

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

APPEAL FROM THE BOARD OF TAX APPEALS

BOARD OF EDUCATION)	
OF THE COLUMBUS CITY SCHOOLS,)	CASE NUMBER: 2014-0885
)	
Appellant,)	
)	
v.)	
)	
FRANKLIN COUNTY BOARD OF)	BOARD OF TAX APPEALS
REVISION, FRANKLIN COUNTY)	CASE NO. 2011-3590
AUDITOR, AND)	
ALBANY COMMONS, LTD.,)	
)	
Appellees.)	

MERIT BRIEF OF APPELLEE ALBANY COMMONS, LTD.

Mark H. Gillis, Esq. (0066908)
COUNSEL OF RECORD
Rich & Gillis Law Group, LLC
6400 Riverside Drive, Suite D
Dublin, Ohio 43017
Tel: (614) 228-5822
Fax: (614) 540-7476
mgillis@richgillislawgroup.com

ATTORNEYS FOR APPELLANT
BOARD OF EDUCATION OF THE
COLUMBUS CITY SCHOOL DISTRICT

Charles L. Bluestone, Esq. (0060897)
COUNSEL OF RECORD
Bluestone Law Group, LLC
141 East Towne street, Suite 100
Columbus, Ohio 43215
Tel: (614) 220-5900
Fax: (614) 462-1930
chuck@bluestonelawgroup.com

ATTORNEY FOR APPELLEE
ALBANY COMMONS, LTD.

Hon. Mike DeWine (0009181)
Ohio Attorney General
State Office Tower 17th Floor
30 East Broad Street
Columbus, Ohio 43215
Tel: (614) 462-7519
Fax: (614) 466-8226

ATTORNEY FOR APPELLEE
TAX COMMISSIONER OF THE
STATE OF OHIO

William J. Stehle, Esq. (0077613)
Paul M. Stickel (0025007)
COUNSEL OF RECORD
Assistant Prosecuting Attorneys
Franklin County Prosecutor's Office
373 South High Street, 20th Floor
Columbus, Ohio 43215
Tel: (614) 525-2500
Fax: (614) 478-3915
wjstehle@franklincountyohio.gov
pstickel@franklincountyohio.gov

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

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE AND FACTS	1
LAW AND ARGUMENT	3
CONCLUSION.....	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

Cases

EOP-BP Tower, L.L.C. v. Cuyahoga Cty. Bd. of Revision, 106 Ohio St.3d 1 (2005) 4

Fife v. Greene County Board of Revision, 120 Ohio St.3d 442 (2008) 4

Godwin v. Mercer Cty. Bd. of Revision, BTA No. 94-P-364,
1995 Ohio Tax LEXIS 141 (Jan. 27, 1995)..... 6, 7

Meijer Stores Limited Partnership v. Franklin County Board of Revision,
122 Ohio St.3d 447 (2009)..... 5

Shiloh Automotive, Inc. v. Levin, 117 Ohio St.3d 4 (2008) 5

South-Western City Schools Board of Education v. Franklin County Board of Revision,
et al., 2014 Ohio Tax LEXIS 4303 5, 6

Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, 112 Ohio St.3d 309 (2007) 4, 5

Toledo Public Schools v. Lucas Cty. Bd. of Revision (Oct. 2, 1998),
BTA No. 1996-A-1563, et al. 1998 Ohio Tax LEXIS 1276..... 5

Weber Holdings, Ltd. v. Franklin Cty. Bd. of Revision (Mar. 2, 2007),
BTA No. 2005-K-1009, 2007 Ohio Tax LEXIS 380..... 5, 6

STATEMENT OF THE CASE AND FACTS

Appellant's statement of the case and facts leaves out several important details about the 240-unit "Albany Commons" apartment complex, located at 5651 Warner Park Drive in the City of Columbus, Ohio that is the subject of the underlying real property tax appeal and also omits a number of significant issues concerning the procedural history of the case below.

First and foremost, the appraisal report prepared by James R. Horner, MAI¹ that was presented to the Franklin County Board of Revision ("BOR") expressed an opinion of value for the subject apartment complex both as of January 1, 2005 (the Franklin County re-appraisal year) and January 1, 2008 (the Franklin County valuation update year). The BOR accepted the appraisal evidence as to both tax years, and issued separate decisions adopting the valuations concluded to by Mr. Horner in his report. Despite all of the criticisms about the appraisal methodologies utilized by Mr. Horner, what appellant does not tell this Court is that it accepted Mr. Horner's value conclusion for the 2008 tax year by not appealing the BOR decision which adopted his 2008 value conclusion.²

Second, appellant never availed itself of the opportunities in the long history of this case to request that appraiser Horner provide the additional documentation maintained in his files, as he is required to do under the Uniform Standards of Appraisal Practice, relating to the sales histories and income and expenses reports pertaining to the comparable apartment complexes that he reviewed in reaching the valuation conclusions stated in his appraisal report. Despite its prior practice of subpoenaing property owners' appraisers and their files at the Board of Tax Appeals level of real property tax appeals, appellant failed to do so here.

Third, appellant's criticism of Mr. Horner not developing the cost approach in valuing the subject property is unfounded. Appellant's characterization of the subject property as "new" as of the January 1, 2005 tax lien date does not tell the whole story. Construction of the first phase of the apartment complex actually began in 2000, with units being rented to tenants as soon as each of the individual buildings were completed. The owner continued this lease-up practice through

¹ Appellant repeatedly misidentified the appraiser involved in this case. James R. Horner, MAI was hired by the property owner to appraise the subject property, not Thomas Horner (Appellant's Merit Brief, pages 1 and 10).

² Appellant's failure to appeal the TY 2008 decision is especially curious since "Horner's 'Restricted Use Appraisal' ... [used] the very same methods and procedures." (Appellant's Merit Brief, page 2).

2004, when the last building in the second phase of the project was completed. Consequently, as of the January 1, 2005 tax lien date, each of the twenty (20) buildings as well as the various detached garage buildings and the club house building making up this apartment complex had different levels of depreciation. Moreover, there was no specific testimony at the BOR hearing regarding the exact costs to construct the subject apartment complex. And the reason why such information is not included in the case file is that appellant never requested it. Here too, appellant failed to exercise its subpoena power. And appellant's use of a cost approximation given by the owner's representative who did not have the construction cost files before him is, in reality, not probative evidence of the true construction costs.

Fourth, appellant fails to disclose that Mr. Horner expressly intended his report to be used and relied upon by a number of parties, including “[the property owner and its counsel], members of the BOR, school board representatives and anyone that is involved in the valuation of this property for determining the Market Value of the property in regards to valuation for real estate tax purposes.” (Appraisal Report, page 8)

Fifth, appellant's Merit Brief wholly ignores the important testimony about the subject apartment complex provided at two (2) BOR hearings involving the tax year 2005 value of this property by the owner's representative, Patrick J. Kelley, and Oakwood Management Company's representative, Deborah Pizzaro. Most significantly, the lengthy discussion of the efforts made by Oakwood Management Company in conducting surveys each month, both of the apartment complexes that it manages as well as others, to ensure that the lease rates charged for units at the subject property reflected market rental rates.

Sixth, appellant devotes a large part of its Merit Brief raising irrelevant issues notably that the BOR elected, *sua sponte*, to re-open the hearing below for the purpose of having additional evidence and testimony entered into the record. The BOR's decision to reopen the case within 30 days after issuing its initial decision (not subject to appeal here) and before any appeal was filed was wholly within the BOR's prerogative. And assuming appellant's criticism of the supposed “new BTA” is even correct, the school district's proper avenue to correct the perceived failings is with the Ohio General Assembly, and is not a proper issue for an appeal such as this one.

LAW AND ARGUMENT

In valuing the subject property, appraiser Jams R. Horner, MAI placed his greatest reliance on the income approach to value. His testimony at the BOR hearing, which appellant never mentions in its Merit Brief, was that he had reviewed (i) income and expense reports from several comparable apartment complexes that were maintained in his office files, (ii) information given to him by Oakwood Management Company, the largest residential apartment complex property manager in central Ohio, as well as (iii) information given to him by the Kelley/Weiler ownership team. Based upon that research, he concluded that the rents charged at the subject property were reflective of market rents, and that the actual expenses incurred at the subject property were also reflective of market expenses. Thus, in actuality, he conducted an appropriate review of relevant data as the basis for his market-based income capitalization approach, which means that appellant's criticism is unfounded.

Also baseless is appellant's argument that the subject property had not achieved a stabilized rental level as of January 2005. On January 1, 2005, the subject complex was 85% occupied (205 out of 240 units were tenanted). Nearly three (3) years later, as of December 18, 2007, only another eight (8) units were occupied (213 out of 204 units, or an 88.75% occupancy level). Thinking back to 2005, which is well before the crisis in the housing market started, banks were freely making loans to borrowers, whether those persons were financially qualified or at sub-prime credit levels, enabling them to buy single-family homes and condominiums. We were, at that time, in the midst of one of the biggest housing booms in the country's history. Thus, the 85% occupancy level as of January 1, 2005 was reflective of the property's stabilized rental level or very close to it. Only after 2005, did lenders begin to initiate wholesale foreclosures that caused the market to swing towards rental properties, which suddenly began to achieve higher rental income and occupancy levels.

Consequently, Horner's averaging of the 2004 and 2005 rental rates, which he believed based upon his research to be reflective of market rents, was an appropriate methodology. Appellant wrongly manipulates the rental data included in the appraisal report to suggest that Horner underestimated 2005's income levels. Yes, gross income did rise from 2004 to 2006 by 27.2%, but that \$461,966 in additional income did not result from the eight (8) extra units that were rented by the end of 2006. Rather, this substantial rise in income levels was attributable to

the sudden, unexpected demand for rental housing as people were displaced by home loan foreclosures.³

Mr. Horner believed, in his professional judgment, that a meaningful market (sales comparison) approach to value could not be performed and explained in his report why he felt that such an approach would, regardless, be a “weak” barometer for estimating value. Moreover, the testimony and evidence presented below established that the typical buyer of an apartment complex would rely most heavily on the income capitalization approach, just as did Mr. Horner in valuing the subject property.

In reviewing the statutory record, which included testimony from Patrick Kelley, the owner’s representative at the BTA hearing, the BTA held:

Upon review of appellee’s [property owner’s] appraisal evidence, which provides an opinion of value as of tax lien date, was prepared for tax valuation purposes, and attested to by a qualified expert, we find the appraisal to be competent and probative and the value conclusion reasonable and well-supported. (BTA Order and Decision – Appx 9.)

Contrary to well-established case law, appellant is asking this Court to now sit as a “Super BTA” and to have it review *de novo* the evidence in this case and render a new judgment. This Court has ruled over and over again that it will not act in the manner requested by the school district. *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 112 Ohio St.3d 309 (2007); *EOP-BP Tower, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 1 (2005)). Therefore, appellant’s request that this Court substitute its judgment for that determined by the BOR and affirmed by the BTA should be rejected.

The standard of reviewing a BTA decision turns on whether the BTA acted reasonably and lawfully. This Court will defer to the BTA’s factual determinations if the record contains reliable and probative evidence. *Fife v. Greene County Board of Revision*, 120 Ohio St.3d 442 (2008). More specifically, the Court “will not reverse the BTA’s determination on credibility of witnesses and weight given to their testimony unless we find an abuse of * * * discretion.”

³ Appellant’s argument that “This increase in the income was due to the fact that the [eight (8)] brand units in the property, finished in 2004, were being leased up at this time.” is simply risible.

Meijer Stores Limited Partnership v. Franklin County Board of Revision, 122 Ohio St.3d 447 (2009) quoting *Strongsville*, 112 Ohio St.3d 309. Finally, the BTA is vested with wide discretion in determining the weight to be given to evidence and the competence and credibility of the witnesses that come before it. *Shiloh Automotive, Inc. v. Levin*, 117 Ohio St.3d 4 (2008).

It is respectfully submitted that the Horner appraisal, bolstered by the testimony of Patrick Kelley, Deborah Pizzaro and appraiser James R. Horner, MAI mets this standard.

And contrary to appellant's argument, restricted use appraisal reports have been accepted by Ohio courts as probative of value in real property tax appeal cases. In an eerily similar case decided just on September 11, 2014, involving the same appraiser – James R. Horner, MAI⁴ – and with same law firm – Rich & Gillis Law Group, LLC - representing the appellant school district, the BTA found a restricted use appraisal report to be “competent and probative evidence of value” in affirming the Franklin County Board of Revision's decision. *South-Western City Schools Board of Education v. Franklin County Board of Revision, et al.*, 2014 Ohio Tax LEXIS 4303, *1, *5.⁵ In this case, the school district argued that the BOR had improperly relied upon appraiser Horner's restricted appraisal report “because it was a restricted use report offered outside the scope of its intended use and did not rely on the most comparable sales to develop his opinion of value.” *Id.* at *2.

The BTA disagreed with the school district's argument and concluded that the restricted appraisal report was not offered outside the scope of its intended use and that it was prepared for tax valuation purposes. Moreover, the BTA pointed out that, even if the report had been prepared for purposes other than tax valuation, it had previously and would still find the report to be admissible – it just retained the discretion to determine what weight would be accorded to the report. *See id.* at *4 (citing *Toledo Public Schools v. Lucas Cty. Bd. of Revision* (Oct. 2, 1998), BTA No. 1996-A-1563, et al. 1998 Ohio Tax LEXIS 1276; *Weber Holdings, Ltd. v. Franklin Cty. Bd. of Revision* (Mar. 2, 2007), BTA No. 2005-K-1009, 2007 Ohio Tax LEXIS 380, unreported).

⁴ The decision inadvertently refers to Mr. Horner as “Mr. Homer”. Attached in Appellee's Supplement, pp. 4-6 are select pages from the appraisal report in that case showing that James R. Horner, MAI was the author. Also in the Supplement is the Board of Education's subpoena issued to James R. Horner.

⁵ Interestingly, appellant never appealed from the BTA's decision in this case. One also has to ask why appellant filed to reference this case in its Merit Brief that was just recently decided by the BTA, while, instead, citing decades old case law.

As to the appellant's argument that the appraiser did not rely on the most comparable sales to develop his opinion, the BTA also disagreed because an appraisal report does not have to contain an explanation and justification for every single decision that an appraiser makes when deciding what data he/she will use to come up with an opinion of value. The BTA held that it is inherent in the appraisal process that an appraiser, like Mr. Horner, who was a "qualified expert", "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." *South-Western*, at *3. Said differently, Mr. Horner concluded to a value by using his expertise as a Member of the Appraisal Institute and, just because the school district concludes that a different type of market value approach to determining the market value of a property, does not mean that Mr. Horner must reach the same conclusion.

During Appellant's nostalgic commentary about how the "New BTA" has moved away from its "more careful and thoughtful days", Appellant cites to *Godwin v. Mercer City Board of Revision* as a case where the BTA did not find a limited appraisal report to be indicative of true value. This twenty-year old case is easily distinguishable from the present case because the appraisal report in *Godwin* was not relied upon due to the following disclaimer: "The reliability of the value conclusion herein is impacted to the degree there is a *departure from specific guidelines of the Uniform Standards of Professional Appraisal Practice (USPAP)*" (emphasis added). *Godwin v. Mercer Cty. Bd. of Revision*, BTA No. 94-P-364, 1995 Ohio Tax LEXIS 141, *7 (Jan. 27, 1995). Additionally, Appellant's next cited case, *Weber Holdings, Ltd. v. Franklin County Board of Revision*, the report not only contained the same type of disclaimer where it departed from the specific guidelines of the USPAP, but the report was also created for financing purposes; not tax valuation purposes. 2007 Ohio Tax LEXIS 380, *8.

Mr. Horner's appraisal report in the present case does not contain any such language about departing from USPAP. In fact, it contains language to the contrary, "Even though the report is restricted, it still must conform to the Uniform Standards of Professional Appraisal Practice of the Appraisal Foundation" (See Supplement of Appellant's Merit Brief page 2). And later, "The report analyses, opinions and conclusions were developed, and this report has been prepared, in conformity with the requirements of the Code of Professional Ethics & Standards of Professional Appraisal Practice of the Appraisal Institute, which include the *Uniform Standards of Professional*

Appraisal Practice.” (See Certificate of Appraisal). Mr. Horner’s appraisal report may have been abbreviated in certain sections, but it never departed from the USPAP like the report in *Godwin*. Finally, Mr. Horner’s appraisal report clearly states that its intended use is for “determining the Market Value of the property in regards to valuation for real estate tax purposes.” (See Supplement of Appellant’s Merit Brief page 5).

CONCLUSION

For the reasons set forth herein, appellee Albany Commons, Ltd. respectfully requests this Court to affirm the decision of the Board of Tax Appeals.

Respectfully submitted,



Charles L. Bluestone (0060897)
ATTORNEY FOR APPELLEE
ALBANY COMMONS, LTD.

CERTIFICATE OF SERVICE

This is to certify the forgoing Reply Brief of Appellee Albany Commons, Ltd. was mailed via email and via regular, first-class United States Postal Service mail, postage prepaid, on this 1st day of April, 2015 (as well as by email to the addresses shown below), to the persons listed below:

Mark H. Gillis, Esq. (0066908)
COUNSEL OF RECORD
Rich & Gillis Law Group LLC
6400 Riverside Drive, Suite D
Dublin, Ohio 43017
Tel: (614) 228-5822
Fax: (614) 540-7476

mgillis@richgillislawgroup.com

William J. Stehle, Esq. (0077613)
Paul M. Stickel (0025007)
COUNSEL OF RECORD
Assistant Prosecuting Attorneys
Franklin County Prosecutor's Office
373 South High Street, 20th Floor
Columbus, Ohio 43215
Tel: (614) 525-2500
Fax: (614) 478-3915

wjstehle@franklincountyohio.gov
pstickel@franklincountyohio.gov

ATTORNEYS FOR APPELLANT
BOARD OF EDUCATION OF THE
COLUMBUS CITY
SCHOOL DISTRICT

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

Hon. Mike DeWine (0009181)
Ohio Attorney General
State Office Tower 17th Floor
30 East Broad Street
Columbus, Ohio 43215
Tel: (614) 462-7519
Fax: (614) 466-8226

ATTORNEY FOR APPELLEE
TAX COMMISSIONER OF THE
STATE OF OHIO



Charles L. Bluestone (0060897)