

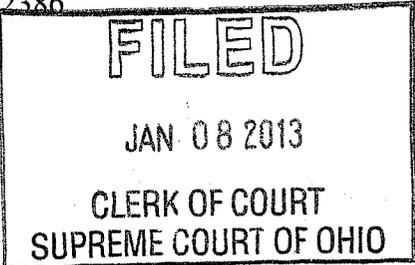
IN THE SUPREME COURT OF OHIO

HIN, LLC,)
Appellant,)
vs.)
Cuyahoga County Board of Revision, the)
Cuyahoga County Fiscal Officer, the)
Bedford Board of Education, and)
the Tax Commissioner of Ohio,)
Appellees.)

CASE NO. 2012-0725

Appeal from the Ohio Board of Tax Appeals

BTA Case No. 2008-K-2386



BRIEF OF APPELLANT, HIN, LLC

J. Kieran Jennings (0065453) Counsel of Record
Jason P. Lindholm (0077776)
Siegel Jennings Co. LPA
23425 Commerce Park Drive, Suite 103
Cleveland, OH 44122
(216) 763-1004
(216) 763-1016
kjennings@siegeltax.com
jlindholm@siegeltax.com

Counsel for Appellant
HIN, LLC

Thomas Kondzer (0017096)
Kolick & Kondzer
24650 Center Ridge Road, Suite 110
Westlake, OH 44145
(440) 835-1200
(440) 835-5878
TKondzer@kolick-kondzer.com

Counsel for Appellee
Board of Education

Saundra Curtis-Patrick (0027907)
Cuyahoga County Assistant Prosecutor
1200 Ontario Street
8th Floor
Cleveland, OH 44113
(216) 443-7790
(216) 443-7602
scurtispatrick@cuyahogacounty.us

Counsel for Appellees
Wade Steen, Cuyahoga County
Fiscal Officer and
Cuyahoga County Board of Revision

Michael DeWine (0009181)
Ohio Attorney General
30 E. Broad Street, 17th Floor
Columbus, OH 43215-3428
(614) 466-4320

Counsel for Appellee
Joseph W. Testa, Tax
Commissioner of Ohio

TABLE OF AUTHORITIES

Cases

<i>AEI Net Lease Income & Growth Fund v. Erie Cty. Bd. of Revision</i> , 119 Ohio St.3d 563, 895 N.E.2d 830, 2008-Ohio-5203 (2008).....	16
<i>Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision</i> , 37 Ohio St.3d 16,23, 523 N.E.2d 826 (1988)	12, 13
<i>Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision</i> , 68 Ohio St.3d 336, 626 N.E.2d 933, 1994-Ohio-498 (1994)	17
<i>County of Franklin v. Lockbourne Manor, Inc.</i> , 168 Ohio St. 286, 287, 154 N.E.2d 147 (1958) 13	
<i>Crow v. Cuyahoga Cty. Bd. of Revision</i> , 50 Ohio St.3d 55, 552 N.E.2d 892 (1990).....	17
<i>Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision</i> , 117 Ohio St.3d 516, 885 N.E.2d 222, 2008-Ohio-1473.....	16
<i>Freshwater v. Belmont Cty. Bd. a/Revision</i> (1997),80 Ohio 81. 3d 26; 1997-Ohio-362.	14
<i>HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision</i> , 923 N.E.2d 1144, 124 Ohio St.3d 481, 2010-Ohio-687 (Ohio 2010).....	2, 12, 14, 15
<i>Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision</i> , 37 Ohio St.3d 318, 526 N.E.2d 64 (1988).....	17
<i>Muirfield Assoc. v. Franklin Cty. Bd. of Revision</i> (1995), 73 Ohio St. 3d 710, 654 N.E.2d 110 (1995).....	12
<i>Pingue v. Franklin Cty. Bd. of Revision</i> , 717 N.E.2d 293, 87 Ohio St.3d 62, 63, 1999-Ohio-252 (Ohio 1999).....	7
<i>Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision</i> , 68 Ohio St.3d 493, 628 N.E.2d 1365 (1994).....	17, 18
<i>Visicon, Inc. v. Tracy</i> (1998), 83 Ohio St 3d 211, 216, 699 N.E.2d 89, 1998-Ohio-115(1998)....	13
<i>Western Industries, Inc. v. Hamilton Cty. Bd. of Revision</i> , 170 Ohio St. 340, 164 N.E.2d 741 (1960).....	18
 Constitutional Provisions	
Ohio Const. Art. XII, Sect. 2	14

Statutes

R.C. 5713.03.....passim

R.C. 5715.01 6

Regulations

Ohio Adm. Code 5703-25-07 18

Other Authorities

Legislative Analysis prepared by the Legislative Service
Commission with respect to H.B. 4876

The Appraisal Institute, *The Appraisal of Real Estate*, 13th Ed. (2008), p. 1118

Appraisal Institute, *The Appraisal of Real Estate*, 13th ed. 2008, p. 114..... 12

The Appraisal Institute, *The Dictionary of Real Estate Appraisal*, 5th Ed. (2010), p. 78.....8

IN THE SUPREME COURT OF OHIO

HIN, LLC,)	
	)	CASE NO. <u>2012-0725</u>
Appellant,)	
)	
vs.	)	Appeal from the Ohio Board of Tax Appeals
)	
Cuyahoga County Board of Revision, the	)	BTA Case No. 2008-K-2386
Cuyahoga County Fiscal Officer, the)	
Bedford Board of Education, and)	
the Tax Commissioner of Ohio,)	
)	
Appellees.)	

BRIEF OF APPELLANT, HIN, LLC

STATEMENT OF FACTS AND CASE

The current matter arises from an original complaint filed with the Cuyahoga County Board of Revision ("BOR") by the Taxpayer, Appellant, HIN, LLC ("HIN") seeking a reduction in valuation for the subject property for tax year 2006. (Supp. 426) The Cuyahoga County Auditor¹ had valued the property at \$8,000,030 for tax purposes. The Bedford Board of Education ("BOE") filed a counter complaint asking to retain the Auditor's value. (Supp. 427)

The subject property is an office building located at 17500 Rockside Road in Bedford, Ohio. The property is identified as parcel number 812-16-005 by the Cuyahoga County Auditor. The subject property consists of approximately 34.5784 acres of land and is improved with a two-story, 78,500 square foot office building. (Supp. 100) The property was constructed initially as a regional headquarters for Tops Supermarket in 1993. (Supp. 25 (Tr.- 94), 90, 100)

¹ Now, Fiscal Officer.

This property was previously the subject of a 2004 tax year case in which this Court found that the sale of the subject property as unencumbered on December 30, 2003 for the price of \$4,900,000 was the best evidence of value for tax lien date January 1, 2004. *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 923 N.E.2d 1144, 124 Ohio St.3d 481, 2010-Ohio-687 (Ohio 2010) ("HIN I").

In connection with the tax year 2004 appeal, a full record was developed concerning the sale and leasing history of the subject property. Therefore, in support of its claim for a decrease in value in this 2006 Complaint, HIN submitted to the BOR the deposition of John B. Kuhn, a principal of JBK Properties ("JBK"), involved in the leasing, purchasing, and selling of the subject property. (Supp. 435) Mr. Kuhn, an experienced real estate developer, (Supp. 181-182) testified that he was approached by U. S. Bank ("US Bank") in late 2003, asking if he would be interested in purchasing the subject property. (Supp. 432) By that time, US Bank had previously negotiated a contract for the purchase of the property from Tops for a sale price of \$4,900,000. (Supp. 432-433) US Bank contacted Mr. Kuhn "in a bit of a bind" because it was no longer interested in purchasing the property, and wanted to lease it instead within a very short time. (Supp.432-433) US Bank wanted JBK to purchase the subject property at the price it had already negotiated for the fee simple, unencumbered interest in the real estate. (Supp. 433) Subsequent to that purchase, US Bank wanted JBK to lease it back to them. (Supp. 433) The lease was for a fifteen-year term with two five-year renewals. (Supp. 455-456) The original lease for the office building required JBD to make a payment to US Bank in the amount of \$739,000 designated as a payment for tenant improvements, but which could have been used for any purpose. (Supp. 438-439) It is unknown how US Bank actually used any of those funds. (Supp. 439) the lease rate was increased to reflect US bank receiving \$22,500 per year from the

City of Bedford and a moving allowance of \$50,000 from the City of Bedford. (Supp. 435) US Bank also wanted JBK to construct a warehouse building on an adjacent parcel and lease it back to US Bank. (Supp. 434) An additional lease was negotiated for the warehouse (Supp. 441). JBK began the planning and development for that project and US Bank terminated their agreement to lease the warehouse building. (Supp.442) An amended lease agreement was negotiated and rental payments were increased by \$89,000 per year to compensate JBK for the termination of the warehouse lease. (Supp. 442) The lease term was fifteen years (Supp. 439) and US Bank had investment grade creditworthiness. (Supp. 456)

Subsequent to the many modifications and increases in payments under the lease to reflect these additional contracts, JBK was contacted by a broker working on behalf of the principals of HIN who needed an investment property with a long-term lease for a 1031 exchange. (Supp. 444) Originally, the purchase was intended only for the main parcel with the office building and an easement was negotiated with respect to the smaller parcel. (Supp. 445) Ultimately, a price of \$7,400,000 was negotiated for the purchase of the subject property by HIN from JBK, encumbered by the layers of lease agreements providing compensation for the various non-real estate undertakings and conditions which had been incorporated into the lease terms. (Supp. 448)

Mr. Kuhn specifically testified that as each and every layer of these undertakings developed, the payments under the lease agreements increased, which, in turn, increased the price HIN paid for the subject property in April of 2004. (Supp. 452-456) Mr. Kuhn testified that no changes or improvements were made to the subject property between his purchase of the unencumbered fee simple interest in December, 2003 for \$4,900,000 and his sale of the leased

fee interest in April of 2004. (Supp. 454) Mr. Kuhn attributed all of the increase in price to the lease. (Supp. 454)

The deposition of Mr. Kuhn included all of the sale documents for both sales along with the leases, easements and deeds relative to those sales. All of these documents are part of the Statutory Transcript from the BOR.

HIN also submitted to the BOR a fee simple unencumbered appraisal prepared by Roger M. Ritley as of tax lien date 2004, valuing the property at \$4,900,000, and the complete transcript of proceedings from the BTA hearing in the 2004 valuation appeal.

After a hearing, the BOR reduced the value of the subject property to \$7,400,000, adopting the April 2004 sale price, and ignoring all of the evidence as to the value of the unencumbered, fee simple estate. Appeals were taken to the Ohio Board of Tax Appeals ("BTA") by both HIN and the BOE. The BOE withdrew its appeals at the commencement of the BTA hearing and proceeded as an appellee in support of the BOR's valuation. (Supp. 3 (Tr.-9))

A hearing was held before the BTA. The parties agreed to submit the deposition of Mr. Kuhn without him being present before the BTA in the present matter. (Supp. 4 (Tr.- 11))

At the BTA hearing in the instant matter, HIN also submitted the appraisal report and related testimony of Roger Ritley, MAI, of Charles M. Ritley and Associates. Mr. Ritley valued the subject property at \$5,100,000 for tax lien date January 1, 2006 (Supp. 89), \$5,000,000 as of tax lien date January 1, 2007 (Supp.310), and \$5,100,000 as of tax lien date January 1, 2008 (Supp. 366) Robert Weiler, a licensed real estate broker; member of the American Institute of Real Estate Appraisers; real estate developer and owner, and licensed attorney in the state of Ohio, also testified on behalf of HIN. (Supp. 43, 45 (Tr.-169, 177)) Mr. Weiler testified as to the differences between a fee simple estate and a leasehold estate and the differences in valuing

them. The BOE did not offer any appraisal evidence at the hearing before the BTA, but submitted the conveyance fee statement and deeds from the sale of the subject property in April of 2004. (Supp. 52 (Tr.-203-206), 425).

The BTA issued its Decision and Order affirming the decision of the BOR on March 27, 2012. It is from this Decision and Order that HIN brings this appeal.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1:

A RECORDED SALE PRICE DOES NOT ESTABLISH VALUE WHERE COMPETENT AND PROBATIVE EVIDENCE ESTABLISHES THAT THE SALE PRICE IS NOT REPRESENTATIVE OF THE FAIR MARKET VALUE OF THE FEE SIMPLE INTEREST IN REAL PROPERTY AS REQUIRED BY R.C. 5713.03 AND ESTABLISHED CASELAW.

R.C. 5713.03, as it existed at the time of the BTA decision in this matter provided:

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.)

It is clear that the intent of R.C. 5713.03 is to employ the sale price as evidence of value insofar as the sale price relates to the "tract, lot or parcel of real estate" which is the subject of the sale. It has never been the intent of R.C. 5713.03 to artificially inflate the value of property for real estate tax purposes when a sale includes the purchase of personal property, in this case, the value of the lease encumbering the property.

R.C. 5713.03 has since been amended, in pertinent part, to provide:

Sec. 5713.03. The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the true value of *the fee simple estate, as if unencumbered*, but subject to any effects from the exercise of police powers or from other governmental actions, 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 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. The auditor shall determine the taxable value of all real property by reducing its true or current agricultural use value by the percentage ordered by the 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 may consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes.*

Both versions of R.C. 5713.03, refer to R.C. 5715.01 which requires that:

" . . . in determining the true value of lands or improvements thereon for tax purposes, **all facts and circumstances relating to the value of the property, its availability for the purposes for which it is constructed or being used, its obsolete character, if any, the income capacity of the property, if any, and any other factor that tends to prove its true value shall be used.**" (Emphasis added.)

The amendment to R.C. 5713.03 clarifies that the intent of the statute is to apply a sale price as evidence of value when it reflects the fee simple estate of the real estate being valued and not other interests which may have also been transferred. It also clarifies that the county assessors have the discretion to make that determination before establishing a sale price as the value of a parcel for tax purposes. The legislative purpose was articulated in the Legislative Analysis prepared by the Legislative Service Commission with respect to H.B. 487 which effectuated the amendment addressed herein.²

"The act authorizes county auditors, in assessing real property that has recently sold, to consider factors other than the sale price. The act also specifies that the value of property is to be based on the fee simple estate, as if unencumbered by liens, easements, and other encumbrances.

"Under continuing law, county auditors are responsible for valuing all real property in the county on a periodic basis to assign taxable values. The governing

²The amended statute also reflects additional changes made in H.B. 501.

statutes and administrative rules direct county auditors to use the "best sources of information available" and to consider "all facts and circumstances relating to the value of the property, its availability for the purposes for which it is constructed or being used, its obsolete character, if any, the income capacity of the property, if any, and any other factor that tends to prove its true value." Administrative rules prescribe certain approaches to estimate value, one of which is to use the value of comparable properties that have recently sold on the open market and to make adjustments to account for any differences.

"Under prior law, if a particular property had recently been sold in an arm's length transaction, the value was required to be set at the sale price: if a parcel had "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 [January 1], the auditor [was required to] consider the sale price of such . . . parcel to be the true value for taxation purposes" unless the parcel had since suffered some kind of casualty or an improvement had since been added. Particular terms of a sale, such as financing terms or encumbrances on the property such as a lease, were to be disregarded if the property was recently sold in an arm's length transaction.[Footnotes omitted].

This has always been the intent and philosophy of R.C. 5713.03, and this Court has never abandoned the principle that a sale cannot be used to establish value for tax purposes when the sale does not represent the fair market value of the fee simple interest of the real estate. To the contrary, this court has consistently acknowledged that situations exist where a sale price is not reflective of fair market value. *Cincinnati School District Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 78 Ohio St. 3d 325, 327, 677 N.E.2d 1197, 78 Ohio St.3d 325, 1997-Ohio-212 (1997); *Pingue v. Franklin Cty. Bd. of Revision*, 717 N.E.2d 293, 87 Ohio St.3d 62, 63, 1999-Ohio-252 (Ohio 1999) .

Even in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2005), 106 Ohio St.3d 269, 834 N.E.2d 782, 2005-Ohio-4979 (2005), where this Court accepted the sale price of a property with long term, below market leases as representative of value, the Court acknowledged its frequent observation that "appraisals based upon factors other than sales price are appropriate for use in determining value only when no arm's length sale has taken place, or

where it is shown that the sales price is not reflective of true value' (Citations omitted)"

Berea at 272.

Similarly, in *Higbee Co. v. Cuyahoga Cty. Bd. of Revision*, 107 Ohio St.3d 325, 839 N.E.2d 385, 2006-Ohio-2 (2006), the Court rejected the use of a recent sale price where the sale price was the product of the business expectations of the buyer and not the fee simple value of the real estate, stating at ¶45:

"{¶ 45} It is apparent from a review of the record in this case that real-property transactions involving anchor department stores are conducted differently from other real-property transactions. Even though Higbee purchased the land for \$10, neither of Higbee's appraisers valued the land at \$10."

Ohio law requires that it is the true value of the fee simple estate which must be determined. R.C. 5713.03. The sale price which was the basis of the valuation determined by the BTA does not reflect the fee simple estate and therefore, does not reflect true value for real property tax purposes.

The fee simple estate is defined as "absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat." The Appraisal Institute, *The Appraisal of Real Estate*, 13th Ed. (2008), p. 111; The Appraisal Institute, *The Dictionary of Real Estate Appraisal*, 5th Ed. (2010), p. 78. Conversely, Mr. Ritley testified that leased fee value is "a valuation that incorporates the situation where a possessory interest has been granted to another party by creation of a contractual landlord/tenant relationship." (Supp. 16 (Tr.- 60)) Mr. Ritley also testified that intangible property is "the nonphysical assets." (Supp. 16 (Tr.- 61)) Mr. Ritley further stated that a lease of real estate is an intangible asset because it is a contract between the parties. (Supp.17 (Tr.- 63)) Mr. Weiler also testified that a lease is an intangible right. (Supp. 44, 46 (Tr.-170, 180)) Mr. Ritley stated that even if a contract is for a tangible object like a car, the

lease itself remains an intangible asset. (Supp. 17 (Tr.- 62)) Mr. Ritley next explained how real estate, a tangible asset, is transferred in Ohio. Mr. Ritley stated that a deed transfers real estate and that the subject of real estate tax is the land and improvements on the real estate. (Supp. 17 (Tr.- 64)) Mr. Ritley then testified that a lease, which is an intangible asset, is not transferred by deed, and if recorded, it would be done via memorandum. (Supp. 17 (Tr.- 65)) However, Mr. Ritley could not recall a time in his extensive real estate experience where he saw a full lease recorded. (Supp. 17 (Tr.-65)) Instead, an interest in a lease would be transferred by contract, and not recorded by deed. (Supp. 18 (Tr.-66-67)) Additionally, real estate, a hard asset, is the subject of a transfer, or conveyance tax. (Supp. 17 (Tr.-63-64)) A lease is not subject to a transfer tax. When asked what the logical conclusion is based on the fact that no transfer tax is imposed on a lease, Mr. Ritley answered "[i]t tells me (Ohio) does not consider it to be real estate." (Supp. 19 (Tr.- 71)) Furthermore, when asked what it suggests if Auditors do not require real estate owners to provide copies of leases so that a transfer tax can be imposed on them, Mr. Ritley answered that "[i]t suggests that it's a fee simple basis for valuation." (Supp. 19 (Tr.- 71-72)) Put simply, if a lease were construed to be real estate, than it must be subject to a transfer tax, which it is not in Ohio.

As explained at hearing before the BTA, the April, 2004 sale price clearly represents the leased fee estate and not the unencumbered fee simple estate of the property. At the time of the April 2004 sale, about four months only had expired on a 15 year lease. Additionally, the tenant had an investment grade creditworthiness (Supp. 456) Because of the creditworthiness of the tenant and the length of the lease term, and other factors unrelated to the real estate which increased the lease rate, the owner was willing to pay a premium price. However, these factors do not reflect characteristics of the subject real estate, but instead, are a reflection of the business

value of the tenant, US Bank. Accordingly, this property was not sold fee simple, unencumbered, in April of 2004, as required by statute, if the sale price is to be used as an indicator of value for real estate tax purposes. Rather, it was a leased fee sale that cannot be considered the best evidence of value.

Despite a recent trend to rely upon a recent sale of the property, regardless of whether or not it includes non-real estate items, it is still necessary for this Court to address the circumstances in the instant matter that plainly show that despite a sale being "recent," and "arms' length," that sale cannot reliably reflect value for ad valorem tax purposes. Here, there are two sales within only four months. The first sale occurred on December 30, 2003 at a sale price of \$4,900,000 for the unencumbered fee simple interest. On April 30, 2004 the subject property sold again, this time at a sale price of \$7,400,000, inflated to reflect the lease encumbrance. Mr. Ritley testified that the property did not materially change between the two sale dates (Supp. 12 (Tr.- 43)), as did Mr. Kuhn (Supp. 454) Mr. Ritley stated that the change in the transfer price was attributable to a long-term credit tenant being secured for the property. (Supp. 12 (Tr.- 44)) Mr. Ritley further stated that "[a] lease can add value to a transaction, my phrasing, by virtue of the quality of the tenant and the duration of the income stream that would be produced." (Supp. 12 (Tr.- 44)) Mr. Ritley also discussed the verification process that occurs when a property transfers within a short period of time, stating:

"Red flags would be up all over the place, storm warnings, like what's wrong here, what's-there's something that needs to be investigated

"You need to understand what the change was, and if there's no discernible physical change, then you would look at market conditions and you would look to see if it were to include interest rates, supply and demand, so on and so forth.

"Over this period of time... there was no significant changes that were-that would create such an effect. The only material change that occurred was that a lease was

created. That was with a quality tenant and of sufficient duration to create an effect on value." (Supp. 14 (Tr-51))

The value of the unencumbered fee simple interest real property did not change in the four month period between the first and second transfer. Mr. Ritley testified that the conveyance of the second sale did not accurately reflect solely the value of the real property. (Supp. 14-15 (Tr.- 52-54)) Mr. Ritley, as an experienced real estate investor, testified that a lease is not subject to tax. (Supp. 14 (Tr-52)) Mr. Ritley stated that the second conveyance reflected the "financial premium that was paid to secure the tenancy, the value of that lease." (Supp. 15 (Tr.-54)) The property was the subject of a fee simple sale on December 30, 2003. In April of 2004 it sold again, subject to a long term lease in a leased fee sale. It is undisputed that the only change in that short period of time was the lease encumbrance. Mr. Kuhn testified that "the only change that occurred to the property between the time when he signed the purchase agreement with Tops Markets, LLC and when Hanna Neumann made her offer to purchase ... was the lease with US Bank ..." (Supp. 454) Nothing in the property's condition, improvements or location changed. Additionally, as testified to by Mr. Ritley, there were not any significant changes in the market for the subject property between the two sales. (Supp. 6 (Tr.- 18)) As such, it is not logical or reasonable to assume, given the lack of market changes, that the value for tax purposes could change by approximately \$2,500,000 in a span of only four months. The only reasonable conclusion that can be derived 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. Mr. Weiler discussed generally, the many issues that can affect leased fee values that do not affect the fee simple value of the real estate. (Supp. 45-49 (Tr.- 174-192))

This Court considered such issues when it refused to employ leases and other intangible assets not reflective of the market in *Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision*, 37 Ohio St.3d 16,23, 523 N.E.2d 826 (1988):

"It is the fair market value of the property in its unrestricted form of title which is to be valued. It is to be valued free of the ownerships of lesser estates such as the leasehold interests, deed restrictions, and restrictive contracts with the government. For real property tax purposes, the fee simple estate is to be valued as if it were unencumbered."

When discussing transferable tax shelter advantages, which are intangible assets, this Court plainly stated that "[t]hese intangible items do not make the real estate more valuable." *Id.* The Supreme Court later cited *Alliance Towers*, *supra*, and stated "we concluded that voluntary encumbrances, such as leasehold interests, deed restrictions, and restrictive contracts with the government, which the owner had granted, should not complicate the true value of property." *Muirfield Assoc. v. Franklin Cty. Bd. of Revision* (1995), 73 Ohio St. 3d 710, 654 N.E.2d 110 (1995). Here, the presence of a lease, an intangible asset, does **not** change the fee simple value of the underlying real estate.

In *HINI*, at ¶26, this Court rejected the BOE's contention that the 2004 valuation of the subject property should be increased based upon the existence of the long-term lease.

Therefore, the second sale does not reflect the true value of the real estate. As HIN submitted the only relevant evidence of value through its appraisals, such appraisals should be used to determine the value of the subject property. Both fee simple and leased fee values were determined by Mr. Ritley. *The Appraisal of Real Estate* defines a leasehold interest as the "right held by the lessee to use and occupy real estate for a stated term and under the conditions specified in the lease." Appraisal Institute, *The Appraisal of Real Estate*, 13th ed. 2008, p. 114. Under Ohio law, there is **no** provision for the taxation of a leasehold interest for real estate taxes.

" The present law of Ohio does not provide for a tax on leaseholds." *County of Franklin v. Lockbourne Manor, Inc.*, 168 Ohio St. 286, 287, 154 N.E.2d 147 (1958). This Court confirmed as such in *Visicon, Inc. v. Tracy* (1998), 83 Ohio St 3d 211, 216, 699 N.E.2d 89, 1998-Ohio-115(1998) : "Ohio law still does not impose a real property tax upon leaseholds." The sale the BTA adopted as representative of fair market value includes a significant leasehold interest, as well as other interests. Ohio law requires that it is the fee simple interest that is taxed. *Alliance Towers, supra*. To do otherwise results in a non-uniform assessment where some taxpayers are taxed on the leased fee value of their real property, while others are taxed on the fee simple value. Mr. Ritley testified to this point:

"Q: According to the Ohio Revised Code, real estate is defined as land, improvements, rights and privileges related thereto. Do you believe that the definition of what constitutes real estate should include lease contracts that encumber the property?

...

A: No, I don't believe leases should be considered.

Q: Why not?

A: Because there are so many variables that enter into a lease situation that you wouldn't have a-I don't believe you would have a manageable system for valuing property, because the amount of work that would be required would be very extensive to analyze all the lease encumbrances and to really understand the dynamics of the marketplace as it impacts each and every property that is to be assessed and determine whether or not that's in keeping with a uniform system of taxation in the State of Ohio." (Supp. 19 (Tr.-72))

Mr. Weiler testified that "the fee simple value doesn't change ... by putting a lease on the property, be it high or lower or at the market rate. It does not affect fee simple value." (Supp. 44 (Tr.- 173)) The two sales of the subject property within four months illustrate this principle. The first sale of the subject took place before the lease was executed, and reflects the unencumbered

fee simple value of the property. The second sale, which was subject to a lease, included more than real property. Despite the property being encumbered with a lease for the second sale, the fee simple value did not change. To accurately value the second sale, the lease must be valued separately. As noted above, HIN's appraisal evidence contains both leased fee and fee simple values.

A non-uniform assessment violates the Ohio Constitution, which mandates that "land and improvements thereon shall be taxed by uniform rule according to value." Ohio Const. Art. XII, Sect. 2. In *HINI*, ¶27, this Court stated "[t]his section of the Revised Code contains no exception for the auditor to value property encumbered by a lease any differently from unencumbered property.³ Here, if the second sale price reflecting the subject property as encumbered by a long term lease is utilized, the property would be valued differently than other properties. Specifically, this property in 2006 would be valued differently than it was in 2004 based on sale prices four months apart, when no material changes to the real property occurred.⁴ This property would not be valued and taxed according to uniform rule, therefore violating the Ohio Constitution. Mr. Weiler used the sale of his company's office to illustrate this important point:

"The best example I can give is when our office sold not too many years ago ... this is the land under Lazarus. . . .

"And Lazarus was under a long-term lease. The lease was for sale. The lease included ground that fronted on the south side of Front Street in downtown Columbus and it sold for a fraction of what the total property was worth, because the buyer was buying a leased fee, which was based upon previously a return on the land. The tenant or others had put the building on the ground.

³ The Supreme Court is referring to R.C. 5713.03.

⁴ HIN does not contend that the 2004 value of the subject property is relevant to the value of the property for 2006. *Freshwater v. Belmont Cty. Bd. a/Revision* (1997), 80 Ohio 81. 3d 26; 1997-Ohio-362. However, this example illustrates the illogical use of valuing a property consistent with one sale as opposed to another when both sales occurred within four months of each other when there has been no change in the market or change in the underlying real property.

"So you come up with extreme variations. You mentioned about uniform. There's no uniformity if you take that sale and another sale of improved downtown property. There's no relationship.

"...

"I prefer to say that you could have a huge disparity between the leased fee value and the fee simple value." (Supp. 48-49 (Tr.-189-191))

Mr. Weiler further testified regarding the impact on uniformity when using a leased fee basis to value properties:

Q: In your opinion as an appraiser and a lawyer, would valuing some of the properties on a fee simple basis, those that are owner-occupied and others on a leased fee basis, would that constitute a uniform approach to valuation?

A: It would result in very un-uniform situations where leases are not at market, they're not-the properties will not sell at market. So each situation you have to look at. Again, you might find some sales that are well above the market value, the fee simple, because on that property is a lease where the rent deviates considerably from what market rent would be. So you're going to have an extremely irregular sales pattern. (Supp. 45 (Tr.- 176-177))

The BTA's decision to utilize the second sale values the property differently than an owner-occupied building not subject to a long-term lease. Although it is true that properties often transfer subject to a lease, this lease must be analyzed to determine whether it reflects the rental market. If the lease does not reflect the market then it is not probative evidence of value of the real estate. Therefore, the April, 2004 sale price of \$4,700,000 must be disregarded in these circumstances because it does not properly reflect the true value of the underlying real property, as evidenced by the lack of change in the market and lack of change to the real estate.

The law is well-settled that proof of an arms' length sale of real property recent to tax lien date creates a presumption of value, it creates a presumption only, which can be overcome by evidence that the sale is not representative of value. In this case, by mischaracterizing and misinterpreting, and incorrectly relying upon *HINI, AEI Net Lease Income & Growth Fund v.*

Erie Cty. Bd. of Revision, 119 Ohio St.3d 563, 895 N.E.2d 830, 2008-Ohio-5203 (2008), and *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 885 N.E.2d 222, 2008-Ohio-1473 in its Decision and Order, the BTA decision in this matter accorded the April 2004 sale a weight much greater than a presumption, which it used to justify its failure to consider the evidence before it proving that the April 2004 sale was not representative of value.

In *Cincinnati School Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, *supra*, , 327, 677 N.E.2d 1197 (1997), the Court explained the appropriate treatment to be afforded a rebuttable presumption as follows:

In *Ayers v. Woodard* (1957), 166 Ohio St. 138, 1 O.O.2d 377, 140 N.E.2d 401, we held in paragraph three of the syllabus:

"A presumption is a procedural device which is resorted to only in the absence of evidence by the party in whose favor a presumption would otherwise operate; and where a litigant introduces evidence tending to prove a fact, either directly or by inference, which for procedural purposes would be presumed in the absence of such evidence, the presumption never arises * * *."

The concept of the burden of proof involved with a presumption is succinctly set forth in Evid. R. 301, which provides: "[A] presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, **but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.**" (Emphasis added.) *Id.*, 328.

The *Cincinnati* Court further stated, "by recognizing the rebuttable presumption that the sale price reflects true value, we, consequently, have recognized that a rebuttable presumption exists that the sale has met **all the requirements that characterize true value.**" *Id.* (Emphasis added.)

In this case, HIN presented abundant proof to the BTA that the sale did not meet the requirements that characterize true value, and overcame the presumption.

Based on the testimony of Mr. Kuhn and the two experts in this matter, it is clear that leased fee interest that was purchased in April of 2004 is not representative of value. Therefore, both conveyances should be disregarded as evidence of true value of the subject property as of January 1, 2006. The evidence and testimony herein requires that this Board look further to the appraisals submitted by Mr. Ritley to properly determine the value of the subject property.

PROPOSITION OF LAW NO. 2:

WHEN COMPETENT AND PROBATIVE EVIDENCE ESTABLISHES THAT THE SALE PRICE IS NOT REPRESENTATIVE OF THE FAIR MARKET VALUE OF THE FEE SIMPLE INTEREST IN REAL PROPERTY AS REQUIRED BY R.C. 5713.03 AND ESTABLISHED CASELAW, THE BTA MUST CONSIDER APPRAISAL EVIDENCE AND OTHER TESTIMONY OFFERED IN SUPPORT OF VALUE.

HIN submitted the appraisal by Roger Ritley in support of its opinion of value. Mr. Ritley's opinion of value constituted competent, probative evidence of the value of the subject property. Mr. Ritley prepared an opinion of value in connection to the property as of tax lien dates January 1, 2006, January 1, 2007 and January 1, 2008.

A party who asserts a right to an increase or decrease in the value of real property has the burden to prove its right to the value asserted. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 68 Ohio St.3d 336, 626 N.E.2d 933, 1994-Ohio-498 (1994); *Crow v. Cuyahoga Cty. Bd. of Revision*, 50 Ohio St.3d 55, 552 N.E.2d 892 (1990); *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision*, 37 Ohio St.3d 318, 526 N.E.2d 64 (1988). Consequently, it is incumbent upon a party challenging the decision of the BOR to come forward and offer evidence that demonstrates its right to the value sought. *Cleveland Bd. of Edn., supra*; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision*, 68 Ohio St.3d 493, 628 N.E.2d 1365 (1994). It is not enough, however, to simply come forward with some evidence of value. Neither is it sufficient to

grant the requested increase or decrease merely because no evidence is adduced in contradiction to the claim. *Western Industries, Inc. v. Hamilton Cty. Bd. of Revision*, 170 Ohio St. 340, 164 N.E.2d 741 (1960). In short, there is a burden of persuasion that rests with the party asserting a change in value to convince the BTA that the party is entitled to the value which it seeks. *Cincinnati School Bd. of Edn. v. Hamilton Cty. Bd. of Revision, supra*.

HIN has met its burden based upon the appraisal reports of and the testimony of Mr. Ritley. Once a party presents competent and probative evidence of value, other parties asserting a different value then have the corresponding burden of providing evidence that rebuts first party's evidence of value. *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision, supra*. The Appellees have failed to meet this burden. The BOE and the County have failed to provide probative evidence of value, as HIN has effectively established through the record that the April 2004 sale of the subject property should be disregarded because it is not probative of the fee simple value of the subject property.

Absent a recent sale probative of value, true value in money can be calculated by applying any of three alternative methods provided for in Ohio Adm. Code 5703-25-07: 1) the market data approach, which compares recent sales of comparable properties, 2) the income approach, which capitalizes the net income attributable to the property, and 3) the cost approach, which depreciates the improvements to the land and then adds them to the land value. Mr. Ritley has applied the sales comparison and income approaches. (Supp. 26 (Tr.- 99)) While Mr. Ritley considered the cost approach, he did not prepare a cost approach analysis because he found that the subject property had both functional and economic obsolescence, making the cost approach unreliable. (Supp. 26 (Tr.- 99)) Mr. Ritley also provided a land value estimate in addition to a leased fee value analysis for the intangible value of the lease itself.

CONCLUSION

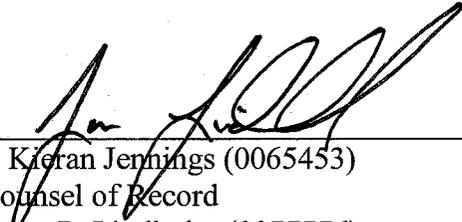
HIN has established through extensive and detailed testimony that both the December 2003 and April 2004 sales are not probative of value as of tax lien date January 1, 2006, 2007 or 2008. The facts of this case clearly illustrate the absurd consequences of blindly adopting a sale price as evidence of value without consideration of the facts which render that sale price not representative of the fair market value of the real estate as required by law. That is precisely what the BTA did in this case. The result is that HIN's property was increased in value for tax purposes in the amount of \$2,500,000 in the space of four months, with no change having occurred at the property. This result is untenable and resulted only because the BTA refused to consider the evidence which was placed before it.

HIN has met its burden with competent and credible evidence that rebutted the presumption that the sale of April 2004 characterized true value; and also by submitting Mr. Ritley's appraisal opinion and testimony as competent and credible evidence of value. The Appellees have failed to provide any credible and reliable evidence or testimony.

Accordingly, HIN respectfully requests that the Decision and Order of the BTA be

reversed and the cause remanded with instructions for the BTA to consider the appraisal evidence submitted by HIN in support of value.

Respectfully submitted,



J. Kieran Jennings (0065453)
Counsel of Record
Jason P. Lindholm (0077776)
SIEGEL JENNINGS CO., LPA
23425 Commerce Park Drive, Suite 103
Cleveland, OH 44122
(216) 763-1004
(216) 763-1016
kjennings@siegeltax.com
jlindholm@siegeltax.com

Counsel for Appellant
HIN, LLC

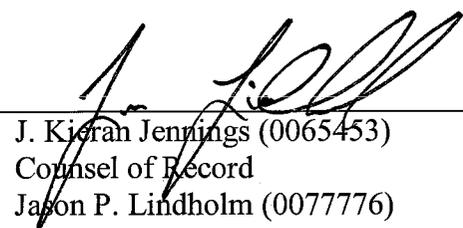
CERTIFICATE OF SERVICE

This is to certify that on this 8th day of January, 2013, a copy of the Brief of Appellant, HIN, LLC was sent via Federal Express to:

Thomas Kondzer
Kolick & Kondzer
24650 Center Ridge Road, Suite 110
Westlake, OH 44145

Sandra Curtis-Patrick
Cuyahoga County Assistant Prosecutor
1200 Ontario Street
8th Floor
Cleveland, OH 44113

Michael DeWine
Ohio Attorney General
30 E. Broad Street, 17th Floor
Columbus, OH 43215-3428



J. Kieran Jennings (0065453)
Counsel of Record
Jason P. Lindholm (0077776)

Counsel for Appellant
HIN, LLC

IN THE SUPREME COURT OF OHIO

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.

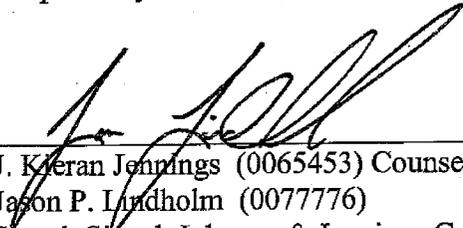
ASSIGNMENT OF ERROR NO. 12:

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,

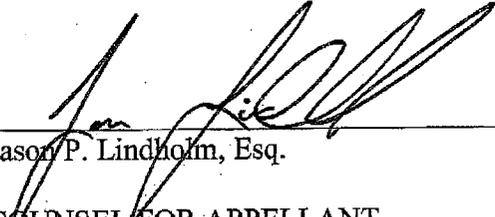


J. Kieran Jennings (0065453) Counsel of Record
Jason P. Lundholm (0077776)
Siegel, Siegel, Johnson & Jennings Co., LPA
25700 Science Park Drive, Suite 210
Cleveland, OH 44122
(216) 763-1004

COUNSEL FOR APPELLANT,
HIN, LLC

PROOF OF SERVICE UPON
OHIO BOARD OF TAX APPEALS

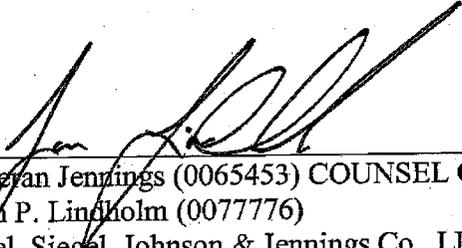
This is to certify that the Notice of Appeal of HIN, LLC was filed with the Ohio Board of Tax Appeals, State Office Tower, 24th Floor, 30 East Broad Street, Columbus, Ohio as evidenced by its date stamp as set forth hereon.



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.



J. Kieran Jennings (0065453) COUNSEL OF RECORD
Jason P. Lindholm (0077776)
Siegel, Siegel, Johnson & Jennings Co., LPA
25700 Science Pk. Drive, Suite 210
Beachwood, OH 44122
(216) 763-1004

COUNSEL FOR APPELLANT
HIN, LLC

OHIO BOARD OF TAX APPEALS

HIN, LLC,	)	CASE NO. 2008-K-2386
)	
Appellant,	)	(REAL PROPERTY TAX)
)	
vs.	)	DECISION AND ORDER
)	
Cuyahoga County Board of Revision, the)	
Cuyahoga County Fiscal Officer, and the)	
Bedford Board of Education,)	
)	
Appellees.)	

APPEARANCES:

For the Appellant - Siegel, Seigel, Johnson & Jennings Co., L.P.A.
 J. Kieran Jennings
 Suite 210, Landmark Centre
 25700 Science Park Drive
 Cleveland, Ohio 44122.

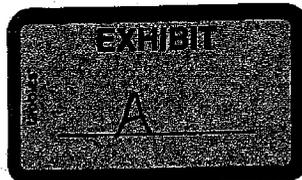
For the County Appellees - William D. Mason
 Cuyahoga County Prosecuting Attorney
 Sandra Curtis-Patrick
 Assistant Prosecuting Attorney
 Courts Tower, 8th Floor
 1200 Ontario Street
 Cleveland, Ohio 44113

For the Appellee Board of Education - Kolick & Kondzer
 John P. Desimone
 Westlake Centre
 24650 Center Ridge Road, Suite 110
 Westlake, Ohio 44145

Entered **MAR 27 2012**

Ms. Margulies, Mr. Johrendt, and Mr. Williamson concur.

Through its appeal, appellant challenges a decision rendered by the Cuyahoga County Board of Revision ("BOR") regarding the valuation of the subject property, i.e., parcel number 812-16-005, for ad valorem tax purposes for tax year 2006, the initial year of the



Appendix 2012-0725

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	\$6,256,900	Building	\$2,189,900
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.

Appendix 2012-0725

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.)

Appendix 2012-0725

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."

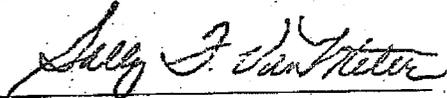
Appendix 2012-0725

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	\$5,656,900	Building	\$1,979,900
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

OHIO BOARD OF TAX APPEALS

HIN, LLC,	)	CASE NO. 2008-K-2386
)	
Appellant,	)	(REAL PROPERTY TAX)
)	
vs.	)	DECISION AND ORDER
)	
Cuyahoga County Board of Revision, the)	
Cuyahoga County Fiscal Officer, and the)	
Bedford Board of Education,)	
)	
Appellees.)	

APPEARANCES:

For the Appellant - Siegel, Seigel, Johnson & Jennings Co., L.P.A.
 J. Kieran Jennings
 Suite 210, Landmark Centre
 25700 Science Park Drive
 Cleveland, Ohio 44122

For the County Appellees - William D. Mason
 Cuyahoga County Prosecuting Attorney
 Saundra Curtis-Patrick
 Assistant Prosecuting Attorney
 Courts Tower, 8th Floor
 1200 Ontario Street
 Cleveland, Ohio 44113

For the Appellee Board of Education - Kolick & Kondzer
 John P. Desimone
 Westlake Centre
 24650 Center Ridge Road, Suite 110
 Westlake, Ohio 44145

Entered **MAR 27 2012**

Ms. Margulies, Mr. Johrendt, and Mr. Williamson concur.

Through its appeal, appellant challenges a decision rendered by the Cuyahoga County Board of Revision ("BOR") regarding the valuation of the subject property, i.e., parcel number 812-16-005, for ad valorem tax purposes for tax year 2006, the initial year of the

Appendix 2012-0725

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.

Appendix 2012-0725

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

Appendix 2012-0725

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**

Appendix 2012-0725

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

Appendix 2012-0725

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.)

Appendix 2012-0725

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.”

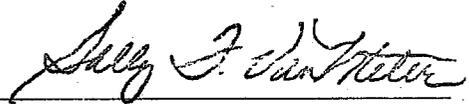
Appendix 2012-0725

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	\$5,656,900	Building	\$1,979,900
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

Cuyahoga County Board of Revision

County Administration Building Room 232

1219 Ontario Street Cleveland, Ohio 44113

(216) 443-7195 / Ohio Relay Service 711

Fax: (216) 443-8282

Email: 2004resbor@cuyahogacounty.us

COMMISSIONER

AUDITOR

TREASURER

Timothy F. Hagan

Frank Russo

James Rokakis

November 6, 2008

HIN, LLC
c/o Ann Hansen
80 South 8th Street, Suite 850
Minneapolis, MN 55402

Re: Complaint No. 200704030137
Complaint No. 200705300236
(Bedford City School District)
Parcel No. 812-16-005
Journal No. 494A-08

Dear Taxpayer:

I am writing to inform you that upon consideration of the evidence and testimony presented at your oral hearing, the Board of Revision has rendered the following decision for the tax year 2006. As your County Auditor, it is my duty as Secretary of the Board of Revision to inform you of their action.

812-16-005	Current Values	New Values	Decision
Land	1,743,100	1,743,100	0
Building	6,256,900	5,656,900	-600,000
Total	8,000,000	7,400,000	-600,000

In order to assure your right to pursue this complaint further, you may appeal this decision directly to the Court of Common Pleas of Cuyahoga County pursuant to Section 5717.05, or the Ohio Board of Tax Appeals under the provisions of Section 5717.01 of the Ohio Revised Code within 30 days from the date of mailing of this letter.

If no action is taken, the Board's decision will be reflected in your next tax bill.

If you have any questions, please call the Board of Revision at (216) 443-7195.

Respectfully,

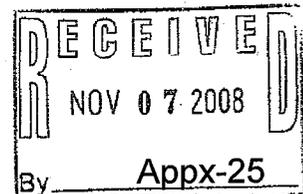
Frank Russo

Frank Russo
Cuyahoga County Auditor
Secretary, Board of Revision

FR\mmb

CERTIFIED MAIL

cc: Siegel, Siegel, Johnson & Jennings Co.
Thomas Kondzer



§ 2. Limitation on tax rate; exemption.

Ohio Constitution

Article XII. Finance and Taxation

Current through the November, 2011 General Election

§ 2. Limitation on tax rate; exemption

No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value, except that laws may be passed to reduce taxes by providing for a reduction in value of the homestead of permanently and totally disabled residents, residents sixty-five years of age and older, and residents sixty years of age or older who are surviving spouses of deceased residents who were sixty-five years of age or older or permanently and totally disabled and receiving a reduction in the value of their homestead at the time of death, provided the surviving spouse continues to reside in a qualifying homestead, and providing for income and other qualifications to obtain such reduction. Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom, general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

Appendix 2012-0725

§ 5713.01. County auditor shall be assessor - assessment procedure - employees.

Ohio Statutes

Title 57. TAXATION

Chapter 5713. ASSESSING REAL ESTATE

Includes all legislation filed with the Secretary of State's Office through 12/26/2012

§ 5713.01. County auditor shall be assessor - assessment procedure - employees

(A) Each county shall be the unit for assessing real estate for taxation purposes. The county auditor shall be the assessor of all the real estate in the auditor's county for purposes of taxation, but this section does not affect the power conferred by Chapter 5727. of the Revised Code upon the tax commissioner regarding the valuation and assessment of real property used in railroad operations.

(B) The auditor shall assess all the real estate situated in the county at its taxable value in accordance with sections 5713.03, 5713.31, and 5715.01 of the Revised Code and with the rules and methods applicable to the auditor's county adopted, prescribed, and promulgated by the tax commissioner. The auditor shall view and appraise or cause to be viewed and appraised at its true value in money, each lot or parcel of real estate, including land devoted exclusively to agricultural use, and the improvements located thereon at least once in each six-year period and the taxable values required to be derived therefrom shall be placed on the auditor's tax list and the county treasurer's duplicate for the tax year ordered by the commissioner pursuant to section 5715.34 of the Revised Code. The commissioner may grant an extension of one year or less if the commissioner finds that good cause exists for the extension. When the auditor so views and appraises, the auditor may enter each structure located thereon to determine by actual view what improvements have been made therein or additions made thereto since the next preceding valuation. The auditor shall revalue and assess at any time all or any part of the real estate in such county, including land devoted exclusively to agricultural use, where the auditor finds that the true or taxable values thereof have changed, and when a conservation easement is created under sections 5301.67 to 5301.70 of the Revised Code. The auditor may increase or decrease the true or taxable value of any lot or parcel of real estate in any township, municipal corporation, or other taxing district by an amount which will cause all real property on the tax list to be valued as required by law, or the auditor may increase or decrease the aggregate value of all real property, or any class of real property, in the county, township, municipal corporation, or other taxing district, or in any ward or other division of a municipal corporation by a per cent or amount which will cause all property to be properly valued and assessed for taxation in accordance with Section 36, Article II, Section 2, Article XII, Ohio Constitution, this section, and sections 5713.03, 5713.31, and

Appendix 2012-0725

5715.01 of the Revised Code.

(C) When the auditor determines to reappraise all the real estate in the county or any class thereof, when the tax commissioner orders an increase in the aggregate true or taxable value of the real estate in any taxing subdivision, or when the taxable value of real estate is increased by the application of a uniform taxable value per cent of true value pursuant to the order of the commissioner, the auditor shall advertise the completion of the reappraisal or equalization action in a newspaper of general circulation in the county once a week for the three consecutive weeks next preceding the issuance of the tax bills, or as provided in section 7.16 of the Revised Code for the two consecutive weeks next preceding the issuance of the tax bills. When the auditor changes the true or taxable value of any individual parcels of real estate, the auditor shall notify the owner of the real estate, or the person in whose name the same stands charged on the duplicate, by mail or in person, of the changes the auditor has made in the assessments of such property. Such notice shall be given at least thirty days prior to the issuance of the tax bills. Failure to receive notice shall not invalidate any proceeding under this section.

(D) The auditor shall make the necessary abstracts from books of the auditor's office containing descriptions of real estate in such county, together with such platbooks and lists of transfers of title to land as the auditor deems necessary in the performance of the auditor's duties in valuing such property for taxation. Such abstracts, platbooks, and lists shall be in such form and detail as the tax commissioner prescribes.

(E) The auditor, with the approval of the tax commissioner, may appoint and employ such experts, deputies, clerks, or other employees as the auditor deems necessary to the performance of the auditor's duties as assessor, or, with the approval of the tax commissioner, the auditor may enter into a contract with an individual, partnership, firm, company, or corporation to do all or any part of the work; the amount to be expended in the payment of the compensation of such employees shall be fixed by the board of county commissioners. If, in the opinion of the auditor, the board of county commissioners fails to provide a sufficient amount for the compensation of such employees, the auditor may apply to the tax commissioner for an additional allowance, and the additional amount of compensation allowed by the commissioner shall be certified to the board of county commissioners, and the same shall be final. The salaries and compensation of such experts, deputies, clerks, and employees shall be paid upon the warrant of the auditor out of the general fund or the real estate assessment fund of the county, or both. If the salaries and compensation are in whole or in part fixed by the commissioner, they shall constitute a charge against the county regardless of the amount of money in the county treasury levied or appropriated for such purposes.

(F) Any contract for goods or services related to the auditor's duties as assessor, including contracts for mapping, computers, and reproduction on any medium of any documents, records, photographs, microfiche, or magnetic tapes, but not including contracts for the professional services of an appraiser, shall be awarded pursuant to the competitive bidding procedures set

Appendix 2012-0725

forth in sections 307.86 to 307.92 of the Revised Code and shall be paid for, upon the warrant of the auditor, from the real estate assessment fund.

(G) Experts, deputies, clerks, and other employees, in addition to their other duties, shall perform such services as the auditor directs in ascertaining such facts, description, location, character, dimensions of buildings and improvements, and other circumstances reflecting upon the value of real estate as will aid the auditor in fixing its true and taxable value and, in the case of land valued in accordance with section 5713.31 of the Revised Code, its current agricultural use value. The auditor may also summon and examine any person under oath in respect to any matter pertaining to the value of any real property within the county.

Cite as R.C. § 5713.01

History. Amended by 129th General Assembly File No. 28, HB 153, §101.01, eff. 9/29/2011.

Effective Date: 08-19-1992; 06-30-2005

Related Legislative Provision: See 129th General Assembly File No. 117, HB 508, §757.10.

Appendix 2012-0725

Sec. 5713.03. The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the true value of the fee simple estate, as if unencumbered but subject to any effects from the exercise of police powers or from other governmental actions, 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 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. The auditor shall determine the taxable value of all real property by reducing its true or current agricultural use value by the percentage ordered by the 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 may 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. Nothing in this section or section 5713.01 of the Revised Code and no rule adopted under section 5715.01 of the Revised Code shall require the county auditor to change the true value in money of any property in any year except a year in which the tax commissioner is required to determine under section 5715.24 of the Revised Code whether the property has been assessed as required by law.

The county auditor shall adopt and use a real property record approved by the commissioner for each tract, lot, or parcel of real property, setting forth the true and taxable value of land and, in the case of land valued in accordance with section 5713.31 of the Revised Code, its current agricultural use value, the number of acres of arable land, permanent pasture land, woodland, and wasteland in each tract, lot, or parcel. The auditor shall record pertinent information and the true and taxable value of each building, structure, or improvement to land, which value shall be included as a separate part of the total value of each tract, lot, or parcel of real property.

SECTION 2. That existing sections 122.17, 122.171, 122.85, 145.114, 145.116, 149.311, 150.01, 150.07, 150.10, 715.013, 742.114, 742.116, 1311.85, 1311.86, 1311.87, 1311.88, 3307.152, 3307.154, 3309.157, 3309.159, 5505.068, 5505.0610, 5703.052, 5703.053, 5703.70, 5707.03, 5709.76, 5711.22, 5713.03, 5725.02, 5725.14, 5725.16, 5725.26, 5725.33, 5733.01, 5733.02, 5733.021, 5733.06, 5747.01, 5747.98, 5751.01, 5751.011, 5751.012, and 5751.98 of the Revised Code are hereby repealed.

SECTION 3. That section 757.51 of Am. Sub. H.B. 487 of the 129th General Assembly is hereby repealed.

Appendix 2012-0725

Ohio Statutes

Title 57. TAXATION

Chapter 5713. ASSESSING REAL ESTATE

Current through January, 2011

§ 5713.03. County auditor to determine taxable value of real property

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 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. He shall determine the taxable value of all real property by reducing its true or current agricultural use value by the percentage ordered by the 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. Nothing in this section or section **5713.01** of the Revised Code and no rule adopted under section **5715.01** of the Revised Code shall require the county auditor to change the true value in money of any property in any year except a year in which the tax commissioner is required to determine under section **5715.24** of the Revised Code whether the property has been assessed as required by law.

The county auditor shall adopt and use a real property record approved by the commissioner for each tract, lot, or parcel of real property, setting forth the true and taxable value of land and, in the case of land valued in accordance with section **5713.31** of the Revised Code, its current agricultural use value, the number of acres of arable land, permanent pasture land, woodland, and wasteland in each tract, lot, or parcel. He shall record pertinent information and the true and taxable value of each building, structure, or improvement to land, which value shall be included as a separate part of the total value of each tract, lot, or parcel of real property.

History. Effective Date: 09-27-1983

Ohio Administrative Code

5703. Department of Taxation

Chapter 5703-25. Equalization - Appraisals

Updated for all rules final filed and adopted through December 3, 2012

5703-25-07. Appraisals

(A) Each general reappraisal of real property in a county shall be initiated by an entry and order of the tax commissioner directed to the county auditor of the county concerned which shall specify the time for beginning and completing the appraisal as provided by section 5715.34 of the Revised Code. In January of each year the commissioner shall adopt a journal entry wherein is set forth the status of reappraisals in the various counties and the tax year upon which the next reappraisal and the next triennial update of real property values in each county shall be completed.

(B) Each lot, tract, or parcel of land, and all buildings, structures, fixtures, and improvements to land shall be appraised by the county auditor according to true value in money, as it or they existed on tax lien date of the year in which the property is appraised. It shall be the duty of the county auditor to so value and appraise the land and improvements to land that when the two separate values for land and improvements are added together, the resulting value indicates the true value in money of the entire property.

(C) Land shall be valued in accordance with the provision of rule 5703-25-11 of the Administrative Code. All land shall be valued according to its true value except where the owner has filed an application under section 5713.31 of the Revised Code for such land to be valued for real property tax purposes at the current value the land has for agricultural use, and the land is qualified to be so valued and taxed as provided in section 5713.30 of the Revised Code.

Buildings, structures, fixtures, and improvements to land shall be valued in accordance with the provisions of rule 5703-25-12 of the Administrative Code.

(D) In arriving at the estimate of true value the county auditor may consider the use of any or all of the recognized three approaches to value:

(1) The market data approach - The value of the property is estimated on the basis of recent sales of comparable properties in the market area after allowance for variation in features or conditions. The use of the gross rent multiplier is an adaptation of the market approach useful

in appraising rental properties such as apartments. This is most applicable to the types of property that are sold often.

(2) The income approach - The value is estimated by capitalizing the net income after expenses, including normal vacancies and credit losses. While the contract rental or lease of a given property is to be considered the current economic rent should be given weight. Expenses should be examined for extraordinary items. In making appraisals by the income approach for tax purposes in Ohio provision for expenses for real property taxes should be made by calculating the effective tax rate in the given tax district as defined in paragraph (E) of rule 5703-25-05 of the Administrative Code, and adding the result to the basic interest and capitalization rate, Interest and capitalization rates should be determined from market data allowing for current returns on mortgages and equities. The income approach should be used for any type of property where rental income or income attributed to the real property is a major factor in determining value. The value should consider both the value of the leased fee and the leasehold.

(3) The cost approach - The value is estimated by adding to the land value, as determined by the market data or other approach, the depreciated cost of the improvements to land. In some types of special purpose properties where there is a lack of comparable sales or income information this is the only approach. Due to the difficulties in estimating accrued depreciation, older or obsolete buildings value estimates often vary from the market indications.

(E) Ideally, all three approaches should be used but due to cost and time limitations, the cost approach as set forth in these rules is generally an appropriate first step in valuation for tax purposes. Values obtained by the cost approach should always be checked by the use of at least one of the other approaches if possible. In the event the auditor uses approaches of estimating true value other than the cost approach appropriate notations shall be shown on the property record.

(F) The appraiser is urged to refer to standard appraisal references as well as the excellent publications by many trade associations, etc., which provide valuable income, expense, and other types of information that may be used as bench marks in making the appraisal.

(G) Nothing set out in these rules shall be construed to prohibit the county auditor from the use of advanced techniques, such as computer assisted appraisals, in the application of the three approaches to the appraisal of real property for tax purposes. However, such programs must be submitted to the tax commissioner for the approval on an individual basis.

History. Eff 12-28-73; 11-1-77; 9-18-03

Rule promulgated under: RC 5703.14

Rule authorized by: RC 5703.05

Rule amplifies: RC 5713.01, 5715.01

Replaces: 5705-3-03

R.C. 119.032 review dates: 09/18/2008

Appendix 2012-0725

Prior law authorized local governments to enter into enterprise zone agreements through October 15, 2012. The act extends the time during which local governments may enter these agreements to October 15, 2013.

Township tax increment financing exemption for residential property (VETOED)

(R.C. 5709.73(L))

Under continuing law, a township may exempt a certain percentage of the value of improvements to parcels of property from taxation for a certain number of years under a tax increment financing arrangement (TIF). The township may exempt certain individual parcels or groups of parcels (parcel-by-parcel TIF) or a collection of parcels in an "incentive district" (incentive district TIF). In either situation, the township may require the owner of the exempted improvements to make payments to the township in lieu of taxes. Currently, such TIF funds generally must be used to pay debt charges on securities that townships typically issue to finance infrastructure. In addition, some townships also might use some TIF funds to compensate school districts or counties for some of the foregone property taxes. Any incidental surplus remaining in a TIF fund after the fund is dissolved must be deposited in the township's general fund.

The Governor vetoed a provision that would have allowed townships to exempt improvements to certain types of residential property pursuant to a tax increment financing resolution. Under the vetoed provision, a township would have been able to authorize an exemption for improvements to property consisting of at least four residential units if construction of the property begins between April 1, 2012, and December 31, 2013, and if the resolution under which the improvements would be exempted was adopted before December 14, 2001.

Continuing law prohibits townships from exempting property used "for residential purposes" under such an arrangement, but does not define what constitutes "residential purposes."

Real property valuation

(R.C. 5713.03; Section 757.51)

The act authorizes county auditors, in assessing real property that has recently sold, to consider factors other than the sale price. The act also specifies that the value of property is to be based on the fee simple estate, as if unencumbered by liens, easements, and other encumbrances.



Appendix 2012-0725

Under continuing law, county auditors are responsible for valuing all real property in the county on a periodic basis to assign taxable values. The governing statutes and administrative rules direct county auditors to use the "best sources of information available" and to consider "all facts and circumstances relating to the value of the property, its availability for the purposes for which it is constructed or being used, its obsolete character, if any, the income capacity of the property, if any, and any other factor that tends to prove its true value."²⁶⁸ Administrative rules prescribe certain approaches to estimate value, one of which is to use the value of comparable properties that have recently sold on the open market and to make adjustments to account for any differences.

Under prior law, if a particular property had recently been sold in an arm's length transaction, the value was required to be set at the sale price: if a parcel had "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 [January 1], the auditor [was required to] consider the sale price of such . . . parcel to be the true value for taxation purposes" unless the parcel had since suffered some kind of casualty or an improvement had since been added.²⁶⁹ Particular terms of a sale, such as financing terms or encumbrances on the property such as a lease, were to be disregarded if the property was recently sold in an arm's length transaction.²⁷⁰

Use of qualified project managers in county appraisals

(R.C. 5713.012)

Continuing law requires county auditors to periodically assess all of the real property in a county for the purposes of property taxation. The act imposes new requirements relating to the involvement of outside entities in these county-wide "mass appraisal" projects and applies those new requirements to projects initiated after September 10, 2014 (i.e., two or more years after the act's effective date).

Under former law, a county auditor could contract with an outside entity to perform all or part of an appraisal, but only if the Tax Commissioner approved the arrangement. The act instead requires auditors to contract with at least one "qualified project manager" to plan and manage each reappraisal, triennial update, or other county-wide property valuation undertaken by the auditor's office. Similarly, under the

²⁶⁸ R.C. 5713.03; R.C. 5715.01 (not in the act).

²⁶⁹ R.C. 5713.03.

²⁷⁰ See *Cummins Property Services, L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516 (2008), and *Berea City Sch. Dist. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269 (2005).



fee simple estate

Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat. See *also* **Fee Simple (Estate)** in the **IVS Glossary** in the Addenda.

Source: Appraisal Institute, *The Dictionary of Real Estate Appraisal*, 5th ed. (Chicago: Appraisal Institute, 2010).



Real Property Ownership and Interests

Real property ownership involves not only the identification and valuation of a variety of rights but also the analysis of the many limitations on those rights and the effect that the limitations have on value. Some limitations on ownership, such as eminent domain, are public while others, such as deed restrictions, are private. Holding a form of private ownership in real property means having an interest in that real property. This chapter examines the bundle of rights theory, the types of real estate ownership interests, and the various forms of property ownership. The valuation of partial interests is discussed in Chapter 29.

The Bundle of Rights

The most complete form of private ownership is the fee simple interest—i.e., absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat. An appraiser may be asked to appraise something less than the fee simple interest—i.e., a partial interest or a fractional interest.

Fee Simple in Theory and in Practice

The complexity of real property ownership in the United States today suggests that a true fee simple interest seldom exists because nearly all properties are encumbered to some degree by easements, reservations, or private restrictions. Although most appraisers define the interest being appraised as a fee simple interest, once a partial interest is created by a lease or a mortgage, the fee simple interest becomes largely theoretical. Even so, many assignments call for the valuation of the fee simple interest.

Appendix 2012-0725

related interests—the leased fee interest and the leasehold interest. Additional economic interests, including subleasehold (or sandwich) interests, can be created under special circumstances.

Leased Fee Interests

A leased fee interest is the lessor's, or landlord's, interest. A landlord holds specified rights that include the right of use and occupancy conveyed by lease to others. The rights of the lessor (the leased fee owner) and the lessee (leaseholder) are specified by contract terms contained within the lease. Although the specific details of leases vary, a leased fee generally provides the lessor with the following:

- Rent to be paid by the lessee under stipulated terms
- The right of repossession at the termination of the lease
- Default provisions
- The right of disposition, including the rights to sell, mortgage, or bequeath the property, subject to the lessee's rights, during the lease period

When a lease is legally delivered, the lessor must surrender possession of the property to the tenant for the lease period and abide by the lease provisions.

The lessor's interest in a property is considered a leased fee interest regardless of the duration of the lease, the specified rent, the parties to the lease, or any of the terms in the lease contract. A leased property, even one with rent that is consistent with market rent, is appraised as a leased fee interest, not as a fee simple interest. Even if the rent or the lease terms are not consistent with market terms, the leased fee interest must be given special consideration and is appraised as a leased fee interest.

Leasehold Interests

The leasehold estate is the lessee's, or tenant's, estate. When a lease is created, the tenant usually acquires the rights to possess the property for the lease period, to sublease the property (if this is allowed by the lease and desired by the tenant), and perhaps to improve the property under the restrictions specified in the lease. In return, the tenant is obligated to pay rent, surrender possession of the property at the termination of the lease, remove any improvements the lessee has modified or constructed (if specified), and abide by the lease provisions. The most important obligation of a tenant is to pay rent.

The relationship between contract and market rent greatly affects the value of a leasehold interest. A leasehold interest may have value if contract rent is less than market rent, creating

fee simple interest

Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat.

leased fee interest

The ownership interest held by the lessor, which includes the right to the contract rent specified in the lease plus the reversionary right when the lease expires.

leasehold interest

The right held by the lessee to use and occupy real estate for a stated term and under the conditions specified in the lease.

a rent
affect t
encum
less th
with re
leaseh
of the l
the ten
tractua
occupa
tenant'
Und
bundle
value c
leaseh
each o
the en
rent th
fee own
the fee
fee rig

Subleas
Norma
leases
an agr
third p
cupanc
lease. I
lessor
has val
subless
to the l
subleas
the own
arrang
upheld

A lea
that ex
lacking
is long
positio
has no
of the l
minish
longer l
not alle
default

Appendix 2012-0725

a rental advantage for the tenant. This relationship, in turn, is likely to affect the value of the leased fee interest. The value of a leased fee interest encumbered with a fixed rent that is below market rates may be worth less than the unencumbered fee simple interest or the leased fee interest with rent at market levels. When contract rent exceeds market rent, the leasehold is said to have negative value. However, the contract advantage of the leased fee may not be marketable. Even in such circumstances, the tenant still has the right to occupy the premises and, despite the contractual disadvantage, may have other benefits that warrant continued occupancy. It is also possible that the contract disadvantage imperils the tenant's business and increases the risk of continued occupancy.

Under the bundle of rights theory, a contract does not change the bundle of rights but may constitute an encumbrance that affects the value of real property. A poor lease that affects both the leased fee and leasehold interests negatively may result in reduced market values for each ownership position and could result in each being worthless with the encumbrance and the lease's requirements. Similarly, a contract rent that exceeds the market rent creates a rent advantage for the leased fee owner, but the rent advantage does not change the market value of the fee simple estate. What may be changed is the value of the leased fee rights as they are created and encumbered by the lease.

Subleasehold or Sandwich Interests

Normally a tenant is free to sublease all or part of a property, but many leases require that the landlord's consent be obtained. A sublease is an agreement in which the tenant in an existing lease conveys to a third party the interest that the lessee enjoys (the right of use and occupancy of the property) for part or all of the remaining term of the lease. In a sublease, the original lessee is "sandwiched" between a lessor and a sublessee (see Figure 6.3). The original lessee's interest has value if the contract rent is less than the rent collected from the sublessee. Subleasing does not release the lessee from the obligations to the lessor defined in the lease agreement. A sublease may affect all the parties, including the owner of the leased fee interest, and such arrangements are common and increasingly upheld by the courts.

A lease contract may contain a provision that explicitly forbids subletting. For a lease lacking either the right to sublet or a term that is long enough to be marketable, the leasehold position cannot be transferred and, therefore, has no market value. Furthermore, the value of the leased fee interest would likely be diminished in this case because a lessee who no longer has need of the leased premises and is not allowed to sublease the space is likely to default on the lease.

sublease

An agreement in which the lessee in a prior lease conveys the right of use and occupancy of a property to another, the sublessee, for a specific period of time, which may or may not be coterminous with the underlying lease term.

sandwich lease

A lease in which an intermediate, or sandwich, leaseholder is the lessee of one party and the lessor of another. The owner of the sandwich lease is neither the fee owner nor the user of the property; he or she may be a leaseholder in a chain of leases, excluding the ultimate sublessee.