Supreme Court of Ohio Clerk of Court - Filed December 10, 2014 - Case No. 2014-0927

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANT BOARD OF EDUCTION OF THE KETTERING CITY SCHOOL DISTRICT

Mark Gillis (0066908)
COUNSEL OF RECORD
Rich & Gillis Law Group, LLC
6400 Riverside Drive, Suite D
Dublin, OH 43017
(614) 228-5822
Fax: (614) 540-7474
mgillis@richgillislawgroup.com

Attorneys for Appellant
Board of Education of the Kettering City School District

Mathias Heck (0014171)
Montgomery County Prosecuting Attorney
R. Lynn Nothstine (0061560)
COUNSEL OF RECORD
Assistant County Prosecutor
301 West Third Street
Dayton, Ohio 45422

Attorneys for Appellee County Auditor

Ryan J. Gibbs (0080331)
The Gibbs Law Firm, LPA
2355 Auburn Avenue
Cincinnati, Ohio 45219
(513) 381-3890
Fax (513) 796-3717

Attorney for Appellee
Dayton-Point West Real Estate Assoc. LLC

The Honorable Mike DeWine (0009181)
Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, OH 43215
PH: (614) 466-4986

Attorney for Ohio Tax Commissioner

TABLE OF CONTENTS

Table of Authorities ii

Appellant's Reply To Appellee's Merit Brief 1

1. Affirmative Evidence Shows That There Was No Loss in Value or Loss in Income for 2
   Two of Appellee's Properties.

2. The Price Paid for the Mortgage Note Does Not Constitute Evidence of the True Value 6
   of the Properties.

3. The BTA's Definition of 'Probative Evidence' is Unreasonable and Unlawful 8

4. The BTA's Unreasonably and Unlawfully Relied on the Subjective Judgments of an.....11
   Appraiser.

Conclusion 13

TABLE OF AUTHORITIES

Cases

Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision, 139 Ohio St.3d 212, 2014-Ohio-1940 5

Dublin Senior Community Ltd. Pshp. v. Franklin Cty. Bd. of Revision, 80 Ohio St.3d 455, 458; 687 N.E.2d 426 (1997) 1, 7

RLG Props., LLC v. Franklin County Bd. of Revision, 10th Dist. Franklin Nos. 06AP-132-134, 2006 Ohio 5096, 2006 Ohio App. LEXIS 5051 7

Constitutional Provisions and Statutes

Article XII, Section 2, of the Ohio Constitution 10

R.C. 5713.03 7

R.C. 5713.04 8

R.C. 5715.01 10

R.C. 5717.03 12

Adm. Code Rule 5703-25-06 10

APPELLANT'S REPLY TO APPELLEE'S MERIT BRIEF

Appellee attempts to support the BTA's decision that the sale of the property which took place on June 15, 2007, at a sale price of $7,400,000, was "too remote" from tax lien day, January 1, 2010. It does so in three ways:

(1) Appellee generally cites to the testimony of its two witnesses, Norman Ross and Anthony Lehman, for the claim that the "global economic recession" had an effect on the "subject property" (Appellee's Merit Brief, p. 3). Ross is from Arizona and was vice president of the company that purchased the mortgage note on the property in January, 2011, and he had no personal knowledge of the any of the facts or circumstances relating to the property during mid-2007 to January 1, 2010. Lehman was the manager of the property and he simply made general claims about the market conditions for the property. Like Appellee's appraiser, Lehman attempted to attribute the actual economic conditions that applied to only one of the properties, 3055 Kettering to other two properties that were shown to have suffered no loss in income or loss in value between the date of sale and tax lien day.

(2) Appellee now claims that the purchase of the mortgage note by Univest in early 2011, constituted a sale of the three separate properties and the price paid for the note supports the opinion of value of its appraiser, Timothy Dunham. (Appellee's Merit Brief, p. 4). The sale of the note was not the sale of a "tract, lot, or parcel" of real property under R.C. 5713.03, and the sale price of a note provides no evidence of the true value of real property. See *Dublin Senior Community Ltd. Pshp. v. Franklin Cty. Bd. of Revision*, 80 Ohio St.3d 455, 458; 687 N.E.2d 426 (1997). Furthermore, the subsequent transfer of the three separate properties to the

holder of the note was not a sale of the properties and even it had been a sale it would have clearly been a "forced sale" under R.C. 5713.04.

(3) Appellee also argues that the adjustments made by its appraiser, Timothy Dunham, to the June, 2007 sale of the three properties show that all three properties lost income and lost value from the date of sale to January 1, 2010 (Appellee's Merit Brief, p. 2). In actual fact, the income and expense statements included in Dunham's appraisal show that two of the properties (3033 Kettering and 3077 Kettering) suffered no loss in net income and no loss in value between the date of sale and tax lien day. The actual data show that Dunham manipulated his calculations of both the income and expenses and the vacancy rates by allocating much of the lost income and vacant space from the third property (3055 Kettering) to the two other properties in order to show that these two properties had also lost income and value, when the actual data show that no such loss in income or value took place. The affirmative data shows that the County Auditor's values for these two properties for three-year appraisal cycle of tax years 2008, 2009, and 2010, which were roughly equivalent to the actual sale price of the properties, were correct and should not have been reduced by either the Board of Revision or the BTA.

1. Affirmative Evidence Shows That There Was No Loss in Value or Loss in Income for Two of Appellee's Properties.

The BTA concluded that the 2007 sale of the subject property was "too remote" for tax lien day of January 1, 2010 (BTA Decision and Order, footnote 1, page 2). It did not identify a single fact upon which this conclusion was based, and it actually did not set forth a single fact in its decision, not even to the point of giving a description of the property involved in the appeal. As such, it is impossible to discern what the BTA relied upon, but both Appellant and Appellee assume that the BTA relied on the claims made by Appellee's appraiser, Mr. Dunham, that

changes in market conditions and lost net income accounted from the loss in value from the date of sale of the three properties (June 15, 2007, at a sale price of $7,400,000) to Dunham's combined value for the three properties of $3,890,000 as of January 1, 2010.

Mr. Dunham did analyze the sale and claimed that each of the three properties lost a flat 10 percent of their value to tax lien day due to change in "market conditions/time" because the properties were not "considered to have sold in similar [market] circumstances to the effective date of the appraisal" (Dunham appraisals, p. 38(39) and 39(40); Supp. p. 42, 95, 148, and Supp. p. 43, 96, and 149). Dunham also claimed that all three properties lost value as a result of the loss of "net income" between the date of sale and tax lien day. According to Dunham, 3033 Kettering lost 37 percent its value due to lost "net income;" 3055 Kettering lost 46 percent of its value due to lost "net income;" and 3077 Kettering lost 55 percent 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 and Supp. p. 43, 96, and 149).

Appellant showed in its Merit Brief that there was not a single item of evidence in Dunham's report or his testimony to support his 10 percent deduction due to a claim of "market changes" (see Appellant's Merit Brief, p. 3 and 13). Appellant cited the actual income and expenses statements included in Dunham's appraisal that showed that two properties, 3033 Kettering and 3077 Kettering, lost no "net income" and lost no value between the sale of June, 2007, and tax lien day (which is set forth in detail at Appellant's Merit Brief, pp. 3-11). The third property, 3055 Kettering, had lost all of the income in question (almost $400,000 in rental income in one year) when one tenant vacated the building. Dunham manipulated the data in his appraisals by allocating much of this lost income from 3055 Kettering to the other two properties

(3033 Kettering and 3077 Kettering) in order to claim that the later two properties had also lost income when in fact no such loss took place. (see Appellant's Merit Brief, p. 6, and 9; where Dunham is shown to have combined the income and expenses from all three properties together and then applied the average net income to each property and where the actual income from each of the properties is shown for the three years from 2008 to 2010). Dunham did the same thing by applying the actual vacancy rate for 3055 Kettering to the other two properties in his income approach, which likewise distorted and artificially reduced the value of these other two properties. (see Appellant's Merit Brief, p. 7 and 23).

What is critical in Appellee's Merit Brief is the fact that Appellee did *not contest or challenge* the *affirmative evidence* in the record that shows that two of the properties, 3033 Kettering and 3077 Kettering, lost no income and no value between the date of sale and tax lien day. While Appellee relied on Mr. Dunham's general claims that all three properties lost income and value due to a change in market conditions (Appellee's Merit Brief, 6), it did not contest or challenge any of Appellant's calculations, taken from the actual income and expense statements for the three properties, that show that Mr. Dunham, manipulated the income data by allocating lost income from 3055 Kettering to the two other properties (3033 Kettering and 3077 Kettering) in order to claim that the later two properties had also lost income when in fact no such loss took place. Appellee did not contest or challenge any of Appellant's calculations that show that the two properties (3033 Kettering and 3077 Kettering) suffered no loss in income from the date of sale to tax lien day. Finally, Appellee also did not contest the fact that Mr. Dunham, acknowledged that the two properties had recovered from the recession by January 1, 2010, in that he wrote in his appraisal that "[t]he 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). Finally, Appellee did not contest or challenge Appellant's arguments that showed that Mr. Dunham had also manipulated his estimates of stabilized vacancy for the three properties by using the rate for the three properties taken together (31 percent) when that figure was based on the vacancy for 3055 Kettering which was over 30 percent while the vacancy rate for the other two properties was closer to 20 percent (see Appellant's Merit Brief, p. 23). Instead, Appellee follows the approach in its Merit Brief taken by Mr. Dunham (in lumping the three properties together in order reduce the value of two of them), by claiming that the vacancy for "Point West" was 31 percent (Appellee's Merit Brief, p. 12). "Point West" is all three separate properties taken together and this includes the vacancy rate of 3055 Kettering, which lost almost 25 percent of its occupied space and over 30 percent of its rental income when one tenant moved out in 2009 (the actual income statement for this property is at Appellant's Supp. p. 107). The vacancy rate for 3055 Kettering had no application to the other two properties and by valuing the 3 properties together solely because they had common ownership, Mr. Dunham gave Appellee a "bulk discount," a method specifically rejected 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 support of Mr. Dunham's claims of lost value and lost income, Appellee cited the general testimony of two of its witnesses (Norman Ross and Anthony Lehman) who claimed that the "global economic recession" had an effect on the "subject property." (Appellee's Merit Brief, p. 3). However, none of these witnesses provided any specific evidence or any appraisal or market data to show that the subject properties actually lost value and the testimony appears to

be based, once again, on the fact that one building, 3055 Kettering, had lost a substantial tenant and had lost a substantial amount of its rental income in 2009 (the tenant was Kaplan College, the details of which was discussed on page 23 of Appellant's Merit Brief).

Appellee also claims that the Board of Education failed to present evidence of the June, 2007 sale of the property to the Board of Revision, although it did present the sale documents to the BTA (Appellee's Merit Brief, p. 5). However, it was not necessary for any of the sale documents to be presented to the BOR because Mr. Dunham, provided the details of the sale in his appraisals (Appellant's Supp. p. 16, 70, and 123) and he included the sale of the three properties in each of his three appraisals as his Comparable Sale No. 5, and Dunham concluded that the 2007 sale was a valid sale and that "[n]o special conditions impacted the sale." (see Appellant's Supp. p. 42, 95, and 134). At the BOR hearing, Mr. Dunham discussed the 2007 sale in detail in connection with the adjustments he made to the sale price as the sale applied to each of the three properties. (BOR recording, track 1, at 10:20 for Dunham's first discussion of the 2007 sale as it applied to each of the three properties).

2. <u>The Price Paid for the Mortgage Note Does Not Constitute Evidence of the True Value of the Properties.</u>

Appellee claims in its Merit Brief that the 2011 sale of the mortgage note also shows that the sale of June, 2007 should not be applied to January 1, 2010 (see Appellee's Merit Brief, p. 2, 4, and 7). The original holder of the note, Prudential, apparently "sold the note" to another entity and after several other transfers of the note, an entity called Univest Dayton Ohio eventually acquired the note from Wells Fargo Bank in January, 2011, and took title to the property on June 27, 2011 pursuant to an earlier foreclosure agreement with Dayton-Point and Wells Fargo. (affidavit of Jack Ross). In his appraisal reports, Dunham described the 2011 transactions (he

wrote that the properties themselves were "not listed for sale") and he did not rely in any way on the price that was paid for the note as evidence of the true value of the properties (Dunham appraisals, p. 13; Supp. p. 16 and 70). According to the documents produced by Appellee, the note was for $7,750,000, which exceeded the actual 2007 sale price of the property ($7,400,000), and the entire amount of the note was due on July 5, 2010, which was only three years after the actual sale of the property, and the "Borrower failed to pay the Loan" on that date (Foreclosure Agreement, p. 2). Appellee claims that the price paid for the note actually constituted the market value of the properties because the buyer of the note was entitled to *force* Appellee to deed the property over to it (Appellee's Merit Brief, p. 4).

However, the purchase of a note and mortgage does not constitute the sale of real property for the purposes of the sale price definition of true value set forth in R.C. 5713.03. This provision refers to the fact that a "tract, lot, or parcel has been the subject of an arm's length sale" and that "the auditor shall consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes." When a note is purchased, there is no sale of a "tract, lot, or parcel" of real property and no "sale price of such tract, lot, or parcel" that could be taken to be the true value of the property. In *Dublin Senior Community Ltd. Pshp. v. Franklin County Bd. of Revision*, 80 Ohio St.3d 455, 458; 687 N.E.2d 426 (1997), this Court rejected the claim that the "purchase of the note and mortgage" was "an arm's-length transaction which established the best evidence of true value for the property." In *RLG Props., LLC v. Franklin County Bd. of Revision*, 10th Dist. Franklin Nos. 06AP-132-134, 2006 Ohio 5096, 2006 Ohio App. LEXIS 5051, the Court of Appeals also held that the sale of a note did not constitute a sale of the property for purposes of R.C. 5713.03 [¶10 and ¶11].

Appellee's subsequent transfer of the property to the party that had acquired the note was not a sale of the property, but even if it were a sale it was a "forced sale" under R.C. 5713.04, which states that "[t]he price for which such real property would sell at auction or forced sale shall not be taken as the criterion of its value." Appellee agreed to transfer the property to any subsequent buyer of note because it was in default on a $7,750,000 debt and as part of an agreement made "in lieu of foreclosure" with the lender. Finally, there was some kind of "Indemnity and Guaranty Agreement" made with respect to payment of the note by an individual named Mark R. Munsell, which may have greatly magnified the force placed on Appellee to discharge the loan and to subsequently convey the property to the buyer of the note in cancellation of the debt (see Deed in Lieu of Foreclosure Agreement, p. 2). As part of the In Lieu of Foreclosure agreement, the guarantor paid an additional $200,000 to Wells Fargo Bank for a "partial settlement of Lender's claims again Guarantor" while the Bank retained its claim against the Guarantor for "any remaining claims Lender may have under the Guaranty" (see Deed in Lieu of Foreclosure Agreement, p. 7). For these reasons, the price paid for the note did not constitute evidence of the true value of the property. The BTA did not address this issue (or any other issue) in its decision.

3. The BTA's Definition of 'Probative Evidence' is Unreasonable and Unlawful.

In Proposition of Law No. 3, Appellant set forth the BTA's new definition of "probative" evidence upon which it relied to justify its acceptance of Dunham's appraisal report, which is any appraisal that: (1) provides an opinion of value as of tax lien date, (2) was prepared for tax valuation purposes, and (3) is attested to by a qualified expert (see BTA Decision and Order, p.

2; and Appellant's Merit Brief, p. 20). Appellant argued in its Merit Brief that the BTA's use of this new definition is unreasonable and unlawful in a number of different respects.

Appellee agrees that the three criteria used by the BTA for a definition of "probative" evidence are completely meaningless because it argues that it is "absurd" to claim that the BTA could have meant that its three criteria could be used as some kind of "justification" for the BTA's acceptance of Dunham's appraisal. (Appellee's Merit Brief, p. 10). However, that is precisely what the BTA said. The BTA's statement means that it found Dunham's appraisal to constitute "probative" evidence solely because the appraisal met its three criteria. The BTA has now used the same three criteria in over one hundred decisions since early 2014 according to a Lexis search of these terms. It is now time for this Court to take the BTA at its word. The BTA *does mean* that it will accept any appraisal report from a property owner that meets the new three-part test for "probative" evidence, and the BTA's decision in this respect is plainly unlawful and unreasonable in all respects.

Appellee, on the other hand, claims that the BTA's sole justification for its decision to accept Dunham's appraisal is set forth in the clause in the BTA's decision that states that "we find the appraisals to be competent and probative and the value conclusion reasonable and well-supported." (BTA Decision and Order, p. 2,). Appellee argues that this is all the BTA has to say to justify its acceptance of the appraisal of a property that results in a reduction in the true value of the property. Appellee does not cite to any statute or case that provides that the BTA can summarily proclaim the evidence to be both competent and probative without no analysis whatsoever, even when the board of revision has previously reduced the value.

Article XII, Section 2 of the Ohio Constitution requires real property to be taxed 'by uniform rule according to value." Appellant's Appx. p. 12. A "uniform rule" at the very least requires that some *rational and intelligible means* be used to determine the true value of the property and that is why R.C. 5715.01 and Adm. Code Rule 5703-25-06(A) require 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, and why R.C. 5715.01 states that "[t]he uniform rules shall prescribe methods of determining the true value and taxable value of real property:" these "methods" being the three appraisal approaches that are defined and described in the administrative code rules adopted by the Tax Commissioner. See Appellant's Appx. p. 15, 18. Needless to say, the BTA's three-part test for determining the "probative" nature of appraisal evidence is neither rational nor intelligible in any manner. Neither is the BTA's conclusory claim that it finds an appraisal to be "competent and probative and the value conclusion reasonable and well-supported" *when the BTA does not cite to a single fact in the record that justifies this conclusion*.

Appellee also claimed in this section of its Merit Brief that Mr. Dunham properly determined market rents for the three subject properties in response to Appellant's claim that he did not. (Appellee's Merit Brief, p. 11, in response to Appellant's claim in its Merit Brief, p. 21). Dunham used the *average rental rate* for all *existing leases* in each of his rental comparables and then took the average of these five average rates to use in determining market rents for the subject property. *Market* rental rates cannot be based on the average rate for all existing leases in a comparable property, but rather must be based on new leases or current leases recently

executed at each of the comparables properties (which is discussed by Appellant under section 2, p. 21 of its Merit Brief).

4. The BTA Unreasonably and Unlawfully Relied on the Subjective Judgments of an Appraiser.

In Proposition of Law No. 4, Appellant also set forth the BTA's new justification for refusing to even address any and all arguments made by a board of education which is a party to one of its appeals in which the board of education points out legal and/or factual defects in an appraisal. The BTA's new rule is that all aspects of an appraisal are based on the "subjective judgments" of the appraiser, and for this reason none of these "subjective judgments" can be challenged by a board of education, and therefore need not be evaluated by the BTA. (Appellant's Merit Brief, p. 23). Appellee does not attempt to defend the BTA's new rule as to the correctness of all "subjective judgments" of an appraiser and it does not contest Appellant's claim that the BTA's reliance on the "subjective judgments" of an appraiser was simply the expression of its intent to effectively exclude any board of education from its proceedings. The BTA now does so by refusing to address any and all arguments made by a board of education that point out substantial legal and factual errors in an appraisal that would otherwise interfere with the BTA's apparent desire to summarily wipeout its backlogged docket and also to grant a property owner a substantial reduction in value and thereby reduce the tax burden on the property owner and ultimately to transfer that burden to the other taxpayers.

Instead, Appellee argues that "Dunham's findings" were based "on actual sales and rents taken from the market" and that the BTA was correct "in adopting these facts" (Appellee's Merit Brief, p. 13). As stated above, the BTA did not adopt any "facts" at all in its decision, because it failed to refer to a single fact in its decision. Appellee also claims that Appellant "does not

identify any specific data point Dunham relies on incorrectly" but Appellant pointed out numerous data points that Dunham misused, misapplied, and improperly manipulated in every part of his appraisal, such as claims of lost income for all three properties when the actual data show no such loss for two properties, misuse of the vacancy rate for 3055 Kettering by applying that rate to the other two properties, use of an "average of the average" rental rates for all *existing leases* in his rental comparable properties instead of new and current leases, and so on.

In line with what the BTA claims in its new "subjective judgments" claim, Appellee also claims that its appraiser had "discretion" to rely on one fact or another or draw one inference or another from the data and that "Dunham was well within his discretion" in making his decisions. (Appellee's Merit Brief, p. 12). Apparently this means that the BTA was required to accept Dunham's decisions because they were based on the exercise of his "discretion." If that is truly the case, it would appear that the BTA serves no function when an appraisal is presented (regardless of its validity) other than to check the "as of" date, make sure that the appraiser "attested" to it (the actual testimony appears to be irrelevant), and to make sure that the appraisal was done for "tax purposes." Simply put, under this new test, the BTA is not "determining the true value of the property" as required by R.C. 5717.03, but instead is rubber stamping appraisals with no analysis of the facts and data contained therein.

The whole point of having a constitutional requirement that the true value of real property be based on the application of a "uniform rule" and statutes that require true value to be based on specific "facts" and administrative code rules that specify the "methods" to be used to determine true value is to require true value to be based on objective facts or market data and that prescribed objective methods to be used to make inferences from that data. The BTA's new

statement that all parts of an appraisal are based on the "subjective judgments" of an appraiser, and therefore not subject to challenge, is a total abdication of its statutory duties.

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. 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,

/s/ Mark H. Gillis
Mark Gillis (0066908)
Rich & Gillis Law Group, LLC
6400 Riverside Drive, Suite D
Dublin, OH 43017
PH: (614) 228-5822
FAX: (614) 540-7476

Attorneys for Appellant
Board of Education of the Kettering City
School District

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing merit brief was served on the following by email transmission and/or regular U.S. mail with postage prepaid, this 10th day of December, 2014.

Ryan Gibbs
2355 Auburn Avenue
Cincinnati, Ohio, 45219
ryan@thegibbsfirm.com

R. Lynn Nothstine
Assistant County Prosecutor
301 West Third Street
Dayton, Ohio, 45422
nothstine@mcohio.org

Mike DeWine
Ohio Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio, 43215

/s/ Mark H. Gillis
Mark Gillis (0066908)
Attorney for Appellant