

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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BRIEF OF APPELLEE HEALTH CARE REIT, LLC

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## STATEMENT OF THE CASE

This is a 2007 real property tax appeal involving an assisted living facility located in Cuyahoga County, Ohio. The Record in the appeal establishes that the operation of an assisted living facility involves the provision of non-real estate services (meals, nursing services and physical therapy, etc.) that generate income that is not attributable to the real estate. The Appellant's own expert recognized this in his testimony before the Ohio Board of Tax Appeals. Supp. at pages 566 through 571 (Transcript at pages 158-163). The operator of the assisted living facility pays CAT tax on the income derived from these non-real estate services. The Board of Tax Appeals decision and order discusses the case law that has developed involving the separation of real estate and non-real estate income in assessing real property in Ohio. Board of Tax Appeals decision and order at page 5. The Board of Tax Appeals made factual findings in its decision that are supported by the Record in this appeal. Board of Tax Appeals decision and order at page 7. The Board's factual findings are not contradicted by any evidence in the appeal. After reviewing the evidence in the appeal, and the applicable case law involving the separation of non-real estate income in valuing properties that have business components that generate non-real estate income, the Board of Tax Appeals issued an order that does not contradict that case law. The standard of review in this appeal is whether the Board of Tax Appeals decision and order is unreasonable and unlawful. See R.C. 5717.04.

The Appellant has raised twenty-three (23) errors with respect to the Board of Tax Appeals decision and order. The Board of Tax Appeals order, excluding the cover page, is seven (7) pages long. The Appellant's appeal raises over three (3) assignments per page. But more importantly, the Appellant has failed to show that the Board of Tax Appeals decision and order is unreasonable and unlawful.

The decision and order of the Ohio Board of Tax Appeals should be affirmed in this appeal.

## LAW AND ARGUMENT

### PROPOSITION OF LAW NO. 1

#### **THE BOARD OF TAX APPEALS DECISION AND ORDER IS NOT UNREASONABLE.**

The property is operated as an assisted living facility. The property owner provided the Board of Revision and Board of Tax Appeals with a copy of the Board of Tax Appeals decision in *Harbor Court Limited Partnership v. Cuyahoga Cty. Bd. of Revision, et al.*, BTA Case No. 92-T-1054, decided June 10, 1994, where the comparison of assisted living facilities to apartment projects for purposes of valuing the real estate and avoiding the taxation of non-real estate income and assets was approved. This methodology was followed by the owner's appraiser, Rick Racek, in his appraisal before the Board of Revision, Supp. at pages 107-157, and the Board of Tax Appeals, Supp. at pages 158-236. The methodology was not followed by the Appellant Board of Education's appraiser, Charles Ritley, which is why the values by the appraisers differ by \$2,300,000. Mr. Ritley admitted in his testimony before the Board of Tax Appeals that he included income from meals, physical therapy and nursing services in his income approach and that he did not have sufficient data to extract it from the data in his sales comparison approach. Supp. at pages 300, 327 and 566 (Transcript at page 158) through 573 (Transcript at page 165). As a result, the Board of Education's appraisal runs afoul of *Dublin Senior Community L.P. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455, 460 (a copy was submitted to the Board of Tax Appeals at the hearing as Appellant's Exhibit 3), which requires that only the real estate be valued in an appraisal, "[a] valuation which includes business income is not acceptable for real estate valuation purposes". The case is discussed in Footnote 2

of the Board of Tax Appeals decision and order at page 5. As a result, the Board of Education's appraisal by Charles Ritley cannot be used to determine value in this appeal because it includes business (non-real estate) income as prohibited by the court in *Dublin Senior Community L.P.* discussed above. The Appellant's argument under its Proposition of Law No. II ignores the testimony of its own appraiser. The Appellant's appraiser acknowledged that his valuation of the property captures non-real estate value. Supp. at pages 300, 327, 566 (Transcript at page 158) through 575 (Transcript at page 165). His projection of net income includes the net income from the provision of non-real estate services.

The Board of Education criticized the owner's appraisal by Rick Racek because they contend that an apartment use would not be allowed under the zoning code. The Board of Education confuses the utilization of a methodology approved by the case law to avoid the taxation of non-real estate income and assets with the requirement that the highest and best use conclusion in an appraisal for real property tax purposes be consistent with the zoning as of the tax lien date. A valuation methodology used to isolate real estate value does not ignore the zoning on the property, and the zoning codes should be used to prohibit a methodology used to isolate real estate value. Focusing on pure real estate (apartment) rents allows an appraiser to avoid including non-real estate income in the value of the real estate. In addition, there is no evidence in the record that major renovations to the property would be required in order to convert the property from an assisted living facility to an apartment complex as the Appellant claims at page 10 of its brief. And their citation to page 207 in the Supplement does not support this assertion. In his appraisal before the Board of Revision (Supp. at page 115), Mr. Racek clearly states the reason for his comparison of the subject property to apartments and acknowledges that the existing assisted living facility is the highest and best use of the property.

This is consistent with the *Harbor Court* decision by the Board of Tax Appeals discussed above and submitted to the Board of Revision. His conclusion in his appraisal before the Board of Tax Appeals of “continued use in an apartment capacity” (Supp. at page 187) is carried over to his discussion of the business income aspects of the assisted living facility and his valuation of the real estate only. (Supp. at pages 188-189). See also *Chippewa Place Development Co. v. Cuyahoga Cty. Bd. of Revision* (Sept. 24, 1993), BTA No. 91-P-245, unreported. Mr. Racek’s desire to exclude going concern value in this appraisal influenced his choice of data. Supp at page 511 (Transcript at page 103). The Board of Tax Appeals decision and order adopting his opinion of value is not unreasonable or unlawful.

Beginning at page 10 in its brief, the Appellant recapitulates its Board of Tax Appeals criticisms of Mr. Racek’s appraisal report. These same criticisms, which run through page 14, were raised at the Board of Tax Appeals. Their reiteration here does not show that the Board of Tax Appeals decision and order was unreasonable and unlawful. The Board of Tax Appeals is the finder of fact and is granted wide discretion in giving weight to expert testimony. Similarly, whether *Elm St., Inc. v. Cuyahoga County Bd. of Revision*, BTA No. 2008-A-1095, 2011 Ohio Tax LEXIS 1185 (June 14, 2011) was incorrectly decided is not something that can be corrected in this appeal. Each tax year and appeal stands on its own record. See *Olmsted Falls Board of Education v. Cuyahoga County Bd. of Revision*, 122 Ohio St.3d 131, 2009-Ohio-2461. (Board of Tax Appeals decision and order adopting an appraisal previously rejected in an earlier tax year decision and order not held to be unreasonable and unlawful, consistency doctrine rejected).

Mr. Racek did not rely on the cost approach in valuing the subject property. Supp. at page 224. Mr. Ritley (the Appellant’s appraiser) gave greatest weight to the income approach to value. Supp. at page 309. The Appellant’s arguments regarding the cost approach are not

relevant in addressing the Board of Tax Appeals decision and order in this appeal. The Appellant's appraiser acknowledged that this cost approach captured the emergency call buttons, hand rails, and other fixtures that would constitute business fixtures under R. C. 5701.03. Supp at pages 589-590. (Transcript at pages 181-182). The Appellant's Propositions of Law I, II and III have no merit.

As discussed above and below, the Board of Tax Appeals findings with respect to the October 2004 sale of the property are amply supported in the record. The Appellant's own appraiser in his testimony supports the Board of Tax Appeals findings. The Appellant's Proposition of Law IV has no merit.

The only competent and probative evidence in the record in this appeal on the value of the real estate only as of January 1, 2007 is the appraisal report of Rick Racek setting forth a value of \$3,100,000 for the property as of January 1, 2007. The Board of Tax Appeals decision and order based on this evidence is not unreasonable.

## **PROPOSITION OF LAW NO. 2**

### **THE BOARD OF TAX APPEALS DECISION AND ORDER IS NOT UNLAWFUL.**

The Board of Tax Appeals in the *Harbor Court* and *Chippewa Place* cases has developed an analysis to eliminate non-real estate value in assessing assisted living facilities. That analysis or approach has not been shown to be unreasonable or unlawful. Appellant offers no reasonable or lawful alternative in the evidence that it submitted in the case, or in this appeal.

The use of an apartment project analysis (rents and expenses) in valuing the real estate is not prohibited by the zoning on the property. The Board of Tax Appeals followed its decisions in *Harbor Court* and *Chippewa Place* which have been on the books since the early 1990's. *Stare decisis* has not been violated in this case. The Board of Tax Appeals has made a factual

finding that apartment buildings are comparable to assisted living facilities in terms of valuing the real estate. This finding is not unreasonable and it is not unlawful. Because the true value of property is a “question of fact, the determination of which is primarily within the province of the taxing authorities,” the Court has held that it will “not disturb a decision of the Board of Tax Appeals with respect to such valuation unless it affirmatively appears from the record that such decision is unreasonable or unlawful.” *Cuyahoga Cty. Bd. of Revision v. Fodor*, 15 Ohio St.2d 52, 239 N.E.2d 25 (1968), syllabus. Moreover, because the Board of Tax Appeals as the finder of fact has “wide discretion in granting weight to evidence and credibility to witnesses,” the Court will not reverse the Board of Tax Appeals determination of evidentiary weight and credibility “unless it finds an abuse of this discretion.” *Natl. Church Residence v. Licking Cty. Bd. of Revision*, 73 Ohio St.3d 397, 398, 653 N.E.2d 240 (1995).

The rent paid for real estate should be consistent regardless of the use of the property. Non-real estate service income should not be taxed as a component of real estate for property tax purposes. When using the income approach to value for real estate with an assisted living component, the income stream from the non-real estate services provided to tenants cannot be used. See *Dublin Senior Community L.P. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455, 460. The Appellant’s appraisal, as acknowledged by the appraiser in his testimony before the Board of Tax Appeals, valued more than just the real estate. Supp. at pages 300, 327, 566 (Transcript at page 158) through 571 (Transcript at page 163). The Board of Tax Appeals valuation does not capture non-real estate value and as a result it is lawful. The Appellant’s suggestion that the 2004 sale of the property is recent and can be used to value the real estate ignores all of the testimony in this appeal. The Appellant’s appraiser states in his appraisal that the October 1, 2004 purchase “included both business property and real estate”. Supp. at page

255. This was confirmed by Scott Marshall's testimony before the Board of Revision. See Supp at pages 376-408 and Tape of Board of Revision hearing in the Transcript on Appeal filed by the Cuyahoga County Board of Revision with the Ohio Board of Tax Appeals. The Appellant's own appraiser acknowledged that the sale "included a business component in the value", Supp at page 595 (Transcript at page 187), the sale was not utilized in his appraisal, Supp at page 561 (Transcript at page 153), he testified that the rent under the lease "exceeds what would be a rent value as of 1-1-07", Supp at page 603 (Transcript at page 195), and "wouldn't be reflective of a fee simple interest as of January 1, 2007," Supp at page 604 (Transcript at page 196). This is consistent with the testimony of Scott Marshall before the Cuyahoga County Board of Revision cited by the Board of Tax Appeals in its decision and order at page 3. Mr. Ritley also acknowledged a change in the market for assisted living facilities caused by the "housing crash [that] had already begun in 2006". Supp at page 583 (Transcript at page 155). This evidence supports the Board of Tax Appeals finding that the 2004 sale was no longer recent. Board of Tax Appeals decision and order at page 4.

Lastly, the holding in *Howard v. Cuyahoga County Bd. of Revision* (1990), 53 Ohio 3d 233 has not been violated in this case. The basis for the Board of Tax Appeals decision and order is clear. Board of Tax Appeals decision and order at pages 5-8. The Board of Tax Appeals does not have to discuss all the evidence in an appeal in order for the decision and order to be reasonable and lawful, they need only explain "what evidence it considered relevant in reaching its value determinations." *Id.* at page 197. The Appellant's Proposition of Law V has no merit. The Board of Tax Appeals decision and order is not unlawful.

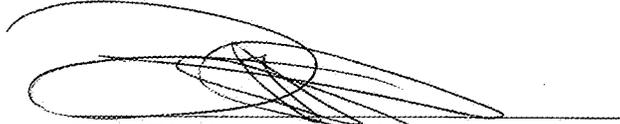
## REQUEST FOR ATTORNEY'S FEES FOR A FRIVOLOUS APPEAL

As demonstrated above, the Appellant's attempt to use a sale that was not longer recent and involved more than just real estate, and an appraisal that values more than just the real estate, to value the real property in this appeal, is in itself unreasonable and unlawful. They have no legitimate basis to contest the Board of Tax Appeals decision and order in this case based upon the evidence in the record. Pursuant to S. Ct. Prac. R. 4.03, the Appellee submits that the Appellant's appeal is not reasonably well-grounded in fact (the facts in the appeal and testimony of their own expert do not support their claims in this appeal) or warranted by existing law (see *Harbour Court* and *Chippewa Place*) or a good-faith argument for the extension, modification or reversal of existing law (they did not, through their expert or in their argument in this appeal, offer a methodology to value the real estate of assisted living facilities.) Their only argument is that appraisers should use assisted living sales data in their appraisals. See Appellant's brief at the bottom of page 9. Their own appraiser was not able to do this. Supp. at page 572 (Transcript at page 164). As a result, the Appellee requests that the Court find that the Appellant's appeal is frivolous, and award attorney's fees and costs against the Appellant in this appeal. The Appellee will file an accounting of the legal fees and costs in defending this appeal following oral argument before the Court.

**CONCLUSION**

For the foregoing reasons, the Appellee Health Care Reit, Inc. respectfully requests that the Board of Tax Appeals decision and order be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Todd W. Sleggs', is written over a horizontal line. The signature is somewhat stylized and overlaps the line.

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**CERTIFICATE OF SERVICE**

A copy of the foregoing Brief of Appellant/Appellee Health Care Reit, Inc. was served by regular U.S. mail this 5<sup>th</sup> day of August, 2013 upon the following:

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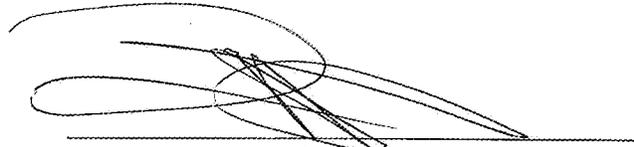
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OHIO BOARD OF TAX APPEALS

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,	)	
	)	JAN 18 2013
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

T325<sup>1</sup>-07

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.<sup>1</sup> 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

<sup>1</sup> 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.”<sup>2</sup> *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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<sup>2</sup> 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.<sup>3</sup> 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

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<sup>3</sup> 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,”<sup>4</sup> less a vacancy rate of 6% and expenses.<sup>5</sup> 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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<sup>4</sup> Mr. Ritley identified five rent comparables, which he believes indicate “that the rental rates for the subject property [from 2012 and adjusted for market conditions to the tax lien date] \*\*\* represent the most likely rents acceptable to the market as of the effective date of this appraisal.” H.R., Ex. A at 74. The rent comparables are all operated as assisted living facilities.

<sup>5</sup> 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.

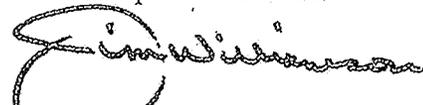
component of many sales,” making adjustments for non-quantifiable differences “questionable.”<sup>6</sup> H.R., Ex. A at 53. He also acknowledged that the comparables used in both his sales comparison and income approaches to value offer different levels and types of service. H.R. at 159. However, in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

<sup>6</sup> 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.







**S.Ct.Prac.R. 4.02. Request for Mediation.**

Except in a criminal appeal or a case related to the practice of law, a party may file a motion to refer the case to mediation pursuant to S.Ct.Prac.R. 19.01. The Clerk of the Supreme Court shall refuse to file a motion to refer a criminal appeal or a case related to the practice of law to mediation.

Effective Date: January 1, 2010

Amended: January 1, 2013

**S.Ct.Prac.R. 4.03. Frivolous Actions; Sanctions; Vexatious Litigators.**

**(A) Supreme Court sanction**

If the Supreme Court, sua sponte or on motion by a party, determines that an appeal or other action is frivolous or is prosecuted for delay, harassment, or any other improper purpose, it may impose appropriate sanctions on the person who signed the appeal or action, a represented party, or both. The sanctions may include an award to the opposing party of reasonable expenses, reasonable attorney fees, costs or double costs, or any other sanction the Supreme Court considers just. An appeal or other action shall be considered frivolous if it is not reasonably well-grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law.

**(B) Vexatious litigator**

If a party habitually, persistently, and without reasonable cause engages in frivolous conduct under division (A) of this rule, the Supreme Court may, sua sponte or on motion by a party, find the party to be a vexatious litigator. If the Supreme Court determines that a party is a vexatious litigator under division (A) of this rule, the court may impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Supreme Court without first obtaining leave, prohibiting the filing of actions in the Supreme Court without the filing fee or security for costs required by S.Ct.Prac.R. 3.04 and 3.05, or any other restriction the Supreme Court considers just.

Effective Date: June 1, 1994

Amended: April 1, 1996; April 28, 1997; July 1, 2004; October 1, 2005; January 1, 2008; January 1, 2010; January 1, 2013

of the foregoing decisions in *Snyder v. Bd. of Revision* (May 1, 1992), B.T.A. Case No. 91-C-566, unreported, and *Tollis v. Bd. of Revision* (Sept. 25, 1992), B.T.A. Case No. 91-K-589, *et seq.*, unreported.

A county board of revision is charged with the statutory obligation to hear properly filed complaints regarding the county auditor's valuation of real property, and to thereafter determine the appropriate value of that property for tax purposes. *Cleveland Bd. of Edn., supra*; *Reese Investments, supra*; *Columbus Bd. of Edn., supra*. It is proper, and in fact statutorily mandated then, that a county board of revision only dismiss a complaint on jurisdictional grounds, such as when a complaint has not been timely filed.<sup>1</sup> See R.C. 5715.19. When a county board of revision dismisses a complaint, it does not review the evidence before it relating to the valuation of the subject property or make a determination of value.

The specific issue here is the effect of the voluntary dismissal of a complaint before hearing by the board of revision. The appellant argues before this Board that a voluntary dismissal is not an adjudication of value for any tax year within the triennial period. The appellant then likens these proceedings to a voluntary dismissal under the Civil Rules, Rule 41, which reads, in pertinent part, as follows:

(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 23(E) and Rule 66, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time

before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by the defendant or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, **the dismissal is without prejudice**, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court, an action based on or including the same claim. (emphasis added)

We are inclined to the view that the limitation of successive complaints in R.C. 5715.19(A)(2) is intended to preclude the necessity for hearing and adjudication of value for the same real property by boards of revision within the same triennial period. Administrative economy is achieved but a party is afforded a determination of value within the interim period. Thus, by virtue of the voluntary dismissal before hearing, there has not been an adjudication of value of the subject real property upon the complaint filed for the tax year 1988. No prejudice should result from the action of the appellant in the voluntary dismissal of the earlier complaint.

For the foregoing reasons, the Board determines that the Motion for Remand must be, and hereby is, granted. It is hereby Ordered that this matter is remanded to the Cuyahoga County Board of Revision for hearing and a determination of the value of the subject real property.

¶ 401-766] *Chippewa Place Development Co. v. Cuyahoga County Board of Revision, et al.*

Ohio Board of Tax Appeals, No. 91-P-245, September 24, 1993.

**Property—Valuation—Federally assisted congregate care facility.**—A senior citizen congregate care facility was entitled to a reduction in its property tax valuation because the county's appraisal was not reliable. The property consisted of a 102-unit apartment-type complex that provided limited nursing care, one daily meal, and certain services to the residents. The individual apartment units were substantially the same as conventional apartments, and the tenants were able to cook most of their meals and otherwise provide for themselves. The county's market-data appraisal consisted exclusively of comparisons of the property with other congregate care facilities. As a result of the differences and variations among the properties selected for comparison, adjustments to the sales data were made. The Board of Tax Appeals rejected the county's appraisal

<sup>1</sup> In that instance, jurisdiction was never properly vested in the county board of revision.

as unreliable because the properties used as sales comparisons were not recent sales and were too remote from the location of the subject. Furthermore, certain adjustments to the sales data were not adequately explained in the report, such as the use of a gross income multiplier that was significantly higher than the average multiplier for the facilities analyzed, and a high capitalization rate. The Board accepted the owner's market data appraisal, which was based upon a comparison of selected conventional apartment buildings located within close proximity to the subject and of similar age and size.

See ¶ 20-605.

For appellant: Fred Siegel Co., L.P.A., Fred Siegel, Karen H. Bauernschmidt, Todd W. Steggs, Cleveland, Ohio. For appellees: Stephanie Tubbs Jones, Cuyahoga County Prosecuting Attorney, by William J. Day, Assistant Prosecuting Attorney, Cleveland, Ohio.

Certified by JOHNSON, Chairman.

*Decision and Order*

This matter is before the Board of Tax Appeals upon a Notice of Appeal pursuant to R.C. 5717.01. Appellant seeks a reduction in the assessed valuation of its 102 unit "congregate care" facility in Brecksville, Ohio, for the 1989 tax year. The matter has been submitted to the Board for its decision based upon the Notice of Appeal, the Statutory Transcript, the legal memoranda submitted by counsel for the respective parties, and the record of proceedings of the *de novo* hearing conducted by the Board of Tax Appeals on March 16, 1992.

The values found by the Cuyahoga County Auditor and the Cuyahoga County Board of Revision, and the values claimed by Appellant in its Notice of Appeal, are as follows:

Cuyahoga County Auditor:<sup>1</sup>

	True Value	Taxable Value
Land	\$ 535,510	\$ 187,430
Building	5,045,000	1,765,750
Total	\$5,580,510	\$1,953,180

Cuyahoga County Board of Revision:

	True Value	Taxable Value
Land	\$ 535,510	\$ 187,430
Building	5,045,000	1,765,750
Total	\$5,580,510	\$1,953,180

Appellant:

	True Value	Taxable Value
Land	\$ 500,000	\$ 175,000
Building	3,100,000	1,085,000
Total	\$3,600,000	\$1,260,000

Appraisal technique provides the point of contention for this appeal. Appellant claims

<sup>1</sup> The Statutory Transcript transposes the True Value and Taxable Value figures. We have adjusted

its property has been improperly valued. Upon review, we concur.

Chippewa Place is a 102-unit federally assisted senior citizen housing project. It was constructed in 1987 as a "congregate care" facility. A congregate care facility is not a nursing home. Rather, it is apartment-like senior citizen housing, which is designed to provide only limited care to its tenants. (R.—13, 14.) 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. There are 69 one-bedroom apartments, and 33 two-bedroom apartments. Although a nurse is continually present, a congregate care facility need not procure any particular medical facility or nursing home license from the state to operate. (R.—14, 114.) An examination of the interior and exterior pictures provided within the respective appraisal reports is quite helpful. They support Appellant's contention that the physical layout and design is quite similar to conventional multi-family apartment buildings. The floor plans in the Chippewa Place brochures also support this assertion. (St.—unnumbered pages 19—21 of Exhibit I.)

However, this congregate care facility also provides certain services which are not customarily associated with conventional apartments. In addition to nursing and a daily evening meal, Chippewa Place offers planned daily activities, transportation for shopping and special trips, weekly house-keeping, a 24 hour emergency call system, a greenhouse, lounges, library, gameroom, and

these figures to conform to their proper designations.

TV rooms. (St.—unnumbered pages 19-21 of Exhibit I.)

The county has predicated its appraisal upon a comparison of other selected congregate care facilities. However, those facilities are situated in different communities, far from the subject property. Some are 80 to 125 miles away from Brecksville, (R.—90.) Each provides a different level of service. One congregate care facility, for example, might offer one meal per day, while another may offer three. (R.—100.) In some cases services were allocated or shared between a congregate care operation and a full nursing home located in the same facility. (R.—103.) The county's appraiser testified tax appraisals of congregate care facilities are difficult because the real estate is so closely tied to the business. It is difficult to separate and differentiate real estate components from the business aspects of operating the congregate care facility.

\*\*\* typically that sort of real estate is analyzed with the services included. It's typically not analyzed any other way. The typical investor doesn't look at it this way. How much total income can I get out of this, pure and simple. That's what matters.

\*\*\* \*\*

Again, the business is very closely tied to the real estate, so it's difficult to differentiate between the two.

(R.—95.) (Emphasis added.)

Expenses varied widely between the comparables selected. One facility bore expenses of \$11,000 per apartment unit, while another carried only \$4,496 per unit. (R.—102.) The county's appraiser was questioned about this variance:

\*\*\* \*\*

Q. Okay. How do you explain the range, let's take No. 7, which also were 1988 expenses, that range of \$4,496 per suite of Norwood Apartments, and \$11,000 per suite for Park Creek. What would explain the difference which is fairly substantial between those two?

A. There is a lot. One has to do with the amount of labor that would be included for all of the amenities. Then, also the real estate itself. An older piece of real estate has higher operating expenses, heating, for example, higher maintenance, things along that line. Whereas, a more modern facility from a real estate standpoint should be cheaper to operate.

These have both these expenses. Take into consideration management's posture

as to how tightly they want to control expenses, how intensely they want to manage this. And also, some of these facilities were also part of maybe a nursing home use, where they were able to share dietary expenses.

(R.—102, 103.) (Emphasis added.)

Virtually all of the sales dates utilized in the county's appraisal are quite notably removed in time from the tax lien date of January 1, 1989—one sale by nearly 4 years (Mayfair Village); two by more than 3 years (Cottingham and West Park); and one by more than 2 1/2 years (Woodview). Appraisal Report, Appellees' Exhibit F, pages 26, 27. Only the Park Creek sale was recent, although it, too, is located in a different community.

These variations and differences may be more reflective of the inherent difficulty of finding comparable congregate care facilities, than the skill, time or effort of the appraiser. As he, himself, noted:

As far as buildings, our congregate care is somewhat of a new concept. Frankly, there are not a lot of transfers of property of this type.

(R.—73.) (Emphasis added.)

In any event, as a result of all of the differences and variations among the properties selected for comparison, a significant number of "adjustments" needed to be made by the appraiser. Sales that require large or excessive adjustments can lessen the accuracy and objectivity of the appraisal. As noted in the authoritative handbook of the American Institute of Real Estate Appraisers, *The Appraisal of Real Estate*:

When sales comparison analysis is completed, the appraiser often derives a single indication of value by reconciling the data. If a point estimate of value cannot be reached due to the scarcity or ambiguity of the data, a range of values may be appropriate. In reconciling the indications of market value, more reliance should be placed on sales that were transacted closest to the date of the appraisal and those that are most similar. *Sales that require large adjustments are generally given less consideration.*

*The Appraisal of Real Estate*, American Institute of Real Estate Appraisers, Ninth Edition, 1987, page 339. (Emphasis added.)

One area dealing with adjustments we find particularly troublesome concerns the county's sales comparison approach, and the "Gross Income Multiple Analysis" it employed. A "gross income multiplier" is a ra-

tio utilized to compare gross income to price for purported comparable sales. The county's appraisal determined the following gross income multipliers for the other congregate care facilities it selected for comparison with Chippewa Place:

**SALES COMPARISON APPROACH:**

*Gross Income Multiplier Analysis:*

Another way of analyzing the subject property relative to other sales is to compare the multiple of gross income relative to price. The multiples from the sales are repeated here for the sake of convenience.

*Congregate Care (w/services):*

Sale 1	2.50
Sale 2	4.17
Sale 3	3.62
Sale 5	3.30
Average:	3.40

Appraisal, Appellee's Exhibit F, page 29. (Emphasis added.)

Despite the fact the other congregate care facilities averaged 3.40, a gross income multiplier of 5.40 was actually used to compute the fair market value of Chippewa Place—more than any other comparable congregate care facility selected. The rationale for use of the 5.40 figure is that "adjustments" were necessary. Appraisal, Appellee's Exhibit F, page 29. When cross-examined as to this apparent discrepancy, the county's appraiser acknowledged he did not include in his appraisal report any information to support this adjustment.

Q. And what—is there any—did you include any data in your report to support the increase from 3.4 to 5.4 that you made on Page 29?

A. Not in the report itself. Again, I have in my file retained various data for apartmentments that demonstrated multiple[s] of \*\*\* six to eight is appropriate.

(R.—95, 96.) (Emphasis added.)

Thus, it appears the 5.40 gross income multiplier was actually obtained from comparisons of Chippewa Place with other "apartment buildings"—not the congregate care facilities that were selected for comparison. In any event, the methodology employed is unclear, since it has not been included in the appraisal report.

A similar area of concern is the methodology employed to determine the proper capitalization rate. Page 39 of the county's appraisal report lists the overall capitalization rates for four retirement facilities. It also lists the capitalization rates for 8 nursing homes. (See also R.—104 to 110.) After

listing these capitalization rates, the report concludes a 10.75% rate is appropriate for Chippewa Place. However, no explanation appears in the report as to how this conclusion was reached. We are unable to discern what mathematical relationship, if any, the 10.75% capitalization rate selected for Chippewa Place has to the retirement facilities and nursing homes presented in the study. From the appraiser's testimony, we are advised in a very general way that some system of "adjustment" was utilized to weigh certain factors concerning one or more of these proposed comparable facilities in order to arrive at a 10.75 rate. (R.—109.) Once again, however, the adjustment methodology actually employed is unclear, and has not been explained or included in the appraisal report. In our view, excessive adjustment to intangible factors, lack of clarity as to methodology, use of remote sales dates, and use of data which has been extensively commingled between the real estate and the business aspects of the various congregate care and nursing home facilities used for comparison increases the subjectivity (and decreases the objectivity) of the valuation process.

Appellant took an entirely different approach. It selected "conventional apartment buildings" within relative close proximity to Chippewa Place as a basis for its valuation. Not only are local multi-family apartment buildings similar in physical characteristics to Chippewa Place, Appellant reasons, they represent the ultimate highest and best use of this property. They point out that so-called "congregate care" is actually nothing more than a business, not a building use classification. Citing *Dinner Bell Meats, Inc. v. Cuyahoga County Board of Revision* (1984), 12 Ohio St. 3d 270, Appellant asserts the county has appraised "value in use"—not "value in exchange." The county's appraisal has not properly segregated the business operations of the congregate care facility from the real estate, it argues. It contends the use of conventional apartment buildings properly alleviates the business factors implicit within the county's proposed congregate care comparable properties, without the need for excessive adjustments.

In an ideal world, we would have one or more similar congregate care facilities within the same community to compare with Chippewa Place. 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 activities conducted within the premises. *Dinner Bell Meats, Inc. v. Cuyahoga County Board of Revision*, supra.

However, the world is not an ideal place. As a result, we must make some judgement as to whether the more remote congregate care and nursing home facilities submitted by Appellees are "more comparable" to the subject property than the conventional apartment facilities located in close proximity to Chippewa Place submitted by Appellant. What is "comparable property?" *The Appraisal of Real Estate*, supra, informs:

In general, comparable properties are those that compete with the property being appraised or have a demonstrable effect on prices or other relevant components of the market in question.

*The Appraisal of Real Estate*, American Institute of Real Estate Appraisers, Ninth Edition, 1987, page 144. (Emphasis added.)

How shall we treat "limited market properties," where there are few sales in the local market? Again, *The Appraisal of Real Estate*, supra, is helpful:

When appraising a type of property that is not commonly exchanged or rented, it may be difficult to determine whether an estimate of market value or use value is appropriate.<sup>2</sup> Such properties, called 'limited market properties,' can cause special problems for appraisers.

\*\*\* \*\*

Limited market properties may be appraised for market value based on their current use or the most likely alternative use.

*The Appraisal of Real Estate*, American Institute of Real Estate Appraisers, Ninth Edition, 1987, page 21. (Emphasis added.)

In our view, the conventional apartment buildings submitted by Appellant are more likely to compete with Chippewa Place, and will have a more demonstrable effect on price, rental rates and other relevant components, than the congregate care facilities proposed by Appellees. The pictures and floor plans of the individual units show they are virtually identical to conventional apartment units. See pictures in Appraisal Re-

<sup>2</sup> Note: Under *Dinner Bell Meats, Inc. v. Cuyahoga County Board of Revision* (1984), 12 Ohio St. 3d 270, we are to determine "value in

ports, Appellant's Exhibit 1 and Appellee's Exhibit F. See Floor Plan Layouts, St.—19—21, Exhibit I. The sales dates are closer in time to the tax lien date. And, they are located within the same local community. In fact, they are all within 2 miles of Chippewa Place. (R.—20.) They are subject to the same local market forces as Chippewa Place. Finally, Appellees' appraiser testified that congregate care is a "new concept," and "there are not a lot of transfers of property of this type." (R.—73.) Thus, congregate care facilities are "limited market properties," within the meaning of *The Appraisal of Real Estate*, supra. As a limited market property, we find it appropriate to determine value based upon conventional apartment buildings—their "most likely alternative use." *The Appraisal of Real Estate*, American Institute of Real Estate Appraisers, Ninth Edition, 1987, page 21.

On the other hand, the congregate care facilities submitted by Appellees are geographically distant and isolated from Chippewa Place. Some are 80 to 125 miles away. (R.—90.) They are located in different communities, and are subject to entirely different market forces. Rental rates, building codes, zoning laws and construction costs may vary widely from community to community. Income and cost of living factors are also likely to differ substantially. Elderly population demographics may be different in each respective community. Finally, the use of other congregate care facilities poses the problem of commingling the business operations conducted on the premises with the real estate, itself. The real estate must be valued separately, without regard to the particular business or business activities conducted within the premises. As Appellees' appraiser noted, the congregate care business is integrally intertwined with the real estate. He testified, "\*\*\* the business is very closely tied to the real estate, so it's difficult to differentiate between the two." Without significant "adjustments," there is a real risk of violating the mandate of *Dinner Bell Meats, Inc. v. Cuyahoga County Board of Revision*, supra, that "value in exchange," not "value in use," be determined.

The appraisal technique offered by Appellant provides us with the best evidence of the true value of Chippewa Place. It has taken into account the requirement of *Alliance Towers, Ltd. v. Stark County Board of Revision* (1988), 37 Ohio St. 3d 16, that the exchange," not "value in use." Therefore, "use value" will never be appropriate.

fee simple be valued as if it were unencumbered, and that due regard be given to market rent and current returns on mortgages and equities. Favorable federal financing terms have been isolated and removed from the valuation. We agree with Appellant, the income method is most appropriate. (R.—29.) Like conventional apartments, the most likely purchasers are investors concerned with returns on their investment. The income method is more appropriate than the cost method employed by the Cuyahoga County Auditor. While not necessarily convinced conventional apartments would make the best comparable properties in all cases, they appear to be the most appropriate in this case.

Upon consideration of the entire record, we believe Appellant has met its burden of

producing sufficient competent and probative evidence to establish the true value of Chippewa Place, and has established its right to a reduction. *R.R.Z. Associates v. Cuyahoga County Board of Revision* (1988), 38 Ohio St. 3d 198, 202. Accordingly, the Cuyahoga County Auditor is directed to correct his records, in accordance with the following:

	True Value	Taxable Value
Land	\$ 500,000	\$ 175,000
Building	3,100,000	1,085,000
Total	\$3,600,000	\$1,260,000

Said values shall carry forward in accordance with applicable law.

[¶ 401-767] *Richland County Board of Mental Retardation and Developmental Disabilities v. Roger W. Tracy, Tax Commissioner of Ohio.*

Ohio Board of Tax Appeals, No. 91:M-641, September 24, 1993.

**Property—Exemptions—Governmental agency—Public purposes—Property leased to private company.**—A portion of a county agency's building that was leased to a private pallet manufacturer was not exempt from property tax, because the property was not used exclusively for public purposes. The government agency leased a portion of its building to be used as a "sheltered workshop" by a nonprofit organization for developmentally disabled adults. The purpose of the sheltered workshop, which manufactured wood products, was to provide employment for the agency's adult clients. This portion of the building was granted exemption under Sec. 5709.08, which exempts government-owned property that is used exclusively for a public purpose. A portion of the same building was also leased to a private for-profit company that manufactured wooden pallets. The agency claimed that the use of the property by the pallet manufacturer served a public purpose because the agency placed certain adult clients in positions with the company. The Board of Tax Appeals held that this portion of the property was used for both private and public purposes and, hence, was not exempt because it was not used exclusively for a public purpose.

The privately leased portion of the property also did not qualify for exemption under Sec. 5709.121, which exempts public property that is made available under the direction or control of a state institution for use in furtherance of, or incidental to, its public purpose and not with a view to profit. The Board was unable to infer incidental use from the fact that some of the agency's clients were placed with the lessee pallet maker; the use of the property was as rental property, and the agency did not require clientele placements as a condition of the lease. Furthermore, the Board could not rule as a matter of law that the agency's lease to the company was not entered into for profit.

See ¶ 20-129, 20-292.

For appellant: Dale Musilli, Assistant Prosecuting Attorney, Mansfield, Ohio. For appellee: Lee Fisher, Ohio Attorney General, by Richard C. Farrin, Assistant Attorney General, Columbus, Ohio.

Certified by JOHNSON, Chairman.

¶ 401-767

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OHIO BOARD OF TAX APPEALS

JUN 10 1994

Harbor Court Limited Partnership,  
Appellant,

vs.

Cuyahoga County Board of Revision, et al.,  
Appellees.

CASE NO. 92-T-1054

(REAL PROPERTY TAX)

DECISION AND ORDER

APPEARANCES:

For the Appellant,

- Todd W. Sleggs, Esq.

For the County Appellees

- Stephanie Tubbs Jones  
Cuyahoga County Prosecuting Attorney

This matter is before the Board of Tax Appeals upon a notice of appeal filed under date of September 2, 1992, by appellant, Harbor Court Limited Partnership. Appellant appeals a decision of the Cuyahoga County Board of Revision which was mailed on August 7, 1992, and in which the Board of Revision determined the total taxable value for the subject property to be \$1,771,070 for tax year 1991.

Both the Cuyahoga County Auditor and the Board of Revision determined the true and taxable values of the subject property to be as follows:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
Land	\$ 628,000	\$ 219,800
Buildings	\$4,432,200	\$1,551,270
Total	\$5,060,200	\$1,771,070

Appellant disagrees with the above stated values and claims in its notice of appeal that the correct values for the subject property should be as follows:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
Land	\$ 500,000	\$ 175,000
Buildings	\$3,400,000	\$1,190,000
Total	\$3,900,000	\$1,365,000

This matter is now considered by the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to the Board by the Cuyahoga County Auditor, and the record of the evidentiary hearing. Both parties were represented by counsel. Appellant offered into evidence the written appraisal report of Paul H. Ballou, a real estate appraiser, who also testified before the Board. In addition, appellant offered the testimony of James Wymer, chief financial officer of Zapis Communications.<sup>1</sup> Counsel for the

<sup>1</sup> Mr. Wymer testified that Zapis Communications is one of the partners in the Harbor Court Limited Partnership.

county appellees offered the testimony and written appraisal report of Paul D. Provencher, a real estate appraiser.

The subject property, identified in the Cuyahoga County Auditor's records as permanent parcel number 303-12-001, is located in the Rocky River taxing district of Cuyahoga County and consists of approximately 2.58 acres of land. The land is improved with a part-five and part-six story building of approximately 106,672 square feet. The building is constructed of concrete block with a stucco on wire mesh exterior. It is divided into 121 suites.<sup>2</sup> The suites are similar to conventional apartment units and range in size from one bedroom one bath suites, consisting of approximately 584 square feet, to two bedroom and two bath suites of approximately 928 square feet. Each of the suites has its own kitchen. Heat is provided by radiant baseboard hot water heating. Air conditioning is provided to the suites by thru-the-wall air conditioners. Also located in the building are recreation rooms, a dining room, and a library. As of tax lien date, approximately thirty suites have been affected with exterior wall leaks around the air conditioning units and at the points where the walls and ceilings meet. The damage appears to have been caused by defective materials

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<sup>2</sup> The building originally contained 126 units. However, by tax lien date, several of the smaller, one bedroom units had been converted into two bedroom suites.

and/or workmanship. Repairs are expected to cost as much as \$500,000.

The building is a federally assisted congregate care facility, providing housing for elderly people ranging in age from 70 to over 90. As a result, the features in the building include extra wide doors to allow wheelchair access, emergency call buttons in all bathrooms and bedrooms, and rails along hallway walls and in bathrooms to aid residents' movements. In addition, several services are provided for the residents, including dining, housekeeping, social and recreational activities, transportation for shopping and other needs, and medical and personal services.

Harbor Court offers two types of plans for its residents. First, there is the independent care program, under which residents receive one meal per day (usually dinner). The second type is the assisted care program. Residents on this program receive three meals per day. All residents have access to the facilities, transportation and medical services. The medical staff includes a registered nurse and several aids. The nurse monitors medications, blood pressure, and blood sugar levels. She further holds health clinics and oversees referrals to other health care providers. When a nurse is not on duty, one remains on call for any emergencies which may arise.

We begin our review of this matter by noting that a party who asserts a right to an increase or a decrease in the value of real property has the burden to prove its right to

the value asserted. Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision (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 rights 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 competent and probative evidence of value is presented by an appellant, other parties asserting a different value then have the corresponding burden of providing evidence which rebuts appellant's evidence of value. Springfield Local Bd. of Edn., supra; Mentor Exempted Village Bd. of Edn., supra.

Furthermore, we note that the issue in an appeal from a board of revision is the true value of the subject property. Accordingly, this Board will proceed to examine the available record and to determine value based upon the evidence before it. Coventry Towers, Inc. v. Strongsville (1985), 18 Ohio St. 3d 120; Clark v. Glander (1949), 151 Ohio St. 229. In so doing, we will determine the weight and credibility to be accorded to the evidence presented. Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision (1975), 44 Ohio St. 2d 13.

R.C. 5713.01 reads, in pertinent part:

"The auditor shall assess all the real estate situated in the county \*\*\* at its true value in money \*\*\*."

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. Board of Revision (1977), 50 Ohio St. 2d 129, at syllabus. See, also, State, ex. rel. Park Investment Co., v. Board of Tax Appeals (1964), 175 Ohio St. 410. R.C. 5717.03 reflects the reliance to be placed on a sales price and reads, in pertinent part:

"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. \*\*\*"

Accordingly, where there exists an actual sale of real property, which is both recent and arm's length, the county auditor, as well as this Board, must consider such a sale as the best evidence of the property's true value. Conalco, supra; Park Investment, supra. In the instant matter, however, no evidence of a recent sale of the subject property has been presented.

In the absence of a recent arm's length sale, other methods of evaluating true value, including appraisals, are appropriate for consideration. See, Ratner v. Stark County

Board of Revision (1986), 23 Ohio St. 3d 59; Consolidated Aluminum Corp. v. Board of Revision (1981), 66 Ohio St. 2d 410. Appraisal evidence is the most reliable method of valuing property and may be utilized to determine true value by applying one of the three methods provided for in Ohio Adm. Code 5705-3-03: (1) the market data approach (also referred to as the sales comparison approach), (2) the income approach, and (3) the cost approach.

Both appellant and the county appellees presented appraisal evidence as to the value of the subject property. Mr. Paul H. Ballou testified on behalf of appellant and based his testimony upon a written appraisal report prepared by him and submitted into evidence. Mr. Ballou utilized all three approaches to value. In his cost approach, Mr. Ballou began by estimating the true value of the land as if vacant. To do this, he compared the sales of six parcels of vacant land, each of which is located near the subject property and has similar zoning requirements. The sales occurred between October of 1989 and August of 1992, and sold between a low of \$1.98 per square foot to a high of \$6.81 per square foot. Mr. Ballou then adjusted those values based upon size, location, and conditions to arrive at a value of \$2.70 per square foot, or a land value of approximately \$305,000.

Continuing his cost approach, Mr. Ballou next turned to the Marshall-Swift Valuation Service and utilized its data for the construction of a low cost, quality apartment building. From this data, he determined a base cost, made

adjustments for story height, sprinkler systems, the dining room extension, and for local costs to arrive at a basic replacement cost of \$4,800,792.

From his basic replacement cost, Mr. Ballou made several deductions. First, he made a deduction for physical depreciation based upon his determination that three of the building's total economic life of fifty years had been used. He made an additional 15% deduction for functional obsolescence due to the lack of balconies, the lack of dishwashers in the suites, and due to inadequate parking. He then made an additional deduction for the depreciated value of the asphalt parking. Based upon these deductions, Mr. Ballou arrived at a depreciated value for the building of approximately \$3,872,633. When land value was added to the building value, Mr. Ballou arrived at a total true value for the subject property of approximately \$4,178,000.

When valuing the subject property under the income approach, Mr. Ballou reviewed market rental data obtained for five area apartment buildings. He noted that rents at the subject property included meals, nursing care, housekeeping and other services. Accordingly, he looked at area apartment buildings in order to determine market rents for the suites at the subject property absent fees paid for the services. In doing so, Mr. Ballou observed that it was "very important to note that this economic rent represents the 'shelter rent' only in contrast to the actual rent collected for the subject building which includes meals, food service, nursing care, and

a host of other amenities and services." (Appellant's Exhibit 2, page 25.) Based upon the data collected, Mr. Ballou reported that the average rental rates for the subject property should be as follows:

one bedroom & one bath:	\$425 per month
two bedroom & one bath:	\$550 per month
two bedroom & two bath:	\$570 per month

Mr. Ballou next added in \$600 per month for miscellaneous income and determined a vacancy rate of 5%. After applying the vacancy to the income per month, Mr. Ballou arrived at an effective gross income for the subject property of approximately \$626,487 per year. He then calculated expenses for the subject property of \$152,626. Expenses included advertising, insurance, utilities, maintenance and repairs, and management fees. After subtracting expenses from income, Mr. Ballou determined the net income for the subject property at approximately \$473,861. Finally, Mr. Ballou calculated a capitalization rate of 12.36%, including a tax additur of 1.93%, to derive a value for the subject property of approximately \$3,835,000.

Mr. Ballou also opined value through the market data approach. He analyzed the sales of four apartment complexes in the area of the subject property. The sales occurred between April of 1989 and September of 1992, and sold for a price between \$15,417 per unit and \$37,167 per unit. He then adjusted those values based upon various characteristics, including size, age, and condition to arrive at a value for

the subject property of \$33,000 per suite. This yielded a total true value of approximately \$3,993,000.

Finally, Mr. Ballou combined the three approaches, and, giving most weight to the income and market data approaches, determined a value for the subject property of approximately \$3,940,000. In an addendum to his appraisal, however, Mr. Ballou made an additional adjustment to the value of the subject property. Based upon the information received regarding the water damage to the subject property, he determined that an additional \$500,000 should be subtracted to account for the cost to repair. Accordingly, Mr. Ballou opined a final true value for the subject property of approximately \$3,440,000 as of tax lien date.

Testifying on behalf of the county appellees was Paul D. Provencher. Like Mr. Ballou, Mr. Provencher utilized all three approaches to value. In opining value through the cost approach, Mr. Provencher began by determining a land value for the subject property. He compared fourteen sales. The sales occurred between 1986 and 1991. However, unlike Mr. Ballou, Mr. Provencher based his estimate of value on a price per unit derived from the sales. Mr. Provencher then made adjustments for size, location, shape, density of units per acre, and other "miscellaneous items," to arrive at a value for the

subject property of approximately \$3,200 per unit. From this, he determined a total land value of \$400,000.<sup>3</sup>

To determine a value for improvements, Mr. Provencher utilized three techniques under his cost approach. First, he looked at actual costs for the subject property. Second, he looked to "comparable facilities." Finally, like Mr. Ballou, he relied upon information contained within the Marshall-Swift Valuation Service. However, unlike Mr. Ballou, Mr. Provencher did not utilize the data relating to conventional apartment buildings. Instead, he turned to the subsection under which "Homes for the Elderly" are contained. Mr. Provencher determined that this section was more appropriate as it encompassed congregate care facilities. From this data he determined a base cost of \$51.49 per square foot. To the base cost he made a "perimeter adjustment" as well as an adjustment for sprinklers. He next factored in for local costs to arrive at a building cost of \$55.35 per square foot. This yielded a building value of \$5,724,297. To this value, he added an additional 10% for "entrepreneurial profit."

Mr. Provencher next made adjustments to the building value to account for physical depreciation. He determined that one year of the building's life had elapsed and made an adjustment of \$188,902. Unlike Mr. Ballou, he did not find

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<sup>3</sup> It is apparent from Mr. Provencher's appraisal report, that land value was calculated using the original 126 units, rather than the 121 units which existed on tax lien date.

that the building suffered from any functional obsolescence. Mr. Provencher then added \$95,000 for land improvements. After adding in land value, these adjustments yielded a value for the subject property of approximately \$6,600,000.

Mr. Provencher also testified as to the income approach as a method of valuing the subject property. Under his income approach, Mr. Provencher utilized both the direct capitalization method and the yield capitalization method. When valuing the property under the direct capitalization method, Mr. Provencher reviewed actual rents from thirteen other facilities. These facilities appear to be other assisted and independent care facilities as well as those offering more extensive nursing care.

Noting that other amenities, such as meals, transportation, housekeeping, and recreational activities, are included in rent, Mr. Provencher made a blanket deduction of 10%. This adjustment was made to remove "non-real estate amenities" from consideration and to establish an "economic rent level for real estate only." (Appellee's Exhibit C, page 41A.) Other adjustments were also made to account for the number of meals being served. For example, for facilities where rent did not include a meal, \$250 was added to rental for one meal. For facilities at which three meals were served, a downward adjustment was made to include only one meal. Other factors were also then considered by Mr. Provencher, including room size and facilities, location, modernness and cleanliness, convenience to family members,

staff and administrative attitude, recreational facilities, and dining facilities. (Appellee's Exhibit C, page 41.)

Based upon his consideration of these "comparables," Mr. Provencher determined that the actual rents obtained at the subject property were proper for consideration. After applying the rents, he determined a gross income of approximately \$1,853,700 for 126 units. From this he subtracted a vacancy rate of 5% to arrive at an effective gross income of \$1,761,015.

In calculating expenses for the subject property, Mr. Provencher looked at both actual expenses and at expense figures for three comparable properties. Based upon his review, he estimated expenses for the subject property at approximately 50%. He next used a capitalization rate of approximately 13.43%, including a tax additur of 1.93%, to derive a value for the subject property of approximately \$6,480,000.

In preparing his yield capitalization approach, Mr. Provencher relied upon a discounted cash flow analysis. Under this analysis, an appraiser makes an estimate of what a property will be worth at the end of a holding period. The appraiser then converts this future value into a present value by applying a discount rate. In his appraisal, Mr. Provencher began by selecting a holding period of five years. He next forecasted a yearly income for the entire holding period. He based effective gross income upon actual rents charged at the subject, upon the income and expense projections he made under

his direct capitalization analysis, upon his projection of rental rates over the holding period, an absorption rate of 2.5 units per month, and upon a vacancy rate of approximately 5%. He further determined that gross income would increase by 3% annually during the holding period. Expenses were estimated at approximately 57% of effective gross income. Subtracting the effective gross income from expenses, Mr. Provencher arrived at a projected net income for each year of the holding period.

Next, Mr. Provencher determined a discount rate of between 12% and 13% based upon market data and appraisal publications. He then determined a reversion, or future selling price, for the subject property. He based this upon sixth year income and expense projections and upon a 5% deduction for selling expenses. The reversion yielded future selling proceeds of approximately \$6,949,606. Finally, Mr. Provencher applied his discount rate to the yearly income and to the reversion data to arrive at a value for the subject property for tax year 1991 of approximately \$6,050,000.

In determining value through the sales comparison approach, Mr. Provencher analyzed the sales of six properties. These properties ranged in type from independent care facilities to nursing homes. The sales occurred between March of 1985 and July of 1992, with three of the five sales occurring prior to 1986. In comparing the sales to the subject property, Mr. Provencher utilized ratios of gross income multiples. The sales yielded gross income multiples

between 2.50 and 4.17. Based upon this data, the appraiser determined a gross income multiple of 3.5 for the subject property. He then applied this multiple to the projected gross income determined under his income approach to arrive at a value for the subject property of \$6,200,000.\*

Summing up his three approaches, Mr. Provencher gave the most weight to the income approach, followed by the cost approach and, lastly, the market data approach. Mr. Provencher commented that the market data approach would usually not be given the least weight; however, he gave it less consideration than normal due to the comparable properties used. Based upon this weighting, he determined a value for the subject of approximately \$6,300,000. He then took into account the water leakage and determined that approximately \$300,000 was needed to correct the existing problems. He reduced his value by this amount and made a final estimate of true value of approximately \$6,000,000.

Upon examination of the appraisal evidence, this Board finds that appellant has met its burden of showing that the subject property has a value less than that set by the Board of Revision. Central to the issue of valuing the subject

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\* In his appraisal report, Mr. Provencher had originally determined a value of \$6,400,000 for the subject property. However, at the evidentiary hearing before this Board, he testified that the \$6,400,000 value was determined using the subject's original 126 units. At the hearing, he corrected the value to reflect the 121 units which existed as of tax lien date. This resulted in the \$6,200,000 value.

property appears to be the question of what is a proper method of finding the true value of a congregate care facility. Appellant argues that the subject should be valued as apartment housing for the elderly at which a business is operated. Appellant further argues that in valuing the property, one must separate the real estate from the business so that the value of the business is not included for real estate taxation purposes. Appellees, however, maintain that a congregate care facility is not only a business but is also a distinct category of real estate. They emphasize that there are physical differences between a congregate care building and an apartment building. As a result, they maintain that higher rent must be charged.

Ultimately, both parties refer to valuing the property based upon some level of income received. On the one hand, appellant insists that income derived from the congregate care business must be separated from the rental of apartment-type units. On the other, appellees, while not denying that income derived for services should be excluded, insist that real estate rentals for the subject are higher than at a comparable apartment building because of the physical differences in the building. While we recognize that there are physical differences between the subject property and an ordinary apartment building, we are reluctant to find that congregate care facilities comprise a separate and distinct real estate category for real estate tax valuation purposes.

In our view, the central issue is the relationship between the real estate and the business operated thereon. In Chippewa Place Development Co. v. Cuyahoga Cty. Bd. of Revision (Sep. 24, 1993), B.T.A. Case No. 91-P-245, unreported (on appeal to the Cuyahoga County Court of Appeals), this Board considered a similar issue. Chippewa Place concerned the valuation of a congregate care facility. We held that in order to properly value such a property, business operations must be separated from the real property. Accordingly, we determined value based upon the property owner's comparison of the property to similar apartment buildings in the market. Specifically, we stated the following:

"Finally, the use of other congregate care facilities poses the problem of commingling the business operations conducted on the premises with the real estate, itself. The real estate must be valued separately, without regard to the particular business or business activities conducted within the premises. As Appellees' appraiser noted, the congregate care business is integrally intertwined with the real estate. He testified, '\*\*\* the business is very closely tied to the real estate, so it's difficult to differentiate between the two.' Without significant 'adjustment,' there is a real risk of violating the mandate of Dinner Bell Meats, Inc. v. Cuyahoga County Board of Revision, supra, that 'value in exchange,' not 'value in use,' be determined." Id. at 13.

Chippewa Place makes it clear that care must be taken to separate out income derived for services offered from that derived from the real estate itself. Given the great variety of services offered at these facilities, we believe that it is

not only difficult to find congregate care facilities which are indeed comparable but it is also difficult to adjust out the value derived from the use of the facility.

This is not to say that congregate care facilities may never be utilized by an appraiser in estimating the true value of real property. There may be situations where there are properties which are comparable in size, condition, and services offered. From such properties, an appraiser may be able to apply an analysis which will properly separate income earned from the real estate from that earned from the business.

In the instant matter, however, we cannot find that Mr. Provencher's income approach properly separates real estate income from service-derived income. First, Mr. Provencher made a 10% adjustment to account for what he termed "non-real estate amenities." From our review of the record, we cannot determine the basis for this adjustment. Mr. Provencher testified that this adjustment was for transportation and housekeeping services; however, it is clear that many of these facilities also offer health screening, nursing care, and other amenities. Nowhere in his adjustment does Mr. Provencher appear to take these items into consideration. Moreover, Mr. Provencher testified that the level and type of services offered differ from facility to facility. However, he utilized the same adjustment for all of his "comparable" properties.

With regard to his other adjustments to income, Mr. Provencher failed to utilize objective criteria. When looking at market rents, he stated in his appraisal report that he considered such factors as convenience to family members and staff and "administrative attitude." Such factors are highly subjective in nature. Moreover, Mr. Provencher does not indicate how he took these various factors into consideration. Next, we note Mr. Provencher's adjustment for meals at the properties. He attempted to adjust each of his purported comparable rentals so that rent would include only one meal. In our view, meals are connected to the business operations at the subject property rather than to the real estate. Accordingly, we find his corresponding adjustment to be improper.

We also cannot determine what adjustments, if any, were actually made for the subject property. After deductions for "non-real estate amenities," Mr. Provencher utilized the actual rents charged at the subject property. He states in his appraisal report that "careful attention has been given to establishing an economic rent level for real estate only." However, in later determining a rent level for the income method, Mr. Provencher stated as follows:

"Most consideration has been given to the actual rents obtained at nearby facilities throughout the subject's rental market areas to defined [sic] in the Neighborhood Data section. Generally, the rates being obtained at the subject during 1991 fall well in line with the rental rates being obtained at these facilities. I have concluded that the actual rentals for the subject were, in fact, the economic obtainable

rentals based upon market evidence and projected gross income for the subject \*\*\*." (Appellee's Exhibit 3 at 42.)

We find these two statements to be contradictory in nature. The nearby facilities referred to all include such services as meals, nursing care, laundry, housekeeping, and transportation in their rent. One of these comparable properties, for example, charges between \$1,000 and \$1,100 per month for a one bedroom one bath suite. This includes three meals, garage parking, housekeeping, transportation, and access to a medical clinic. Yet, Mr. Provencher utilized a gross rent for the subject property of \$1,100 per month for the same type of unit. Thus it appears that despite Mr. Provencher's representation that only real estate income was considered for his income approach, a rental level was utilized which included income derived for services rendered.

We also decline to accept Mr. Provencher's discounted cash flow analysis. First, Mr. Provencher testified that the income utilized for the analysis was based upon the income he determined for his direct capitalization approach. Because we find that his determination of income failed to exclude business income, we find that his reliance upon those figures for his discounted cash flow analysis is misplaced. Next, we note that the percentage of expenses utilized for each of the projected years remains stable, subject only to inflation in income. We find that this does not adequately take into account any repairs which may be necessary as the property ages. Just because an appraiser believes that repairs and

maintenance are at a certain level now does not mean that the only increase in repairs over the holding period is caused by an inflation factor. As the subject property ages, more attention to repairs and maintenance will be required. Skolnik, Comments on Discounted Cash Flow Analysis, The Appraisal Journal, July 1993.

With regard to the market data approach, we find that the properties examined by Mr. Provencher are not comparable to the subject property. Only one of the five facilities utilized by him is located in the same county as the subject. One property is located in Dublin, Ohio, over 140 miles away from Rocky River. Another is located in Cincinnati, Ohio. As a result, the sales of these properties may be influenced by local economic and market conditions, making the data supplied by them unreliable.

In addition, it appears that each facility offers different levels of services. Some of the properties offer meals; other do not. Some facilities offer nursing care in addition to independent living. Also, the physical make up of the facilities appears to differ. One sale, for example, includes a garage. Another boasts "studio" style units. The "Breckenridge" property, upon which Mr. Provencher testified he relied the most, is structurally different from the subject in that it is composed of two, twin towers rather than one multi-story building. As a result, we cannot say that these properties are comparable to the subject.

Finally, we note that three of the five sales occurred in 1985, and one other sale occurred in 1986. Changing economic, financial, and market conditions may affect the reliability of sales data over a period of time. See, Griffin v. Fairfield Cty. Bd. of Revision (Oct. 9, 1992), B.T.A. Case No. 90-P-806, unreported. Given the period of time between these sales and the tax lien date, we find the sales to be unreliable for valuation purposes.

In reviewing the cost approach, we note that the Marshall-Swift Valuation Service recognizes differences between conventional apartment buildings and "Homes for the Elderly," including congregate care facilities. While appellant may argue that, structurally, there is little difference between an apartment unit and the units at the subject property, there are several differences between the two types of buildings. For example, a congregate care facility, like the subject, must make allowances for its older residents. Wider doors are necessary to accommodate handicapped residents. Handrails are placed throughout such a facility to aid residents in moving about. Call buttons are installed in bedrooms and bathrooms for emergencies. The facility also has additional recreational rooms, a library, and a dining room. Such differences indicate that the cost to build such a facility may indeed be greater than at an apartment complex. The valuation service appears to be taking these differences into account in its "Homes for the Elderly"

section. Accordingly we find Mr. Provencher's reliance on those figures to be appropriate.

Nevertheless, we take issue with some of the adjustments which were made under the approach. First, Mr. Provencher took only one year's worth of physical depreciation. We find that as of tax lien date the building was three years old. Next, although we recognize that entrepreneurial profit is a legitimate consideration in the cost approach, we find that Mr. Provencher has not supported his 10% figure. He states that the profit figure was based upon market data; however, he does not provide any market information in support of his finding. Finally, we find that some adjustment is appropriate for functional obsolescence. With only eighty-three spaces, the parking is inadequate for the size of building located upon the subject property. Additionally, unit kitchens have no dishwashers. Because we find that Mr. Provencher failed to make proper adjustments, we decline to give weight to the estimate of value determined under the cost approach.

Turning to Mr. Ballou's market data approach, we find reliance upon the recent sales of apartment complexes to be appropriate. We dealt with a similar situation in Chippewa Place, supra. Therein, we stated:

"In our view, the conventional apartment buildings submitted by Appellant are more likely to compete with Chippewa Place, and will have a more demonstrable effect on price, rental rates and other relevant components, than the congregate care facilities proposed by Appellees. The

pictures and floor plans of the individual units show they are virtually identical to conventional apartment units. \* \* \* The sales dates are closer in time to the tax lien date. And, they are located within the same local community. In fact, they are all within 2 miles of Chippewa Place. (R. - 20.) They are subject to the same local market forces as Chippewa Place. Finally, Appellees' appraiser testified that congregate care is a 'new concept,' and 'there are not a lot of transfers of property of this type.' (R. - 73.) Thus, congregate care facilities are 'limited market properties,' within the meaning of The Appraisal of Real Estate, supra. As a limited market property, we find it appropriate to determine value based upon conventional apartment buildings - - - their 'most likely alternative use.' The Appraisal of Real Estate, American Institute of Real Estate Appraisers, Ninth Edition, 1987, page 21." Id. at 12.

In the instant matter, we find the sales utilized by Mr. Ballou to be comparable to the subject property. A consideration of the photographs and floor plans of the subject indicate that the suites are similar to apartment units. Additionally, the sales utilized are recent enough for consideration and they are located in a proximity to the subject property which we find renders them susceptible to similar market forces.

We also find Mr. Ballou's income approach appropriate for consideration. By comparing the subject property to other apartment complexes, income associated with the use of the property has been isolated and removed from a consideration of income related to the real property. We also find his capitalization rate of 12.36%, including tax additur, to be

reasonable. Finally, we find his determination of expenses to be supported by the record.

We again reiterate that we are not necessarily convinced that conventional apartment complexes make the best comparable properties in all cases; however, they do appear to be the most appropriate under the specific facts of this appeal. Furthermore, with regard to appellees' concern that the use of conventional apartments fail to account for income derived from the physical differences in a congregate care facility, we note that no competent and probative evidence has been presented by them which would support such a contention.

Turning to the issue of water leakage, we find that a deduction for a cost to cure would not be appropriate in this matter. The evidence presented indicates a cost-to-repair range of between \$300,000 and \$500,000. No estimate for repairs has been offered by the parties, nor has any person testified as to the nature and extent of the repairs which will have to be completed. Appellant does indicate that it has placed into escrow an amount of \$500,000 to cover all expenses which may be incurred due to the leakage; however, this amount appears designed to cover the highest total possible cost rather than the actual cost of repairs. (Appellant's Exhibit 3, unnumbered page 3.)

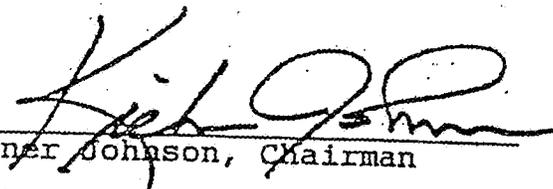
Based upon the foregoing, this Board finds that appellant has met its burden of showing that the subject property has a value less than that set by the Board of Revision and that its contention of value is supported by a

preponderance of the evidence. Accordingly, the Board of Tax Appeals finds the true and taxable values of the subject property for tax year 1991 to be as follows:

	<u>TRUE VALUE</u>	<u>TAXABLE VALUE</u>
Land	\$ 500,000	\$ 175,000
Buildings	\$3,400,000	\$1,190,000
Total	\$3,900,000	\$1,365,000

The Auditor of Cuyahoga County is hereby ordered to list and assess the subject real property in conformity with this Board's decision and order and to carry forward the determined values in accordance with law.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

  
Kiehn Johnson, Chairman