

ORIGINAL

IN THE SUPREME COURT OF OHIO

Board of Education of the Dublin City Schools,	:	
	:	
Appellee.	:	Case No. 2012-1432
v.	:	
	:	
Franklin County Board of Revision, Franklin County Auditor, Tax Commissioner of the State of Ohio,	:	Appeal from the Ohio Board of Tax Appeals
	:	
Appellees,	:	
and	:	BTA Case Nos. 2009-Q-1282 through 1301, and 2009-Q-1408
	:	
East Bank Condominiums II, LLC,	:	
	:	
Appellant.	:	

---

APPELLANT EAST BANK II, LLC'S MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION FOR RECONSIDERATION

---

Marion H. Little, Jr. (0042679)  
 Matthew S. Zeiger (0075117)  
 ZEIGER, TIGGES & LITTLE LLP  
 41 S. High Street, Suite 3500  
 Columbus, Ohio 43215  
 Telephone: (614) 365-9900  
 Facsimile: (614) 365-7900  
 Email: little@lithiohio.com  
 zeigerm@lithiohio.com

Mark H. Gillis (0066908)  
 Karol C. Fox (0041916)  
 RICH & GILLIS LAW GROUP, LLC  
 6400 Riverside Drive, Suite D  
 Dublin, Ohio 43026  
 Telephone: (614) 228-5822  
 Facsimile: (614) 540-7476  
 Email: mgillis@richgillislawgroup.com  
 kfox@richgillislawgroup.com

COUNSEL FOR APPELLANT EAST BANK CONDOMINIUMS II, LLC

COUNSEL FOR APPELLEE BOARD OF EDUCATION OF DUBLIN CITY SCHOOLS

Ron O'Brien (0017245)  
 Paul M. Stickel (0025007)  
 Franklin County Prosecuting Attorney  
 373 South High Street, 20<sup>th</sup> Floor  
 Columbus, Ohio 43215  
 Telephone: (614) 462-7519  
 Facsimile: (614) 525-2530  
 Email: rjobrien@franklincountyohio.gov  
 pmstickel@franklincountyohio.gov

Joseph W. Testa  
 Ohio Tax Commissioner  
 30 E. Broad Street, 22nd Floor  
 Columbus, Ohio 43215-3428  
 Telephone: (614) 466-2166  
 Facsimile: (614) 466-6401

APPELLEE JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

COUNSEL FOR APPELLEES FRANKLIN COUNTY BOARD OF REVISION AND FRANKLIN COUNTY AUDITOR

FILED  
 NOV 04 2013  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

## I. INTRODUCTION

*“[T]his Court’s opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant’s pleasure. Motions such as this reflect a fundamental misunderstanding of the limited appropriateness of motions for reconsideration.”*

[Quaker Alloy Casting Co. v. Gulfeo Industries, Inc., 123 F.R.D. 282, 288 (N.D. Ill. 1988) (emphasis added).]

These comments are equally applicable to the Board of Education’s (“BOE”) Motion for Reconsideration. By its October 16, 2013 opinion (“Opinion”), the Court held that: (1) the BOE failed to elicit any evidence supporting the Auditor’s Value and thus failed to carry its burden of proof; (2) the evidence in the record negated the Auditor’s Value and thus the BTA acted unreasonably and unlawfully in reinstating the Auditor’s Value; and (3) the only evidence of value in the record supported a \$3,100,000 valuation.

The BOE’s Motion for Reconsideration effectively challenges the first two of the Court’s three findings even though each had been thoroughly briefed and argued by the parties and, further, vetted by the Court as evidenced by the majority, concurring, and dissenting opinions. As for the third item, whether there was evidence of an alternative valuation in the record, this is an argument that the BOE strategically abandoned and elected not to even advance before this Court.

Accordingly, the Court may summarily deny the BOE’s motion. “It is not the function of a motion to reconsider . . . to renew arguments already considered and rejected . . . .” McConocha v. Blue Cross, 930 F. Supp. 1182, 1184 (N.D. Ohio 1996). See also S. Ct. Prac. R. 18.02(B)(4). As recognized by this Court in State ex rel. Shemo v. City of Mayfield Heights, 96 Ohio St. 3d 379, 381 (2002):

[R]espondents' attempted reargument of this contention is not authorized by our Rules of Practice. "A motion for reconsideration...shall not constitute a reargument of the case...."

A motion for reconsideration "based on recycled arguments only serves to waste the resources of the court." State of Louisiana v. Sprint Communications Co., 899 F. Supp. 282, 284 (M.D. La. 1995).

Nor is a motion for reconsideration a vehicle for "advancing theories of the case that could have been presented earlier." Resolution Trust Corp. v. Holmes, 846 F. Supp. 1310, 1316 (S.D. Tex. 1994). This Court has made this clear:

Additionally, we note that the motion for reconsideration apparently raises an entirely new argument. ... East Liverpool never pressed this argument in its briefs, and under our precedent it is therefore deemed to be abandoned.

[City of East Liverpool v. Columbiana Cty. Budget Comm., 116 Ohio St. 3d 1201, 1201-02 (2007) (emphasis added).]

A motion for reconsideration is thus disfavored and may be considered only under the most limited of circumstances. Such circumstances do not exist here. At bottom, the BOE seeks reconsideration by rehashing arguments previously considered and rejected, or by advancing a new argument which it opted not to present to this Court in the first instance. The BOE's motion should be denied.

## **II. A PARTY MAY NOT SEEK RECONSIDERATION UNDER S. CT. PRAC. RULE 18.02(B)(4) BY REARGUING A CASE.**

Two of the BOE's arguments for "reconsideration" are no different than the same it made and lost before this Court.

First, the BOE takes issue with the Court's determination that it was required to but did not elicit competent and probative evidence before the BTA to establish true market value. This

is exactly the same argument that the BOE made, and the Court rejected, during briefing and argument. As East Bank explained: the BOR found that East Bank had presented evidence to support a \$3,100,000 valuation and, at that point, the burden shifted to the BOE to present evidence supporting an alternative valuation. The BOE chose not to present any evidence but rather only performed a perfunctory cross-examination of East Bank's witnesses which did nothing to support the BOE's valuation.

Before the Court, the BOE took the position that it was still East Bank's burden before the BTA. The Court's precedent is clear: it was not East Bank's burden. Rather, it was the BOE's burden and the Court ultimately concluded that the BOE did not satisfy its burden.

Despite exhaustive consideration of this issue, the BOE requests the Court to reconsider the Opinion in light of this Court's decision in Board of Education of Vandalia-Butler City School District v. Montgomery County Board of Revision, 106 Ohio St. 3d 157 (2005)—a decision which was obviously available to the BOE to cite on this issue as part of its original briefing if it believed it to be significant.

It is not, however, significant. In Vandalia-Butler, the BOR decided to reject both the taxpayer's and the county auditor's claimed values, and set its own true value for the property at issue. Id. at 157. The city school district appealed the BOR's decision, and the BTA reversed and reinstated the county auditor's valuation. The BTA found that the only evidence the taxpayer had presented to the board of revision was the testimony of a real property tax consultant who the BTA deemed not qualified to offer expert testimony on the property's value. Id. at 158. Since the taxpayer had relied solely on its consultant at the BOR, the BTA concluded there was no other evidence in the record to support the BOR's decision and ordered reinstatement of the county auditor's value. Id. The taxpayer then appealed to this Court which

affirmed the BTA's decision, and held that reinstatement of the county auditor's value was "not unreasonable" in light of the lack of an evidentiary record. Id. at 159.

This case, however, is markedly different from Vandalia-Butler. Here, East Bank first established and the BOR adopted the \$3,100,000 valuation for the Units—a value that East Bank proved with competent and probative evidence, which included testimony from Mr. Horner, who is an expert appraiser that the BOE has admitted was more than qualified to testify as an expert. [Opinion at ¶¶ 23-26.] East Bank further substantiated the \$3,100,000 valuation with the testimony of its managing partner, George Babyak. Finally, there was also evidence offered as to actual market sales. Thus, the record here, unlike in Vandalia-Butler, was replete with evidence that the Court found to be competent and probative evidence supporting the BOR's valuation and contradicting the Auditor's Value the BTA chose to reinstate.

Yet, the BOE claims Vandalia-Butler is significant as it recognizes a party may meet its burden of proof through cross-examination and post-hearing briefing. We submit it cannot on a record such as this. It does not suffice for a board of education who bears the burden of proof to simply criticize one component of the property owner's evidence, ignore the remaining components, and then boldly declare its burden has been satisfied. And that's all that occurred here.

More fundamentally, the BOE cannot even make this argument. The new-minted component to its argument is that it was sufficient to cross-examine Mr. Horner, and then argue before the BTA that Mr. Horner's report provides an alternative valuation of \$6,492,294. But it made no such argument before this Court. As set forth below, it cannot advance it now.

Again, the evidence in the record here—which the Court found to be the "only evidence in the record"—supports the BOR's and now the Court's determination setting a \$3,100,000

valuation for the East Bank Units. The Court correctly reviewed the evidentiary record within the framework of its prior precedent and appropriately concluded that the BTA acted unreasonably and unlawfully in reinstating the Auditor's Value which was "affirmatively contradicted by the only evidence in the record." [Opinion at ¶ 26.] Therefore, the Court's Opinion does not create any conflict, let alone a "direct conflict" with this Court's precedent, and thus the BOE's Motion should be denied.

Second, the BOE offers another argument it lost before – that the appropriate remedy if the BOE lost before the Court was remand, not for the Court to determine its own value or reinstate the BOR's value. But the Court has already addressed this. It was presented in the briefs; at oral argument, the Court specifically inquired of counsel what the appropriate remedy would be if the Court were not to simply affirm the BTA's decision; and it is a subject of disagreement between majority and dissenting opinions. Nothing new is presented—other than an alternative valuation argument which the BOE waived the right to assert.

**III. A PARTY MAY NOT SEEK RECONSIDERATION UNDER S. CT. PRAC. RULE 18.02(B)(4) BY ADVANCING AN ARGUMENT NOT ORIGINALLY PRESENTED AS PART OF ITS ORIGINAL BRIEFING OR ARGUMENT.**

The oft-cited rule is that an argument not preserved below may not be raised for the first time on appeal. A corollary to this rule is that a party may not premise a motion for reconsideration on an argument or theory which existed but was not advanced or presented as part of its merit brief. This Court's precedent makes this clear: Reconsideration is not appropriate where "the motion for reconsideration apparently raises an entirely new argument... [which the movant] never pressed...in its briefs, *and under our precedent it is therefore deemed to be abandoned.*" City of East Liverpool, *supra*, at 1201-02 (emphasis added). See also State v. Metcalf, 2003-Ohio-6782, at ¶ 20 (Ohio App. 12th Dist. Dec. 15, 2003) ("It would be illogical to

find that the court abused its discretion in failing to grant appellant's motion for a reason not brought to its attention by appellant.").

Accordingly, the Court may and should summarily reject the BOE's alternative request that the Court adopt a \$6,492,294 valuation. Simply put, such an argument has been waived. Prior to the instant motion, the BOE strategically elected not to pursue this theory and thus did not advocate this alternative argument before the Court.

Perhaps the reason it opted not to do so is because the very alternative value now sought by the BOE was previously described by the BOE as incorrect. The BOE specifically stated that the Auditor's Value should not be "reduced on a dollar-for-dollar basis due to the estimated cost to finish." [Appellee's Brief at 19.] Where a party abandons an argument, or, as here, does not advance the argument and states that the argument is wrong, reconsideration is obviously inappropriate:

In basing its entire case on the contention that no agreement not to prosecute Appellant ever existed, Appellee was apparently very confident in its argument to that effect. We ruled otherwise, without benefit of any additional analysis by Appellee concerning Appellant's alleged breach of the non-prosecution agreement. Appellee's position here appears illogical. It can hardly be considered an obvious error on the part of this Court to rule that Appellant did not breach the non-prosecution agreement, when Appellee presented absolutely no analysis of the issue.

[State v. Stanley, 2002-Ohio-4372, ¶ 13 (Ohio App. 7th Dist. Aug. 21, 2002).]

The rationale for such a result is clear. It is an abuse of the judicial process through cynical gamesmanship for a litigant to represent to the Court that a particular position is invalid, but after failing to achieve success, then argue the exact opposite to suit an exigency of the moment. A litigant should not be permitted to profit from litigation positions that are clearly inconsistent and uttered merely to obtain judicial advantage.

Yet, even if the BOE had properly preserved this argument, the Court appropriately entered final judgment as it was entitled to do:

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from...is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

[R.C. 5717.04 (emphasis added).]

The General Assembly vested this Court with the authority to reverse and modify the BTA and enter final judgment. See, e.g., Sapina v. Cuyahoga Cty. Bd. of Rev., 136 Ohio St. 3d 188, 198 (2013) (relying on R.C. 5717.04 to modify the BTA's valuation and enter final judgment in favor of taxpayer where the BTA was found to have acted unreasonably and unlawfully based on the evidentiary record in the case).

On point is Bedford Board of Education v. Cuyahoga County Board of Revision, 115 Ohio St. 3d 449 (2007), where this Court properly relied on its statutory authority to reverse the BTA's decision and enter final judgment in the taxpayer's favor. The Court held that the BTA's reversion to the auditor's valuation was unreasonable and unlawful because the taxpayer had presented evidence contrary to the auditor's value to the BOR and the appellant board of education had failed to produce sufficient evidence before the BTA to justify a reversion. Id. at 452. This Court then explained that the evidentiary record before it rendered remand to the BTA unnecessary:

But in *Dayton*, the BOR's determination of value was not supported by the record. Thus, we needed to remand the cause to the BTA so that it could compute a new value based on the evidence in the record. In this case, however, we do not need to remand the cause to the BTA, because the BOR's determination comports with the evidence in the record.

[Id. at 453 (emphasis added).]

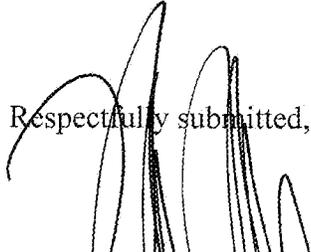
The same is true here. There is evidence in the record comporting with the BOR's determination: the report and testimony of Mr. Horner; the testimony of Mr. Babyak, East Bank's representative who testified as to multiple offers received for the unsold portion of the property; and the subsequent actual market sales. Thus, if the BOE is correct and Mr. Horner's testimony is excluded, the only competent, admissible evidence offered as to valuation was that from Mr. Babyak and the valuations established by the subsequent sales. Both of these elements were never refuted by the BOE, and thus the BOR's determination comports with the evidence in the record. The Court therefore appropriately entered judgment.

Hence, the only purpose of a remand would be to allow the BOE to remedy its failure to offer any evidence and secure the proverbial second bite at the apple. But the BOE was already afforded its day in court. The BOE had every opportunity to present its own valuation or support the Auditor's Value. By its failure to do so and application of this Court's precedent, the only result which could be reached is that found in the Court's Opinion. There is nothing to reconsider.

#### **IV. CONCLUSION**

For these reasons, the Motion for Reconsideration must be denied.

Respectfully submitted,



---

Marion H. Little, Jr. (0042679)  
Matthew S. Zeiger (0075117)  
ZEIGER, TIGGES & LITTLE LLP  
41 S. High Street, Suite 3500  
Columbus, Ohio 43215  
Telephone: (614) 365-9900  
Facsimile: (614) 365-7900  
Email: little@litoio.com  
zeigerm@litoio.com

Attorneys for Appellant East Bank  
Condominiums II, LLC

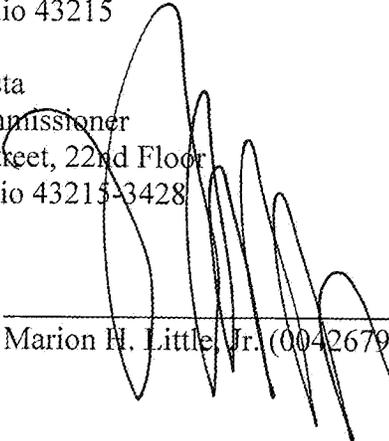
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was sent November 4, 2013, by first-class  
U.S. Mail, postage paid, to the following:

Mark K Gillis, Esq.  
Karol C. Fox, Esq.  
RICH & GILLIS LAW GROUP, LLC  
6400 Riverside Drive, Suite D  
Dublin, Ohio 43026

Ron O'Brien, Esq.  
Paul M. Stickel, Esq.  
Franklin County Prosecuting Attorney  
373 South High Street, 20<sup>th</sup> Floor  
Columbus, Ohio 43215

Joseph W. Testa  
Ohio Tax Commissioner  
30 E. Broad Street, 22<sup>nd</sup> Floor  
Columbus, Ohio 43215-3428



---

Marion H. Little, Jr. (0042679)