

IN THE SUPREME COURT OF OHIO

Board of Education of the Dublin City School District, :
 Appellee, : Case No. 2012-1432
 v. :
 Franklin County Board of Revision and : Appeal from the Ohio Board of
 Franklin County Auditor, : Appeals - Case No. 2009-Q-1282 to
 Appellees, : Case No. 2009-Q-1301 and 2009-Q-1408
 and :
 East Bank Condominiums II, LLC, :
 Appellant. :

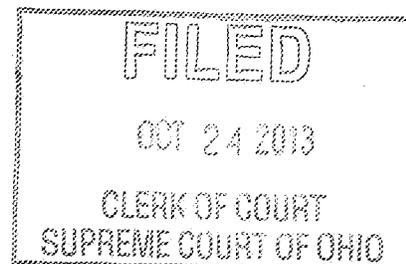
**MOTION FOR RECONSIDERATION OF APPELLEE
 BOARD OF EDUCATION OF THE DUBLIN CITY SCHOOL DISTRICT**

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Appellee,	:	
	:	
v.	:	
	:	Appeal from the Ohio Board of Appeals - Case No. 2009-Q-1282 to Case No. 2009-Q-1301 and 2009-Q-1408
Franklin County Board of Revision and Franklin County Auditor,	:	
	:	
Appellees,	:	
	:	
and	:	
	:	
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	:	
Appellant.	:	

MOTION FOR RECONSIDERATION OF APPELLEE BOARD OF EDUCATION OF THE DUBLIN CITY SCHOOL DISTRICT

Now comes Appellee Board of Education of the Dublin City School District and requests that the Supreme Court of Ohio reconsider its decision issued October 16, 2013 in the above-styled case. In summary, the reasons for this request are: (1) the Court’s ruling that the Board of Education failed to sustain its burden of proof because it did not present any new evidence of value and chose to satisfy its burden of proof before the BTA through cross-examination and post hearing brief is in direct conflict with the Court’s previous ruling in *Vandalia-Butler City School Dist. Bd. of Edn v. Montgomery Cty. Bd. of Revision*, 106 Ohio St.3d 157, 2005-Ohio-4385; (2) The Court’s holding that “the board of education did not present any evidence [to the BTA] to support its own valuation” is factually incorrect as it fails to recognize that the board of education argued for alternative values before the BTA, one of which was one the multiple

values included within the property owner's own appraisal; and (3) Holding that the BTA acted unreasonably in failing to both "conduct[] its own independent valuation" and also reinstating the auditor's original value does not justify the acceptance of an opinion of value based upon a bulk discount specifically rejected by the BTA in its decision.

HOLDING THAT THE BOARD OF EDUCATION FAILED TO SUSTAIN ITS BURDEN OF PROOF BECAUSE IT DID NOT PRESENT ANY NEW EVIDENCE OF VALUE AND CHOSE TO SATISFY ITS BURDEN OF PROOF BEFORE THE BTA THROUGH CROSS-EXAMINATION AND POST HEARING BRIEF IS IN DIRECT CONFLICT WITH THE COURT'S PREVIOUS RULING IN *VANDALIA-BUTLER CITY SCHOOL DIST. BD. OF EDN. V. MONTGOMERY CTY. BD. OF REVISION*, 106 OHIO ST.3D 157, 2005-OHIO-4385

In *Vandalia-Butler City School Dist. Bd. of Edn v. Montgomery Cty. Bd. of Revision*, 106 Ohio St.3d 157, 2005-Ohio-4385 ("Timberlake"), this Court held:

To be sure, the burden of proof rested on the board of education before the BTA, but "[h]ow a party seeking a change in valuation attempts to meet its burden of proof * * * is a matter for that party's judgment." *Snively v. Erie Cty. Bd. of Revision* (1997), 78 Ohio St.3d 500, 503, 1997 Ohio 28, 678 N.E.2d 1373. **The board of education could meet its burden of proof before the BTA by showing through cross-examination of Timberlake's appraiser and in a postearing brief -- that the board of revision had erred when it reduced the value from the amount first determined by the auditor. *Id.* at ¶9. (emphasis added.)**

The Court's finding in the present case that: "Here, the board of education did not present any evidence before the board of revision or the BTA. Thus, it failed to meet its burden" is in direct contradiction to this Court's decision in *Timberlake*. Before the BTA, the Board of Education effectively refuted East Bank's appraiser's bulk discount deduction. In its decision, the BTA correctly rejected this deduction. While the Board of Education argued for the reinstatement of the Auditor's original value because it felt that East Bank's appraisal was not competent and probative evidence of value in its entirety, the Board of Education also argued alternatively that if the BTA found some merit in East Bank's appraisal, that it should

specifically reject the bulk discount deduction and find that the value of the property was what East Bank's appraiser determined it to be prior to making the bulk discount deduction. This bulk discount deduction can be found on page IV5 of East Bank's appraisal report. Therein, East Bank's appraiser determines the "retail value" of the subject parcels as if 100% completed to be \$7,672,860. He then takes a deduction to reflect his opinion of the cost to finish the otherwise incomplete units resulting in an "as-is" valuation of \$6,492,294. This is the alternative value put forth by the Board of Education before the BTA. See Board of Education BTA Brief at 7.

Based upon the BTA's detailed analysis of and complete rejection of the bulk discount, the Board of Education, through cross-examination of East Bank's appraiser and in its post hearing brief, clearly satisfied its burden of proof under the *Timberlake* decision to demonstrate that the Board of Revision's decision was unreasonable and unlawful and that the property owner's appraisal contained another valuation for the subject property that was lawful.

THE COURT'S HOLDING THAT "THE BOARD OF EDUCATION DID NOT PRESENT ANY EVIDENCE [TO THE BTA] TO SUPPORT ITS OWN VALUATION" IS FACTUALLY INCORRECT AS IT FAILS TO RECOGNIZE THAT THE BOARD OF EDUCATION ARGUED FOR ALTERNATIVE VALUES BEFORE THE BTA, ONE OF WHICH WAS ONE THE MULTIPLE VALUES INCLUDED WITHIN THE PROPERTY OWNER'S OWN APPRAISAL.

This Court has never before held that in order to be successful as an Appellant before the BTA, that one must present *new* evidence of value in order to rebut a decision of a board of revision. To the contrary, this Court has repeatedly held that "[A] determination of the true value of real property by a board of revision * * * is not presumptively valid." *Timberlake* at ¶10 (citing *Amsdell v. Cuyahoga Cty. Bd. of Revision* (1994), 69 Ohio St.3d 572, 574, 1994 Ohio 314, 635 N.E.2d 11) and that the BTA "is not required to adopt the appraisal methodology espoused by any expert or witness." *Id.* at ¶11. (citing *Hotel Statler v. Cuyahoga Cty. Bd. of*

Revision (1997), 79 Ohio St.3d 299, 303, 1997 Ohio 388, 681 N.E.2d 425). Finally, this Court has consistently stated: “We will not reverse the BTA's determination on credibility of witnesses and weight given to their testimony unless we find an abuse of * * * discretion.” *Id.* at ¶11 (citing *Natl. Church Residence v. Licking Cty. Bd. of Revision* (1995), 73 Ohio St.3d 397, 398, 1995 Ohio 327, 653 N.E.2d 240).

In the present case, this Court found that the BTA's *decision to revert to the Auditor's original value* when “confronted with such clear evidence negating the auditor's valuation” was unreasonable and unlawful. This result, whether one agrees with this characterization of the evidence or not, does not justify a reversion to the valuation decision of the board of revision which was likewise shown by clear evidence negating the bulk discount applied thereto to be incorrect and therefore also unreasonable and unlawful. According to the *Timberlake* decision, no *new evidence* was required to satisfy Appellant Board of Education's burden of proof. All that was required was that the Board of Education demonstrate that East Bank's evidence was flawed such that the Board of Revision's decision was unreasonable and unlawful, which it successfully accomplished. By reverting back to the Board of Revision's decision accepting the bulk discount deduction, this Court's decision in essence replaces one unreasonable and unlawful valuation with another.

Under current case law, had the BTA not reverted back to the Auditor's original valuation but instead set the value at the non-bulk discounted value of East Bank's own appraiser (\$6,492,294), this Court would not have reversed the BTA absent a finding that the bulk discount was not only a proper deduction to apply to the subject property in general, but also a finding that the amount of the bulk discount applied (48%) was accurate. The Board of Education argued all along in this case that the bulk discount should not have been applied at all. The

Board of Education clearly demonstrated through cross-examination of East Bank's witnesses and through its post hearing brief that the application of a bulk discount was completely inappropriate in this case. Absent an abuse of discretion, this Court's long standing precedent dictates that a value of \$6,492,294 would have been upheld. Therefore, holding that the board of education failed to sustain its burden to prove that the decision of the board of revision was in error and to also demonstrate an alternative value for the subject property is incorrect. To hold that the board of education failed to present any evidence of value in this case simply because it chose to utilize East Bank's own appraisal ignores the fact that *the record* in this case was shown by the board of education to support a non-discounted value of \$6,492,294 if not the auditor's original value. Reverting to the board of revision's value without a complete analysis of the bulk discount amounts to the application of a presumption of validity to the board of revision decision in direct contradiction to this Court's prior rulings.

HOLDING THAT THE BTA ACTED UNREASONABLY IN BOTH FAILING TO "CONDUCT[] ITS OWN INDEPENDENT VALUATION" AND ALSO REINSTATING THE AUDITOR'S ORIGINAL VALUE DOES NOT JUSTIFY THE ACCEPTANCE OF AN OPINION OF VALUE BASED UPON A BULK DISCOUNT SPECIFICALLY REJECTED BY THE BTA IN ITS DECISION.

This Court held that "the BTA acted unreasonably and unlawfully in adopting the auditor's valuation *rather than determining the taxable value of the property.*" *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, Slip Opinion No. 2013-Ohio-4543 at ¶26 (emphasis added). In response to this, the Court's decision was not to remand the case back to the BTA in order for the BTA to lawfully fulfill its statutory responsibility to "determine[] the taxable value of the property", but rather was to "adopt the only evidence of valuation contained in the record presented by East Bank through its expert, resulting in a valuation of \$3,100,000."

Id. at ¶27. As has been previously discussed, while the East Bank appraisal in its entirety may have been the only evidence of value in the record, the value of \$3,100,000 was not the only valuation included within the appraisal report.

The \$3,100,000 valuation was the third of three different and distinct opinions of value of East Bank's appraiser. The BTA correctly rejected the bulk discount applied to East Bank's appraiser's "as-is" valuation. This Court held that the units were not 100% complete and therefore, East Bank's appraiser's "retail valuation" could not be utilized. Consequently, the only remaining lawful valuation contained in the record is East Bank's appraiser's "as-is" valuation of \$6,492,294.

In its decision, the Court stated that it was not considering whether the bulk sale approach was appropriate, not because of something the Board of Education or the other parties did or failed to do, but because the BTA failed to conduct its own independent valuation of the property taking into account the unfinished state of some, if not all, of the units, the depreciation in value, and the sales history." *Id.* at Fn. 1. However, by setting the value at \$3,100,000 without any analysis of the bulk discount or without remanding the matter back to the BTA for it to complete its statutorily mandated duties, the Court has effectively permitted the bulk discount without any analysis. This is not a just result. If the failure of the BTA to perform its statutorily mandated duties was unreasonable and unlawful, then the proper result would be for the case to be remanded back to the BTA to allow them to satisfy their responsibilities.

In fact, this Court has done just that in countless other appeals from the BTA. This Court has repeatedly held that it is not a Super BTA and is not a trier of fact *de novo*. "We have often stated that this court "is not a super BTA or a trier of fact *de novo*." *HK New Plan Exchange Property Owner II, L.L.C. v. Hamilton Cty. Bd. of Revision*, 122 Ohio St.3d 438, 2009-Ohio-

3546 (citing *EOP-BP Tower, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 1, 2005 Ohio 3096, 829 N.E.2d 686, P 17, citing *Youngstown Sheet & Tube Co. v. Mahoning Cty. Bd. of Revision* (1981), 66 Ohio St.2d 398, 400, 20 O.O.3d 349, 422 N.E.2d 846.) As the dissenting opinions correctly point out, this Court's decision in *Vandalia-Butler City Schools Bd. of Edn. v. Montgomery Cty. Bd. of Revision*, 130 Ohio St.3d 291, 2011-Ohio-5078 ("Bajarangi Corp.") presented substantially the same issue before the Court in the present case. In *Bajarangi Corp.*, the Court held that the:

"BTA failed to discharge its duty to base its decision on an independent weighing of the evidence. It is well settled that when the BTA reviews a board-of-revision decision based upon the record developed before that tribunal, the BTA has the duty to "independently weigh and evaluate all evidence properly before it" in arriving at its own decision. *Hilliard City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 128 Ohio St.3d 565, 2011 Ohio 2258, 949 N.E.2d 1, ¶ 17, quoting *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13, 15, 1996 Ohio 432, 665 N.E.2d 1098 (BTA must reach its "own independent judgment based on its weighing of the evidence contained in [the board of revision] transcript"). Equally well established is the proposition that "decisions of boards of revision should not be accorded a presumption of validity." *Colonial Village, Ltd. v. Washington Cty. Bd. of Revision*, 114 Ohio St.3d 493, 2007 Ohio 4641, 873 N.E.2d 298, ¶ 23, citing *Columbus Bd. of Edn. at 15 and Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493, 494, 1994 Ohio 501, 628 N.E.2d 1365. Read in conjunction, these two principles foreclose the approach taken by the BTA in this case." (emphasis added.)

The *Bajarangi* Court went on the state:

In deciding to retain the value found by the BOR, the BTA placed sole reliance on the bare fact that "the BOR saw fit to reduce the subject's valuation, while not to the value opined by the property owner, but to a value lower than that which the auditor had determined," along with the lack of any "indication in the record that the auditor attempted to defend and/or maintain the auditor's original valuation." BTA No. 2007-M-1022, 2009 Ohio Tax LEXIS 1286 at *102 In other words, even though the BTA itself was unpersuaded by the evidence, it adopted the BOR's reduction of value on the grounds that the BOR was persuaded. ***That constitutes the very deference that the case law prohibits.*** (emphasis added.)

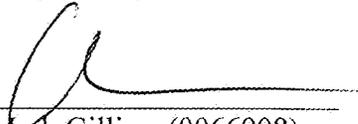
The *Bajarangi* Court correctly remanded the matter back to the BTA with an order that

the BTA fulfill its statutory responsibilities. In the present case, the BTA specifically rejected the 48% “Bulk Discount” applied by East Bank’s appraiser. While the Court’s holding that the BTA failed to conduct its own independent valuation of the property taking into account the unfinished state of some, if not all of the units, the depreciation in value, and the sale history is correct (this was the only point upon which the entire Court agreed upon), the proper result is for the Court “therefore [to] vacate the BTA's decision and remand for the BTA to conduct further proceedings....” as was done by the *Bajarangi* Court. *Bajarangi* at ¶28. By reversing the BTA’s decision and reverting to the board of revision’s decision despite the BTA’s specific determination that the 48% bulk discount was improper amounts to the same “improper deference [to the board of revision’s decision] that the case law prohibits.”

CONCLUSION

For the reasons set forth herein, this Court is respectfully requested to reconsider its decision to set the value of the subject property at \$3,100,000 and to either set the value at the only lawfully justifiable valuation contained in the record, resulting in a valuation of \$6,492,294 or in the alternative to vacate the BTA’s decision and remand for the BTA to conduct further proceedings and to conduct its own independent valuation of the property taking into account the unfinished state of some, if not all, of the units, the depreciation in value, and the sales history.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Brief of Appellee was served upon Marion Little, Zeiger, Tigges & Little, 41 South High Street, Suite 3500, Columbus, Ohio, 43215 and upon Paul M. Stickel, Assistant Prosecuting Attorney, 373 South High Street, 20th Floor, Columbus, Ohio, 43215, and upon Mike DeWine, Ohio Attorney General, 30 East Broad Street, 25th Floor, Columbus, Ohio, 43215, by regular US mail, postage prepaid, on day of this 24 day of October, 2013.


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