

IN THE SUPREME COURT OF OHIO

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

MOTION FOR RECONSIDERATION OF A DECISION ON THE MERITS OF THE CASE BY APPELLANT BEREA CITY SCHOOL DISTRICT BOARD OF EDUCATION

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RECEIVED
 JUN 28 2014
 CLERK OF COURT
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FILED
 JUN 28 2014
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MOTION FOR RECONSIDERATION

Now comes the Appellant Berea City School District Board of Education, by and through its counsel, who herein respectfully requests this Honorable Court to reconsider its decision issued June 18, 2014 in the above-styled appeal. This Motion is made pursuant to S.Ct.Prac.R. 18.02(B)(4). The reasons for the request are (1) that this Court's Opinion permits the valuation of real property to be based on comparisons to properties which are dissimilar; (2) that the BTA's decision permits the valuation of real property to be based on comparisons to properties for which the subject property's zoning would not be permissible; (3) that this Court's Opinion supports the fact that the BOE showed that the BTA's decision was unreasonable and unlawful; and (4) that the BTA's determination that Mr. Racek's appraisal is "more persuasive" is not a sufficient basis upon which to adopt Mr. Racek's value. The basis for this motion is more fully set forth in the brief attached and incorporated herein by reference.

Respectfully submitted,



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LAW AND ARGUMENT

1. This Court's decision permits the valuation of real property to be based on comparisons to properties which are dissimilar.

Taxation by uniform rule requires uniformity in the mode of assessment. *WJJK Investments, Inc. v. Licking County Board of Revision, et al.*, 76 Ohio St.3d 29, 1996-Ohio-437. This Court's decision in the instant case continues the out-of-date method of permitting assisted-living facilities to be valued as if they were apartment buildings. By so doing, the valuation of assisted-living facilities violates the requirement that land and improvements be taxed by uniform rule. While the common level of assessment may be the same for apartment buildings as for assisted-living facilities, the starting point for valuation is not. The decision permits one classification of property to enjoy the benefit of taxing the property as if it were something else; in this case, an apartment building.

The BOE showed that the comparable apartment buildings and the subject assisted-living facility are very different types of properties. The size and amenities vary significantly as evidenced in the chart contained within the BOE's brief. See Board of Education Brief, page 11. The differences in the amenities show that the properties have dissimilar purposes. Apartment buildings are homes. They have kitchens, bedrooms, bathrooms, living rooms, balconies or patios and more. Assisted-living facilities, on the other hand, are created to care for individuals, in this case for those who cannot live alone or perform all their daily activities without the assistance of others. The amenities in an assisted-living facility are geared for those who cannot take care of themselves and include round-the-clock medical assistance. The facilities are usually fenced in for the protection of the residents, there are communal dining and living rooms and a kitchen. Meals are not prepared by the residents but by a staff and taken in the communal

dining room. In some assisted-living facilities, there are no individual kitchens or appliances. Apartment buildings are not marketed to those who need supervision over their daily tasks and assisted-living facilities are not marketed to people who can take care of themselves.

The properties serve different functions and appeal to different segments of the population. The BOE submits that the BTA's decision is unreasonable and unlawful because it permits the property to be valued as if it were something else. Most importantly, though, the BTA's decision does not address how the two dissimilar properties can be compared to each other for valuation purposes. It is impossible to tell from the BTA decision how it arrived at its decision of permitting an apartment building comparison to control the valuation of property which is clearly not an apartment building.

To be taxed consistent with the Ohio Constitution (Section 2, Article XII states: "Land and improvements thereon shall be taxed by uniform rule according to value..."), assisted-living facilities should be taxed in comparison to other assisted-living facilities. To hold otherwise, closes the door on taxing properties based on a uniform rule. Although the common level of assessment remains the same for each property, the types of properties are different; and therefore, the threshold for valuation is different. It opens the door, as the dissent states to cause the subject property to be compared "to abandoned car dealerships and factories of similar square footage?" *Health Care REIT, Inc. v. Cuyahoga County Board of Revision, et al., Appellees; Berea City School District Board of Education, Appellant*, Slip Opinion No. 2014-Ohio-2574 at ¶80. While at one time valuing assisted-living facilities as apartment buildings made sense since the concept and development of assisted-living facilities was just developing, nearly two decades have passed and there are a plethora of assisted-living facilities throughout the state and

numerous facilities have transferred giving appraisers a broad range of data from which to extract information.

The Country's aging population has caused a new niche in commercial properties to be developed; namely, the assisted-living facility. As the large population known as "Baby Boomers" enter their golden years, commercial entrepreneurs have had the foresight to develop a new housing market. This new market is now an established market as evidenced by the growing number of assisted-living facilities being developed and traded in the open market.

To allow appraisers to say that an assisted-living facility is like an apartment is totally inappropriate. This large part of the commercial market is actually more similar to a hotel than an apartment. The only difference is the length of stay but the amenities and services are more similar to a full-service hotel and an apartment.

Admittedly, it is a more difficult appraisal assignment, but to allow the value of an assisted-living facility to be established by comparing it with an apartment is like comparing an apple to an orange. The law demands better and the appraiser's standard of practice needs to meet that higher standard.

The BTA's decision gives one classification of property an advantage that other classifications do not have; that is, the ability to be compared to properties which are not similar to them. No other classification of property enjoys this benefit.

2. The BTA's decision permits the valuation of real property to be based on comparisons to properties for which the subject property's zoning would not permit.

The subject property is zoned as a Senior Residence/Live Care District. It is not zoned for multi-family. The BTA's decision is unreasonable and unlawful because it permits the property to be appraised as an apartment building which the zoning would not permit. As with

the decision to permit appraising the assisted-living facility as if it were an apartment building, ignoring the zoning restrictions of a property permits the use of any type of property as a comparable.

The theory of Mr. Racek's appraisal is that the Property could be rented out as an apartment building. In order for the Property to become an apartment complex, the units would have to be reconfigured and reduced in order to comply with the size requirements of the zoning ordinance. Furthermore, all occupants would have to be 60 years of age or older..

Mr. Racek testified that if legally allowed, the Property could be leased to Baldwin Wallace University students. This logic requires three assumptions; first, that the Baldwin Wallace University students are 60 or older; second, that someone is willing to purchase the property and reconfigure the property from that of assisted-living units to apartment units; and, third, that the 60-year old Baldwin Wallace student needs assisted living. Although Mr. Racek reviewed the zoning information prior to preparing his report, he did not "care" how old a resident of the Property had to be even though the City's zoning required that only persons aged 60 years or older could reside in the Property. See Board of Education Brief, pages 3, 4.

It is unreasonable to accept Mr. Racek's report which ignored the zoning restrictions for a subject property and reject Mr. Ritley's report which did take into account the zoning restrictions and compared the subject property to other assisted-living facilities. By extension, if it acceptable to appraise a property by comparing it to a totally different property, then appraisers do not need to be concerned with zoning restrictions.

3. The Court's Opinion supports the fact that the BOE showed that the BTA's decision was unreasonable and unlawful.

This Honorable Court states throughout its decision that the BOE failed to overcome the burden of showing that the BTA's decision was unreasonable and unlawful. We respectfully disagree. Even this Court had issues with Mr. Racek's appraisal. That fact alone is the proof that the BTA's opinion is unreasonable and unlawful. As this Court stated: "The BTA's identification of certain problems with Racek's analysis in *Elm St.* arguably does highlight flaws in Racek's present appraisal. But the BTA did not cite the same problems with Mr. Racek's adjustments in this case that is identified in *Elm St.* Accordingly, we cannot conclude that *Elm St.* required the BTA to reach a different outcome here." *Id.* at ¶50. The fact that the BTA did not expound on Mr. Racek's adjustments and distinguish it from *Elm St.* is unreasonable and unlawful. This Court is very aware of the importance of distinguishing cases as it did when it criticized the BOE's use of the *Porter* and *Park Place* cases in its brief. *Id.* at ¶¶35-38. The need for and the ability to distinguish cases goes to the very core of case law.

That is the point of an appeal. With those three sentences quoted above, this Court has essentially concluded that that BTA decision is unreasonable and unlawful. There are flaws in Mr. Racek's appraisal. The BTA did not address the flaws. The BTA's purpose is to address the flaws so that this Court can determine if a different outcome would have or should have been reached. To permit the BTA to cavalierly ignore its purpose of supporting its opinion of value with a well-thought out, reasoned conclusion is to permit a disservice to the parties of the appeal.

Further, this Court states: "Racek's unchanged valuation is somewhat perplexing..." *Id.* at ¶58. The BOE submits that this is further proof that the BTA's decision is unreasonable and unlawful. Mr. Racek added additional apartment sales and market rents to his report prepared for the BTA from his report prepared for the BOR. However, in spite of this new market information, Mr. Racek's opinion of value did not change by even one dollar. This conclusion

defies logic. So much so, that this Court even agreed that Mr. Racek's unchanged value was "somewhat perplexing". In spite of this new information, the BTA did not question Mr. Racek's unchanged value. All the BTA did was state that Mr. Racek's valuation was more persuasive. The BTA did not explain why Mr. Racek's report was more persuasive. There is no explanation as to why the BTA did not question this unchanged conclusion of value of Mr. Racek's. It bears reiteration, even this Court, itself, found Mr. Racek's unchanged valuation "somewhat perplexing".

4. The BTA's determination that Mr. Racek's appraisal is "more persuasive" is not a sufficient basis upon which to adopt Mr. Racek's value.

The Court states: The BTA could have explained additional aspects of its reasoning, but its failure to do so does not necessitate reversal." *Id.* at ¶70. This Honorable Court's Opinion permits the BTA to issue decisions which offer no explanation for their valuation determinations at all. A BTA decision can now be summed up in one sentence: "We find Appraiser So-and-So more persuasive" and this Court will have to affirm that decision. The decision could be based on comparing an empty warehouse to a shopping mall or a residential property to a commercial shopping center. The decision could be based on pure nonsense but neither the parties to the appeal nor this Court would ever know because the BTA would not be required to explain its decision any further.

In at least three paragraphs of its Opinion, this Court has stated there are issues with Mr. Racek's opinion methodology. If the BTA is never required to account for its decisions in writing, then the BTA will never be wrong no matter what its decision.

It is not enough for the BTA to come forth with an opinion that states that it finds one appraiser more persuasive than another. It must be required to explain why. The BTA criticized

Mr. Ritley's appraisal and then said it found Mr. Racek's appraisal more persuasive. But as this Court has pointed out, there are flaws with Mr. Racek's appraisal.

The BTA is not required to accept any appraiser's report. *Independence School Dist. Bd. Of Edn. v. Cuyahoga county Bd. of Revision, et al.*, 2010-Ohio-5845; Ohio App. LEXIS 4915. It has the option of finding that neither appraiser put forth competent, probative evidence. The BTA could look at all the evidence, including the income and expenses for the property, and develop its own opinion of value. The BTA could also reject all the evidence and maintain the BOR's valuation. *Vandalia-Butler City Schools Bd. of Edn. v. Montgomery Cty. Bd. Of Revision*, 130 Ohio St.3d 291, 2011-Ohio-5078, 958 N.E.2d 131, Par. 26 ("When there is sufficient evidence to permit the BTA to perform an independent valuation ... the BTA must do so.").

More should be required of the BTA than to simply find one appraiser's opinion of value "more persuasive" than another's. When a County's valuation of a property is challenged, considerable time and expense goes into attempting to get the right value. A change in the value does not just affect the taxpayer but also the school district, county, library, and the city in which the property is located. Expenses for appraisers and legal counsel are incurred. Sometimes years have passed before a decision is rendered.

It is for these reasons that the BTA should be required to render a decision that shows that a great deal of thought and effort was expended on their part to arrive at a value that fairly and accurately values the property as of the tax lien date. The BOE submits that this BTA decision is unreasonable and unlawful because it fails to adequately explain why the value of an assisted-living facility should be determined by comparing it to an apartment, which it can never be, resulting in a reduction in value of over \$5,000,000 as a consequence of reducing the value

from \$8,740,000 to \$3,100,000. The parties deserve more of an explanation from the BTA than a “more persuasive” conclusion, particularly in light of the enormous loss of income to the school district, city, library, and county.

CONCLUSION

For the reasons set forth herein, this Honorable Court is respectfully requested to reconsider its decision to affirm the decision of the BTA which accepted Mr. Racek’s opinion of value and to either set the value at Mr. Ritley’s value of \$5,400,000 since it values the subject property as what it is – an assisted-living facility; or, in the alternative, to vacate the BTA’s decision and remand for the BTA to conduct its own independent valuation of the property taking into account the actual income and expense information which is generated by the property.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion for Reconsideration of Appellant Berea City School District Board of Education was sent by overnight delivery to counsel for Appellee, Cuyahoga County Board of Revision and Cuyahoga County Auditor, Sandra Curtis-Patrick, Cuyahoga County Prosecutor's Office, The Justice Center, Eighth Floor, 1200 Ontario Street, Cleveland, Ohio 44113; to the counsel for Appellant Todd W. Sleggs, Esq., Sleggs, Danziger & Gill Co., LPA, 820 W. Superior Avenue, Seventh Floor, Cleveland, Ohio 44113; and to counsel for the Tax Commissioner, R. Michael DeWine, Attorney General, State Office Tower, 30 East Broad Street, 17th Floor, Columbus, Ohio this 25th day of June, 2014.



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