

IN THE SUPREME COURT
STATE OF OHIO
APPEAL FROM THE BOARD OF TAX APPEALS

LOWE'S HOME CENTERS, INC.,)
)
 Appellant,)
)
 v.)
)
 WASHINGTON COUNTY BOARD)
 OF REVISION, et al.,)
)
 Appellees.)
)

CASE NO. 2014-0843

REPLY BRIEF OF APPELLANT LOWE'S HOME CENTERS, INC.

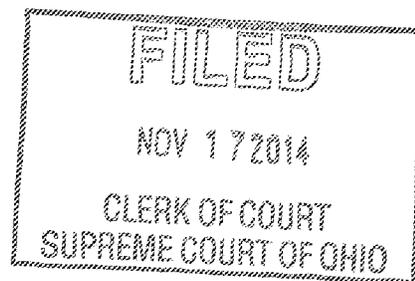
James E. Schneider, Esq. (0011141)
Washington County Prosecutor's Office
Kelley A. Gorry, Esq. (0079210)
COUNSEL OF RECORD
Special Prosecuting Attorney
Rich & Gillis Law Group, LLC
6400 Riverside Drive, Suite D
Dublin, OH 43017

Ryan J. Gibbs, Esq. (0080331)
COUNSEL OF RECORD
Geoffrey N. Byrne, Esq. (0090906)
The Gibbs Firm, LPA
2355 Auburn Ave
Cincinnati, OH 45219
P: (513) 381-3890
F: (866) 796-3717

P: (614) 228-5822
F: (614) 540-7476

ATTORNEYS FOR APPELLEES
WASHINGTON COUNTY BOARD
OF REVISION AND COUNTY AUDITOR

ATTORNEY FOR APPELLANT
LOWE'S HOME CENTERS, INC.



Mike Dewine, Esq. (0009181)
COUNSEL OF RECORD
Ohio Attorney General
State Office Tower, 17th Floor
30 East Broad Street
Columbus, OH 43215-3428
P: (614) 462-7519
F: (614) 466-8226

ATTORNEY FOR APPELLEE
TAX COMMISSIONER OF THE
STATE OF OHIO

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES.....i

ARGUMENT.....1

Reply to Appellee’s Proposition of Law No. I:

The BTA’s decision in this case creates an unlawful and illogical preference for the use of leased fee sales over fee simple sales to determine fee simple value.....1

Reply to Appellee’s Proposition of Law No. II:

The BTA’s decision violates the Equal Protection Clause by applying the law in an inconsistent manner.....3

Reply to Appellee’s Proposition of Law No. III:

Blosser’s negligence in developing her market rental rates makes her report neither probative nor credible.....4

Reply to Appellee’s Proposition of Law No. IV:

On remand, the BTA must either accept the report of Costello or come to an independent determination of value5

CONCLUSION.....5

TABLE OF AUTHORITIES

PAGE

STATUTES

Ohio Revised Code §4763.01.....4

Ohio Revised Code §5713.03.....1-6

CASES

Dublin City Schools Board of Education v. Franklin County Board of Revision, et al. Slip Opinion 2014-Ohio-1940.....5

Meier Stores Ltd. Partnership v. Franklin Cty. Bd. of Revision (2009), 122 Ohio St.3d 447, 2009-Ohio 3479, 912 N.E.2d.....1-2

Meyer et al v. Cuyahoga Cty Bd. of Revision (1979), 58 Ohio St.2d 328, 390 N.E.2d 796.....3

Rite Aid v. Washington County Board of Revision, et al., BTA Case No. 2011-1760, 2014 Ohio Tax LEXIS 2541.....1, 3

State ex rel. Struble v. Davis (1937) 132 Ohio St. 555, 9 N.E.2d 684.....3

ARGUMENT

Reply to Appellee's Proposition of Law No. I:

The BTA's decision in this case creates an unlawful and illogical preference for the use of leased fee sales over fee simple sales to determine fee simple value.

Appellee asks this Court to create a preference for the use of leased fee sales over fee simple sales to value real property despite the plain language of R.C. §5713.03, requiring valuation in fee simple. The BTA's sole reason for not accepting Ms. Costello's value conclusion was that she "did not properly analyze the market" when her testimony revealed she deliberately excluded the use of leased fee transactions as comparables. BTA Decision, p. 2. Costello testified that she valued the property in fee simple as required by R.C. §5713.03. She analyzed the entire market and, after determining that there were a sufficient number of fee simple sales and leases similar in time, size and location to the subject property, chose the appropriate comparables in accordance with the law. Her process was identical to that employed by Mr. Hatcher in *Rite Aid*, where the BTA adopted Mr. Hatcher's valuation. *Rite Aid v. Washington County Board of Revision, et al.*, BTA Case No. 2011-1760, 2014 Ohio Tax LEXIS 2541.

The term "fee simple" has, since the beginnings of English Common Law, meant absolute ownership interest in real property, free from any encumbrances. This is most often explained by the use of the "bundle of rights" concept. In Ohio, R.C. §5713.03 clearly states that only the fee simple interest in real property should be valued for tax assessment purposes. The Ohio General Assembly recently passed House Bill 510, which amended the language of the statute to add the words "as if unencumbered" after the words "fee simple estate." This is merely a clarification of existing law. Footnote 4 to this Court's decision in *Meijer Stores Limited*

Partnership v. Franklin Cty. Bd. of Revision, 122 Ohio St.3d 447, 2009-Ohio-3479 suggests that there is a dichotomy between the meaning of “fee simple” in the law, and the meaning of “fee simple” within the appraisal profession. But the legal definition of fee simple was settled many centuries ago, as explained above, and the appraisal profession took its definition of “fee simple” from the law. *The Appraisal of Real Estate* (12th ed., 2001), p. 68. The Court’s reasoning on this distinction is unsound, and Black’s Law Dictionary does not support such an idea.

A ruling upholding the BTA’s decision in this case would signal that the Ohio Supreme Court favors the use of sales involving the transfer of differing legal interests over those clearly transferring the fee simple, despite the legislature’s mandate that property is valued in the fee simple. This is an absurd and illogical proposition that is contrary to the definition of “fee simple” in the common law, and the plain language of R.C. §5713.03. Upholding the BTA in this instance additionally creates a system in Ohio where the applicable statute plainly states that all property should be value in fee simple, but where, in reality, one must somehow arrive at fee simple value utilizing leased fee transfers and an objective and arbitrary system of adjustments to arrive at fee simple interest. Ohio courts and the appraisal profession have long recognized that the sales requiring the fewest adjustments are the most comparable, and such a holding by the Court will create additional confusion and litigation within the state. There is no reason for an appraiser to employ leased fee sales in a fee simple analysis unless the goal is a higher value conclusion, and the resulting conclusion reflects the value of the leased fee, not the fee simple.

The BTA’s stated rationale for adopting Ms. Blosser’s opinion of value over Costello’s was Ms. Costello’s decision to exclude leased fee comparables. Based on the plain language of R.C. §5713.03, the BTA’s decision is an unreasonable and unlawful abuse of discretion. The Court’s validation of this decision would create an irrational standard in Ohio where appraisers

would be directed to appraise real property in a different legal interest than the applicable statute mandates. For these reasons, the Court must reverse and remand the decision so that the BTA may enter an order accepting the fee simple appraisal of Costello as probative and credible evidence of value.

Reply to Appellee's Proposition of Law No. II:

The BTA's decision violates the Equal Protection Clause by applying the law in an inconsistent manner.

The BTA has discretion to weigh factual issues and evidence presented in each case it hears. *Meyer et al v. Cuyahoga Cty Bd. of Revision*, (1923) 58 Ohio St.2d 328, 390 N.E.2d 796 (1979). The BTA may not, however, discriminate among parties in the application of the law. *State ex rel Struble v. Davis* (1937) 132 Ohio St. 555, 563, 9 N.E.2d 684. The instant case does not involve a situation where the BTA has abused its discretion regarding a factual decision on the evidence. In this case, the BTA's decision is inconsistent with the plain language of R.C. §5713.03 and must be reversed.

In its decision in this case, the BTA states that "Costello has not properly analyzed the market" because she excluded leased fee comparables in her sales comparison approach and build-to-suit rental rates in her income capitalization approach. BTA Decision, 2. As previously mentioned, the Ohio General Assembly has clarified that, for tax assessment purposes, all property shall be valued in its fee simple interest as if unencumbered. By rejecting Costello's appraisal for only including fee simple comparables and failing to include leased fee sales, the BTA committed an error of law.

As explained in the previous section, this Court must clarify the standard of appraisal practice as applied to R.C. §5713.03. The inconsistent rulings of the BTA, as shown by its decision in *Rite Aid*, show that the BTA has not established a standard for whether appraisers

should use leased fee or fee simple sales as comparables. By applying R.C. §5713.03 unevenly and in a manner that discriminates among taxpayers the BTA has created an unconstitutional lack of uniformity under the law.

The Ohio General Assembly has directed that the legal standard regarding valuation for assessment purposes should follow the standard used by the appraisal practice. Appraisers must value the property in its fee simple interest as if unencumbered. In this case, Costello's report was the only appraisal that correctly followed the plain language and legislative intent of R.C. §5713.03. By rejecting her report for following a fee simple analysis, the BTA committed an error of law and violated the Appellant's Equal Protection rights.

Reply to Appellee's Proposition of Law No. III:

Blosser's negligence in developing her market rental rates makes her report neither probative nor credible.

Appellee claims that Ms. Blosser and Ms. Hamilton followed all applicable USPAP procedures and followed the provisions of R.C. §4763.01. USPAP requires all appraisers to certify that their reports are true and correct. It also states that appraisers should not make a series of errors, which in succession, discredit the report.

Despite Ms. Blosser's claims that she followed every applicable provision of USPAP, the fact remains that she used an unlicensed appraiser to gather data from a number of brokers who either had no real estate license or has their licenses revoked. Ms. Blosser's and Ms. Hamilton's disregard for the validity of the gathered information affects the credibility of the reported rental and sales figures. These facts, taken as a whole, put her final valuation into question.

By accepting the report and testimony of Blosser as probative and credible evidence of value, the BTA abused its discretion. This Court should reverse and remand the BTA's decision for being unreasonable and unlawful.

Reply to Appellee's Proposition of Law No. IV:

On remand, the BTA must either accept the report of Costello or come to an independent determination of value.

For the reasons discussed in Appellant's Merit Brief and in the first three sections of this Reply Brief, the Court should reverse the BTA's decision accepting the appraisal of Karen Blosser and remand the case for a decision consistent with R.C. §5713.03. In *Dublin City Schools Board of Education v. Franklin Cty. Bd. of Revision, et al.*, Slip Opinion 1014-Ohio-1940, this Court reversed its prior decision on a motion for reconsideration. Upon reconsideration in *Dublin*, the Court found that an appraisal it had previously accepted did not conform to the law. Rather than revert to the Auditor's original valuation, the Court ordered the BTA to make an independent determination of value based on the evidence in the record. *Id.* at ¶3.

In this case, it does not matter if either side is seeking to reinstate the Auditor's valuation. The BTA is under a duty to determine the fee simple value of the subject property. On remand, the BTA must either accept the appraisal report of Patricia Costello as probative and credible evidence of value, or it must come to an independent determination of fee simple value based on all evidence in the record.

CONCLUSION

The plain and unambiguous language of R.C. §5713.03 requires all real property be valued in its fee simple interest for tax purposes. The Ohio General Assembly recently clarified the standard by adding that "fee simple" means valuing the property as if it were unencumbered by any leases. By accepting an appraisal that relies predominantly on leased-fee sales, unadjusted for property rights conveyed, the BTA issued an unreasonable and unlawful decision

and abused its discretion. The decision also violates Appellant's Equal Protection rights because it applies R.C. §5713.03 in a discriminatory and inconsistent manner. The Appellant respectfully urges that this Court remand the case to the BTA for a decision consistent with the law.

Respectfully submitted,



Ryan J. Gibbs, Esq. (0080331)

COUNSEL OF RECORD

The Gibbs Firm, LPA

2355 Auburn Avenue

Cincinnati, OH 45219

P: (513) 381-3890

F: (866) 796-3717

ATTORNEY FOR APPELLANT
LOWE'S HOME CENTERS, INC.

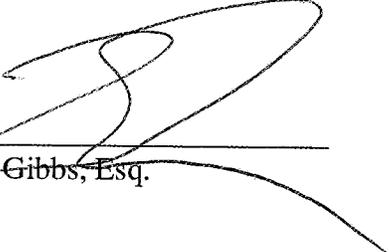
CERTIFICATE OF SERVICE

A copy of foregoing *Appellant's Reply Brief* was served this 17 day of November, 2014, by certified mail upon:

Mike Dewine, Esq.
Ohio Attorney General
State Office Tower, 17th Floor
30 East Broad Street
Columbus, OH 43215-3428

James E. Schneider, Esq.
Washington County Prosecutor's Office
223 Putnam St.
Marietta, OH 45750

Kelley A. Gorry, Esq.
Rich & Gillis Law Group, LLC
6400 Riverside Drive, Suite D
Dublin, OH 43017



Ryan J. Gibbs, Esq.