

IN THE SUPREME COURT OF OHIO

HEALTH CARE REIT, INC.,)
)
 Appellant/Appellee,)
)
 and)
)
 BERE A CITY SCHOOL DISTRICT)
 BOARD OF EDUCATION,)
)
 Appellant/Appellee,-)
)
 vs.)
)
 CUYAHO GA COUNTY BOARD OF)
 REVISION, CUYAHO GA COUNTY)
 FISCAL OFFICER, TAX)
 COMMISSIONER OF OHIO,)
)
 Appellees.)

13-0278

Appeal from the Ohio
Board of Tax Appeals

Board of Tax Appeals
Case Nos. 2009-Q-1547
2009-Q-1615
2009-Q-1616

NOTICE OF APPEAL OF APPELLANT
 BERE A CITY SCHOOL BOARD OF EDUCATION

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NOTICE OF APPEAL OF APPELLANT
BEREA CITY SCHOOL DISTRICT BOARD OF EDUCATION

Appellant Berea City School District Board of Education hereby gives notice of its appeal as of right, pursuant to R. C. 5717.04, to the Supreme Court of Ohio from a Decision and Order of the Board of Tax Appeals, journalized in consolidated case numbers 2009-Q-1547, 2009-Q-1615, and 2009-Q-1616 on January 15, 2013. A true copy of the Decision and Order of the Board being appealed is attached hereto as Exhibit A and incorporated herein by reference.

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

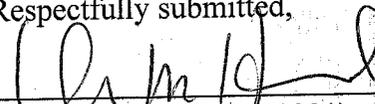
1. The Board of Tax Appeals acted unreasonably and unlawfully when it failed to find that the September 2004 sale price of the subject property was the best evidence of the subject property's true value in money for the tax lien date at issue.
2. The Board of Tax Appeals acted unreasonably and unlawfully when it failed to explain why it did not consider the October 2004 sale price of the subject property was the best evidence of subject property's true value in money for the tax lien date at issue.
3. The Board of Tax Appeals acted unreasonably and unlawfully by finding that Health Care REIT, Inc.'s appraiser's opinion of value more persuasive than that presented by the Board of Education's appraiser.
4. The Board of Tax Appeals acted unreasonably and unlawfully by accepting Health Care REIT, Inc.'s appraiser's opinion of value who valued the property inconsistent with the subject property's zoning restrictions.
5. The Board of Tax Appeals acted unreasonably and unlawfully by accepting Health Care REIT, Inc.'s appraiser's opinion of value which compared the subject property to apartment buildings when the subject property is not zoned for apartment use.
6. The Board of Tax Appeals acted unreasonably and unlawfully when it failed to consider that the zoning of the subject property is restricted to a Senior Resident/Life Care District.
7. The Board of Tax Appeals acted unreasonably and unlawfully when it failed to consider that the subject property is restricted to elderly living and assisted care.
8. The Board of Tax Appeals acted unreasonably and unlawfully when it accepted Health Care REIT, Inc.'s appraiser's opinion of value which used as comparable sales,

comparable rents, and comparable expense apartment properties which would not meet the subject property's zoning restrictions.

9. The Board of Tax Appeals acted unreasonably and unlawfully when it accepted Health Care REIT, Inc.'s appraiser's opinion of value who stated that the highest and best use of the subject property as improved is continued use in an apartment capacity when the subject property is not zoned for general apartment use and as constructed cannot be used as an apartment.
10. The Board of Tax Appeals acted unreasonably and unlawfully when it accepted Health Care REIT, Inc.'s appraiser's opinion of value who used comparable sale properties and comparable rent rates, income and comparable expense information, and capitalization rate information to develop his opinion of value which were extracted from general apartment properties which was all inconsistent with the subject property's use and zoning requirements.
11. The Board of Tax Appeals acted unreasonably and unlawfully when it accepted Health Care REIT, Inc.'s appraiser's opinion of value who testified he used information from Marshall Swift for the replacement of apartment buildings and not information regarding assisted living facilities when developing his cost approach to value.
12. The Board of Tax Appeals acted unreasonably and unlawfully when it accepted Health Care REIT, Inc.'s appraiser's opinion of value which used a depreciation of 58% when developing his cost approach for a property which was only 9 years old as of the tax lien date.
13. The Board of Tax Appeals acted unreasonably and unlawfully by failing to consider its own rejection of Health Care REIT, Inc.'s appraiser's opinion of value in *Elm St., Inc. v. Cuyahoga Cty. Bd. of Revision* (June 14, 2011), BTA No. 2008-A-1095, unreported (rejecting the same appraiser's sales and rent comparables for being neither similar to the subject property nor considered in competition for the same market of renters).
14. The Board of Tax Appeals acted unreasonably and unlawfully by relying on Health Care REIT, Inc.'s appraiser's opinion of value using sales of apartment buildings as comparable sale properties which the Board of Tax Appeals had previously found those same apartment properties dissimilar to assisted living facilities in *Elm St., Inc. v. Cuyahoga Cty. Bd. of Revision* (June 14, 2011), BTA No. 2008-A-1095, unreported.
15. The Board of Tax Appeals acted unreasonably and unlawfully by rejecting the Board of Education's appraiser's use of actual income and expense information in determining an opinion of value using the income approach method.
16. The Board of Tax Appeals acted unreasonably and unlawfully by rejecting the Board of Education's appraiser's use of sales of assisted-living facilities as comparable sales for the development of his comparable sales approach method.

17. The Board of Tax Appeals' decision is an abuse of discretion given the competence and credibility of the evidence presented by the parties.
18. The Board of Tax Appeals acted unreasonably and unlawfully when it rejected the appraisal report and opinion of the Board of Education's appraiser who prepared an appraisal report that considered the zoning restrictions of the subject property, used comparable sales of assisted-living facilities, developed an income approach using actual income and expense information of the subject property; and instead, relied on a comparable sales approach which it had previously rejected (*Elm St., Inc, supra*).
19. The Board of Tax Appeals acted unreasonably and unlawfully when it issued a decision which does not explain why the opinion of value and report of Health Care REIT, Inc.'s appraiser is more persuasive than that presented by the Board of Education.
20. The Board of Tax Appeals acted unreasonably and unlawfully by acting contrary to law stated its own previous decisions valuing assisted-living facilities.
21. The decision of the Board of Tax Appeals is against the manifest weight of the evidence.
22. The Board of Tax Appeals acted unreasonably and unlawfully by determining and issuing an opinion of value which was not supported by the evidence.
23. The decision of the Board of Tax Appeals is unreasonable and unlawful.

Respectfully submitted,



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School District Board of Education

OHIO BOARD OF TAX APPEALS

Health Care Reit, Inc.,)	CASE NOS. 2009-Q-1547,
)	2009-Q-1615,
Appellant/Appellee,)	and 2009-Q-1616
)	
and)	(REAL PROPERTY TAX)
)	
Berea City School District Board of)	DECISION AND ORDER
Education,)	
)	
Appellee/Appellant,)	
)	
vs.)	
)	
Cuyahoga County Board of Revision and)	
Cuyahoga County Fiscal Officer,)	
)	
Appellees.)	

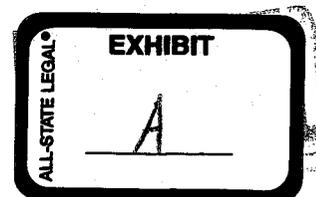
APPEARANCES:

For the Property Owner	- Sleggs, Danzinger & Gill Co., LPA Todd W. Sleggs 820 W. Superior Avenue, Seventh Floor Cleveland, Ohio 44113
For the Board of Education	- Kadish, Hinkel & Weibel Rita M. Jarrett 1360 E. Ninth Street, Suite 400 Cleveland, Ohio 44114
For the County Appellees	- Timothy J. McGinty Cuyahoga County Prosecuting Attorney Saundra Curtis-Patrick Assistant Prosecuting Attorney Courts Tower, 8th Floor 1200 Ontario Street Cleveland, Ohio 44113

Entered JAN 15 2013

Mr. Williamson and Mr. Johrendt concur.

These matters came on to be considered by the Board of Tax Appeals upon three separate notices of appeal filed by the above-named parties from a decision



of the Cuyahoga County Board of Revision. In said decision, the board of revision determined the taxable value of the subject real property for tax year 2007.

The matters were submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcript ("S.T.") certified by the Cuyahoga County Fiscal Officer, the record of this board's hearing ("H.R."), and the written legal arguments submitted by the parties.

The subject property is improved with a 48,648-square foot structure operated as an assisted living facility, located in the Berea taxing district, and identified on the fiscal officer's records as parcel number 373-26-018. The Cuyahoga County Fiscal Officer found the true and taxable values of the subject property for tax year 2007 to be as follows:

	TRUE VALUE	TAXABLE VALUE
Land	\$1,676,600	\$ 586,800
Building	\$7,063,400	\$2,472,200
Total	\$8,740,000	\$3,059,000

In March 2008 the property owner ("Health Care") filed a complaint against the valuation of real property requesting a decrease in the subject property's total true value to \$5,400,000.¹ S.T., Ex. A. The board of education ("BOE") thereafter filed a countercomplaint in support of the fiscal officer's valuation. S.T., Ex. B. Both parties were represented at the board of revision hearing. In support of its requested decrease, Health Care presented the appraisal report and testimony of Rick Racek, Jr., MAI, who opined a value of \$3,100,000 for the subject property as of tax

¹ Health Care amended its complaint at the board of revision hearing to request a value of \$3,100,000, consistent with its appraiser's opinion of value. S.T., audio recording.

lien date. Mr. Racek explained that he compared the subject property to conventional apartments to prevent valuing any business income associated with the property. Health Care also presented the testimony of Scott Marshall, an employee of the property manager, Emeritus Assisted Living, who indicated that, although the property sold in October 2004 for \$8,740,000, the sale included assets beyond the real estate (i.e., the licenses, trademarks, contracts, etc.). Mr. Marshall also testified that Emeritus managed the property both before and after the October 2004 sale, and leases the entire facility, including the real estate, from Health Care. S.T., audio recording.

In support of the fiscal officer's value, the BOE presented a prior decision of the board of revision relating to tax year 2006 in which the sale price was accepted as the best evidence of the property's value. Counsel for the BOE also presented information regarding the sale of an assisted living facility; she asserted that the sale price of this facility supported the fiscal officer's valuation of the subject. She argued that Mr. Racek's comparison of the subject property to conventional apartments is inappropriate given the restrictions on who may reside in the subject property, the lack of a complete kitchen in the subject's units, and the large amount of common space in the subject. S.T., audio recording. After considering the evidence presented, the Cuyahoga County Board of Revision ("BOR") decided that no change in value was warranted. Both parties thereafter appealed to this board.

We begin by noting that a party who asserts a right to an increase or decrease in the value of real property has the burden to prove the right to the value asserted. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio

St.3d 336; *Crow v. Cuyahoga Cty. Bd. of Revision* (1990), 50 Ohio St.3d 55; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318. Consequently, it is incumbent upon an appellant challenging the decision of a board of revision to come forward and offer evidence which demonstrates its right to the value sought. *Cleveland Bd. of Edn.*, supra; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493. Once an appellant has presented competent and probative evidence of value, other parties asserting a different value then have a corresponding burden of providing sufficient evidence to rebut the appellant's evidence. *Springfield Local Bd. of Edn.*, supra; *Mentor Exempted Village Bd. of Edn.*, supra.

When determining value, it has long been held by the Supreme Court that "the best evidence of 'true value in money' of real property is an actual, recent sale of the property in an arm's-length transaction." *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129. See, also, *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979. The most recent sale of the subject property occurred in October 2004, twenty-six months prior to the tax lien date. Although we acknowledge that whether a sale is sufficiently "recent" to or too "remote" from tax lien date to qualify as the "best evidence" of value is not decided exclusively upon temporal proximity, see *Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 124 Ohio St.3d 27, 2009-Ohio-5932, at ¶32, we find the October 2004 sale of the subject property is too remote from the tax lien date in this

matter. Moreover, we find insufficient evidence in the record about the circumstances of the sale.

On appeal, both parties have presented appraisals of the property. At the outset, we note that this board has previously addressed the appraisal of assisted living facilities. Most recently, in *Elm St., Inc. v. Cuyahoga Cty. Bd. of Revision* (June 14, 2011), BTA No. 2008-A-1095, unreported, we noted that “in determining the real property valuation of a congregate care facility, we have routinely relied upon appraisal information utilizing a comparison to conventional apartment buildings since *Chippewa Place Dev. Co. v. Cuyahoga Cty. Bd. of Revision* (Sept. 24, 1993), BTA No. 1991-P-245, unreported.” In that case, we stated that comparison to “other congregate care facilities poses the problem of commingling the business operations conducted on the premises with the real estate, itself.”² *Chippewa Place*, supra.

In support of its requested valuation, Health Care once again presented the report and testimony of Rick Racek, Jr. H.R., Ex. 2. Mr. Racek expanded the report he had prepared for the BOR to include three additional comparable sales of

² As the Supreme Court explained in *Dublin Senior Cmty. Ltd. Partnership v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455, 460: “The property being valued is a congregate care center that comprises a combination of real estate and business activities. Dublin charges for such services as food and housekeeping; these are business activities. It also charges rental for the apartments; that is a real estate activity. Each activity has separate expenses. In a valuation of only the real estate, the two activities must be kept separate. The separate of the income and expenses is important not only when determining net income, but also when considering a comparison of the sale prices of comparable facilities.” Likewise, in *Chippewa Place*, supra, we stated: “In an ideal world, we would have one or more similar congregate care facilities within the same community to compare with [the subject property]. They would have similar features and amenities, and be located within and subject to the market influences of the same community. Ideally, they would provide recent sales data for our comparison. Even so, we would still be required to separate the real estate characteristics and the physical features of the property (and the income and expenses pertaining thereto), from the actual business conducted on the premises. *Dinner Bell Meats, Inc. v. Cuyahoga Cty. Bd. of Revision* [(1984), 12 Ohio St.3d 270].”

conventional apartment properties “to try to bracket the subject in terms of size, age, location, things of that nature,” two additional rent survey properties that had units “that were possibly similar in size or similar in utility to what the units are in” the subject property, three additional expense comparables, and two additional land sales. H.R. at 18-19, 23, 25-26. He also completed a cost approach to value, which indicated a value of \$3,030,000. H.R., Ex. 2 at 51. However, the additions to his report did not alter his final opinion of value of \$3,100,000. H.R. at 18, 31.

The BOE presented the report and testimony of Charles M. Ritley, a state certified real estate appraiser. Unlike Mr. Racek, Mr. Ritley compared the subject property to other assisted living facilities. He indicated that he did consider an approach similar to Mr. Racek’s; however, given the size of the units compared to conventional apartments and the lack of amenities he did not find comparison to conventional apartments appropriate. Id. at 138-139. In addition, he noted that the property’s current zoning restriction limits its use to senior residential use.³ As such, he indicated the highest and best use for the property as improved is continued use as an assisted living facility. Id. at 119-122.

Mr. Ritley used all three approaches to value in his report; however, he relied primarily on the income approach with support from the sales comparison and cost approaches. In his income approach, he estimated a net operating income for the subject of \$576,372 using the subject’s 2012 rents adjusted “for market conditions at

³ Through direct examination, Mr. Ritley testified that the subject property’s zoning classification is “Senior Residential/Life Care District,” which restricts rental to individuals who are 60 years of age or older. H.R. at 119-122. See also, H.R., Ex. C.

the effective date,”⁴ less a vacancy rate of 6% and expenses.⁵ H.R., Ex. A at 67. The report does not indicate the source of the expenses; however, we note that the expense amount used in his pro forma approximates the actual expenses for the subject in 2007 and 2008. Id. at 66. He then capitalized the net operating income at a rate of 10.7%, based on the mortgage-equity band of investment model and a tax additur, to arrive at a final value conclusion using the income approach of \$5,400,000. Reconciling this value with the values concluded to using the cost approach and sales approach (utilizing sales of comparable assisted living facility properties), both \$5,800,000, Mr. Ritley opined a value of \$5,500,000 less \$100,000 of chattel. Id. at 76.

The BOE argues that Mr. Racek’s approach to valuing the subject property, i.e. by comparison to conventional apartments, is inappropriate. However, Mr. Racek made adjustments to each of the sale and rent comparables used to account for the differences in amenities and size of the units. H.R., Ex. 1 at 41-42. In addition, he considered the “relatively small size and number of residential units” within the subject property, “as well as the significant amount of common areas” in estimating operating expenses. Id. at 47.

By comparison, Mr. Ritley acknowledged in his report that, in using the sales of other assisted living facilities as comparables, “it was still difficult to understand what is included in the sale price relative to the large business value

⁴ Mr. Ritley identified five rent comparables, which he believes indicate “that the rental rates for the subject property [from 2012 and adjusted for market conditions to the tax lien date] *** represent the most likely rents acceptable to the market as of the effective date of this appraisal.” H.R., Ex. A at 74. The rent comparables are all operated as assisted living facilities.

⁵ While the subject’s actual vacancy rate for 2007 was reported to be 20% to 25%, it experienced only 5% vacancy in 2012. Mr. Ritley stated in his report that he believed the 2007 rents “were to[sic] high,” and that “current rents are line with market rents.” H.R., Ex. A at 65.

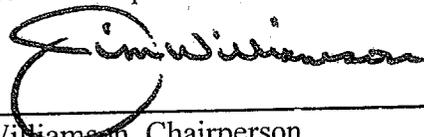
component of many sales,” making adjustments for non-quantifiable differences “questionable.”⁶ H.R., Ex. A at 53. He also acknowledged that the comparables used in both his sales comparison and income approaches to value offer different levels and types of service. H.R. at 159. However, in conducting his income approach, upon which he placed primary emphasis, he simply compared the subject’s actual 2012 rental rates to the rents charged by the comparables. H.R., Ex. A at 74.

Based upon the foregoing, we find Mr. Racek’s opinion of value more persuasive. Accordingly, we find the value of the subject property as of January 1, 2007, shall be \$3,100,000, as allocated by Mr. Racek as follows:

	TRUE VALUE	TAXABLE VALUE
Land	\$ 516,000	\$ 180,600
Building	\$2,584,000	\$ 904,400
Total	\$3,100,000	\$1,085,000

It is the order of the Board of Tax Appeals that the Cuyahoga County Fiscal Officer list and assess the subject real property in conformity with this decision and order.

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.

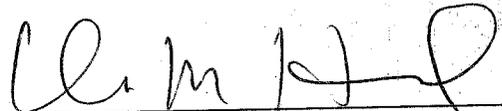


Jim Williamson, Chairperson

⁶ We note that Mr. Ritley made a \$1,000,000 adjustment to sale comparable number 4, which appears to have sold through foreclosure proceedings, for the “conditions of sale.” H.R., Ex. A at 60.

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Notice of Appeal of Appellant Berea City School District Board of Education was sent to Counsel for Health Care REIT, Inc., Todd W. Sleggs, Esq., Sleggs, Danzinger & Gill Co., LPA, 820 W. Superior Avenue, Seventh Floor, Cleveland, Ohio 44113; to Counsel for the County Appellees, Sandra Curtis-Patrick, Assistant County Prosecutor, Cuyahoga County Prosecutor's Office, Courts Tower, Eighth Floor, 1200 Ontario Street, Cleveland, Ohio 44113; and to Counsel for the Tax Commissioner, R. Michael DeWine, Ohio Attorney General, State Office Tower, 17th Floor, 30 East Broad Street, Columbus, Ohio 43215-3428 by certified mail, return receipt requested, on this 12th day of February, 2013.



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