carr v. Commr. of Internal Revenue, 1985 WL 14653 (U.S. Tax Ct. 1985) the United States Tax Court found a “30 percent discount is a fair and reasonable discount for all of the developed lots” in providing a bulk discount to account for market absorption. See also In re Centennial Park, LLC, 2011 WL 5520968 (Bankr.D. Kan. 2011) (adopting a 65% bulk sale discount in valuing real property in a Chapter 11 proceeding); In re Sailboat Properties, LLC, 2011 WL 1299301 (Bankr. E.D.N.C. 2011) (applying a 22% discount to value the real property whether sold as a bulk sale or held and disposed of over a period of time, a choice the owner must make).

- In MI Homes, the BTA refused to apply a discount because the record reflected that MI Homes never contemplated selling the vacant lots in a single transaction. It stressed that MI Homes had never even considered selling all of the vacant parcels in one transaction and that M/I Homes' business model is solely as an "'integrated homebuilder' which does not sell vacant building lots to other developers." M/I Homes, at 1. In fact, the BTA characterized M/I Homes' theory as a "hypothetical bulk sale approach when there was no evidence in the record to support that M/I was even contemplating a bulk sale of the 29 parcels." [Id. at 1, 5.] In contrast, the record here reflects East Bank's internal discussions concerning a possible bulk sale and even the receipt, negotiation and consideration of offers from both in-state and out-of-state potential purchasers.

Q. [D]id you have discussions during 2008 about selling this entire project?

A. We did.

\* \* \*

Q. Did you approach some local developers?

A. We did.

Q. ...Were you approached by any developers outside the State of Ohio?

A. We were.

Q. Did you discuss potential purchase prices for this entire project with those...national developers...?

A. We brought nothing up. They made a couple of offers.

Q. What were those offers; do you recall?

A. A million-and-a-half to perhaps three million dollars.

Q. And approximately how many of those discussions did you have with those national developers?

A. Three or four.

[Id. at 16-17; Appx. 233.]

These distinctions are significant. Even the MI Homes decision itself acknowledged a different valuation approach where a single economic unit exists: "the parcels do not form an economic unit, e.g., as might an apartment complex situated across several parcels...." MI

Homes, at 6. Of course, the distinction identified by the BTA exists here, as the occupancy permit requirements compelled the partial construction of the Unfinished Units as a single economic unit.

At bottom, the BTA's disapproval of a bulk sale discount in MI Homes has no application here. The evidence was uncontroverted that this was not some hypothetical scenario disassociated from reality. To the contrary, given the absorption rate with this single economic unit, the only economically realistic option was to sell the unfinished project as one unit or sell multiple unfinished units to individual investors, all of which are consistent with the highest and best use as defined by Mr. Horner. [BTA Tr. at 22; Appx. 235.]

Where as of the tax lien date the units remain unfinished, the absorption rate is nominal, and a bulk sale would require a buyer willing to assume a risk to purchase the incomplete project and to sell any of the unfinished units,<sup>6</sup> a bulk-sale discount is appropriate for determining the true value of a single-economic unit property. Or, at the very least, it is an appropriate consideration that is dispositive if left un rebutted, which, if as was the case before both the BOR and BTA.

Accordingly, for this reason as well, the decision of the BTA should be reversed.

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<sup>6</sup> Consistent with this approach, where the status of the property is unfinished, the property owner is entitled to an "inherent risk" discount as a matter of law. See Webb/Henne Montgomery Luxury Apts. v. Hamilton Cty. Bd. of Revision, 73 Ohio St. 3d 739, 742 (1995) (affirming the use of a twenty-five percent (25%) "inherent risk discount factor" as the project was only partially complete); Bd. of Edn. of the South-Western City Schools v. Franklin Cty. Bd. of Revision, 2008 WL 5397460 (Ohio Bd. Tax. App. Dec. 23, 2008) (applying a fifty percent (50%) discount); Abbott Laboratories, Inc. v. Franklin Cty. Bd. of Revision, 1996 WL 17067 (Ohio Bd. Tax. App., Jan. 12, 1996) (applying a twenty-five percent (25%) discount to "reflect the undeniable risk any purchaser would take in acquiring the subject property" in its stage of completion).

ASSIGNMENT OF ERROR NO. 5:

The Board Of Tax Appeals' Decision And Order Is Both Unreasonable And Unlawful As A Matter Of Law By Not Applying A Discount Based Upon Property Never Completed.

ASSIGNMENT OF ERROR NO. 6:

The Board of Tax Appeals' Decision And Order Is Both Unreasonable And Unlawful As The Board of Tax Appeals Abused Its Discretion By Erroneously And Unjustifiably Rejecting The Board of Revision's Determination That East Bank Presented The Requisite Evidence Of Value.

ASSIGNMENT OF ERROR NO. 7:

The Board of Tax Appeals' Decision To Value The Property At The Full Finished Value Was An Abuse of Discretion Where The Undisputed Record Shows That The Parcels At Issue Are Unfinished And Evidence Of The Cost To Complete Was In The Record.

At bottom, the BOE claims only that Mr. Horner's approach is not credible because it does not value the Unfinished Units as fully completed units. But it is the position of the BOE which is incredible and the decision of the BTA which is unreasonable.

First, Ohio law permits the development method of valuation to determine a true market for the Unfinished Units. See O.A.C. 5705-3-07(C)(4) ("The development method can be used in valuing land ready for development by estimating value as fully developed and subtracting the development, administrative and entrepreneurial costs."). This valuation approach is especially appropriate where, as here, the property is unfinished.

Second, the Ohio Administrative Code, Section 5703-25-067(G), requires that the state of completion must be taken into account. "If a building, structure, fixture or other improvement to land is under construction on January first of any year, *its valuation shall be based upon its value or percentage of completion as it existed on January first.*" (Emphasis added). Necessarily then, a valuation cannot be predicated based upon the completed value.

Third, again, this Court has recognized that a bulk sale is competent and probative evidence of true market value for several properties that together form a single economic unit,

such as apartments or condominiums that are encompassed within a single building. See, e.g., Pingue v. Franklin Cty. Bd. of Revision, 87 Ohio St. 3d 62 (1999).

Given the foregoing, East Bank easily satisfied its initial burden before the BOR. Indeed, as there were no arm's length sales of unfinished units as of the tax lien date, East Bank offered the best evidence possible. It submitted Mr. Babyak's testimony, which proved that in-state and out-of-state developers valued and made offers to purchase the units at issue for between \$1.5 and \$3 million. [BTA Tr. 16-17.]

East Bank also offered a percentage of completion of these Unfinished Units. Specifically, East Bank stated that these units have not been sold and will remain in various stages of completion until sold. Specifically, East Bank stated Units 103, 105, 106, 107, 202, 203, 205, 206, 207, 300, 301, 302, 305, 306, 307 and 308 "will remain 50% complete until sold" while Units 104 and 204 are "60% complete and will not be finished until sold;" and Units 209 and 309 "are 80% complete and will not be finished until sold." [Verified Complaints; Appx. 146-187]<sup>7</sup>

East Bank next offered Mr. Horner's analysis, which estimated the retail value based upon comparable sales. Here only three completed units in the entire complex have been sold, with an average sales price of \$200.01 per square foot. [Horner App. IV at 2, Appx. 131.] In addition, Mr. Horner's analysis accounted for list prices of the units, which are at \$190.00 per

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<sup>7</sup> Ohio Administrative Code section 5703-25-06(G) makes clear that partially completed structures cannot be valued, like the BTA did here, as if fully completed. See Westlake Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, 2008 WL 4688982, \*3-4 (Ohio Bd. Tax App. 2008) (reducing the auditor's value by 33% pursuant to O.A.C. 5703-25-06(G) where the property owner's evidence established the structure's improvements were 33% complete and the appellant "offered nothing that refutes [appellee's] evidence as to the percentage of the building's completion").

square foot; a single resale at \$207.00 per square foot; the units at East Bank I<sup>8</sup> which have resold at \$183.50 per square foot; and the withdrawn listings. [*Id.*; BOR Tr. at 5; Appx. 70.] Taking these facts into consideration, the value of the Unfinished Units, *fully completed*, would be \$180 per square foot for a total value of \$7,672,860.<sup>9</sup> [Horner App. IV at 3; Appx. 132.]

But since the subject units were obviously unfinished, Mr. Horner appropriately accounted for completion costs in his appraisal by deducting these costs from the “fully completed” value. Specifically, Mr. Horner determined that it would cost \$1,180,566 to complete the Unfinished East Bank II Property, an average of \$56,217 per unit. Even the BTA acknowledged that East Bank presented evidence of the costs to complete the Unfinished Units—nearly \$1.2 million—but it summarily rejected Mr. Horner’s cost-completion analysis on the grounds that “dollar-for-dollar costs do not necessarily directly correlate to value.” [BTA Dec. at 14; Appx. 39.] BTA missed the point: the cost-completion analysis simply illustrates that these units are unfinished and cannot be finished without significant expense, which obviously reduces the true market value of the unit regardless of whether the amount is reduced on a dollar-for-dollar or other percentage basis. No rational person would pay full price for an unfinished condominium—and the BTA agrees.

We add that the BTA asserted that “no evidence has been provided as to the completion percentage of each unit to allow this board *to make appropriate adjustments* to the properties’

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<sup>8</sup> East Bank I is the predecessor condominium project developed adjacent to the East Bank II property.

<sup>9</sup> With the benefit of the passage of time, Mr. Horner was able to undertake additional analysis and present additional testimony at the BTA related to the comparable sales. At the time of the hearing, 14 units at the Unfinished East Bank II Property had transferred and the average price per square foot was \$146. [BTA Tr. at 70; Appx. 247.] As such, the 42,627 square foot building’s completed value based on comparable sales was \$6,095,661. The building is, of course, far from being complete.

values.” [BTA Dec. at 15; Appx. 40 (emphasis added).] Not true. East Bank provided the BOR and the BTA with competent and unrefuted evidence of the completion costs and percentages for each unit, nearly all of which are only 50 percent complete. [Horner App. IV at 5; BTA Tr. at 46; and Verified Complaints; Appx. 134, 146-187, 241.] The BOR relied on the “As-Is” value attributed by Mr. Horner to the Unfinished Units. [BOR Tr. at 11; Appx. 76] For whatever reason, the BTA chose to simply ignore the evidence actually offered while simultaneously ignoring the BOE’s failure to even offer evidence.

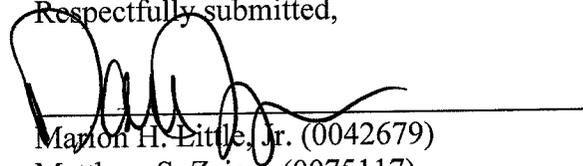
Finally, Mr. Horner correctly accounted for the fact that the Unfinished Units represented a single economic unit unless and until they are sold individually, which had not occurred as of the tax lien date. He thus applied a bulk sale discount. By doing so, Mr. Horner derived the truest indicator of the market value of the Unfinished Units as of January 1, 2008, which was determined to be \$3,100,000.

IV.

**CONCLUSION**

For these reasons, the BTA’s decision must be reversed and the BOR’s value of \$3,100,000 must be reinstated.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

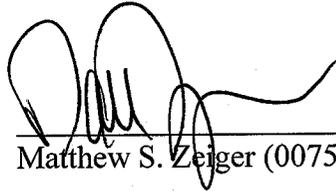
I hereby certify that a copy of the foregoing was sent December 20, 2012, by first-class

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