

IN THE SUPREME COURT OF OHIO

Dayton-Point West Real Estate Assoc. LLC :
 Appellee, : Case No. 2014-0927
 and :
 Board of Education of the Kettering City :
 School District, :
 Appellant, : Appeal from the Ohio Board of
 v. : Tax Appeals, BTA Case Nos.
 : 2011-4472 and 2011-4478
 Montgomery County Board of Revision, and :
 Montgomery County Auditor, :
 Appellees. :

MERIT BRIEF OF APPELLANT BOARD OF EDUCATION OF THE KETTERING CITY SCHOOL DISTRICT

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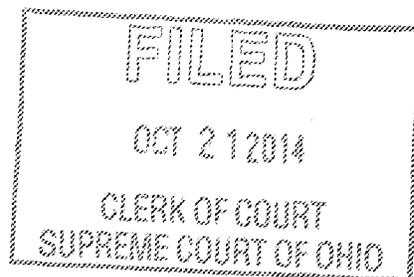


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STATEMENT OF THE CASE AND FACTS

This is an appeal from the Board of Tax Appeals (BTA) involving the determination of the true value in money of three separate multi-tenant offices buildings located in the City of Moraine in Montgomery County for tax year 2010. The separate properties are referred to by their addresses: 3033 Kettering Boulevard, which is a 47,838 square foot office building located on 3.74 acres of land; 3055 Kettering Boulevard, which is a 90,824 square foot office building located on 4.38 acres of land; and 3077 Kettering Boulevard, which is a 46,428 square foot office building located on 2.95 acres of land.

Dayton Point filed a complaint with the Board of Revision (BOR) for tax year 2010 and presented the Montgomery County Board of Revision (BOR) with three separate appraisals prepared by Timothy Dunham. The Montgomery County Board of Revision rejected Dunham's appraisals and determined its own values for the three properties. Both the Board of Education (BTA Case No. 2011-4478) and the property owner (BTA Case No. 2011-4472) appealed the BOR decisions to the BTA. The BTA reversed the BOR decision and summarily adopted Dunham's values without any independent analysis of his data or methodologies instead choosing to defer to Mr. Dunham's "subjective judgments." The values at issue are the following:

<u>Address</u>	<u>Auditor</u>	<u>BOR</u>	<u>Dunham/BTA</u>	<u>Parcel No.</u>
3033 Kettering	2,150,300	1,348,260	1,240,000	J44 04103 0219
3055 Kettering	3,000,380	2,016,110	1,750,000	J44 04103 0222
3077 Kettering	2,044,550	1,042,590	900,000	J44 04103 0183

1. June 2007 Sale of the Properties

The three properties were purchased by Appellee Dayton Point West Real Estate Associates (Dayton Point) on June 15, 2007, for the sum of \$7,400,000. The deed for this sale

was submitted to the BTA, but the conveyance fee form was not available from the Montgomery County Auditor.

The Montgomery County Auditor conducted a six-year reappraisal of the properties for tax year 2008, and his appraised values were essentially the same as the total sale price of the properties in the sale of June, 2007. The Auditor's appraised values for the three properties were the following:

June 2007 sale price for three properties	7,400,000
Auditor's value - 3033 Kettering	2,150,300
Auditor's value - 3055 Kettering	3,000,380
Auditor's value - 3077 Kettering	<u>2,044,550</u>
Total	7,195,230

Dayton Point did not present an allocation of the total purchase price to the three properties. Under these circumstances, the County Auditor's 2008 six-year reappraisal values constitute a confirmation of the sale prices of the three properties and a proper allocation of the total sale price to the three individual properties.

2. Dunham Analysis of the June 2007 Sale Price

Dunham analyzed the June, 2007 sale as he was required to do by R.C. 4763.12 and R.C. 4763.13, which incorporate the USPAP standards into state law (USPAP Standards Rule 1-5(b)). This rule required Dunham to "analyze all sales of the subject property that occurred within the three (3) years prior to the effective date of the appraisal"). He did so by using the June, 2007 sale of each of the three properties as comparable sales in his market or sales comparison approach (each was Sale No. 5) and by making adjustments to the sales to bring them up to January 1, 2010. After he made his adjustments, he arrived at a total value for the three properties of \$3,890,000 as of January 1, 2010, compared to the actual sale price for three

properties of \$7,400,000. He claimed that the difference between the June 2007 sale price and his own value of \$3,890,000 was due to only two factors:

A. Market Conditions – Dunham claimed that each property lost 10% of its value due to what Dunham called “market conditions/time.” He stated that “[a]ll of the sales occurring after the start of the last recession (December 2007) are considered to have sold in similar circumstances to the effective date of the appraisal” (appraisals, p. 38(39) and 39(40))¹, and for a sale taking place prior to December, 2007, he deducted a flat 10% off the sale price because the market conditions were presumably not “similar.” Supp. p. 42, 95, 148 and Supp. p. 43, 96, 149.

B. Lost Net Income - Dunham then made another adjustment for the same claimed change in market conditions in order to arrive at his extraordinarily lower values by claiming that each of the three properties lost value from the date of sale due to the loss of “net income” up to January 1, 2010 (appraisals, p. 38(39) and 39(40)). Supp. p. 42, 95, 148 and Supp. p. 43, 96, 149. According to Dunham this loss of income was calculated as follows:

Net Income/SF: The net income for each sale is compared to the subject net income [the three properties are comparable to themselves]. Then the difference is capitalized into an adjustment by that particular sales capitalization rate.

The results of his calculations were that 3033 Kettering lost an additional 37% its value due to lost “net income;” 3055 Kettering lost an additional 46% of its value due to lost “net income;” and 3077 Kettering lost an additional 55% of its value due to lost “net income” from the date of sale to tax lien day, January 1, 2010. Dunham appraisals, p. 38(39), Supp. p. 42, 95, 148. It was on the bases of these two deductions (market conditions and lost “net income”) that

¹ All three of Dunham’s appraisals are identical except where differences in the properties required changes in the wording. The pages in the appraisals of 3055 and 3077 Kettering are the same, but the 3033 Kettering appraisal contains an extra photograph at p. 21. Page references will be in the form 38(39) with the first number being to the appraisals of 3055 and 3077 Kettering, and the second page number reference is to the appraisal for 3033 Kettering.

Dunham claimed that the June 2007 sale price of the properties no longer reflected the true value of the property. In footnote 2 on page 2 of its decision, the BTA summarily concluded that the June, 2007, sale price was “too remote from the tax lien day,” but it did not identify a single fact to support or to justify that conclusion, and what the BTA based this conclusion on is unknown.

However, since Mr. Dunham’s two “lost value” claims were the only evidence in the record that could possibly support the BTA’s conclusion, the facts that Dunham included in his appraisal report are critically important even though the BTA failed to analyze any of them. Had the BTA bothered to perform its statutorily required duty to perform a *de novo* review of the evidence and to independently determine value, it would have concluded that, despite Mr. Dunham’s claims, two of the subject properties, 3033 Kettering and 3077 Kettering, in fact lost no “net income” and therefore no value whatsoever between the sale of June, 2007, and tax lien day. In fact, both of these properties were just as, or more, valuable on tax lien day than each was on the date of sale under Dunham’s own theory. One of the three properties, 3055 Kettering, did see its actual income decline between the date of sale and January 1, 2010. All of the lost “net income” that Dunham attributed to the other two properties was due solely to the lost net income of 3055 Kettering.

3. Dunham’s Lost Income Analysis to Discount the June 2007 Sale

Dunham’s lost net income analysis is shown to be incorrect for two of the properties (3033 and 3077 Kettering) by the actual income and expense data Dunham included in his appraisal reports. To determine the lost net operating income from the date of sale to January 1, 2010 Dunham simply compared net operating income per square foot for the properties *on the date of sale* to net operating income per square foot *as of January 1, 2010*, and he determine a

loss in value due to the difference between the two figures by capitalizing the lost income per-square-foot into a value deduction. This is a dubious approach in the first place because it is solely dependent upon the performance of the subject property and is not based on any market derived data. Under Dunham's theory, a building that was purchased with tenants that later became vacant would be worth \$0 because it would necessarily have a 100% "loss of income" and consequently a 100% downward adjustment for loss of income resulting in a value of \$0. When this analysis is then coupled with the actual 10% adjustment made for the same change in market conditions, it becomes clear that Mr. Dunham made multiple adjustments for the very same thing. The data given by Dunham for these calculations were as follows (Sale #5) :

Dunham appraisals, p. 40(41), Supp. p. 44, 97, 150:

Address	<u>3033 Kettering</u>	<u>3055 Kettering</u>	<u>3077 Kettering</u>
NOI date of sale	\$3.95	\$3.95	\$3.95
NOI January 1, 2010	<u>\$2.65</u>	<u>\$2.32</u>	<u>\$1.99</u>
Claimed "Lost NOI"	-\$1.30	-\$1.63	-\$1.98
Claimed Value Loss per sq. ft.	\$13.21 (37%)	\$16.57 (46%)	\$19.92 (55%)
Actual NOI date of sale²	\$1.90	\$5.89	\$1.56
Actual Change in NOI	+\$0.75	-\$3.57	+\$0.43
Actual Change in Value	+39.5%	-60%	+27.5%

The actual in the above chart clearly demonstrate that Mr. Dunham's method of determining his NOI date of sale figure by *averaging the net income for all three properties together* (\$3.95) distorted the net income figure on date of sale for all three properties by a significant amount.

The sale price of the three properties was \$40 per square foot. Dunham appraisals, p. 38(39)), Supp. p. 42, 95, 148. Dunham's 10% market condition adjustment and his lost net

² NOI calculations for date of sale

3033 Kettering - (\$388,707 - \$297,722 = \$90,985 / 47,838 sq. ft. = \$1.90 per sq. ft.)

3055 Kettering - (1,267,557 - \$656,626 = \$631,040 / 90,824 sq. ft = \$5.89 per sq. ft.)

3077 Kettering - (\$365,233 - \$292,704 = \$72,529 / 46,428 sq. ft. = \$1.56 per sq. ft.)

income adjustment constitute a double deduction for the same thing. The only difference is that the 10% market condition adjustment was presumably based upon Mr. Dunham's analysis of *market data* and the "net income" loss adjustment was based upon the short-term change in the occupancy of one of the three properties and was in no way based upon any market based data.

A. Dunham's use of *Average* NOI for all Three Properties

The first thing to see is that Dunham used the same figure (\$3.95) for the NOI on the date of sale for all three properties. This is because despite appraising the properties separately, he lumped together the income and expenses for all three properties for purposes of making the NOI date of sale calculations for each individual property and he applied the *average* (\$3.95) to all three properties as the net income for each separate property on date of sale (appraisal, p. 37(38)). Dunham stated that the average net income figure of \$3.95 was based on the following data:

Total income for 3 properties at date of sale	\$2,071,191
Total expenses for 3 properties at date of sale	<u>\$1,343,169</u>
Total NOI for 3 properties at date of sale	\$728,022

See Dunham Appraisals p. 37 (38), Supp. p. 40, 93, 146.

Total square feet for all 3 properties	185,090
Average NOI for all 3 properties together at date of sale	\$3.95 (Comp. #5)

See Dunham Appraisals p. 40(41), Supp. p. 44, 97, 150.

This approach makes sense, of course, only if the NOI for each of the three properties matched the average NOI assigned to it by Mr. Dunham. The actual income and expense data show, however, that none of the three properties had an NOI on the date of sale that even approximated Dunham's average of \$3.95 for date of sale NOI. The correct NOI on the date of sale for each of the three properties, which is based on the actual income and expenses

statements for each property, were shown in the figures in the chart of page 5 of this brief. This shows that when Mr. Dunham assigned the average NOI to each of the three properties he totally distorted the picture for two of the properties (3033 Kettering and 3077 Kettering), never mind the fact that he never compared the actual income and expense data to the market in this regard.

At other critical places in his appraisal, Dunham also averaged data from all three properties and applied the average to each separate property. He did so for purposes of calculating a vacancy rate for each property. The average vacancy rate for all three properties on January 1, 2010, was 31.4%, which Dunham applied to all three properties. However, the actual vacancy rate for two of the properties was substantially less: 3033 Kettering had a actual vacancy rate of only 21% (appraisal, p. 33, Supp. p. 36) and 3077 Kettering had an actual vacancy rate of only 24% on tax lien day (appraisal, p. 32, Supp. p. 142).

B. Actual Income and Expense Data

The actual income and expense data can be found in Mr. Dunham's appraisals on page 30(31) This data shows that 3033 Kettering and 3077 Kettering *lost no net income* between the date of sale and tax lien day and, therefore, neither lost any value using Dunham's analysis. This is also evidenced by Dunham's statement in each appraisal that market rental rates for the properties had recovered from the recession *by 2009* and were back to the date of sale levels. According to Dunham: "The subject trend for new market leases is downward for the first two years [after the sale] and stabilizing near 2007 levels in 2009 for both the going in rental rates and the effective rental rate." Dunham appraisals, p. 27(28)), Supp. p. 31, 84, 137.

Actual Operating Expenses for the Three Properties 2008

<u>Address</u>	<u>2008</u>
3033 Kettering	392,795
3077 Kettering	389,404
3055 Kettering	<u>752,614</u>
	\$1,534,813 Dunham Appraisals p. 50(51), Supp. p. 54, 107, 160.

Dunham's date of sale expenses = \$1,343,169³

There is a difference between the 2008 operating expenses and Mr. Dunham's date of sale operating expenses (\$1,534,813 compared to \$1,343,169), and there is no evidence in the record to account for the difference because Dunham failed to include in his appraisal reports any of the income and expense data for 2007, including data for the last five months of 2007 during which Dayton Point owned the property. However, the actual 2008 operating expenses included a total of \$313,446 in "Non Recurring R&M" (Dunham Appraisals p. 50(51), Supp. p. 54, 107, 160) which by the fact that it is a "non-recurring" expense should not have been present in the 2007 expenses and which Dunham should not have included in his calculations; and not using this expense would result in actual 2008 operating expenses being less than 2007 operating expenses.

The actual income and expense data can also be examined to see if any of the properties lost net income from the date of sale to January 1, 2010. The actual data for the properties show the following (the actual income and expenses statements for 2008, 2009, and 2010 are included on the last page of each of Dunham's appraisals (50/51), Supp. p. 54, 107, 160:

³ This is calculated by taking Mr. Dunham's Effective Gross Income (EGI) figure for the sale of the subject properties and subtracting Mr. Dunham's Net Operating Income (NOI) figure. (2,071,191-728,022 = 1,343,169.

Actual Income for the Three Properties

<u>Address</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	
3033 Kettering	388,707	388,131	528,946	(appraisal, p. 51)
3055 Kettering	1,287,557	1,160,963	843,678	(appraisal, p. 50)
3077 Kettering	365,233	408,807	323,177	(appraisal, p. 50)

Actual Operating Expenses for the Three Properties Without "Non-Recurring R & M"

<u>Address</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	
3033 Kettering	297,722	295,381	323,437	(appraisal, p. 51)
3055 Kettering	630,941	610,671	547,163	(appraisal, p. 50)
3077 Kettering	292,704	284,387	269,439	(appraisal, p. 50)
<u>3033 Kettering</u>				

The actual income and expense data show that this property lost no net income from January 1, 2008 to January 1, 2010, and the net operating income actually increased by \$1,765 during this period of time. Furthermore, this property then substantially increased in value from 2009 through 2010 in that the income increased substantially from 2008 through 2010, and the expenses increased in only a small amount. This data directly contradicts Dunham's claim that this property lost more than 32% of its net operating income and 37% of its value between the date of sale and tax lien day.

3055 Kettering

A comparison of the 2008 actual income for this property (\$1,287,557) compared to the other two properties shows that this property was 3½ times more profitable than the other two properties at the date of sale, yet it was only twice the size of the other properties, and the net operating income per square foot was four times higher than the net operating income per square foot of the other two properties. Therefore, when Dunham averaged the net income from this property with the other two, the results were distorted by increasing the average NOI on the date of sale to a substantially higher figure than was representative of the other two properties. This

produced a substantially higher and totally artificial loss in value for these two properties from the date of sale to tax lien day.

This one property, 3055 Kettering, lost a single tenant which resulted in the loss of all of the income from the date of sale to tax lien day that Dunham attributed to the three properties together. The actual income fell from date of sale, going from \$1,266,489 in 2008, to \$1,182,367 in 2009, to \$836,279 in 2010. This loss in income is essentially attributable to the loss of one 19,837 square foot tenant, Kaplan College, in 2009, representing 23% of the space in the building, and this space remained vacant due to the extraordinarily high cost to transform the space from college classrooms to office space (3055 Kettering appraisal, p. 15). The loss of this tenant must have taken place late in 2009 because the income loss appears in 2010. This would no doubt largely account for the fact that the owner closed this building in 2011. However these facts have no impact on the performance or value of the other two properties and this unique factor for 3055 Kettering should not be used to average the three properties together.

3077 Kettering

Dunham claims that this property lost 55% of its net operating income from the date of sale to tax lien day, but the actual income and expense data directly contradict this claim. This property, in fact, gained a substantial amount of net income from 2008 to 2009: income increased from \$365,233 up to \$408,807, and expenses decreased from \$292,704 to \$284,387. While this property lost income in 2010, it did not lose any significant net operating income over the 2008 figures. This property lost net operating income of only \$18,791 between 2008 to the end of 2010.

Together the income and expense charts prove that neither 3033 nor 3077 Kettering lost any net operating income between January 1, 2008 and January 1, 2010, contrary to the claims

made by Dunham. In fact, based on the actual income and expenses for both properties, 3033 and 3077 Kettering were as valuable on January 1, 2010 as they were on both January 1, 2008 and January 1, 2009. Furthermore, there is no evidence to show that these two properties lost any net income from the date of sale, June 15, 2007, to January 1, 2008, and the actual income support this conclusion. Only 3055 Kettering lost net income from the date of sale to the end of 2009 and the end of 2010.

LAW AND ARGUMENT

Proposition of Law No. 1:

There must be some evidence in the record to support the BTA's conclusion that the date of the actual sale of real property is "too remote" from tax lien day such that the sale price cannot be used to determine the true value of the property under R.C. 5713.03.

The BTA concluded that the June 2007 sale of the three properties was "too remote from tax from the tax lien date" to constitute evidence of the true value of the properties as of January 1, 2010. The BTA stated as follows: "The board of education argues that a June 2007 transfer was the best evidence of the subject's value. We find this sale to be too remote from the tax lien date ***." BTA Decision and Order, p. 2, fn. 1, Appx. p. 10. The BTA, of course, did not identify a single fact or single reason to support its conclusion. It is axiomatic that there must be some evidence in the record to support the BTA's conclusion. *Health Care Reit, Inc. v. Cuyahoga County Bd. of Revision*, 140 Ohio St.3d 30, 2014-Ohio-2574, 14 N.E.3d 1009, ¶ 27. In *Hilliard City Schs. Bd. of Educ. v. Franklin County Bd. of Revision*, 139 Ohio St.3d 1, 12, 2014-Ohio-853, 9 N.E.3d 920 ¶ 48, this Court stated that if "the record contains reliable *and probative* support' for the BTA's decision, we will affirm it" citing *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶ 14. Emphasis added.

In this appeal, however, there is no evidence in the record to support the BTA's conclusion and, in fact, there is affirmative evidence in the record to show that the BTA's conclusion was incorrect as to two of the properties involved in this appeal (3033 Kettering and 3077 Kettering). For these reasons, this Court should reverse the BTA as to these two properties. Arguments given below will also show that this Court should reverse the BTA's decision in total.

At the time this appeal arose, R.C. 5713.03 stated that:

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. Appx. p. 14.

This version of R.C. 5713.03 was applicable to the present appeal. See *Sapina v. Cuyahoga County Bd. of Revision*, 136 Ohio St.3d 188, 2013-Ohio-3028, 992 N.E.2d 1117, ¶ 20, fn. 1.

In *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision*, 139 Ohio St.3d 92, 2014-Ohio-1588, 9 N.E.3d 1004, ¶ 26-27, this Court held that "[w]hen a sale occurs more than 24 months before the lien date, and the assessor decides not to base the reappraisal on it, the sale should not be presumed recent." *Id.*, headnote 3 ¶ 23. This holding has no application to the appeal at hand. The sale of the three properties involved here took place on June 15, 2007, for the total sum of \$7,400,000, and the Montgomery County Auditor's six-year reappraisal of the properties took place for tax year 2008 less than 6 months later. As a result, the sale is presumed to be recent and the burden to prove otherwise was on Dayton Point West Real Estate, LLC.

As indicated in the Facts, the property owner's appraiser, Mr. Dunham, claimed that the sale price of June, 2007, did not represent the value of the properties as of January 1, 2010 because of a change in "market conditions" and because all three properties had lost substantial

net operating income from the date of sale to tax lien day. These two adjustments account for the same thing and to include them both undervalues the properties by deducting for the same thing multiple times.

Mr. Dunham's 10% market condition adjustment accounts for the change in the market for the subject property based upon changing market conditions between the date of sale and the tax lien date. Market conditions are those factors that affect the rent and occupancy for the subject property which in turn affect the amount for which the property would sell. With the subject property being the "perfect comparable" to the subject property, then at most, the 2007 sale price should be adjusted downward by 10% to arrive at its value as of January 1, 2010. To then make an additional deduction for "loss of income" only serves as a second deduction for the same change in the market for the subject property.

As to the "loss of income" deduction itself, Mr. Dunham's theory simply does not hold water. For example, if in mid-2007, a single tenant building was purchased for \$1,000,000 which subsequently loses its only tenant calendar year 2009, Mr. Dunham would have applied the same 10% market condition adjustment and then applied a 100% downward adjustment for "loss of income." This would result in a value of \$0 and is not based upon any *market data*. Furthermore, Mr. Dunham stated that by 2009 the rental rates for new leases had recovered from the recession and were near the levels for 2007. According to Dunham: "The subject trend for new market leases is downward for the first two years [after the sale] and *stabilizing near 2007 levels in 2009* for both the going in rental rates and the effective rental rate." Dunham appraisals, p. 27(28), Supp. p. 31, 84, 137. Thus, it would appear that the market data included in Mr. Dunham's report directly contradicts this "loss of income" adjustment.

The actual income and expense statements included in Dunham's appraisals also contradict this claim. The actual income from one of the properties, 3033 Kettering, remained the same from January 1, 2008, through 2009, and then substantially increased in 2010. The actual income for 3077 Kettering substantially increased from January 1, 2008, through 2009 (from \$365,233 to \$408,807). The actual income is based in part on the actual vacant space in the property, so there is affirmative evidence showing that the vacancy rates of these two properties did not change to any significant degree from the date of sale to January 1, 2010. That is, if rents and actual income were the same for both properties as of the date of sale and January 1, 2010, then vacancy rates between these two dates did not change. For these reasons, there is no evidence in the record supporting Dunham's 10% market condition deduction.

Dunham's net income deduction was shown not to be valid for two of the properties, 3033 Kettering and 3077 Kettering. The actual income and expense statements show that the third property, 3055 Kettering, suffered all of the lost income that Dunham attributed to all three properties together by his use of an average date of sale NOI calculation to value the other two properties. The other two properties, 3033 Kettering and 3077 Kettering, were shown not to have lost any net income between the date of sale and January 1, 2010. By lumping all 3 properties together, Mr. Dunham failed to accurately value any of the 3 properties.

For these reasons, there is no evidence in the record to support the BTA's conclusion that the actual sale of the properties, taking place on June, 15, 2007, was "too remote from the tax lien date."

Proposition of Law No. 2:

When the BTA places a new duty on a board of education to prove that a 29-month old sale is recent for the purposes of R.C. 5713.03, it must provide the board of education with an opportunity to present evidence to carry out that duty.

In its decision the BTA asserted that “the record does not indicate that the subject property ‘recently’ transferred through a qualifying sale” BTA Decision and Order, p. 2, Appx. p. 10. The context in which this sentence is found is the following:

*** “[T]he best method of determining value, when such information is available, is an actual sale of such property *** However, such information is not usually available, and thus an appraisal become necessary. *Such is the case in this matter, as the record does not indicate that the subject property ‘recently’ transferred in a qualifying sale.* BTA Decision and Order, p. 2, fn. 1; emphasis added)

The footnote added by the BTA to the last sentence of this quotation is as follows: “The board of education argues that a June 2007 transfer was the best evidence of the subject’s value. We find this sale to be too remote from the tax lien date ***.”

The BTA’s summary conclusion that “the record does not indicate that the subject property ‘recently’ transferred through a qualifying sale” demonstrates that the BTA incorrectly placed the burden on the Board of Education to produce evidence that proved that the 29-month old sale was “recent.” Otherwise, the absence of such evidence in the record (what “the record does not indicate”) when coupled by the standard presumption of recency that applied to this sale would necessitate a ruling that it was in fact recent. Had the BTA placed the burden of proof where it should have been placed, on Dayton Point West to prove that the sale was not recent, the BTA would have stated, instead, that *affirmative evidence in the record* proved that the sale was

not “recent,” and then the BTA would have had to cite to what that evidence was. But this is not what the BTA concluded and that it not what is said in its decision.⁴

In this respect, the BTA’s conclusion that “the record does not indicate that the subject property ‘recently’ transferred through a qualifying sale” was clearly inconsistent with the BTA’s prior decisions and constitutes a new doctrine of law. The BTA’s decision in the appeal at hand was issued on May 6, 2014, which was several weeks after this Court’s decision on April 16, 2014, in *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision*, 139 Ohio St.3d 92, 2014-Ohio-1588, 9 N.E.3d 1004, ¶ 26-27, in which this Court held that “[w]hen a sale occurs more than 24 months before the lien date, and the assessor decides not to *base the reappraisal* on it, the sale should not be presumed recent.” *Id.* headnote 3 beginning ¶ 23, emphasis added. It would appear that the BTA applied this new principle to the case at hand in concluding that “the record does not indicate that the subject property ‘recently’ transferred through a qualifying sale.” However, the parties formulated their arguments and submitted their briefs to the BTA long before *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision*, was decided by this Court. For instance, the Board of Education’s brief was submitted to the BTA on July, 16, 2013, and the BOE relied on the presumption that the 29 month-old sale was a recent sale under the BTA’s existing precedent.

In Proposition of Law No. 1, above, it was shown that the County Auditor reappraised the three properties for tax year 2008 at approximately the actual sale price arising from the sale of June, 2007. As such, the presumption that the sale price reflected the true value of the properties

⁴ The BTA’s conclusion set forth in the footnote (“We find this sale to be too remote from the tax lien date”) is not inconsistent with its claim that the sale was “too remote” because the BTA incorrectly placed the burden on the Board of Education to prove that the sale was “recent” and held that it failed to do so in this case.

(as allocated by the Auditor) still applied to the sale of June, 2007. Since the BTA shifted the burden to prove that the sale was “recent” to the BOE, then at the very least the BOE should be given an opportunity to prove that the sale was “recent.” However, the *Akron Rule* does not apply by its own terms in this case because the *county reappraisal* occurred less than 6 months after the sale.

In its brief to the BTA in this matter (p. 6), the Board of Education pointed to the BTA’s recent decision in *Board of Education of the Olentangy Local Schools vs. Delaware County Board of Revision, et al., (Kautilya Sunbury Hotel, LLC)*, BTA Case 2010-K-1241, 2013 Ohio Tax LEXIS 110, (Jan. 15, 2013) involving a 27-month old sale of a Hampton Inn, in which the BTA specifically held that “[e]vident from numerous Supreme Court decisions, the passage of twenty-seven months between sale and tax lien date is not per se remote” (p. 12; footnote 2), and it held that:

The person opposing reliance upon a recorded sale has an affirmative burden to demonstrate why the transfer amount does not properly reflect that property’s true value. [citations omitted] *In this instance, we conclude Kautilya has failed to rebut the presumption that the subject’s September 2006 sale is the most reliable indication of its value for tax year 2009.* (p. 14; emphasis added)

Notably, the BTA actually explained its reasoning in *Kautilya* unlike in the present case.

The Board of Education also cited another BTA case, *Olympia Holdings, Ltd., vs. Delaware County Board of Revision, et al.*, BTA Case 2011-L-88, 2013 Ohio Tax LEXIS 2799, (May 30, 2013) in which the BTA held that a 27-month old sale of a restaurant was a “recent” sale with respect to January 1, 2009 (p. 10, fn. 4), and the BTA placed the burden on the property owner to prove that the sale was not “recent.” The BTA concluded that:

As there is insufficient evidence to indicate the sale was not arm’s-length in nature, we find the evidence of the subject’s sale to be the most reliable indication of its value as of the tax lien date at issue. (pp. 13-14)

This is precisely the opposite principle that the BTA applied in its decision in the appeal at hand: instead of holding that “there is insufficient evidence to” rebut the presumption of the validity of the sale, the BTA held that “the record does not indicate that the subject property ‘recently’ transferred through a qualifying sale.”

In *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision*, supra, this Court recognized that its adoption of the new 24-month old sale rule required the BTA to allow the board of education to “to present evidence if it desires” to meet its requirement to prove that the sale was recent. This Court stated the following in this respect:

¶ 28 We recognize, however, that the 24-month rule that we are announcing in this case is new, and the parties might not have anticipated this innovation. In particular, the absence of bright-line tests in our case law might have led the school board to believe that it could rely on the recency presumption, with no need to present evidence in support of using the sale.

¶ 29 When we announce a decision that clarifies and corrects the legal standards to be applied, we ordinarily remand with the understanding that the BTA may hear additional evidence. And because this case involves our having shifted the burden by removing a presumption, the school board should have the opportunity to present evidence if it desires. Accordingly, we remand the cause to afford it the opportunity to do so. [citations omitted].

If this Court holds that the *Akron* Rule applies in this case, Appellant respectfully requests this Court to reverse the decision of the BTA and to remand this appeal back to the BTA with instructions that it allow the BOE to present evidence showing that the 29-month sale is recent for the purposes of R.C. 5713.03.

Proposition of Law No. 3:

The BTA's determination of the true value of real property must be based on probative evidence. Probative evidence is evidence that is sufficient to prove the true value of the property.

The BTA is required to base its determination of true value on probative evidence. In the appeal at hand, the BTA concluded that Dunham's appraisals constitute "probative" evidence, but the criteria it expressly applied to determine the "probative" nature of the evidence was entirely incorrect as a matter of law. In one sentence, the BTA summarily accepted and adopted the property owner's appraisals with absolutely no independent analysis with the following proclamation:

Upon review of the property owner's appraisal evidence, which [1] provides an opinion of value as of tax lien date, [2] was prepared for tax valuation purposes, and [3] attested to by a qualified expert, we find the appraisals to be competent and probative and the value conclusion reasonable and well-supported. BTA Decision and Order, page 2, Appx. p. 10, brackets added.

On its face, this one sentence clearly violates well-settled law that requires a property owner to present competent "and probative" that is sufficient to prove the true value of the property. Obviously, none of the BTA's three criteria, identified by the brackets in the above quotation, have anything to do with the "probative" nature of the appraisal evidence, and they are not even relevant in deciding whether an appraisal is "reasonable and well-supported."

1. Probative Evidence Is Evidence That Is Sufficient To Prove the True Value Of The Property.

"Probative evidence" is evidence that is sufficient to "prove" that the value claimed is the "correct value" of the property or to "prove that the value that [the property owner] proffers is correct." In *Sapina v. Cuyahoga County Bd. of Revision*, 136 Ohio St.3d 188, 2013-Ohio-3028, 992 N.E.2d 1117, this Court stated the following at ¶ 26: "The 'first rule' in an appeal from the

board of revision is that ‘the party challenging the board of revision's decision at the BTA has the burden of proof to establish its proposed value as the value of the property,’” citing from *Colonial Village Ltd. v. Washington Cty. Bd. of Revision*, 123 Ohio St.3d 268, 2009 Ohio 4975; 915 N.E.2d 1196. The requirement to present the BTA with “probative” evidence means that the evidence must “prove that the value that [the property owner] proffers is correct.” *Dak, PLL v Franklin County Board of Revision*, 105 Ohio St.3d 84, 2005-Ohio-573, 822 N.E.2d 790, ¶ 13. “[T]he appellant must come forward and demonstrate that the value it advocates is a correct value. *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision*, 68 Ohio St.3d 493, 628 N.E.2d 1365 (1994).

The three factors that the BTA cited as justification for its acceptance of the Dunham appraisals (a correct “as of” date; “attested to by a qualified expert;” and an appraisal prepared for tax purposes) have nothing to do with the “probative” nature of the evidence and alone cannot “establish” or “prove” the true value of the property. Indeed, these criteria have nothing to do with the true value of the property at all. The first and third requirements (a correct “as of” date and “attested to by a qualified expert”) obviously have nothing to do with the question of whether any appraisal evidence is “probative” or whether the appraiser’s conclusions are “reasonable and well-supported.” These two factors relate only to the legally competent nature of the appraisal as evidence before the BTA, not to the probative nature of the appraisal evidence itself. The second requirement (an appraisal prepared for tax purposes) likewise has nothing to do with the probative nature of the analysis and conclusions contained therein.

This Court’s review of this single sentence, which is the only sentence in the BTA’s decision that relates to the valuation of the property, should be sufficient to justify a reversal of

the BTA's decision because it demonstrates the BTA's complete abdication of its statutory duty to independently determine the true value of the subject properties.

2. Dunham's Appraisals Do Not Constitute Competent And Probative Evidence Of The True Value Of The Properties.

Dunham's appraisals violated a number of requirements of the laws governing the determination of the true value of real property and do not legally constitute *probative* evidence of the true value of any of the three properties. Thus, even if the BTA's conclusion that the actual sale was to "too remote" in time might be correct, its blind, summary acceptance of Mr. Dunham's appraisals was clearly an error.

To calculate market or economic rental rates for the three separate subject properties, Mr. Dunham used five rental comparables, and simply averaged the rental rates for these properties to determine market rents for the subjects as of January 1, 2010. The figure that Dunham used to determine market rents for the subject property was "Rental Rate/avg" taken from the rent comparables. Dunham appraisals, p. 24(25), Supp. p. 28, 81, 134. Mr. Dunham then made minor adjustments to the average rental rate of the comparables as it was applied to each of the three subjects. He then took the "Average/Mean" of the average rental rates (an "average of the averages") for the rent comparables and applied that figure to the three subject properties. The "average of the average" rental rates for the rent comparables was \$13.03 per square foot for 3033 and 3055 Kettering (appraisals, p. 25 and 24, Supp. p. 28, 81, respectively) and \$11.74 per square foot for 3077 Kettering (appraisal, p. 24, Supp. p. 134). Mr. Dunham then used the "average of the averages" figures, rounding each slightly, to be market rents for the subject properties as of tax lien day. Dunham appraisals, p. 30(31), Supp. p. 34, 87, 140. The average of the average rental rates taken from the comparables were *significantly low than the actual*

average rental rates for each of the three subject properties. Mr. Dunham used an “average of the average” rental rates of his rental comparables of \$13.20 per square foot to value 3033 Kettering, while the actual average rental rate for this property as of January 1, 2010, was \$14.80 per square foot. (appraisal, p. 26, Supp. p. 29). He used an “average of the average” rental rates of his rental comparables of \$13.20 per square foot to value 3055 Kettering, while the actual average rental rate for this property as of January 1, 2010, was \$15.78 per square foot (appraisal, p. 25, Supp. p. 82). Only the “average of the average” rental rates of his rental comparables of \$12.00 per square foot matched the actual average rental rates for 3077 Kettering (appraisal, p. 25, Supp. p. 135).

There is no relationship between the average rental rates of comparable properties (or the “average of the average” rents of all comparables) and market or economic rents for the property being appraised. In *Alliance Towers, Ltd. v. Stark County Bd. of Revision*, 37 Ohio St.3d 16, 18, 523 N.E.2d 826, fn. 2, (1988), this Court defined “market rent” as follows:

“The Dictionary of Real Estate Appraisal, American Institute of Real Estate Appraisers (1984) 194, contains the following definition of ‘market rent’: ‘The rental income that a property would most probably command in the open market; indicated by *current rents paid and asked for comparable space as of the date of the appraisal.*’ (emphasis added)

For appraisal purposes, ‘economic rent’ is synonymous with ‘market rent.’ Id. at 103.

Market rents are “current rents paid and asked for comparable space as of the date of the appraisal” and are rents being paid for *new leases* as of the date of appraisal, and not the average rental rates (or the “average of the average” of rental rates) that are being paid on all *existing leases* at other properties as of the date of the appraisal. This is especially true when the appraiser does not provide any data as to when the existing leases were entered into.

Dunham also erred in calculating a stabilized vacancy rate for each of the three properties. Once again, Mr. Dunham lumped together the vacant space for all three properties and applied the average vacancy rate of all three to each individual property. Dunham used a vacancy rate for all three properties as of January 1, 2010, of 30% with a 1% credit loss. There is no rational justification or support in the evidence for using a 30% vacancy rate for either 3033 Kettering or 3077 Kettering. The actual vacancy rate for 3033 Kettering as of tax lien day was 21% (appraisal, p. 33, Supp. p. 36.), and the rent roll for February, 2011, showed a vacancy rate of 23%. The actual vacancy for 3077 Kettering was 24% (appraisal, p. 32, Supp. p. 142.), and the rent roll of February, 2011 showed a vacancy rate of 24%. However, the actual vacancy for 3055 Kettering was 29% (appraisal, p. 32, Supp. p. 89.), and the rent roll of February, 2011, showed the vacancy rate increased to 34%. Dunham noted that the vacancy rate for all three properties “at 2009” was 22%, but it rose to 31% “in 2010” which is *after* the tax lien date in question. Dunham appraisals, p. 32(33), Supp. p. 36, 89, 142. The increased vacancy from 2009 to 2010 would appear to be due to the fact that Kaplan College vacated 20,000 square feet of space in 3055 Kettering in late 2009 and this accounts for the increased vacancy in this property as of tax lien day. By using the vacancy rate that applied to the three properties taken as whole, Dunham distorted the vacancy rates of 3033 and 3077 Kettering based on the substantially higher vacancy rate of 3055 Kettering.

Proposition of Law No.4:

The BTA must base the determination of the true value of real property on objective appraisal facts and objective market data and not upon the subjective judgments of some appraiser.

The BTA also erred in holding that since all of the errors in Mr. Dunham’s report are based on his “subjective judgments,” that the BTA can accept the appraisal without conducting

any independent analysis whatsoever. This sentence is unreasonable and unlawful and contradicts all of the constitutional, statutory, and administrative code rules that govern the determination of true value. The BTA's one sentence declaration that all parts of an appraisal reflect the "subjective judgments" of an appraiser was the following:

While we acknowledge the arguments made by the board of education, inherent in the appraisal process is the fact that an appraiser must necessarily make a wide variety of subjective judgments in selecting the data to rely upon, effect adjustments deemed necessary to render such data usable, and interpret and evaluate the information gathered in forming an opinion. BTA Decision and Order, p. 2, Appx. P. 10.

The only point of this cryptic and extraordinary statement is to prohibit a board of education from making any objections to a property owner's appraisal because a board of education cannot raise a meritorious objection to what is merely the "subjective judgments" of an appraiser. As such, the BTA now declares that it has no need to perform any actual evidentiary analysis or even address any objection made by the BOE to any part of the appraisal because it will blindly defer to any and all "subjective judgments" made by an appraiser."

This single sentence is patently inconsistent with Article XII, Section 2, of the Ohio Constitution and with all of the statutes and rules that govern the determination of the true value of real property. Article XII, Section 2, of the Ohio Constitution states that "[I]and and improvements thereon shall be taxed by uniform rule according to value" and the first sentence of this section refers to "true value in money" as the criterion of "value." Appx. p. 12. R.C. 5715.01 implements the constitutional "uniform rule" requirement by instructing the Tax Commissioner to "adopt, prescribe, and promulgate rules for the determination of true value and taxable value of real property by uniform rule." Appx. p. 15. Under both R.C. 5715.01 and Adm. Code Rule 5703-25-06(A), the essential or fundamental requirement of the "uniform rule"

is that true value must be based on the “*facts* *** that tend[] to prove [true] value” and the “*facts* tending to indicate the” true value of the property (emphasis added). In addition to these general references to the “facts” required to be used, these two provisions, as well as other provisions, describe a large number of specific “facts” upon which true value must be based. Appx. p. 18.

In *Porter v. Bd. of Revision*, 50 Ohio St.2d 307, 311, 364 N.E.2d 261, (1977), this Court held that the BTA was subject to these requirements: “In determining [true value], this court has held on several occasions that, for tax assessment purposes, all facts and circumstances which may affect the value of the property must be taken into consideration.”

All of these provisions require the true value of real property to be based on the “facts” that prove true value and not on the “subjective judgments” of some appraiser. For instance, while the BTA refers to the “subjective judgments in selecting the data to rely upon” and in making “adjustments” to the data, Adm. Code Rule 5703-25-05(F)(1) states that “[t]he reliability of [the income approach] is dependent upon *** [t]he reasonableness of the estimate of the anticipated net annual incomes;” and Division (G)(1) of this rule states that “[t]he reliability of [the market data approach] is dependent upon ***[t]he degree of comparability of each property with the property under appraisal.” Appx. p. 16-17. In no sense is the “reasonableness” of an income estimate or the “degree of comparability” of another property to the property being appraised based on the “subjective judgments” of some appraiser. It is beyond dispute that the true value of real property must be based on facts and that these facts consist of appraisal data or market data, and that none of these facts either are, or can be based on, or be created by, the “subjective judgments” of some appraiser. See *Rollman & Sons Co. v. Hamilton Cty. Bd. of Revision* (1955), 163 Ohio St. 363, 365, 127 N.E.2d 1; and *Meijer, Inc. v. Montgomery County Bd. of Revision*, 75 Ohio St.3d 181, 186, 661 N.E.2d 1056. Consequently, it is incumbent upon

the BTA to actually analyze and discuss those “subjective judgments” and make its own *independent* determination as to their validity. The BTA simply abdicated its responsibility in this case.

Third, if the critical parts of an appraisal are all based on the “subjective judgments” of the appraiser, then there is no such thing as a good appraisal or a bad appraisal (which, of course, appears to be the BTA’s point). If this is true, then the entire body of case law established by this Court to govern the BTA’s determination of true value is now obsolete. Of course, there is such a thing as a bad appraisal and an appraiser’s “subjective judgments” can be unreasonable as was most recently pointed out by this Court in *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, in which this Court held that “Horner’s Bulk-Value Appraisal Was Inappropriate” (headnote A at the beginning of this Court’s analysis at ¶ 16). That appraisal was inconsistent with law because the “appraisal predicted actual sale prices and then discounted those sale prices to arrive at a cash-in-hand valuation.” *Id.* ¶27. In the present appeal, the appraiser made numerous “subjective judgments” which were improper and inappropriate because they were not consistent with the laws governing the determination of the true value of real property. The BTA’s decision to defer to the appraiser’s judgment with no independent analysis is unreasonable and unlawful and should be reversed. The BTA’s “subjective judgment” statement appears to be nothing more a mere rhetorical device that is now used by the BTA to justify its acceptance of any appraisal without any review or analysis and regardless of its merits and to further justify its refusal to address any objections made to the appraisal by an opposing party.

CONCLUSION

For the reasons set forth herein, this Court is respectfully requested to reverse the

decision of the Board of Tax Appeals and to reinstate the Montgomery County Auditor's original appraised values of the three properties involved in this appeal. The Appellee property owner failed to prove that the sale of June, 2007, did not represent the true value of the property as of January 1, 2010. In the alternative this Court is requested to remand this appeal back to the BTA with instructions that it decide the specific issues raised by Appellant in this appeal and that it render a decision that specifically determines the relevant facts of the matter, and that it set forth those facts in its decision.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing merit brief was served on Ryan Gibbs, 2355 Auburn Avenue, Cincinnati, Ohio, 45219, and on R. Lynn Nothstine, Assistant County Prosecutor, 301 West Third Street, Dayton, Ohio, 45422, and on Mike DeWine, Attorney General, 30 East Broad Street, 25th Floor, Columbus, Ohio, 43215, by regular U.S. mail with postage prepaid, this 21st day of October, 2014.



Mark Gillis (0066908)
Attorney for Appellant

IN THE SUPREME COURT OF OHIO

ORIGINAL

Dayton-Point West Real Estate Assoc., LLC :

14-0927

Appellee : Case No. _____

and :

Board of Education of the Kettering
City Schools, :

Appeal from the Ohio Board of
Tax Appeals - Case Nos. 2011-4472
and 2011-4478

Appellant, :

v. :

Montgomery County Board of Revision,
Montgomery County Auditor, :

FILED
JUN 05 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Appellees. :

NOTICE OF APPEAL OF THE BOARD OF EDUCATION OF THE
KETTERING CITY SCHOOLS

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FILED
JUN 05 2014
BOARD OF TAX APPEALS
COLUMBUS, OHIO

HAND DELIVERED

IN THE SUPREME COURT OF OHIO

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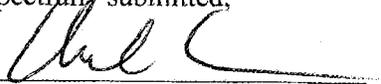
Montgomery County Board of Revision,
Montgomery County Auditor, :

Appellees.

NOTICE OF APPEAL OF THE BOARD OF EDUCATION OF THE
KETTERING CITY SCHOOLS

Now comes the Appellant, the Board of Education of the Kettering City School District, and gives notice of appeal to the Supreme Court of Ohio from the decision of the Ohio Board of Tax Appeals in the case of *Dayton-Point West Real Estate Associates, LLC and Board of Education of the Kettering City Schools v. Montgomery County Board of Revision, et al.* BTA Case No. 2011-4472 and 2011-4478, rendered on May 6, 2014, a copy of which is attached hereto as Exhibit B. The Errors complained of therein are set forth herein as Exhibit A.

Respectfully submitted,



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EXHIBIT A - STATEMENT OF ERRORS

(1) The Ohio Board of Tax Appeals (BTA) erred in holding that the appraisals were competent and probative evidence of value merely because: (1) it “provides opinions of value as of tax lien date”; (2) “was prepared for tax valuation purposes;” and (3) was “attested to by a qualified expert.”

(2) The BTA erred by failing to conduct a de novo review of the evidence in the record;

(3) The BTA erred by failing to specifically state the facts and figures upon which its decision is based.

(4) The BTA erred by failing to independently determine the true value of the subject property.

(5) The BTA erred by accepting appraisals for which the appraiser testified that he looked for and utilized “substandard and unstabilized” properties for his comparables and which failed to utilize the recent sale of the subject property.

(6) The BTA erred in determining that the June 15, 2007 arm’s-length sale of the subject property was “too remote from the tax lien date” of January 1, 2011 when it accepted Dayton-Point West Real Estate Associates, LLC’s appraisals which used an older sale with no adjustment for market conditions and a sale occurring only 6 month after the sale of the subject property using a nominal 10% adjustment for market conditions.

(7) The BTA erred in allowing the testimony of Mr. Jack Ross and Mr. Anthony Lehman in violation of R.C. 5715.19(G) without a showing of good cause as to why their testimony was not presented to the board of revision below.

(8) The BTA erred by failing to specifically address any of the arguments presented by the Board of Education that demonstrated the flaws in and insufficiency of the evidence presented by the property owners.

(9) The BTA erred when it merely “acknowledge[d] the arguments made by the appellant” and then deferred to Dayton-Point West Real Estate Associates, LLC’s appraiser’s “wide variety of subjective judgments” for which there was no detail or justification given.

(10) The BTA erred by failing to accept the Auditor’s original value as the default value of the subject property.

(11) The BTA erred in holding that Dayton-Point West Real Estate Associates, LLC’s sustained its burden of proof before the Montgomery County Board of Revision to prove that the subject property was over-valued and further failed to prove the true value of the subject property.

PROOF OF SERVICE ON THE OHIO BOARD OF TAX APPEALS

I hereby certify that a true and complete copy of the foregoing notice of appeal was served upon the Clerk of the Ohio Board of Tax Appeals, as is evidenced by its filing stamp set forth hereon.



Mark Gillis (0066908)
Attorney for Appellant

CERTIFICATE OF SERVICE BY CERTIFIED MAIL

I hereby certify that a true and complete copy of the foregoing notice of appeal was served on the following by certified mail, return receipt requested, with postage prepaid, this 5th day of June, 2014.

Ryan J. Gibbs
The Gibbs Firm, LPA
2355 Auburn Avenue
Cincinnati, Ohio 45219

Mike Dewine
Appellee Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio, 43215

Ron O'Brien
Franklin County Prosecutor
William J. Stehle, Esq.
Assistant County Prosecutor
373 South High St., 20th Floor
Columbus, Ohio 43215



Mark Gillis (0066908)
Attorney for Appellant

IN THE SUPREME COURT OF OHIO

Dayton-Point West Real Estate Assoc., LLC :

Appellee : Case No. _____

and :

Board of Education of the Kettering : Appeal from the Ohio Board of
City Schools, : Tax Appeals - Case Nos. 2011-4472
: and 2011-4478

Appellant, :

v. :

Montgomery County Board of Revision, :
Montgomery County Auditor, :

Appellees.

REQUEST TO CERTIFY ORIGINAL PAPERS TO THE SUPREME COURT OF OHIO

TO: The Clerk of the Ohio Board of Tax Appeals:

The Appellant, who has filed a notice of appeal with the Supreme Court, makes this written demand upon the Clerk and this Board to certify the record of its proceedings and the original papers of this Board and statutory transcript of the Board of Revision in the case of *Dayton-Point West Real Estate Associates, LLC and Board of Education of the Kettering City Schools v. Montgomery County Board of Revision, et al.* BTA Case No. 2011-4472 and 2011-4478, rendered on May 6, 2014, to the Supreme Court of Ohio within 30 days of service hereof as set forth in R.C. 5717.04.

Respectfully submitted,



Mark Gillis (0066908)
Rich & Gillis Law Group, LLC

Attorneys for Appellant Board of Education

OHIO BOARD OF TAX APPEALS

Dayton-Point West Real Estate Associates, LLC,)	CASE NOS. 2011-4472 and 2011-4478
)	
Appellant/Appellee,)	(REAL PROPERTY TAX)
)	
Board of Education of the Kettering City Schools,)	DECISION AND ORDER
)	
Appellant/Appellee,)	
)	
vs.)	
)	
Montgomery County Board of Revision and Montgomery County Auditor,)	
)	
Appellees.)	

APPEARANCES:

For the Property Owner	-	The Gibbs Firm, LPA Ryan J. Gibbs 2355 Auburn Avenue Cincinnati, Ohio 45219
For the Board of Education	-	Rich & Gillis Law Group, LLC Karol C. Fox 6400 Riverside Drive, Suite D Dublin, OH 43017
For the County Appellees	-	Mathias H. Heck, Jr. Montgomery County Prosecuting Attorney R. Lynn Nothstine Assistant Prosecuting Attorney 301 West Third Street P.O. Box 972 Dayton, Ohio 45422

Entered **MAY 06 2014**

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellants appeal decisions of the board of revision ("BOR") which determined the value of the subject real property, parcel numbers J44 04103 0219, J44 04103 0222, and J44 04103 0181. These matters are now considered upon the notices of appeal and the transcripts certified by the BOR pursuant to R.C. 5717.01. The subject's total true value was initially assessed at \$7,195,230. A decrease complaint was filed with the BOR seeking a reduction in value to \$2,600,000. The board of education filed a countercomplaint in support of maintaining the auditor's values. The BOR issued decisions reducing the total true value to \$4,406,960, which led to the present appeals.

When cases are appealed from a board of revision to this board, an appellant must prove the adjustment in value requested. See, e.g., *Shinkle v. Ashtabula Cty. Bd. of Revision*, 135 Ohio St.3d 227, 2013-Ohio-397. As the Supreme Court of Ohio has consistently held, “[t]he best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so. *** However, such information is not usually available, and thus an appraisal becomes necessary.” *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410. Such is the case in this matter, as the record does not indicate that the subject property “recently” transferred through a qualifying sale.¹ While we acknowledge the arguments made by the board of education, inherent in the appraisal process is the fact that an appraiser must necessarily make a wide variety of subjective judgments in selecting the data to rely upon, effect adjustments deemed necessary to render such data usable, and interpret and evaluate the information gathered in forming an opinion. See, e.g., *Developers Diversified Realty Corp. v. Ashland Cty. Bd. of Revision* (Mar. 17, 2000), BTA Nos. 1998-A-500, et seq., unreported; *Armco Inc. v. Richland Cty. Bd. of Revision* (Nov. 19, 2004), BTA No. 2003-A-1058, unreported. Upon review of the property owner’s appraisal evidence, which provides opinions of value as of tax lien date, were prepared for tax valuation purposes, and attested to by a qualified expert, we find the appraisals to be competent and probative and the value conclusion reasonable and well-supported.

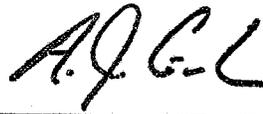
It is therefore the order of this board that the subject property’s true and taxable values, as of January 1, 2010, were as follows:

PARCEL NUMBER	TRUE VALUE	TAXABLE VALUE
J44 04103 0219	\$1,240,000	\$434,000
J44 04103 0222	\$1,750,000	\$612,500
J44 04103 0181	\$ 900,000	\$315,000

It is the order of the Board of Tax Appeals that the subject property be assessed in conformity with this decision and order.

¹ The board of education argues that a June 2007 transfer was best evidence of the subject’s value. We find this sale to be too remote from the tax lien date, though we acknowledge that the Supreme Court has made it clear that no “bright line” test exists when establishing recency and that the mere passage of time does not, per se, render a sale unreliable. See, e.g., *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059.

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.

Handwritten signature of A.J. Groeber in black ink.

A.J. Groeber, Board Secretary

ty days for persons to change residence in order to be eligible for election.

The governor shall give the persons responsible for apportionment two weeks advance written notice of the date, time, and place of any meeting held pursuant to this section.

(1967)

CONTINUATION OF PRESENT DISTRICT BOUNDARIES.

§14 The boundaries of House of Representatives districts and Senate districts from which representatives and senators were elected to the 107th General Assembly shall be the boundaries of House of Representatives and Senate districts until January 1, 1973, and representatives and senators elected in the general election in 1966 shall hold office for the terms to which they were elected. In the event all or any part of this apportionment plan is held invalid prior to the general election in the year 1970, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment to be effective until January 1, 1973, in accordance with section 13 of this Article.

(1967)

SEVERABILITY PROVISION.

§15 The various provisions of this Article XI are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions.

(1967)

ARTICLE XII: FINANCE AND TAXATION

POLL TAXES PROHIBITED.

§1 No poll tax shall ever be levied in this state, or service required, which may be commuted in money or other thing of value.

(1851, am. 1912)

LIMITATION ON TAX RATE; EXEMPTION.

§2 No property, taxed according to value, shall be so taxed in excess of one per cent of its true value in money for all state and local purposes, but laws may be passed authorizing additional taxes to be levied outside of such limitation, either when approved by at least a majority of the electors of the taxing district voting on such proposition, or when provided for by the charter of a municipal corporation. Land and improvements thereon shall be taxed by uniform rule according to value, except that laws may be passed to reduce taxes by providing for a reduction in value of the homestead of permanently and totally disabled residents, residents sixty-five years of age and older, and residents sixty years of age or older who are surviving spouses of deceased residents who were sixty-five years of age or older or permanently and totally disabled and receiving a reduction in the value of their homestead at the time of death, provided the surviving spouse continues to reside in a qualifying homestead, and providing for income and other qualifications to obtain such reduction. Without limiting the general power, subject to the provisions of Article I of this constitution, to determine the subjects and methods of taxation or exemptions therefrom,

general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

(1851, am. 1906, 1912, 1918, 1929, 1933, 1970, 1974, 1990)

AUTHORITY TO CLASSIFY REAL ESTATE FOR TAXATION; PROCEDURES.

§2a (A) Except as expressly authorized in this section, land and improvements thereon shall, in all other respects, be taxed as provided in Section 36, of Article II and Section 2 of this article

(B) This section does not apply to any of the following:

(1) Taxes levied at whatever rate is required to produce a specified amount of tax money or an amount to pay debt charges;

(2) Taxes levied within the one per cent limitation imposed by Section 2 of this article;

(3) Taxes provided for by the charter of a municipal corporation.

(C) Notwithstanding Section 2 of this article, laws may be passed that provide all of the following:

(1) Land and improvements thereon in each taxing district shall be placed into one of two classes solely for the purpose of separately reducing the taxes charged against all land and improvements in each of the two classes as provided in division (C)(2) of this section.

The classes shall be:

(a) Residential and agricultural land and improvements;

(b) All other land and improvements.

(2) With respect to each voted tax authorized to be levied by each taxing district, the amount of taxes imposed by such tax against all land and improvements thereon in each class shall be reduced in order that the amount charged for collection against all land and improvements in that class in the current year, exclusive of land and improvements not taxed by the district in both the preceding year and in the current year and those not taxed in that class in the preceding year, equals the amount charged for collection against such land and improvements in the preceding year.

(D) Laws may be passed to provide that the reductions made under this section in the amounts of taxes charged for the current expenses of cities, townships, school districts, counties, or other taxing districts are subject to the limitation that the sum of the amounts of all taxes charged for current expenses against the land and improvements thereon in each of the two classes of property subject to taxation in cities, townships, school districts, counties, or other types of taxing districts, shall not be less than a uniform per cent of the taxable value of the property in the districts to which the limitation applies. Different but uniform percentage limitations may be established for cities, townships, school districts, counties, and other types of taxing districts.

(1980)



4 of 16 DOCUMENTS

Page's Ohio Revised Code Annotated:
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*** ARCHIVE DATA ***

Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through File 143
*** Annotations current through August 6, 2012 ***

TITLE 57. TAXATION
CHAPTER 5713. ASSESSING REAL ESTATE

ORC Ann. 5713.03 (2012)

THIS SECTION HAS MORE THAN ONE DOCUMENT WITH VARYING EFFECTIVE DATES.

§ 5713.03. Taxable valuation of real property [Effective until September 10, 2012]

The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the true value of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon and the current agricultural use value of land valued for tax purposes in accordance with *section 5713.31 of the Revised Code*, in every district, according to the rules prescribed by this chapter and *section 5715.01 of the Revised Code*, and in accordance with the uniform rules and methods of valuing and assessing real property as adopted, prescribed, and promulgated by the tax commissioner. He shall determine the taxable value of all real property by reducing its true or current agricultural use value by the percentage ordered by the commissioner. In determining the true value of any tract, lot, or parcel of real estate under this section, if such tract, lot, or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor shall consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes. However, the sale price in an arm's length transaction between a willing seller and a willing buyer shall not be considered the true value of the property sold if subsequent to the sale:

(A) The tract, lot, or parcel of real estate loses value due to some casualty;

(B) An improvement is added to the property. Nothing in this section or *section 5713.01 of the Revised Code* and no rule adopted under *section 5715.01 of the Revised Code* shall require the county auditor to change the true value in money of any property in any year except a year in which the tax commissioner is required to determine under *section 5715.24 of the Revised Code* whether the property has been assessed as required by law.

The county auditor shall adopt and use a real property record approved by the commissioner for each tract, lot, or parcel of real property, setting forth the true and taxable value of land and, in the case of land valued in accordance with *section 5713.31 of the Revised Code*, its current agricultural use value, the number of acres of arable land, permanent pasture land, woodland, and wasteland in each tract, lot, or parcel. He shall record pertinent information and the true and taxable value of each building, structure, or improvement to land, which value shall be included as a separate part of the total value of each tract, lot, or parcel of real property.

5715.01 Tax commissioner to supervise assessments by county auditors - rules and procedure - county board of revision.

(A) The tax commissioner shall direct and supervise the assessment for taxation of all real property. The commissioner shall adopt, prescribe, and promulgate rules for the determination of true value and taxable value of real property by uniform rule for such values and for the determination of the current agricultural use value of land devoted exclusively to agricultural use. The uniform rules shall prescribe methods of determining the true value and taxable value of real property and shall also prescribe the method for determining the current agricultural use value of land devoted exclusively to agricultural use, which method shall reflect standard and modern appraisal techniques that take into consideration: the productivity of the soil under normal management practices; the average price patterns of the crops and products produced to determine the income potential to be capitalized; the market value of the land for agricultural use; and other pertinent factors. The rules shall provide that in determining the true value of lands or improvements thereon for tax purposes, all facts and circumstances relating to the value of the property, its availability for the purposes for which it is constructed or being used, its obsolete character, if any, the income capacity of the property, if any, and any other factor that tends to prove its true value shall be used. In determining the true value of minerals or rights to minerals for the purpose of real property taxation, the tax commissioner shall not include in the value of the minerals or rights to minerals the value of any tangible personal property used in the recovery of those minerals.

(B) The taxable value shall be that per cent of true value in money, or current agricultural use value in the case of land valued in accordance with section 5713.31 of the Revised Code, the commissioner by rule establishes, but it shall not exceed thirty-five per cent. The uniform rules shall also prescribe methods of making the appraisals set forth in section 5713.03 of the Revised Code. The taxable value of each tract, lot, or parcel of real property and improvements thereon, determined in accordance with the uniform rules and methods prescribed thereby, shall be the taxable value of the tract, lot, or parcel for all purposes of sections 5713.01 to 5713.26 , 5715.01 to 5715.51 , and 5717.01 to 5717.06 of the Revised Code. County auditors shall, under the direction and supervision of the commissioner, be the chief assessing officers of their respective counties, and shall list and value the real property within their respective counties for taxation in accordance with this section and sections 5713.03 and 5713.31 of the Revised Code and with such rules of the commissioner. There shall also be a board in each county, known as the county board of revision, which shall hear complaints and revise assessments of real property for taxation.

(C) The commissioner shall neither adopt nor enforce any rule that requires true value for any tax year to be any value other than the true value in money on the tax lien date of such tax year or that requires taxable value to be obtained in any way other than by reducing the true value, or in the case of land valued in accordance with section 5713.31 of the Revised Code, its current agricultural use value, by a specified, uniform percentage.

Effective Date: 09-27-1983; 06-30-2005

5703-25-05 Definitions.

As used in rules 5703-25-05 to 5703-25-17 of the Administrative Code:

(A) "True value in money" or "true value" means one of the following:

(1) The fair market value or current market value of property and is the price at which property should change hands on the open market between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having a knowledge of all the relevant facts.

(2) The price at which property did change hands under the conditions described in section 5713.03 of the Revised Code, within a reasonable length of time either before or after the tax lien date, unless subsequent to the sale the property loses value due to some casualty or an improvement is added to the property.

(B) In compliance with the provisions of sections 5713.01 , 5713.03 , 5715.01 and 5715.24 of the Revised Code, the "taxable value" of each parcel of real property and the improvements thereon shall be thirty-five per cent of the "true value in money" of said parcel as of tax lien date in the year in which the county's sexennial reappraisal is or was to be effective beginning with the tax year 1978 and thereafter or in the third calendar year following the year in which a sexennial reappraisal is completed beginning with the tax year 1978.

(C) "Computer assisted appraisal systems" - A method in which the value of a property is derived by any or all of the following computerized procedures:

(1) Multiple regression analysis using sales to form the data base for valuation models to be applied to similar properties within the county.

(2) Computerized cost approach using building cost and other factors to value properties by the cost approach as defined in this rule.

(3) Computerized market data approach where a subject property is valued by adjusting comparable sales to subject by adjustments based on regression or other analyses.

(4) Computerized income approach using economic and income factors to estimate value of properties.

(5) Computerized market analysis to provide trend factors used by appraisers as basis of market valuation.

(D) "Cost approach" - A method in which the value of a property is derived by estimating the replacement or reproduction cost of the improvements: deducting therefrom the estimated physical depreciation and all forms of obsolescence if any; and then adding the market value of the land. This approach is based upon the assumption that the reproduction cost new normally sets the upper limit of building value provided that the improvement represents the highest and best use of the land.

(E) "Effective tax rate" - Real property taxes actually paid expressed as a percentage rate in terms of actual true or market value rather than the statutory rate expressed as mills levied on taxable or assessed value. In Ohio four factors must be considered in arriving at the effective tax rate:

(1) The statutory rate in mills;

(2) The composite tax reduction factor as calculated and applied under section 319.301 of the Revised Code;

(3) The percentage rollback prescribed by section 319.302 of the Revised Code;

(4) The prescribed assessment level of thirty-five per cent of true or market value.

(F) "Income approach" - An appraisal technique in which the anticipated net income is processed to indicate the capital amount of the investment which produces the net income. The reliability of this technique is dependent upon four conditions:

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- (1) The reasonableness of the estimate of the anticipated net annual incomes;
- (2) The duration of the net annual income, usually the economic life of the building;
- (3) The capitalization (discount) rate;
- (4) The method of conversion (income to capital).

(G) "Market data approach" - An appraisal technique in which the market value estimate is predicated upon prices paid in actual market transactions and current listings, the former fixing the lower limit of value in a static or advancing market (price wise), and fixing the higher limit of value in a declining market; and the latter fixing the higher limit in any market. It is a process of correlation and analysis of similar recently sold properties. The reliability of this technique is dependent upon:

- (1) The degree of comparability of each property with the property under appraisal;
- (2) The time of sale;
- (3) The verification of the sale data;
- (4) The absence of unusual conditions affecting the sale.

(H) "Replacement cost"

- (1) The cost that would be incurred in acquiring an equally desirable substitute property;
- (2) The cost of reproduction new, on the basis of current prices, of a property having a utility equivalent to the one being appraised. It may or may not be the cost of a replica property;
- (3) The cost of replacing unit parts of a structure to maintain it in its highest economic operating condition.

Eff 10-20-81; 9-18-03

Rule promulgated under: RC 5703.14

Rule authorized by: RC 5703.05

Rule amplifies: RC 5713.01 , 5715.01

Replaces: 5705-3-01

R.C. 119.032 review dates: 09/18/2008

5703-25-06 Equalization procedures.

(A) "True value in money" shall be determined, in the first instance, by the county auditor as the assessor of real property in the county on consideration of all facts tending to indicate the current or fair market value of the property including, but not limited to, the physical nature and construction of the property, its adaptation and availability for the purpose for which it was acquired or constructed or for the purpose for which it is or may be used, its actual cost, the method and terms of financing its acquisition, its value as indicated by reproduction cost less physical depreciation and all forms of obsolescence if any, its replacement cost, and its rental income-producing capacity, if any. The assessor shall likewise take into consideration the location of the property and the fair market value of similar properties in the same locality.

(B) At least once each six-year period the county auditor of each county, in conformity with the provisions of section 5713.01 of the Revised Code, shall view and appraise each parcel of real property and the improvements thereon in the county and this appraisal shall reflect the one hundred per cent true value in money of each parcel appraised, and the auditor shall place each parcel of real property on the tax duplicate at its "taxable value" which is thirty-five per cent of its true value in money.

(C) In the update year the county auditor shall determine whether each parcel of real property and the improvements thereon is appraised at its true value in money, as defined in paragraph (A) of rule 5705-25-05 of the Administrative Code, as of tax lien date of said year. If the auditor finds that there has been either an increase or decrease in value, the auditor shall adjust the tax records to show the true value in money of each parcel and the improvements thereon as well as the "taxable value" thereof, which "taxable value" shall be thirty-five per cent of the true value in money thereof as redetermined by the county auditor as of tax lien date.

(D) In making this triennial update of the true value in money and the "taxable value" of each parcel of real property, the county auditor shall be guided by sales of comparable property for a like use; the sales ratio and other related studies compiled by the tax commissioner for the three calendar years immediately preceding the update year; by the increase or decrease in current building costs and changes in construction technique both after the proper application of depreciation and obsolescence; by the increase or decrease in the net rental income, expenses, and services for comparable property since the year in which the preceding sexennial reappraisal had been completed; and such other indications of increase or decrease in value as may be pertinent, such as test or sample appraisals on a current basis, where sales of real property are limited or in question.

(E) In implementing any increase or decrease in valuation of real property pursuant to this rule or ordered by the tax commissioner pursuant to section 5715.24 of the Revised Code, the county auditor shall, when practicable, increase or decrease the taxable valuation of parcels in accordance with actual changes in valuation of real property which occur in different subdivisions, neighborhoods, or among classes of real property in the county. The auditor may increase or decrease the true or taxable value of any lot or parcel of real estate in any township, municipal corporation, or other taxing district by an amount which will cause all real property on the tax list to be valued as required by law, or the auditor may increase or decrease the aggregate value of all real property, or any class of real property, in the county, township, municipal corporation, or other taxing district, or in any ward or other division of a municipal corporation by a per cent or amount which will cause all property to be properly valued and assessed for taxation in accordance with section 36, Article II and section 2, Article XII, Ohio Constitution, and sections 5713.03 and 5715.01 of the Revised Code, and this rule.

(F) In determining the true value in the year of the sexennial reappraisal or update year of any tract, lot, or parcel of real estate 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. However, the sale price in an arm's length transaction between a willing seller and a willing buyer shall not be considered the true value of the property sold if subsequent to the sale:

(1) The tract, lot, or parcel of real estate loses value due to some casualty;

Appx. P. 18

(2) An improvement is added to the property.

(G) The lien for taxes attaches to all real property on the first day of January. If a building, structure, fixture or other improvement to land is under construction on January first of any year, its valuation shall be based upon its value or percentage of completion as it existed on January first.

(H) When the county auditor revalues real property, notifications of the change in value shall be made as provided in section 5713.01 of the Revised Code.

Eff 12-28-73; 11-1-77; 9-18-03

Rule promulgated under: RC 5703.14

Rule authorized by: RC 5703.05

Rule amplifies: RC 5713.01 , 5715.01

Replaces: 5705-3-02

R.C. 119.032 review dates: 09/18/2008