

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

REPLY BRIEF OF APPELLANT, HIN, LLC

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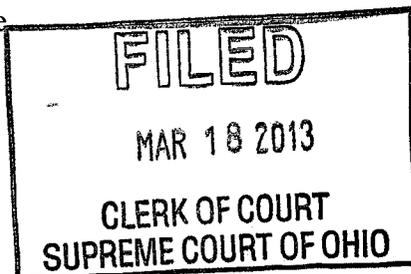


TABLE OF AUTHORITIES

	Page
Cases	
<i>Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision</i> , 37 Ohio St.3d 16,23, 523 N.E.2d 826 (1988)	5, 6, 8
<i>Bedford Bd. of Education v. Cuyahoga Cty. Bd. of Revision</i> , 2012-Ohio-2844, 132 Ohio St.3d 371, 972 N.E.2d 559 (Ohio 2012).....	4
<i>Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision</i> (2005), 106 Ohio St.3d 269, 834 N.E.2d 782, 2005-Ohio-4979 (2005).....	4
<i>Cincinnati School District Bd. of Edn. v. Hamilton Cty. Bd. of Revision</i> , 78 Ohio St. 3d 325, 327, 677 N.E.2d 1197, 78 Ohio St.3d 325, 1997-Ohio-212 (1997).....	3, 9
<i>County of Franklin v. Lockbourne Manor, Inc.</i> , 168 Ohio St. 286, 287, 154 N.E.2d 147 (1958)..	5
<i>Freshwater v. Belmont Cty. Bd. a/Revision</i> (1997),80 Ohio 81. 3d 26; 1997-Ohio-362.	6
<i>Higbee Co. v. Cuyahoga Cty. Bd. of Revision</i> , 107 Ohio St.3d 325, 839 N.E.2d 385, 2006-Ohio-2 (2006).....	4
<i>Highland Crest Assoc., LLC v. Lucas Cty. Bd. of Revision</i> , 194 Ohio App. 3d 127, 2011-Ohio-2078.....	5
<i>Hilliard City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision</i> , 128 Ohio St.3d 565, 2011-Ohio-2258, 949 N.E.2d 1	4
<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).....	1, 5, 7, 10
<i>New Winchester Gardens, Ltd. v. Franklin County Bd. of Revision</i> , 1997-Ohio-360, 80 Ohio St.3d 36, 684 N.E.2d 312 (Ohio 1997)	10
<i>Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision</i> , 125 Ohio St.3d 103, 2010-Ohio-1040.....	5, 6, 8
<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).....	3,9
<i>Visicon, Inc. v.Tracy</i> (1998), 83 Ohio St 3d 211, 216, 699 N.E.2d 89, 1998-Ohio-115(1998).....	5
<i>Woda Ivy Glen Ltd. Partnership v. Fayette Cty. Bd. of Revision</i> , 121 Ohio St.3d 175, 2009-Ohio-762.....	4

TABLE OF AUTHORITIES

	Page
Statutes	
R.C. 5713.03	3, 8, 10, 12
R.C. 5715.01	8
Constitutional Provisions	
Ohio Const. Art. XII, Sect. 2	3, 12

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Appellant,)	
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vs.)	Appeal from the Ohio Board of Tax Appeals
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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.)	

REPLY 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 real property owned by HIN identified as Cuyahoga County Permanent Parcel No. 812-16-005 ("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)

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.*

¹ Now, Fiscal Officer.

Cuyahoga Cty. Bd. of Revision, 923 N.E.2d 1144, 124 Ohio St.3d 481, 2010-Ohio-687 (Ohio 2010) ("HIN I").

A second sale of the Subject Property occurred four months after the one adopted in the 2004 case at a recorded sale price of \$7,400,000. Both the BOR and Board of Tax Appeals ("BTA") adopted the second sale price as evidence of value for tax year 2006. This appeal is from that decision. Briefs have been filed by HIN and the BOE. This is the Reply Brief of HIN.

HIN incorporates all of the facts as stated in its Brief.

LAW AND ARGUMENT

Summary of Argument

There are two fundamental flaws in the reasoning employed by the BTA in this case and advocated by the BOE, the perpetuation of which have undermined the meaningful valuation of real property in Ohio:

1. An "arm's length sale" is not the same as a "sale which is representative of value." It is only one element of that determination. In this case, the phrase "arm's length sale" has been applied carelessly, and contrary to established law, to sum up all of the criteria which must be considered to determine whether a sale is indicative of value.

2. The reasoning of the BTA and BOE in this case approves and legitimizes a standard of analysis which drives a result based upon conjecture and speculation, and rejects a standard of analysis which permits a meaningful assessment of all of the facts and circumstances relevant to the valuation of real property.

Every argument advanced by the BOE in its brief to support the BTA's determination depends upon one of these flawed premises.

The repeated application of, and blind adherence to, these flawed premises have led to the situation presented to the Court today. The case at bar presents this absurd result in the valuation of the Subject Property: that the BTA could conclude that the Subject Property was worth \$4.9 million on December 30, 2003 but four months later, on April 29, 2004, conclude it was worth \$7.4 million, when absolutely no physical change occurred at the subject property and no significant change in market conditions was present.

In the landscape of Ohio's tax valuation law, it is the application of these flawed principles that produce this, and other comparably absurd results, that impelled the legislative clarification of R.C. 5713.03. In the absence of this amendment, this flawed analysis leads to a lack of uniformity in tax valuation which is prohibited by the Ohio Constitution.

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.

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.

In its response to this argument, the BOE has distorted both the proposition and established caselaw to assert that an "arm's length sale" is the best evidence of value. The gist of this case is that, despite its arm's length nature, the sale in April, 2004 is not representative of the fair market value of the Subject Property. This Court has consistently recognized factors other than a sale's arm's length nature and recency which can render a sale unrepresentative of value for purposes of ad valorem taxation. *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.

This court has recognized that a sale price may not be representative of value when:

1. It includes consideration paid for tangible personal property - *Hilliard City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 128 Ohio St.3d 565, 2011-Ohio-2258, 949 N.E.2d 1;
2. The price was negotiated based upon consideration of business expectations rather than the fair market value of the fee simple estate - *Higbee Co. v. Cuyahoga Cty. Bd. of Revision*, 107 Ohio St.3d 325, 839 N.E.2d 385, 2006-Ohio-2 (2006);
3. The price includes the purchase of intangible personal property not subject to real estate taxation- *Woda Ivy Glen Ltd. Partnership v. Fayette Cty. Bd. of Revision*, 121 Ohio St.3d 175, 2009-Ohio-762;
4. The price was negotiated based upon tax motivations of the parties to the transaction - *Bedford Bd. of Education v. Cuyahoga Cty. Bd. of Revision*, 2012-Ohio-2844, 132 Ohio St.3d 371, 972 N.E.2d 559 (Ohio 2012); and

5. The sale is an attempt to tax a leasehold estate-*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). See also, *Highland Crest Assoc., LLC v. Lucas Cty. Bd. of Revision*, 194 Ohio App. 3d 127, 2011-Ohio-2078, where the Lucas County Court of Appeals found a sale was not representative of value even though the parties were dealing at arm's length, because the sale price was negotiated based upon consideration of factors other than the fair market value of the real estate.

This Court has never overruled its pronouncement in *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision*, 125 Ohio St.3d 103, 2010-Ohio-1040, ¶22, that when determining whether a sale is representative of value, the deciding tribunal "must decide not only whether a proffered sale price satisfies the criteria of recency and arm's-length character, but also what amount of the stated sale price pertains to the realty."

This Court has never overruled its pronouncement 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."

In *HIN I*, ¶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.² 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

² The Supreme Court is referring to R.C. 5713.03.

prices four months apart, when no material changes to the real property occurred.³ This property would not be valued and taxed according to uniform rule, therefore violating the Ohio Constitution.

If this Court strays from the principles it adopted in *Olentangy* and *Alliance Towers*, it will be applying a non-uniform standard in violation of the Ohio Constitution.

Despite the clearly enunciated body of law which recognizes numerous situations where an arm's length sale price is not representative of the fair market value of the real property under consideration, the action of the BTA, and the BOE's argument in support of that action, rely on the premise that an arm's length sale price is synonymous with a sale price that is representative of value. This premise is untenable. This record is replete with evidence that the April, 2004 sale was driven by factors unrelated to the value of the Subject Property. Yet, with the superficial and careless application of the words "arm's length transaction," both the BTA and BOE have concluded that those facts need not be considered.

What it accomplishes for the BOE is an opportunity to ignore all of the facts of record which demonstrate that this sale is not representative of the fair market value of the fee simple interest of the Subject Property. These facts were amply developed in this record by the testimony of Mr. Kuhn, who was the buyer in the first transaction and the seller in the second transaction, the appraisals and testimony of an appraiser who appraised the Subject Property and verified his factual determinations in accordance with accepted appraisal practice, and the

³ 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.

testimony of a second expert appraiser who explained the differences between appraising a leased fee estate and a fee simple estate.

The BOE's brief is replete with comments that place reliance on facts it claims are unknown. Repeatedly, the BOE raises speculation about what HIN may have thought (e.g., BOE Brief, pp. 7, 14, 15) that could have supported the BOE's argument. These conjectural diversions are not evidence of record and should not be accepted by this Court as a fulfillment of the BOE's obligation to prepare and present its case either to the BTA or to this Court. The BOE had every opportunity in the BTA to engage in discovery, obtain its own appraisal, and take any action it deemed appropriate to develop a record to support its position in this case. It chose not to do so and should not be afforded another opportunity now to remedy its failure to meet its burden before the BTA.

With similar disregard for the record, the BOE argues that it is impossible to separate the fair market value of the Subject Property from the value of other considerations which drove the negotiation of the sale price. This is exactly what the expert testimony of Mr. Weiler and Mr. Ritley provided. This is precisely the role of expert appraisers and is precisely the reason why expert appraisal evidence is relied upon in valuation litigation.⁴

It takes only the careless application of the phrase "arm's length transaction," to permit all of this evidence to be ignored in the view espoused by the BTA and the BOE. It takes only the careless application of the phrase "arm's length transaction," to permit the disregard of carefully

⁴ The BOE suggests throughout its Brief that HIN has changed its position from that taken in *HIN I*. This is incorrect. The Court can take judicial notice of its own record to see that HIN argued in *HIN I* that the leased fee interest should be disregarded in determining the fair market value of the fee simple interest in the Subject Property and that HIN provided expert appraisal evidence to support the value of the first sale, rather than merely rely on the sale.

In fact, it is the BOE that has changed its position from that advanced in *HIN I*. The BOE sought to artificially inflate the valuation of the Subject Property because of the lease. This Court rejected its argument. *HIN I*, at ¶26

developed, established caselaw which recognizes and takes into consideration other factors which may compel a result that a sale price is not reflective of value. Disregarding such caselaw and relevant factors is a non-uniform application of the tax law.

R.C. 5713.03 cannot be construed in a vacuum. It is only one statute in a comprehensive scheme of real property valuation, the goal of which is to achieve valuation based on a meaningful determination of "true value in money" of the fee simple estate.

R.C. 5713.03, both before and after its amendment, refers 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.)

This Court must consistently construe R.C. 5713.03 harmoniously with the provisions of R.C. 5715.01 to achieve uniformity. The standards articulated in *Olentangy* and *Alliance* permit such a harmonious construction, as do all of the cases cited in which the Court recognizes that a sale price does not always reflect true value. There has been a trend recently for the BTA and this Court to ignore relevant "facts and circumstances" when those facts and circumstances demonstrate that a sale is not representative of value. The General Assembly recently amended R.C. 5713.03 to prevent this trend. 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 amendment to R.C. 5713.03 is not a change in substantive law which cannot be applied immediately. It is a reminder to apply R.C. 5713.03 as it has always been intended to apply. The recent amendment reflects what 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) .

The amendment to R.C. 5713.03 is a reminder that the proof of a recent arm's length sale merely gives rise to a **rebuttable presumption** that the sale price is reflective of fair market value. A sale of real property is not a "silver bullet" which resolves all valuation issues. It is also not a "free pass" that the BTA and School Boards can employ to avoid dealing with difficult valuation issues.⁵ It is one factor that must be considered in determining a property's "true value in money" for purposes of taxation. In an appropriate case, where the record demonstrates that a sale is not indicative of value, the BTA must rely on appraisal and other evidence to determine value. There is no more appropriate case than this one.

There is absolutely no evidence to suggest that the Subject Property increased in value by two and a half million dollars in the space of four months when no physical change occurred in the Subject Property and no meaningful change in of market conditions occurred. Appraisal

⁵ Glaringly absent from the BOE's brief is any response to HIN's argument that it failed to meet its burden of proof in the BTA.

evidence must be considered. The BTA acted unreasonably and unlawfully in failing to consider the evidence before it.

HIN IS NOT BARRED BY PRINCIPLES OF COLLATERAL ESTOPPEL FROM ASSERTING THAT THE SALE OF APRIL, 2004 IS NOT EVIDENCE OF VALUE OF THE SUBJECT PROPERTY.

Contrary to the assertion of the BOE, this Court in *HIN I* did not make a determination that the April, 2004 sale constituted evidence of the value of the Subject Property for tax lien date 2006. The Court characterized the sale as "arm's length" which is not disputed herein. However, it did not reach any determination concerning whether that sale was representative of the value of the Subject Property for any tax year, and certainly not for tax year 2006, which was not even before the Court. Clearly, each tax year must stand on its own. *New Winchester Gardens, Ltd. v. Franklin County Bd. of Revision*, 1997-Ohio-360, 80 Ohio St.3d 36, 684 N.E.2d 312 (Ohio 1997).

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. That appraisal evidence must be considered by the BTA.

CONCLUSION

There are two fundamental flaws in the reasoning employed by the BTA in this case and advocated by the BOE, the perpetuation of which have undermined the meaningful valuation of real property in Ohio:

1. An "arm's length sale" is not the same as a "sale which is representative of value." It is only one element of that determination. In this case, the phrase "arm's length sale" has been applied carelessly, and contrary to established law, to sum up all of the criteria which must be considered to determine whether a sale is indicative of value.

2. The reasoning of the BTA and BOE in this case approves and legitimizes a standard of analysis which drives a result based upon conjecture and speculation, and rejects a standard of analysis which permits a meaningful assessment of all of the facts and circumstances relevant to the valuation of real property.

Every argument advanced by the BOE in its brief to support the BTA's determination depends upon one of these flawed premises.

The repeated application of, and blind adherence to, these flawed premises have led to the situation presented to the Court today. The case at bar presents the absurd result in the valuation of the Subject Property - that the BTA could conclude that the Subject Property was worth \$4.9 million on December 30, 2003 and four months later, on April 29, 2004, was worth \$7.4 million, when absolutely no physical change occurred at the subject property and no significant change in market conditions was present.

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clarification of R.C. 5713.03. In the absence of this amendment, this flawed analysis leads to a lack of uniformity in tax valuation which is prohibited by the Ohio Constitution.

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.

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. The BOE made a choice before the BTA to proceed on a record without additional evidence, despite having every opportunity to do so. Any remand should be limited to the existing record.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on this 18th day of March, 2013, a copy of the Reply Brief of Appellant, HIN, LLC was sent via certified mail to:

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