ORIGINAL

IN THE SUPREME COURT OF OHIO

HEALTH CARE REIT, INC.,	)	CASE NO. 2013-0278
Appellant/Appellee,	)	
and	)	
BEREA CITY SCHOOL DISTRICT BOARD OF EDUCATION,	)	Appeal from the Ohio Board of Tax Appeals
Appellant/Appellee,-	)	
vs.	)	Board of Tax Appeals
CUYAHOGA COUNTY BOARD OF REVISION, CUYAHOGA COUNTY FISCAL OFFICER, TAX COMMISSIONER OF OHIO,	)	2009-Q-1547 2009-Q-1615 2009-Q-1616
Appellees.	)	

BRIEF OF APPELLANT BEREA CITY SCHOOL DISTRICT BOARD OF EDUCATION

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STATEMENT OF THE FACTS

This case is on appeal from a decision of the Ohio Board of Tax Appeals (hereinafter referred to as the "BTA") in which the BTA determined the value of the subject property (hereinafter referred to as "Property") to be $3,100,000 as of January 1, 2007 and this appeal was filed by the Appellee at the BTA, the Berea City School District Board of Education (hereinafter referred to as "BOE"). This appeal involves one parcel of property operating as an assisted-living facility located in the City of Middleburg Heights in Cuyahoga County and identified by the Cuyahoga County Fiscal Officer as permanent parcel number 373-26-018 (the "Property"). At issue is the fair market value of the Property for tax year 2007, the second year of the triennium in Cuyahoga County. See Supplement to Appellant's Brief, hereinafter referred to as "S". (S., pages 414-416).

The BTA conducted a hearing on September 18, 2012 at which Owner presented, among other documents, the testimony of Richard Racek, Jr., real estate appraiser (S., pages 158-236). The BOE presented the testimony and report of Charles Ritley, expert real estate appraiser (S., pages 237-36) and the following documentary evidence : Appraisal report of Richard Racek, Jr., for the Property submitted to the BOR (S., pages 107-157); Codified Ordinance Chapter 1134 addressing senior residence/life care district zoning (S., pages 1-7); the appraisal report of Richard Racek, Jr., for Elm St., Inc. property located at 25920 Elm Street, Olmsted Falls, Ohio (S., pages 8-91) and the decision rendered by the BTA for the Elm St. property. (S., pages 92-106).

The Property is known as Brookside Estates located at 15435 Bagley Road, Middleburg Heights. The Property consists of 6.415 acres of land improved in 1998 with a one-story, brick, H-shaped building containing approximately 48,648 square feet. The building contains four

lounges, a kitchen, dining room, arts and crafts room, TV room, a beauty shop, a wellness center and other support facility rooms. There are 98 rooms for the residents. (S., p. 271). There are 21 surface parking spaces in the front of the building and 36 surface parking spaces in the rear of the Property. Two small courtyards are accessible from the interior of the building. The suites, themselves, have a small kitchenette with a stainless steel sink; and a small, apartment-sized refrigerator. There is a dining room, commercial kitchen which provides and prepares meals for the residents, a library/lounge area, an activities room, and a laundry room. (S., page 424, lines 10-20).

The Property was constructed in 1998, making the Property nine years old as of the tax lien date. The Property was the subject of a sale in September 2004 when the Owner purchased it for $8,740,000. (S., page 448, lines 1-18).

The Property was the subject of a multi-property transfer in September 2004 for $8,740,000 from AL Investors Middleburg Heights, LLC to Health Care REIT, Inc. Copies of the deed and allocation of the purchase price were provided to the BOR. (S., page 363-366; 372). In addition, at the time of the purchase, the Owner entered into a lease with Emeritus Corporation as the tenant of the Property. (S., page 377-408).

LAW AND ARGUMENT

APPELLANT'S PROPOSITION OF LAW NO. I:

The Board of Tax Appeals acted unreasonably when it accepted the valuation of an assisted-living facility based on comparisons to apartment buildings when the zoning is classified as a Senior Residence/Life Care District restricted to elderly living and assisted care and does not permit use as an apartment building.

The Owner's appraiser, Richard Racek, valued the Property by comparing it to an apartment building. Mr. Racek erroneously stated that the highest and best use of the Property was the continued use as an apartment complex. (emphasis added) (S., page 187). The BTA erred in accepting this premise. First, the Property is not used as an apartment; second, the Property is zoned only for senior residential use. Chapter 1134 addresses the zoning for the Property. (S., page 1-7). The Property is zoned as a Senior Residence/Life Care District. The chart set out below summarizes pertinent portions of the Chapter.

Characteristic	Definition
Intent of Chapter	District specifically designed for elderly living and care where the elderly person's needs can be met in independent living units
Elderly Defined	A person 60 years of age or older
Use	Apartments and one-family cluster dwelling units designed for the elderly Skilled-nursing facility Assisted-living facility
Dwelling Unit Size	Assisted living = 250 square feet No bedroom = 500 square feet One bedroom = 650 square feet Two bedroom = 800 square feet One-family cluster = 1,100 square feet

The theory of Mr. Racek's appraisal is that the Property could be rented out as an apartment building. (S., page 472, lines 20-24). In order for the Property to become an apartment complex, the units would have to be reconfigured and reduced in order to comply with the size requirements of Chapter 1134. Furthermore, all occupants would have to be 60 years of age or older. (S., page 473, lines 14-25; p. 474, lines 1-25).

Mr. Racek testified that if legally allowed, the Property could be leased to Baldwin Wallace University students. (S., page 431, lines 6-10). This logic requires three assumptions; first, that the Baldwin Wallace University students are 60 or older; second, that someone is willing to purchase the property and reconfigure the property from that of assisted-living units to

apartment units and that the 60-year old Baldwin Wallace student needs assisted living. Even a no bedroom unit is limited to 500 square feet. However, the zoning information shows that there is an age restriction on who could live there. (S., pages 1-7). Although Mr. Racek reviewed the zoning information prior to preparing his report, he did not "care" how old a resident of the Property had to be. (S., page 463, lines 1-20). Even though the law (zoning code) required that only persons aged 60 years or older could reside in the Property, Mr. Racek did not take that into consideration when determining the highest and best use for the Property.

The BOE submits that it is unreasonable for the BTA to rely on an appraisal report and testimony from an appraiser who disregards current zoning ordinances. In *Park Place Props., L.L.C. v. Board of Revision,* 2nd Dist. No. 2001-CA-35, 2002 Ohio App. LEXIS 692 (February 15, 2002) held that the trial court acted unreasonably in accepting the appraiser's valuation of the property. It stated:

> "Evidence of value for uses prohibited by an ordinance may be introduced and considered <u>only</u> when there is evidence showing a reasonable probability that the ordinance will be changed in the near future." (emphasis added)

See, also, *Porter v. Cuyahoga County Board of Revision,* 50 Ohio St. 2d 307, 364 N.E.2d 261 (1977) (speculation cannot be ruled out but the record must support such conclusion). Mr. Racek appraised the Property as if it were an apartment building. The zoning ordinance restricts the Property to a Senior Residence/Life Care District. In actuality the room sizes are less than 500 square feet, so the Property can only be used for assisted living based on the room size and the zoning. The Property was not zoned for multi-family. No evidence was presented that the Property's zoning would be changed in the near future. The Property is zoned as a Senior Residential/Life Care not as multi-family residential. The BTA's acceptance of Mr. Racek's

valuation of the Property as an apartment is unreasonable since the Property's current zoning classification does not permit such a use.

APPELLANT'S PROPOSITION OF LAW NO. II

The Board of Tax Appeals acted unreasonably and unlawfully when it accepted a valuation for an assisted-living facility relying on an appraisal report and methodology which valued the property as an apartment building.

1. The BTA's rejection in one case and subsequent acceptance in a similar case of an appraisal methodology which valued assisted-living facilities as apartment buildings contradicts the principle of *stare decisis.*

Contrary to its own previous holding, the BTA found the appraisal report of Richard Racek, Jr., to be more persuasive. The decision on appeal states:

> 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.'"

See Appendix to Appellant's Brief, hereinafter referred to as "A". (A., page 19).

The *Elm St., Inc. v. Cuyahoga County Board of Revision,* BTA No. 2008-A-1095, 2011 Ohio Tax LEXIS 1185 (June 14, 2011) opinion went on further, however, and rejected Mr. Racek's appraisal methodology and opinion of value. (S., pages 92-106). By way of background Mr. Racek was retained by Elm St., Inc. (hereinafter referred to as "Elm") to appraise a 38-unit assisted-living facility known as Village of the Falls in Olmsted Falls, Ohio for a case before this Board. The Elm St. property is located within five miles of the Property. *Elm St., supra.* (S., page 496, lines 4-8). The two properties are very similar as evidenced by the side-by-side chart presented below.

Characteristic	Subject Property	Elm St. Property
Tax Year	2007	2006
# of Stories	1	2 + partial basement
Square Footage	48,648	39,599
Age	1998	1999
# of Units	86	38
Acreage	6.415	3.5
Condition	Good	Average

Mr. Racek used four comparable sales in the Elm St. appraisal report. (S., pages 32-57). Those sales were located on Detroit Road in Westlake; Glenmont and Royalton Road in North Royalton, and Hidden Lake Drive in Stow in Summit County.

Those were the only sales he used in the Elm St. appraisal. He used only those same five sales in his appraisal of the Property submitted to the BOR and included three additional sales for a total of eight comparable sales in his appraisal presented to the BTA with no change in value. As the chart above shows, the Elm St. property and the Property, are very similar in size and characteristics. Mr. Racek testified that his analysis of these two properties was very similar. (S., p. 495, lines 12-14). He used the same comparable sales in the sales approach; the same expense information and the same comparable sales to establish a capitalization rate; the same cost method including a depreciation rate which was well over 50% for a property which was also only 7 years old; and the same methodology for determining a depreciation rate in the cost approach deriving it from the income approach. (S., p. 495, p. 87, lines 12-25, p. 496, lines 1-3).

In **rejecting** Mr. Racek's opinion of value in the *Elm St.* appeal, the BTA stated on pages 8 and 9 of its opinion. (S., pages 99, 100):

> "...we find that the apartment comparables Mr. Racek utilized in both his income approach and his sale comparison approach are significantly dissimilar to the subject, and, as such, their utilization renders the valuation conclusion derived unreliable.

Additionally, on page 11, the Board stated:

> "This board finds that Mr. Racek's sales and rent comparables were neither similar to the subject nor could they be considered in competition for the same market of renters." (emphasis added)

(S., page 102).

The BTA was also critical of Mr. Racek applying the same rent rate to 100% of the square footage noting that a rental rate for the common areas should not be derived from apartment unit rates. The BTA concluded that since the same rent rate was used to value 100% of the square footage, "a significant portion of the subject's overall value has been calculated using an improper basis of comparison."

Mr. Racek's first report for the Property which was presented to the BOR is dated March 23, 2009. The BOR hearing was held April 6, 2009. The BOR issued its decision on July 6, 2009. The BTA issued its decision in the *Elm St.* appeal on June 14, 2011. The BTA hearing for the Property was held in September 2012 BTA. After the issuance of the *Elm St.* decision and before the BTA hearing for the Property, Mr. Racek amended his report for the Property. This was done in February 2012. Two Racek appraisals were before the BTA; one identified as a Summary Appraisal Report and the other identified as a Self-Contained Appraisal Report. One can conclude that Mr. Racek amended his report to comply with the BTA's criticism of his valuation methodology in the *Elm St.* decision. The chart below shows the similarities and differences between his two reports. Basically, he added three comparable sales and two rent comparable properties and did not change anything else including value.

	BOR Report	BTA Report
Cost Approach	**None**	Included
Sale Comparables	27701 Detroit, Westlake	27701 Detroit, Westlake
	7475 Glenmont Dr., N. Royalton	7475 Glenmont Dr., N. Royalton
	8290 Royalton Rd., N. Royalton	8290 Royalton Rd., N. Royalton
	1500 Westford Circle,	1500 Westford Circle,

	Westlake	Westlake
	1941 Hidden Lake, Stow	1941 Hidden Lake, Stow
	Not included	4396 Rocky River Dr., Cleveland
	Not included	4129 Greenwald Rd., S. Euclid
	Not included	15393 Baldwin Ct., Middleburg Heights
Rent Comparables	Hunters Manor, Middleburg Heights	Hunter's Manor, Middleburg Heights
	The Islander, Middleburg Heights	The Islander, Middleburg Heights
	Baldwin Park, Middleburg Heights	Baldwin Park, Middleburg Heights
	Kingston Place, Middleburg Heights	Kingston Place, Middleburg Heights
	Not included	Parkside Towers, Strongsville
	Not included	Oak Brook Gardens, N. Royalton
Land Sales	27370-27380 Cook Rd., Olmsted Township	27370-27380 Cook Rd., Olmsted Township
	South Side of Bagley, Olmsted Township	South Side of Bagley, Olmsted Township
	8460 Westport Dr., Mentor	8460 Westport Dr., Mentor
	Not included	528 Roth Roth Rock Rd., Copley Township
Value based on Comparable Sales Approach	$3,162,120	$3,162,120
Value based on Income Approach	$3,032,204	$3,032,204
Land Value	$ 516,000	$ 516,000
Overall Opinion of Value	$3,100,000	$3,100,000

In spite of including these additional comparable sales of apartment buildings and vacant land and including two additional rent comparables, Mr. Racek's opinion of value did not change one penny. His overall opinion of value remained $3,100,000. (S., page 224). As a result, his conclusion of value was using the same analysis which was totally rejected by the BTA in *Elm St.*

Mr. Racek used the same comparable sales in *Elm St.* as in the Property currently before this Court and which were criticized by the BTA. He also applied the same rent rate to 100% of

the Property's square footage as he did in *Elm St.* and for which he was criticized by the BTA. Mr. Racek used sales of apartment building with approximately four times more suites and which were nearly six times larger in square footage. The amenities are totally different considering that the Property has a beauty shop, craft room, activity room, nurse room, and community dining room/kitchen. The Property is zoned strictly for senior living requiring the people residing in the Property to be at least 60 years of age or older. The comparable sale properties included fireplaces, tennis courts, pools, fitness centers, patios and balconies and garages. These properties would not be marketed to those who are in need of assistance with their daily health care routine. Conversely, the Property could not be marketed to individuals under the age of 60 who can live independently.

The BOE submits that the BTA acted unreasonably by failing to read beyond the language in the *Elm St.* decision which states that the BTA routinely relied upon appraisal information utilizing a comparison to conventional apartment building. If there had been a complete reading of the decision, the BTA would have seen that Mr. Racek's valuation methodology was rejected by the BTA. The argument could be made that the *Elm St.* decision is inconsistent with the law since it did not accept the comparison to apartments. However, the BTA decision in *Elm St.* specifically sets out why the apartments are not comparable. The BOE submits that by rubber-stamping the acceptance of appraising an assisted-living facility as an apartment, the appraisers have come to rely on any apartment building regardless of its similarities or differences to a subject property. Furthermore, the appraisers have failed to recognize that assisted-living facilities continue to be built, bought, and sold and would make a better comparison than an apartment building.

Mr. Racek used the same methodology, comparable properties, and valuation techniques in both the Property which is before this Court and in *Elm St.* and yet the decisions issued by the BTA were totally opposite. The BOE submits that in order for the public to have confidence in the law, the law must be reliable; and in order to be reliable, the law must be consistent.

The principle of *stare decisis* requires judges and other tribunals to respect the precedents established in prior cases with similar fact patterns. In the case before this Court, the BTA had before it the same type of property of similar size and age with the same purpose as it had in *Elm St.* In *Elm St.*, the BTA rejected the appraisal technique used by the appraiser. In the Property in the instant appeal, the same appraisal method, using the same techniques and same comparable properties was found to be persuasive. Based on the BTA's decision in *Elm St.*, the BTA should have once again found Mr. Racek's opinion of value and methodology to be unreliable.

2. Apartment buildings are not comparable to assisted-living facilities.

Mr. Racek utilized the sales of eight apartment complexes in developing his opinion of value of the Property. (S., page190-208). Mr. Racek did not value the Property on a per-unit basis but on a per-square foot basis. This is to allow for the fact that major renovations would be required in order to convert the Property from an assisted-living facility to an apartment complex. (S., page 207). The chart on the next page is a side-by-side comparison of the apartment buildings/complexes used as comparable sale properties in comparison with the Property.

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	Subject	Sale No. 1	Sale No. 2	Sale No. 3	Sale No. 4	Sale No. 5	Sale No. 6	Sale No. 7	Sale No. 8
Unit Size	293 sf	891 sf	869 sf	892 sf	865 sf	853 sf	465 sf	850 sf	759 sf
Value	$3,100,000	$19,300,000	20,250,000	15,900,000	20,100,000	17,143,000	794,980	2,675,000	3,100,000
# of Units	86	283	366	300	270	258	36	64	76
Age	1998	1993	1990	1991	1987	1988	1962	1964	1972
Sq. Feet	48,648	293,301	321,728	249,248	268,685	228,662	19,338	54,400	69,098
$/SF	$63.72	$65.57	$62.94	$63.79	$74.81	$74.97	$41	$49.17	$44.86
Amenities	Activity room, nurse room, craft room, library, lounge, wider hallways, dining room/kitchen	Pool, fitness center, spa, garages, in-unit fireplace, full-scale appliances, patio/balcony	Clubhouse, in-unit fireplace, fitness center, pool, full-size appliances, patio/balcony, garages	Clubhouse, business center, in-unit fireplace, full-size appliances, fitness center, racquetball court, pool/grilling area, patio/balcony, movie theater, garages	Clubhouse, fitness center, racquetball court, in-unit fireplace, tennis courts, garages, patios/decks full-size appliances	Full-size appliances, balcony, fitness center, business center, pond w/fountain, in-unit fireplace, garages, clubhouse	Full-size appliances	Full-size appliances, garages	Full-size appliances, carports

Summarized in the chart below is the difference between the Property and the comparables stated as a percentage.

	Subject	Sale No. 1	Sale No. 2	Sale No. 3	Sale No. 4	Sale No. 5	Sale No. 6	Sale No. 7	Sale No. 8
Unit Size	293 sf	+204%	+197%	+204%	+195%	+191%	+59%	+190%	+159%
Value	$3,100,000	+523%	+553%	+413%	+548%	+453%	-74%	-13.7%	Even
# of Units	86	+229%	+326%	+249%	+214%	+200%	-58%	-25%	-11.6%
Age	1998	-5 years	-8 years	-7 years	-11 years	-10 years	-36 years	-34 years	-26 years
Sq. Feet	48,648	+503%	+561%	+412%	+452%	+370%	-60%	+12%	+42%

As reflected in these two charts, the comparable sales used by Mr. Racek are not comparable to the Property by any stretch of the imagination. Mr. Racek even concurred that the comparable sale properties are much larger than the Property. Regarding Sale No. 1, Mr. Racek agreed that the property sold for more than 6 times his opinion of value of the Property, that there were no full-scale stoves or refrigerators in the Property, and that the individual units were from 2.3 to 4 times larger than those in the Property. (S., page 475, lines 1-8, 14-21; p. 476, lines 5-8). Regarding Sale No. 2, Mr. Racek agreed that the sale price was approximately 7 times greater than his opinion of value of the Property, that the individual units of the sale property were 2.5 to 3 times larger, and that the amenities were different. (S., page 476, lines 9-25; p. 477, lines 1-3, 9-13).

As to Sale No. 3, Mr. Racek concurred that the sale price was 5 times larger than his opinion of value for the Property, that the amenities are different, and that the individual unit sizes were 2.3 to 4 times larger than those in the Property. (S., page 477, lines 14-18, 19-21; p. 478, lines 3-25; p. 479, lines 1-14). As to Sale No. 4, he also agreed that the purchase price was 6 times greater than the value opined for the Property, that the gross building area was 5 times

larger as well as the gross building area in all the prior sale properties, and that the individual unit sizes were 2.2 to 4 times larger. (S., page 479, lines 15-18, 19-25; p. 480 lines 2-4). Finally, Mr. Racek concurred that as to Sale No. 5, the same metrics are about the same within the same range as for Sales 1 through 4. (S., page 480, lines 5-8). None of the comparable sale properties are similar to the subject property. The BTA criticized Mr. Racek for the use of such comparables in the *Elm St.* decision. (S., page 102).

Mr. Racek had presented an appraisal report at the BOR hearing. That report was marked at the BTA as Ex. B. (S., pages 107-157). In that report, Mr. Racek used only five comparable sales, the same first five sales as used in Ex. 2. (S., pages 116-125; pages 191-200). After the BOR hearing and for the report submitted to the BTA, Mr. Racek supplemented his report with three additional sales. These three sales would be Sales Nos. 6, 7, and 8. (S., pages 201-206). The sale properties are smaller in gross square footage and number of units than the original five. Mr. Racek testified that he added these three sales were added to "try to bracket the subject in terms of size, age, location, things of that nature." (S., page 426, lines 1-11). However, the addition of these sales to his report did not alter his opinion of value. (S., 426, lines 20-23). The BOE submits that the addition of these three sales is not logical. Mr. Racek stated he added these sales in order to give consideration to properties similar in size, age, and location.

The three additional sale properties added by Mr. Racek show a per-square foot range from a low of $41/sf to a high of $49.17/sf. The per-square foot range of the original five sales as used in the report presented to the BOR shows a low of $62.94/sf to a high of $74.97/sf. Mr. Racek concludes a value of $63.72/sf. The BOE submits that if you add three additional sale properties to the mix of comparable sales with a per-square foot range that is approximately 50%

lower than the previous conclusion of value, it stands to reason that the overall per-square foot value should change.

In terms of age the three additional properties are from 26 to 36 years older than the Property, overall the square footage is less than the original five sales, sold for less than the original five and offer fewer amenities. Yet in spite of the fact that these three additional properties are so fundamentally different from the original five, their inclusion in his report is suspect. The overall mix of comparable sale properties is odd. And absolutely none of them are similar to the subject property. The BOE submits that these three additional sale properties are no more relevant than the original five Mr. Racek presented in his BOR report. The BOE submits that these three properties were added to Mr. Racek's report in order to stave off the BTA's criticism of Mr. Racek in its decision in the case styled *Elm St.*

3. When using the income approach to valuation for an assisted-living facility, the income stream from apartment buildings shall not be used.

On page 212 of the Supplement which is page 44 of his report, Mr. Racek states: "The subject apartment building is operated as an assisted living facility. (S., page 212). Therefore, it will be necessary to establish the market rent levels for the subject based upon other competing conventional apartment properties throughout the market." Mr. Racek actually stated that the Property was an apartment building; however, the Property is not an apartment building. Mr. Racek admits that the Property is an assisted-living facility.

"Q. So at the time that they bought it, at the time that they built it, did they build it as an apartment project or an assisted living project?

A. They built it as you see it today.

Q. As an assisted living project?

A. Yes."

(S., page 456, lines 18-24).

In spite of the fact that the Property was zoned, developed, and purchased as an assisted-living facility, Mr. Racek valued the Property as an apartment complex using the income approach to value. Furthermore, when considering market rent rates, he did not consider rent comparables of assisted-living facilities or elder care properties. (S., 489, lines 1-3). He did not consider the income and expense information of elder care properties. (S., 489, lines 4-6). His rent comparables are open to people of all ages. (S., page 463, lines 21-25). The Property, however, is only available to people over 60 years of age and he did not account for the fact that Property is limited to those individuals only. (S., 464, lines 1-10). Mr. Racek did not make any adjustments whatsoever in the rent comparables as a result of the age limitation. (S., 473, lines 1-8). He applied the rent rate to the entire square footage of the Property without considering the square footage which is used for non-living space such as nurse room, craft room, dining/kitchen, and lounge area. (S., page 214). Mr. Racek was criticized in the *Elm St.* decision for using the same rent rate to the entire square footage. (S., page 103). Yet in the case before this Court, Mr. Racek was not criticized for doing the exact same thing.

Mr. Racek considered a 5% vacancy factor in his income approach. This 5% vacancy rate was based solely on apartment occupancy. The rate has nothing to do with the occupancy of the Property or with the occupancy of any other assisted-living property or elder care property. (S., page S., page 488, lines 5-19). Other than the land sales, Mr. Racek did not consult or look at any market information regarding assisted-living or elder care operations. (S., page 489, lines 20-25, page 490, lines 5-9).

Mr. Racek considered both the operating expenses of the eight comparable sale properties presented in his report and IREM. Prior to amending his report for the BTA, the range for

expenses from the sale properties ran from a low of $4.59 to a high of $5.94. (S., pages 130, 131). He developed an annual expenditure of $4.50/sf per year for a total expense of $218,916 without real estate taxes. His amended report included the three additional sale properties. These three properties had operating expenses with a range from a low of $3.45/sf to a high of $4.70/sf. (S., page 216). Yet, his annual expenditure remained unchanged at $4.50/sf. (S., page 216).

The IREM report showed the median income and operating costs for seven garden-type buildings in the Cleveland area. Mr. Racek states in his report that the median operating expense are $6.13/sf from which he extracted the $0.97 for real estate taxes arriving at an expense amount of $5.16/sf. The garden-type buildings used in the IREM report showed a sample of seven buildings with a total of 1,439 apartments and 963,164 square feet. Mr. Racek stated in his report that he considered the size and expenses of the Property and reduced the expense rate to $4.50/sf. (S., page 216). The issue with the IREM report, however, is that there is no identification of the properties included in the sample, the age, the amenities available to residents, or the unit size. The report presents information of 1,439 apartments with a total square footage of 963,164 which is equal to a unit size of 670 square feet. This is nearly 2.5 times larger than the subject. In addition, the Property contains considerable square footage devoted to non-unit space such as wider corridors, a nurse room, an activities room, and a communal dining/kitchen area. In addition to the IREM report, Mr. Racek testified he used the expenses from the comparable sales in his report. However, even Mr. Racek testified that the sale properties and the Property are not similar. (S., pages 477-479).

Mr. Racek also used the comparable sale properties to arrive at a capitalization rate. As with the expense rate, the comparable sale properties are not a reliable indicator of cap rate and

his report does not indicate what types of adjustments he would or should have made to the comparable sale properties to arrive at a cap rate. (S., page 485, lines 5-25; page 486, lines 1-6.

Mr. Racek did not consider the income and expenses which the Property generates. He looked at market rent rates for apartment complexes, used a vacancy rate developed for apartment buildings, used expenses and capitalization rates from the comparable sale properties used in his sales approach, and did not consider any elder care or assisted living properties. The BOE submits that Mr. Racek's income approach is not a good indicator of value.

4. <u>When using the cost approach to value an assisted-living facility, the replacement or reproduction cost of an apartment building shall not be considered.</u>

Mr. Racek's cost approach to value is found on pages 49-51 of his report. (S., pages 219-222). He testified he used apartment information from Marshall Swift and not information as to assisted living facilities. Note, however, as will be discussed below, Mr. Ritley used the more appropriate Marshall Swift information for reconstructing and reproducing homes for the elderly which was available. (S., page 447, lines 2-5). Although the Property was constructed in 1998, Mr. Racek took a depreciation of 58.2%. As of the tax lien date of January 1, 2007, the Property was only nine years old. (S., page 222; page 447, lines 6-10). Mr. Racek's basis for this huge depreciation deduction is because the Property would not be able to generate the rent rates that would be needed to support the cost of the new construction. (S., page 222). The BOE submits that had Mr. Racek valued the property as an assisted living facility or elder care facility, the depreciation would not be 58.2%. (See for example, Mr. Ritley's depreciation in his cost approach which is 18%. (S., page 285). The cost approach developed by Mr. Racek does not accurately value the Property as an assisted living facility.

None of the methods used by the Owner's appraiser gave consideration to the fact that the Property being appraised was an assisted-living facility. The appraiser considered sales of

apartment buildings, derived an income stream from apartment rent rates, and considered replacement costs for apartment buildings. These were the reasons that the BTA rejected this appraisal methodology in *Elm St.* The BTA concluded in *Elm St.* that the apartments used were not similar to the assisted-living facility. The BOE makes the same argument in the instant case. The Property is nothing like an apartment.

The doctrine of *stare decisis* requires this Court to overturn the BTA's decision accepting the Owner's appraisal report as persuasive and his opinion of value.

APPELLANT'S PROPOSITION OF LAW NO. III

The Board of Tax Appeals acted unreasonably and unlawfully when it failed to accept a valuation for an assisted-living facility in which the appraisal report and methodology valued the property as an assisted-living facility.

1. When property used as an assisted-living facility is not classified for zoning purposes or useable as an apartment building under applicable zoning law, apartment building properties shall not be used as comparable properties when developing a cost, income, or sales approach to valuation and use of comparable assisted-living facilities is preferred.

The BOE presented the report and testimony of Charles Ritley, a real estate appraiser with extensive experience, knowledge, and expertise in the field of commercial property appraising. He has forty-seven years of full time appraisal and consultation experience in all types of properties which include residential, retail, shopping centers, motels, hotels, nursing homes, office buildings, industrial and office/warehouse properties, parking lots and garages. He has been a speaker and expert witness testifying in Cuyahoga and Lake County courts of common pleas as well as in Federal Bankruptcy Court in Ohio and Indiana. (S., page 356-358).

Mr. Ritley stated that the Property's zoning relates directly to its highest and best use and that it is important that the zoning restrictions are recognized. (S., page 528, lines 12-16). The Property is characterized as assisted living. According to the zoning the property could not be

used for rental to individuals under 60 years of age. (S., page 530, lines 1-5). Mr. Ritley testified that the Property was not laid out like an apartment building. The front yard area was very substantial which is not conducive to apartment dwelling since it is high maintenance. (S., page 532, lines 18-25). He further stated that the driveway was curved to allow good access for emergency vehicles. He further stated that there were no garages and that the Property would require massive reconfiguration to convert it into an apartment building. (S., page 125, lines 1-16). He further considered that the population of Middleburg Heights was aging which sets up well for an assisted living property. There is the convenience of shopping and medical care. (S., page 536, lines 19-21; page 537, lines 16-25). Mr. Ritley concluded his highest and best use testimony by stating that any buyer of this Property would be buying it for what it is, an assisted living facility. (S., page 539, lines 10-12).

Mr. Ritley considered that some appraisers appraise assisted living properties as if apartment buildings. He considered this approach and rejected it. (S., page 297). Mr. Ritley stated he could not make a "great deal of sense of it." (S., page 546, lines 8-9). Mr. Ritley further stated in his report that he did not develop this approach "due to the excessive hypotheticals [sic] conditions that have to be made when utilizing this method." (S., page 297). He further stated that he was able to isolate the income and expense to the real estate from the information provided by the Owner. Mr. Ritley testified that if you look at the Property and divide the square footage by the number of units, the result in about 550 square feet. However, those 550 square feet include walls, halls, and everything else. (S., page 546, lines 6-15). If you take out approximately 15%, then the units become approximately 480 square feet. (S., page 546, lines 16-21. However, the zoning requires a minimum of 500 square feet for a no bedroom unit and a minimum of 650 square feet for a one-bedroom unit. (S., pages 1-7). Mr. Ritley

further testified that the facilities do not offer any amenities such as a pool, tennis court or clubhouse; that parking is inadequate and that there are no garages. (S., page 547, lines 12-17).

Mr. Ritley states in his report, (S., page 297):

> "This facility does not lend itself to conversion to an apartment building. This is the main fallacy of the apartment method. One can not [sic] accurately extract comparable rental rates due to the physical differences as well as the differences in the intensity of use."

It is for these reasons that Mr. Ritley did not appraise this Property as if an apartment building and does not recommend that method.

In developing the cost approach to value, the first component of the cost approach is land valuation. Mr. Ritley's land sales are found on pages (S., pages 282-284). He considered three sales of vacant land. The sales range on a price-per-acre basis from a low of $69,072 to a high of $243,902. His adjustments can be found on page 50 of his report where he also concluded a value of $125,000/acre. This resulted in a land value of $800,000 for the Property. (S., page 540, lines 1-15).

The second component of the cost approach is building value. Mr. Ritley used the Marshall Swift Valuation Service for Homes for the Elderly. (S., page 285). He used a cost factor of $99.71/square foot which he readjusted to 2007 conditions. (S., page 540, lines 24-25; page 541, lines 1-2. He used the current cost multiplier which he adjusted for time (2007) and market (Cleveland) arriving at an indicated replacement value of $5,289,449 for the building. (S., page 541, lines 3-9). He further considered site improvements and entrepreneurial profit. The entrepreneurial profit considers that a developer of such a Property would not build it to break even but would expect to see a return. He considered a 7% return.

He also considered depreciation. He used the "age life method". He considered the Property was nine years old as of the tax lien date and with a life of 50 years, the depreciation

would be 18%. To that he added 5% depreciation for the smallness of the room size for a total depreciation of 23%. (S., page 285; S., page 542, lines 1-25; page 543, lines 1-8). Mr. Ritley's depreciation was only 23% compared to Mr. Racek's depreciation of 58%.

Mr. Ritley concluded to a depreciated value of $5,007,101. To the depreciated building cost he added the land value of $800,000 for a total estimated value by way of the cost approach of $5,800,000. (S., page 542, lines 7-12).

Mr. Ritley utilized the income approach to valuation. Mr. Ritley testified that the Owner provided "excellent financial information" for the Property, that there was four years of detailed financial information. (S., page 209; S., page 557, lines 1-3). Additionally, though, he stated that he also considered comparable rental properties. (S., page 557, lines 6-8). Mr. Ritley set out the actual income and expense information for the Property for the years 2005 through 2008 in his report. (S., page 299). Beginning on page 68 of his report, Mr. Ritley presents five comparable assisted living facilities and their monthly rent rates. He states that these comparable rental properties are similar to the Property. (S., page 557, lines 9-13. All of the rent comparables which Mr. Ritley used were assisted living facilities. (S., pages 302-306).

Using the comparable rent revenues he developed a gross income for 2007. He then considered the actual expenses for the Property and a vacancy and credit loss, which compared favorably with the Property's actual in 2007. (S., page 558, lines 6-25, page 559, lines 1-6. Mr. Ritley also considered that a buyer for the Property as of January 1, 2007 would be looking at the actual 2005 and 2006 financial information and would not have the advantage of the 2007 income at that time. (S., page 559, lines 7-10). The net operating income developed by Mr. Ritley was $576,372 which was very close to the 2007 actual income of $569,359. (S., page

559, lines 11-15). He also developed a reserve for replacements, which he concluded to be $52,200. (S., page 559, lines 19-25; page 307).

Mr. Ritley discussed his method for developing a capitalization rate. (S., page 308). He used the mortgage-equity ban of investment model. He used a loan to value ratio of 60% with a loan maturity of ten years and a 6% interest rate. With a 10% rate of return, the capitalization rate became 8.31% to which the tax additur of 2.42% was added. (S., page 308; page 560, lines 1-25).

By way of the income approach, Mr. Ritley concluded to a value of $5,400,000. Mr. Ritley considered the income approach to value to be the most credible indicator of the Property's value because it reflected the typical analytical process that a prudent buyer and seller would use in this market. This conclusion was supported by the four years of actual income and expense information provided by the Owner. (S., page 309).

Mr. Ritley's sales comparison approach is set out in his report. (S., pages 286-295). Mr. Ritley stated that the difficulty in using the sales comparison approach is "that there are many non-quantifiable differences making adjustments questionable." (S., page 286). He stated in his report that he considered appraising the Property as an apartment. Specifically Mr. Ritley states:

> "However, we found this method lacking in the instances of the subject property. When we analyzed this method we recognized that subject's improvements beared [sic] no physical resemblance to what an apartment project built during this time period would look like. Analysis utilizing this method requires one to fit the subject property into a box in which quite simply <u>it just does not fit</u>. In fact, the <u>physical nature of the structure</u>, [sic] lends itself <u>more to an office building</u>. This is the point. <u>Excessive hypotheticals would have to made [sic] to value the subject as other than an assisted living facility</u>." (Emphasis added)
>
> S., page 286.

Mr. Ritley's chart of his comparable sales is contained within his report. (S., page 288-294). He used five sales of assisted living facilities or nursing homes. Sale No. 1 is a property in

Ravenna. Although it was part of a bulk sale, Mr. Ritley testified that he spoke with the buyers who stated that the allocated price of $3,989,117 was for the real estate only. That property sold for $120/square foot. (S., page 288; page 548, lines 13-25; page 549, lines 1-5). Sale No. 2 is on North Rocky Drive in Berea which sold for $157/square foot. Mr. Ritley testified that the property was originally built as an assisted living facility but was converted by the new owners to a nursing home. (S., page 288; page 549, lines 6-13).

Sale No. 3 is in Kent, Ohio. Mr. Ritley testified that it is a one-story building which resembles the Property but that it is a skilled nursing facility. He did not give as much weight to this sale as he did Sale No. 1. (S., page 288; page 548, lines14-22).

Sale No. 4 is located in Olmsted Falls. This two-story property went through a foreclosure sale and sold at Sheriff's sale for $71/square foot. He made a significant upward adjustment to account for the Sheriff's sale. He also considered adjustments for age, size, gross building size, and amenities. (S., page 288; page 551, lines 13-22; page 552, lines 7-25). Sale No. 5 is located in Shaker Heights. To this three-story property, Mr. Ritley made a downward adjustment for date of sale (January 2011); he made a downward adjustment for number and size of units. He made an upward adjustment of 30% for financial difficulty. In total he made a 20% upward adjustment to Sale No. 5. (S., page 289; S., 553, lines 15-25; page 554, 1-14).

Mr. Ritley's report presents a graph on page 60 of his Comparable Sales Adjustment Grid. (S., page 293). In addition to a graph showing his adjustments, Mr. Ritley also provided commentary as to the rationale behind the adjustments. (S., page 293, 294). Mr. Ritley's adjusted values range, on a per-square-foot basis, from a low of $89/sf to a high of $169/sf. Giving the most weight to Sale No. 1, Mr. Ritley concluded to a value of $120/sf for the Property. (S., page 295; page 470, lines 15-18).

Mr.Ritley used information which was subject specific, such as using comparable rental and sale properties which were assisted living and/or nursing homes. He considered the actual financial information provided by the Owner. Mr. Ritley then reconciled the three indicators of value to $5,500,000 and took a $100,000 reduction for personal property. His final overall opinion of value was$5,400,000. He testified that the greatest weight was placed on the income approach to value. (S., page 309; page 562, lines 9-13).

Unlike Mr. Racek, Mr. Ritley developed a cost approach using information from Marshall Swift Valuation Services for Homes for the Elderly; he used sales of comparable assisted-living facilities, and he used actual income and expense information for the Property and comparable rental rates of other assisted-living facilities. Mr. Ritley's entire appraisal process took into consideration that the Property was an assisted-living facility and used only information relating to assisted-living facilities in developing his value. There was no need to speculate or hypothesize as to the use of the property or be concerned that "major renovations" would need to be made in order to reconfigure the Property to that of an apartment building.

2. There is no mandate that assisted-living facilities must be valued as if apartment buildings.

The BTA's decision is based on the fact that Mr. Racek appraised the Property comparing it to an apartment building. The BTA cites to *Chippewa Place Development Co., v. Cuyahoga Cty. Bd. of Revision,* BTA No. 91-P-245, 1993 Ohio Tax LEXIS 1589 (September 24, 1993). However, the BTA's reliance on *Chippewa Place* is misplaced. Chippewa Plaza was constructed in 1987 as a "congregate care" facility. The case defines a congregate care facility as not a nursing home but an apartment-like senior citizen house which is designed to provide only "limited care to its tenants." The BTA went on further in *Chippewa Place* and further described Chippewa Place:

> "Some meals are served to the tenants. Generally, one meal per day is provided. Other services are also provided. However, the individual apartment units are substantially the same as conventional apartments, and tenants are able to cook most of their own meals and otherwise provide for themselves....a congregate care facility need not procure any particular medical facility or nursing home license from the state to operate." (Emphasis added)

The BOE submits that the Property is not a congregate care facility and there is very limited independent living afforded to the resident. The suite size and arrangement itself supports that proposition. The suites do not have "bedrooms" or kitchens. The residents cannot make meals for themselves.

In determining that the best approach to valuing the Chippewa property was to use the apartment comparison, the BTA compared pictures and floor plans of the individual units which showed the apartment units to be "virtually identical" to conventional apartment units. In the case before this Court, in order for the Property to be similar to an apartment building the entire property would have to be rezoned and reconfigured. Even Mr. Racek testified that for the Property to legally operate as an apartment complex, the interior walls would have to be changed and the number of units would have to be reduced and all occupants would have to be 60 years of age or older. (S., page 474, lines 12-25). Unlike the BTA's reasoning in the *Chippewa Place* case, the Property is virtually identical to the apartment sales used by Mr. Racek and would require a total, costly renovation and rezoning in order to do so.

In *Chippewa Place*, the BTA further explained that the use of apartment buildings was appropriate in that case because the concept of congregate care facilities was "new" and there were not a lot of transfers. In relying on the sales of apartment buildings to value the Chippewa property, this Board stated:

> "In an ideal world, we would have one or more similar congregate care facilities within the same community to compare with Chippewa Place." (emphasis added)

This is important. The tax year in the *Chippewa Place* case was 1989. It has been nearly a quarter of a century and since that time assisted-living facilities have multiplied; and as shown in Mr. Ritley's appraisal, there have been several transfers in the market upon which appraisers can rely for market information. The need to only consider apartment buildings as comparable to assisted-living facilities had long passed given the increase in the number of facilities that have been constructed and which have transferred.

APPELLANT'S PROPOSITION OF LAW NO. IV

The Board of Tax Appeals acted unreasonably and unlawfully when it failed to consider the purchase price of the Property as the best evidence of value or address its rationale for failing to accept the purchase price as the best evidence of value.

1. Ohio law has long recognized that the price paid for property in a market transaction best reflects the value of that property.

Ohio Revised Code Sec. 5713.03 governs the law on valuing real property for taxation purposes. Specifically, the law states:

> "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."

The Ohio Supreme Court has consistently upheld this law in holding that when property has been the subject of a recent, arm's-length transaction between a willing buyer and a willing seller, the sale price of the property shall be the true value for taxation purposes. *State ex rel. Park Investment Co. v. Bd. of Tax Appeals*, 175 Ohio St. 410, 195 N.E.2d 908 (1964); *Conalco Incorporated v. Monroe County Board of Revision*, 50 Ohio St.2d 129, 363 N.E.2d 722 (1977); *Board of Education of Hilliard City School District v. Franklin County Board of Revision,*

Arlinggate Plaza Limited Partnership, 53 Ohio St.3d 57, 558 N.E.2d 1170 (1990); *Zazworsky v. Licking County Board of* Revision, 61 Ohio St.3d 604. 575 N.E.2d 842 (1991).

In the case styled *Berea City School District Board of Education v. Cuyahoga County Board of Revision, et al.,* 106 Ohio St.3d 269, 2005-Ohio-4979, 834 N.E.2d 782, ¶13, this Court overruled *Ratner*. In *Berea,* the Court held that "when the property has been the subject of a recent arm's-length sale between a willing seller and a willing buyer, the sale price of the property shall be 'the true value for taxation purposes.'" Id, ¶13.

Since the Court's decision in *Berea,* it has consistently applied this principal. *Lakota Local School District Board of Education v. Butler County Board of Revision, et al.,* 108 Ohio St.3d 310, 2006-Ohio-1059, 843 N.E.2d 757, ¶25 (holding that a recent arm's-length sale is the best evidence of value when the BOE failed to prove that the sale was not arm's-length); *Cobblestone Square Co., Ltd. v. Lorain County Board of Revision, et al.* 106 Ohio St.3d 305, 2005-Ohio-5128, 835 N.E.2d 1, ¶14 (holding that a recent arm's-length sale is the best evidence of value when the purchaser fails to show economic duress); *Cummins Property Services, LLC. v. Franklin County Board of Revision, et al.,* 117 Ohio St.3d 516, 2008-Ohio-1473, 885 N.E.2d 222, ¶13 (holding that a price arrived at in a recent, arm's-length sale of real property between a willing seller and a willing buyer is deemed to be the value of the property for purposes of taxation and the only rebuttal of such a valuation lies in challenging whether the elements of recency and arm's-length character between a willing seller and a willing buyer are genuinely present for that particular sale); *Rhodes, Aud. v. Hamilton County Board of Revision, et al.,* 117 Ohio St.3d 532, 2008-Ohio-1595, 885 N.E.2d 236, ¶11 (holding that the true value of property for taxation purposes shall be the price a willing buyer paid a willing seller in a recent, arm's-length transaction, regardless of other appraisal evidence or methods); and *AEI Net Lease Income*

& Growth Fund v. Erie County Board of Revision, et al. 119 Ohio St.3d 563, 2008-Ohio-5203, 895 N.E.2d 830, ¶26 (holding that the sale price of property subject to a long-term lease is the best evidence of value).

The BOE submits that the Property was the subject of a recent, arm's-length sale. There was no evidence presented disputing this fact. Based on the law and the facts in this case, the Board should determine that the sale price is the best evidence of value as of the tax lien date of January 1, 2007 and determine an opinion of value for the Property as of January 1, 2007 of $8,740,000. (S., page 368-371).

The Property Owner may argue that the sale was a "bulk sale" and the allocated prices did not accurately the fair market value of the properties. A recent BTA case styled *Prudential Insurance Co. of America v. Franklin County Board of Revision, et al.,* BTA Case No. 2004-T-352, 2005 Ohio Tax LEXIS 1417 (Oct. 2005) held that even though the property was part of a bulk sale, the sale price provided the best evidence of value. Citing *Pingue v. Franklin Cty. Bd. of Revision,* 87 Ohio St.3d 62, 717 N.E.2d 293 (1999), the BTA stated that although the transfer was part of a bulk sale, there appeared to be no factors that would cast suspicion upon the price allocated to the subject. The properties were sold with the parties acting in their own self-interest.

2. <u>The sale in September 2004 is "recent" for the purpose of determining value with a tax lien date of January 1, 2007 and when there is no evidence which negates the transaction as being an arm's-length sale.</u>

With regard to the timeframe of the tax lien date of January 1, 2007 and the September 2004 transaction, the BOE submits that there is no bright line test for determining whether a sale is "within a reasonable length of time" for purposes of Ohio Revised Code §5713.03. Specifically, the Ohio Supreme Court has recognized that a sale may be considered recent even

though the sale occurs a significant period of time before or after the tax lien date. In *R.R.Z. Associates v. Cuyahoga County Board of Revision*, 38 Ohio St.3d 198, 527 N.E.2d 874 (1988), the Supreme Court affirmed a Board of Tax Appeals' decision that the property's sale price *twelve months prior* to the tax lien date provided a good indication of the property's true value. In *Hilliard City School District Bd. of Education v. Franklin County Board of Revision,* this Court held that property sold *twelve months after* the tax lien date was a proper measure of the parcel's true value. *Hilliard, supra.*

In *Zazworsky v. Licking County Board of Revision* this Court held the value based on a sale occurring fifteen months after the tax lien date was indicative of value. *Zazworsky, supra.* Furthermore, in *Lakota Local School District Board of Education v. Butler County Board of Revision* this Court held that the best evidence of value was a sale which occurred twenty-two months after the tax lien date. *Lakota, supra.*

In *Westerville City Schools Board of Education v. Franklin County Board of Revision,* BTA No. 95-T-278, 1996 Ohio Tax LEXIS 237 the BTA held that property that sold approximately thirty-three (33) months before the tax lien date provided a controlling indicator of the property's value.

The BOE submits that because the arm's-length sale of the subject property took place during late 2004, the sale price is recent and the best evidence of value for tax year 2007.

There has been no testimony or evidence that the sale is not an arm's-length transaction. There was no relationship between the buyer and seller. When applying the law to the facts of this case, only one conclusion can be reached and that is that the best evidence of value as of January 1, 2007 is the recent price of $8,740,000.

3. The Allocation of the Purchase Price is Supported by Corroborating Evidence.

Owner structured a transaction to purchase the 16 healthcare facilities for a total consideration of $125,910,000. A purchase price of $8,740,000 was allocated to the Property. At the same time, an Amended Management Agreement and Sublease was executed. A lease rent rate was established in Section 3 of the Sublease Agreement. The annual operating lease expenses were:

2005	$760,380; (S., page 319 "Operating Lease Expense");
2006	$795,340; (S., page 325 "Operating Lease Expense");
2007	$830,300; (S., page 331 "Operating Lease Expense");
2008	$863,075; (S., page 337 "Operating Lease Expense")

The BOE's appraiser, Charles Ritley, reviewed the lease between Owner and Emeritus (the management company). He further testified that the rent rate was commensurate with the rate used in the required return to Owner. (S., page 561, lines 1-4; 13-16). The Supreme Court has recently decided several significant cases involving allocations of sale prices. *St. Bernard Self-Storage, L.L.C. v. Hamilton County Board of Revision, et al,* 115 Ohio St.3d 365, 2007-Ohio-5249, 875 N.E.2d 85 is applicable to the case before this Board. In *St. Bernard,* this Court held that for tax purposes, in bulk sale cases, courts typically look for corroborating indicia to ensure that the allocation reflects the true value of the property. Where attendant evidence shows reason to doubt such a correspondence, the court should decline to use the allocation to establish true value. An allocation in the purchase contract is not to be taken as indicative of the value of the real property at issue unless some other indicia on the face of the contract, the circumstances attending the allocation, or some other independent evidence establishes the propriety of the allocation. For these reasons, the BOE submits that the allocation of the purchase price best reflects the value of the property as of January 1, 2007.

The Property was the subject of an arm's-length transaction. The allocation of the purchase price allotted to the Property is supported by other indicia; namely, the lease which was derived based on the income stream of the Property. The allocated sale price is the best evidence of value and consistent with Ohio law, the BOE respectfully requests that this Board determine that the value of the Property as of January 1, 2007 is $8,740,000.

APPELLANT'S PROPOSITION OF LAW NO. V

The Board of Tax Appeals' decision is unreasonable and unlawful because it does not set forth its findings or state what evidence it considered relevant in reaching its determination of value or why it rejected the evidence it did reject.

It is axiomatic that the BTA is vested with wide discretion in determining the weight to be given to evidence and the credibility of witnesses that come before it. It is also axiomatic that an appellate court will not overturn the decision of the BTA provided its decision is supported by competent, probative evidence. However, an appellate court can only find a BTA decision to be supported by competent, probative evidence if the BTA's decision sets forth its findings. In *Howard v. Cuyahoga County Board of Revision, et al.,* 37 Ohio St.3d 195; 524 N.E.2d 887 (1988), this Court stated:

> "the witnesses' opinions on the valuation of the property were divergent. This court is unable to perform its appellate duty when it does not know which facts the BTA selected in rendering its decision. We now require it to state what evidence it considered relevant in reaching its value determinations." Page 197, 889

See also, *General Motors Corporation v. Cuyahoga County Board of Revision, et al.,* 53 Ohio St.3d 233; 559 N.E.2d 1328 (1990) (reversing and remanding the case to the BTA to specify the reasons for its determinations); *New Forum Apartments v. Hamilton County Board of Revision and Hamilton County Auditor and the City of Cincinnati,* 1st Dist. No. C-920983, 1994 Ohio App. LEXIS 725 (Mar. 2, 1994) (...the Ohio Supreme Court has been very explicit as to

what is expected of the BTA); *Sutton Grove Limited Partnership Traditional Living Communities, Inc. and Mt. Washington Baptist Church v. Hamilton County Board of Revision, Hamilton County Auditor, and Cincinnati School District Board of Education,* 1st Dist. No. C-920297, 1994 Ohio App. LEXIS 3940 (Sept. 7, 1994) (the Supreme Court has repeatedly emphasized that when the BTA determines the true value of property, it must state the "specific reasons" for its decision).

The BOE submits that given all the evidence that was presented to the BTA which included two appraisal reports and the testimony of two appraisers, the zoning ordinance which proves that the Property could not be used as an apartment building since it is zoned for Senior Resident/Life Care; the *Elm St.* BTA decision; and proof of a recent purchase of the Property, the BTA decision should have addressed these major points:

- why it considered the sale of the Property too remote in time since it was 26 months before the tax lien date, there had been no change in the market, and the statutory transcript contained the deed, and the Master Agreement between Owners and Daniel R. Batty regarding the sale;
- why it accepted an appraisal method which valued the Property contrary to the zoning ordinance limiting the Property to Senior Residence/Life Care;
- why it rejected Mr. Ritley's use of sales of assisted living facilities and why it accepted apartment buildings sales.
- why it accepted an appraisal method based on apartment buildings when the Property is not zoned for multi-family residential living but is limited to residents over the age of 60.
- why it accepted a valuation method which would require extensive major renovations as well as a zoning change in order to become an apartment building.

- why it accepted as comparable sale properties apartment complexes which were several times greater than the Property and which included amenities not found on the Property;
- why it accepted an appraisal method using apartment buildings which would not be in competition with the Property for tenants.
- why it rejected Mr. Ritley's use of the actual income and expense information and use of rent rates of comparable assisted-living facilities;
- why it rejected Mr. Ritley's cost approach using information to reproduce an assisted-living facility and use of Marshall & Swift Valuation of Homes for the Elderly;
- why it accepted a cost approach which was based on reproducing an apartment building and not an assisted-living facility;

The BOE submits that the BTA's decision does not meet this Court's requirement that it fully set forth the basis for its decision. A review of the BTA's decision in *Elm St.* shows that there was extensive discussion by the writer of that decision as to why Mr. Racek's valuation techniques and methods were rejected. The *Elm St.* decision addressed why the apartment comparables were "significantly dissimilar" to the subject property even pointing out size differences. The decision discussed the difference in amenities offered in the apartment complexes which were of no use to an assisted-living facility such as tennis courts and fitness centers. The decision also addressed the fact that it was unable to ascertain what adjustments Mr. Racek had made to the comparable properties to account for differences between the comparable property and the subject property.

Under the income approach, the BTA stated in the *Elm St.* opinion that it questioned the reliability of the calculated expenses using the 2006 IREM report. Furthermore, the BTA criticized Mr. Racek's report for using expense information derived from the comparable sale

properties he used which it had already concluded did not reflect the basic characteristics of the subject property. The BTA decision went on further to criticize the capitalization rate and provided a discussion as to why that was unreliable.

These very same techniques were used by Mr. Racek in his appraisal report of the Property. Yet, the BTA did not address any of the same concerns in the instant case as it did in the *Elm St.* decision. Just looking at the length of the decisions shows that no thought was given to setting forth the findings or the basis for its decision. The *Elm St.* decision is 15 pages while the decision for the Property is half that at 8 pages and 4.5 pages of the 8 pages are boilerplate.

The BOE submits that the BTA acted unreasonably and unlawfully by issuing a decision which did not fully address the basis for its findings.

CONCLUSION

The BTA decision is unreasonable and unlawful for several reasons. Most significantly, the BTA accepted an appraisal valuation for a property which is an assisted-living facility. It was built to be an assisted-living facility and the property is zoned for senior residence/life care. It is zoned specifically for elderly living and care for persons over the age of 60. The zoning is limited to apartments or one-family dwelling units designed for the elderly, for skilled nursing or assisted-living facilities. It is not zoned for multi-family residential apartment buildings. Since the Property is not zoned for multi-family residential the BTA erred which it accepted an appraisal report which valued the property as if it were. This is in strict conflict with the zoning.

Further, the BTA failed to adequately explain why it rejected the sale of the Property in spite of the sale having occurred only 26 months prior to the tax lien with no change in the market during that time period; with evidence of the sale in the form of the deed and Master Agreement of the Sale contained in the statutory transcript.

The BTA decision contradicts the principle of *stare decisis*. In *Elm St.* the BTA rejected Mr. Racek's appraisal and methods. The decision set forth in great detail its criticism of the report and why it did not find his report persuasive. However, using the same evidence and with the same fact pattern, the BTA found Mr. Racek's report to be the more persuasive of the two reports.

Furthermore, it rejected the appraisal report which valued the Property comparing it to other assisted-living or health care facilities. The BTA decision found more persuasive an appraisal method which valued the Property as if it were an apartment building in spite of the fact that the zoning does not permit such a use.

The BTA decision is unreasonable and unlawful because it does not set out its findings of fact and the basis for giving no consideration to zoning, for accepting an appraisal report which it has rejected in the past, and for rejecting an appraisal report which valued the Property consistent with its zoning and use, that of an assisted-living facility.

For these reasons, the Berea City School District Board of Education respectfully requests that this Honorable Court find that the BTA's decision is unreasonable and unlawful based on its previous holding in *Elm St.*, that the decision is unreasonable and unlawful since it valued the Property as an apartment building which is contrary to the zoning ordinance, that the decision is unreasonable and unlawful in rejecting an appraisal method which valued the

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Property as an assisted-living facility, and remand the case to the BTA to issue an decision and order consistent with this Court's ruling.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of this Appellant's Brief was sent by overnight delivery to counsel for Appellee, Cuyahoga County Board of Revision and Cuyahoga County Auditor, Saundra Curtis-Patrick, Cuyahoga County Prosecutor's Office, The Justice Center, Eighth Floor, 1200 Ontario Street, Cleveland, Ohio 44113; to the counsel for Appellant Todd W. Sleggs, Esq., Sleggs, Danziger & Gill Co., LPA, 820 W. Superior Avenue, Seventh Floor, Cleveland, Ohio 44113; and to counsel for the Tax Commissioner, R. Michael DeWine, Attorney General, State Office Tower, 30 East Broad Street, 17th Floor, Columbus, Ohio this 12th day of June, 2013.

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APPENDIX

IN THE SUPREME COURT OF OHIO

HEALTH CARE REIT, INC., Appellant/Appellee, and BEREA CITY SCHOOL DISTRICT BOARD OF EDUCATION, Appellant/Appellee,- vs. CUYAHOGA COUNTY BOARD OF REVISION, CUYAHOGA COUNTY FISCAL OFFICER, TAX COMMISSIONER OF OHIO, Appellees.	)	Appeal from the Ohio Board of Tax Appeals Board of Tax Appeals Case Nos. 2009-Q-1547 2009-Q-1615 2009-Q-1616

13-0278

NOTICE OF APPEAL OF APPELLANT
BEREA 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.

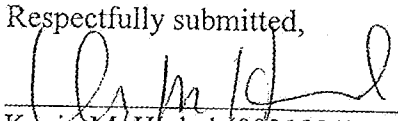
20. The Board of Tax Appeals acted unreasonably and unlawfully by acting contrary to law stated its own previous decisions valuing assisted-living facilities.

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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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 Education,	)	DECISION AND ORDER
	)	
Appellee/Appellant,	)	
	)	
vs.	)	
	)	
Cuyahoga County Board of Revision and Cuyahoga County Fiscal Officer,	)	
	)	
Appellees.	)	

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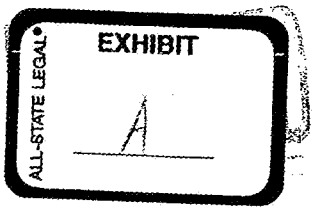
Entered JAN 15 2013

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



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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 feet 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

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[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

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[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.

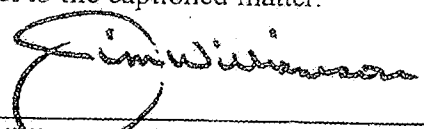
component of many sales," making adjustments for non-quantifiable differences "questionable."[6] H.R., Ex. A at 53. He also acknowledged that the comparables used in both his sales comparison and income approaches to value offer different levels and types of service. H.R. at 159. However, in conducting 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.

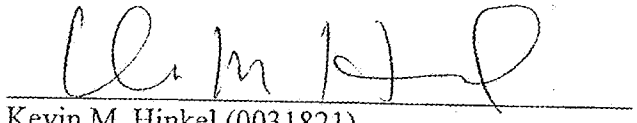


Jim Williamson, Chairperson

[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, Saundra 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.



Kevin M. Hinkel (0031821)
Rita M. Jarrett (0058491)

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 Education,	)	DECISION AND ORDER
	)	
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 1 5 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

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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 feet 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

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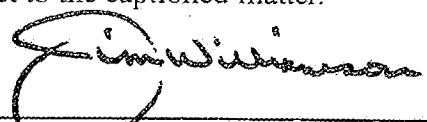

Jim Williamson, Chairperson

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Exhibit C

CHAPTER 1134
Senior Residence/Life Care District (SR/LC)

1134.01 Intent.
1134.02 Elderly defined
1134.03 Use regulations.
1134.04 Development criteria.
1134.05 Area, yard and height regulations.
1134.06 Parking
1134.07 Dwelling unit size.
1134.08 Procedures for Senior Residence/Life Care development.
1134.09 Preliminary development area site plan.
1134.10 Preliminary development area site plan review and approval.
1134.11 Final development area site plan.
1134.12 Building permits.
1134.13 Phased development.
1134.14 Amendment to plans.
1134.15 Skilled nursing care facility requirements

1134.01 INTENT.

In recognition of the special nature of the needs of elderly persons, it is necessary to establish a zoning district specifically for elderly living and care where elderly persons needs, whatever level of attention they may require, can be met ranging from minimal care in independent living units, through personal intermediate and skilled nursing care.
(Ord. 1992-34. Passed 9-8-92.)

1134.02 ELDERLY DEFINED.

"Elderly" means a person 60 years of age or older as defined in the Federal Housing and Community Development Act of 1989, as amended.
(Ord. 1992-34. Passed 9-8-92.)

1134.03 USE REGULATIONS.

Buildings and land shall be used, and buildings shall be designed, erected, altered, moved or maintained in whole or in part, in Senior Residence/Life Care (SR/LC) Districts, only for the uses set forth in the following schedules and regulations:

(a) Main Buildings and Uses Permitted.

(1) Apartments and one family cluster dwelling units designed specifically for the elderly.

(2) Skilled nursing care facilities.

(3) Assisted living facilities that include individual sleeping rooms and common areas for activities, dining, laundry, and other similar type services.
(Ord. 1996-92. Passed 2-11-97.)

(b) Accessory Uses Permitted. Any accessory use is permitted which is incidental to the main use, provided it is planned and developed integrally with the main building and that it has no injurious effect on adjoining use districts, such as:

(1) Multipurpose senior community activity centers, common eating areas, health and counseling areas for passive and active recreation for the elderly; and

(2) Storage garages and off-street parking areas for residents, guests and employees of the elderly housing facility.
(Ord. 1992-34. Passed 9-8-92.)

1134.04 DEVELOPMENT CRITERIA.

The following development criteria are established to guide and control the development and use of land for housing designed for the elderly in a Senior Residence/Life Care (SR/LC) District.

(a) Ancillary Facilities. All housing developments designed for the elderly shall contain the following ancillary facilities: a multipurpose senior center, health and counseling offices, craft and meeting rooms, lounge area, areas for passive and active recreation and any and all other amenities required in buildings for the elderly in new construction designed for the elderly.

(b) Special Safety and Convenience Features. All housing developments designed for the elderly shall include any and all other special safety and convenience features required in buildings qualifying for housing assistance for the elderly in new construction designed for the elderly, including a central dining area where meals may be provided for all residents. Each independent living unit within an elderly housing building shall include individual cooking facilities.
(Ord. 1992-34. Passed 9-8-92.)

1134.05 AREA, YARD AND HEIGHT REGULATIONS.

Land and buildings shall be used only in accordance with the lot area regulations, and buildings shall be erected, altered, moved and maintained only in accordance with the area, yard and building height regulations set forth in the following schedule:

SCHEDULE OF AREA, YARD AND HEIGHT REGULATIONS
SENIOR RESIDENCE/LIFE CARE (SR/LC)

Dwelling Type	Minimum Lot Area Per Dwelling Unit (sq. ft.)	Maximum Density (UN/AC)	Maximum Lot Coverage by Building (Percent)	Front Yard Depth (ft.) (a)	Side Yard Depth (ft.)	Rear Yard Depth (ft.)	Height Main Building (stories) (b)
Apartment	2,490	17.5	25	100(c)	(d)	(d)	3
Single Family Cluster (Attached and Detached)	7,260	6	35	(e)	(f)	(f)	2
Skilled Nursing Care	--	--	25	75	50	50	1
Off-Street Parking	--	--	--	35	20	20	--

NOTES:

(a) Building setback measured from street right-of-way or nearest edge of pavement for private drives.

(b) Apartment buildings constructed in a Senior Residence/Life Care (SR/LC) District shall not exceed three stories. Mechanical space for building equipment placed on the roof of an apartment building may be allowed above the maximum height specified, provided that such mechanical space is set back a minimum of fifteen feet from any exterior wall, does not exceed eight feet in height and is adequately screened from view, and provided, further, that such mechanical space and screening are approved by the Planning Commission.

(c) Front yard depth may be reduced to seventy-five feet if no off-street parking is located in the front yard.

(d) Yard dimensions shall be determined by the formula set forth in Chapter 1133, Section 1133.06 (RMF-2 District).

(e) Buildings shall have a setback of 35 feet. Building setback shall be measured from the street right-of-way for dedicated streets or from the nearest edge of pavement of private drives.

(f) Single family cluster dwellings shall be set back not less than 35 feet from any adjacent single family side or rear lot line. The minimum distance between individual family units and buildings of attached units shall be ten feet. Not more than four single family cluster units may be attached in any building group. (Ord. 1992-34. Passed 9-8-92.)

(g) Assisted living facilities shall have the same area, yard and building height regulations as skilled nursing care facilities. (Ord. 1996-91. Passed 2-11-97.)

1134.06 PARKING.

Parking in any Senior Residence/Life Care (SR/LC) District shall be provided in accordance with the following schedule:

Apartment	½ space per dwelling unit plus one (1) space for each employee.
Single family cluster (attached and detached)	Two spaces per unit with one enclosed.
Skilled Nursing Care	½ space per bed plus one (1) space for each employee.

The design and construction of off-street parking areas shall be determined by the City Engineer in accordance with Chapter 1141. Additional guest off-street parking may be required as determined by the Planning Commission.
(Ord. 1992-34. Passed 9-8-92.)

1134.07 DWELLING UNIT SIZE.

The minimum floor area of dwelling units in any Senior Residence/Life Care (SR/LC) District shall be as indicated in the following schedule:

Apartment	Minimum Floor Area (sq. ft.)
No bedroom	500
One bedroom unit	650
Two bedroom unit	800
One-family cluster	1,100
Assisted living	250 sq. ft. per unit and the common area divided by the number of units must be equal to or greater than 500 sq. ft.

(Ord. 1992-34. Passed 9-8-92; Ord. 1996-93. Passed 2-11-97; Ord. 1997-22. Passed 6-10-97.)

1134.08 PROCEDURES FOR SENIOR RESIDENCE/LIFE CARE DEVELOPMENT.

Subject to the requirements of this chapter, a developer shall submit to the Planning Commission a preliminary and final site plan of a senior residence/life care development area. (Ord. 1992-34. Passed 9-8-92.)

1134.09 PRELIMINARY DEVELOPMENT AREA SITE PLAN.

The developer of any Senior Residence/Life Care facility shall prepare a preliminary site plan of the development area designed in accordance with the planning standards, regulations and criteria established in this Zoning Ordinance and the Subdivision Regulations indicating all uses proposed for the development, the location and arrangement of uses and shall include, unless waived by the Planning Commission as not being applicable, the following:

(a) Topography at two-foot contour intervals of the proposed development area, including property lines, easements, street rights of way and existing structures, trees and landscape features existing thereon and a certificate, by a registered surveyor, of the gross area of the development area in acres and square feet;
(b) The location of all structures in the development area to be removed and all structures lying outside of the boundaries of the development area, located within 200 feet thereof (aerial photography may be utilized);
(c) The number, and general location of all proposed dwelling units, and other buildings and facilities;
(d) The proposed use of all land;
(e) The general location and arrangement of all streets, private driveways, and pedestrian accessways;
(f) The general arrangement of all open and enclosed parking and service areas.
(g) Such other relevant information as the Planning Commission and City Engineer may require.

The site plan of a development area shall be prepared by licensed professional persons qualified in the planning of land development.
(Ord. 1992-34. Passed 9-8-92.)

1134.10 PRELIMINARY DEVELOPMENT AREA SITE PLAN REVIEW AND APPROVAL.

The preliminary site plan shall be submitted to the Planning Commission, City Engineer, Service Director, City Architect and Building Official for their review and comment. If the Commission finds that based upon reports of the Engineer, Service Director, City Architect and Building Official and its own review that the preliminary plan meets all of the requirements of Chapter 1134, it shall approve the plan and submit same to Council for its consideration.

Council shall review the preliminary plan and recommendation of the Commission and shall approve, reject or modify the plan. If Council approves the preliminary plan, the applicant shall proceed with the preparation of a final site plan.
(Ord. 1992-34. Passed 9-8-92.)

1134.11 FINAL DEVELOPMENT AREA SITE PLAN.

Following the approval of a preliminary site plan the developer shall prepare a final site plan of the development area indicating the following:
(a) Topography at one-foot contour intervals of the proposed development area, including property lines, easements, street rights of way and existing structures, trees and landscape features existing thereon and a certificate, by a registered engineer or surveyor, of the gross area of the development area in acres and square feet;
(b) The location of all structures in the development area to be removed and all structures lying outside of the boundaries of the development area, located within 200 feet thereof (aerial photography may be utilized);
(c) The number, location and arrangement of all proposed dwelling units, and other buildings and facilities;
(d) Preliminary architectural elevations of all proposed buildings;

(e) The proposed use of all land;
(f) The location and arrangement of all dedicated streets, private driveways and pedestrian accessways;
(g) The number and arrangement of all open and enclosed parking and service areas;
(h) The location of all site utilities including disposal areas and containers;
(i) The location of all walls and other site features;
(j) The landscape design for the development area;
(k) Such other relevant information as the Planning Commission and City Engineer may require.

The final site plan of the development area shall be prepared by professional persons qualified in the planning of land development, building and landscape design. The architectural and engineering services required for the preparation of the site plan shall be rendered by licensed professional persons.

The final site plan shall be referred to the City Engineer, Service Director, City Architect and Building Official for their review and approval. Following the aforementioned approvals if the Commission determines that the final plan meets all the requirements of Chapter 1134, it shall approve the final plan and forward same to Council for their review and approval.
(Ord. 1992-34. Passed 9-8-92.)

1134.12 BUILDING PERMITS.

Following approval of the senior residence/life care final development area site plan by the Commission and approval of building plans by the Building Official, building and other permits may be issued upon payment of the required fees.
(Ord. 1992-34. Passed 9-8-92.)

1134.13 PHASED DEVELOPMENT.

A developer, having obtained approval of a final development area site plan, may accomplish the development in progressive stages as may be approved by the City Engineer and Planning Commission.
(Ord. 1992-34. Passed 9-8-92.)

1134.14 AMENDMENT TO PLANS.

At any time after the approval of a final site plan of a senior residence/life care development area, the owner or owners may request an amendment of their plans. The request for such amendment shall be filed with the Building Official and one copy filed with the Clerk of Council. If such amendment is in substantial agreement with the approved final development area site plan, it shall be processed by the Planning Commission.

Should such amendment represent a significant departure from the intent of a prior approval in terms of:
(a) Building location and arrangement;
(b) Street alignment;
(c) Intensity of use (density);
(d) Land use arrangements; and
(e) Area and parking requirements,

such amendment shall then be subject to the same procedures and conditions of approval as the original application.
(Ord. 1992-34. Passed 9-8-92.)

1134.15 SKILLED NURSING CARE FACILITY REQUIREMENTS.

In addition to compliance with the requirements of all applicable regulations of Chapter 1134, any nursing care facility shall comply with the following:

(a) Ohio Building Code;

(b) NFPA 101, Life Safety Code;

(c) Ohio Department of Health, Nursing and Rest Home Law and Rules; and

(d) U. S. Department of Health and Human Services, Guidelines for Construction and Equipment of Hospitals and Medical Facilities.

(Ord. 1992-34. Passed 9-8-92.)

TITLE 57. TAXATION
CHAPTER 5713. ASSESSING REAL ESTATE

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ORC Ann. 5713.03 (2013)

§ 5713.03. Taxable valuation of real property

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.