Supreme Court of Ohio Clerk of Court - Filed July 06, 2015 - Case No. 2014-0882

IN THE SUPREME COURT OF OHIO

Board of Education of the Groveport-Madison Local School District,	:	
Appellant,	:	Case No. 2014-0882
v.	:	
Franklin County Board of Revision, Franklin County Auditor, and Lutheran Social Services of Central OH Groveport Housing	:	Appeal from the Ohio Board of Tax Appeal - Case No. 2012-146
Appellees.	:	

AMENDED REPLY BRIEF OF APPELLANT BOARD OF EDUCTION OF THE GROVEPORT-MADISON LOCAL SCHOOL DISTRICT

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LAW AND ARGUMENT

Reply to Appellee's Proposition of Law No. 1:

In its first proposition of law, the appellant Boards of Education argued that the BTA's decision was *per se* unreasonable and unlawful because the BTA failed to set forth even a single fact that was relevant to its determination of the true value of the property before it. The one and only operative sentence in the BTA's entire decision was the following:

> Upon review of property owner's appraisal evidence, [1] which 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 appraisal to be competent and probative evidence and the value conclusion reasonable and well supported. (BTA Decision and Order, page 2, brackets added).

As stated by Appellants in their Merit Brief (page 5-6), the three criteria identified by the brackets in the above quotation are not even relevant to the determination of whether the property owner's appraisal (prepared by Donald Miller) constituted "probative" evidence or whether the appraiser's "value conclusion [was] reasonable and well supported." While the BTA stated that it did "review the property owner's appraisal evidence" there is nothing in the BTA's decision to show that it actually did so. The BTA did not refer to a single fact about the property owner's appraisal in its decision. The standardized template form decision that the BTA used to decide this appeal, and the numerous other appeals now before this Court (see Appellant's Merit Brief, at 6, fn. 2), does not even contain a description of the property that is before it or an identification of the type of property involved in the appeal.

Appellee does not, in fact, address the issue raised by Appellant in its first proposition of law. That issue is whether or not what the BTA *actually said it relied upon* to support its decision was reasonable and lawful, and whether the property owners' appraisal could be

adopted by the BTA for no other reason than it provided "an opinion of value as of tax lien date;" were "prepared for tax valuation purposes;" and were "attested to by a qualified expert."

In the first proposition of law in the Appellee property owner's merit brief, Appellee errs in inferring that the BTA found the appraisals probative and competent. In its decision, the BTA "found" nothing at all: rather the BTA simply declared that "we find the appraisal to be competent and probative evidence and the value conclusion reasonable and well supported." BTA Decision and Order at 2. (App. Appx. at 9.) A finding of the BTA must be based upon facts, and in this case the BTA cited no relevant facts to support its mere conclusory statement that the property owner's appraisal constituted "probative evidence and the value conclusion reasonable and well supported."

Instead, on pages 3 and 4 of their merit brief, Appellee sets forth what they claim are the actual facts from the Miller appraisal report that the BTA *could have* relied upon or "found" to be "probative" evidence had the BTA actually "review[ed] [the] property owner's appraisal evidence" as it claimed to have done. In other words, Appellee attempts to provide the relevant facts that could support their appraiser's values. However, the fact remains that the BTA did not state what facts it relied upon in rendering its decision herein. Second, Appellee attempts to address the obvious errors in the Miller appraisal that shows that Miller's value cannot be the true value of the subject property. See pages 3 and 4 of Appellee's Merit Brief. The issue addressed by Appellee is that Miller's sales comparison or market approach shows that his income approach grossly undervalued the property.

In the appraisal, Miller's income approach was based on the four standard components of that approach which estimate: (1) market rents for the property; (2) a stabilized vacancy rate; (3)

stabilized operating expenses; and (4) a capitalization rate to be applied to net operating income to transform net operating income into a value estimate. It is possible for the appraiser to err in making any one or more of these estimates or to manipulate the data to arrive at a desired value. That is why the income approach must always be checked or verified by also relying on a market approach, which shows what comparable properties actually sell for in the open market notwithstanding any desktop income approach value at which the appraiser might have arrived.

In his income approach for the property, Miller arrived at a value of $23,540 per unit ($1,130,000 divided by 48 units). This value is so grossly low that in order to have his sales comparison approach "support" this value, Miller had to use sales comparables in his market approach that were *not even remotely comparable to the subject property*. The subject property was built in 1998. The comparable sales used by Miller were built in 1973, 1963, 1970, 1986, and 1980. Miller's appraisal at 35. Four of five of these properties were *eighteen to thirty-five years older than the subject property*. Miller admitted in his appraisal that *all five of these properties* were "below average" in "quality" and "construction" and were *all "inferior" to the subject property*. Miller appraisal report at 35.

Historically, when the BTA used to conduct an *independent analysis of the evidence*, it would have rejected Miller's appraisal on this ground alone. As shown by the photographs of the sale comparable properties, they are not even of the same generation of apartment complexes as is the modern subject property. Because Miller *had to use the actual sale prices* of his comparables in order *to match in his income approach value*, Miller had to offset the inferior quality, inferior construction, and the substantially older age of these comparables by making compensating adjustments for the larger "size" of the units in each comparable, while refusing at

the same time to make any positive adjustments for the fact that the subject property had a large amount of common areas to account for the smaller size of the individual units. *Four of the five comparable sale properties had no common spaces at all*, when compared to the subject property which had 13,654 square feet of common space comprising 33.7% of the overall building. To make downward adjustments to the comparable sales for the larger "size" of the individual units, while at the same time refusing to make any upward adjustments at all for the substantial amounts of common space in the subject property is an age-old trick and is precisely what the BTA said an appraiser could not do in *Cambridge Arms, Ltd. v. Hamilton Cty. Bd. of Revision*, BTA Nos. 90-M-1352 and 90-M-1353, 1992 Ohio Tax LEXIS 1365 (Oct. 30, 1992), as affirmed by this Court in *Cambridge Arms v. Hamilton Cty. Bd. of Revision*, 69 Ohio St.3d 337, 632 N.E.2d 496 (1994). See Appellants' Merit Brief, at 3, 15.

Appellee's reply to this issue misses the point altogether. Appellee responds by claiming that Miller's "*rent* comparables," and not his sales or market comparables, which was the sole point, were similar to the subject properties. Appellee notes that Miller's 5 *rent* comparables were both older and newer than the subject property (Appellee's merit brief, at 2), and that his "*rent* comparables" were not all "older and inferior buildings." Appellee Merit Brief, at 3. (emphasis added.)

Finally, Appellee claims that the "BTA does not need to state" what particular "evidence" or appraisal data that it found to support its values "[b]ecause Miller's appraisals and testimony were the only evidence in the record." Appellee Merit Brief, at 4. However, the mere fact that Miller's appraisals were the only documentary evidence in the record is not sufficient to prove the true value of the property because the BTA must determine whether any appraisal presented

to it is consistent with the laws that govern the determination of true value. Both Appellee and the BTA ignore the fundamental principal requiring a complainant who seeks an increase or decrease in value must prove the right to the requested increase or reduction with competent and probative evidence in the first place. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 68 Ohio St.3d 336, 626 N.E.2d 933 (1994); *Crow v. Cuyahoga Cty. Bd. of Revision*, 50 Ohio St.3d 55, 552 N.E.2d 892 (1990); *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision*, 37 Ohio St.3d 318, 526 N.E.2d 64 (1988). Any party can present vast quantities of unreliable or unsubstantiated "evidence" that is of little or no probative value or that is otherwise legally insufficient to prove value. An appraisal that "does not comport with the statutory purposes of real-property taxation" is not a valid appraisal. See *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, ¶ 25 (East Bank II). As a result, the BTA was required to specifically address the arguments submitted by the BOE demonstrating the legal flaws of the Miller appraisal and the findings of the BTA on those points must be supported by the facts contained in the record.

In fact, on May 12, 2015, the 10th District Court of Appeals ruled as such in *S.-W. City Schools Bd. of Edn v. Franklin Cty. Bd. of Revision*, 10th Dist. Franklin No. 14AP-729, 2015-Ohio-1780 (Bank Street Partners). In *Bank Street Partners*, the Court was presented, unlike the present case, with a BTA decision with at least some, albeit very little, actual analysis of the evidence contained within the record. In response, the Appellate Court correctly held that:

> {¶ 34} Although the BTA decision concludes that Bank Street presented insufficient evidence to support the BOR's reduction in value, the ***BTA decision does not contain any factual findings in support of that conclusion***. With regard to the threshold issue of Clarke's competency to offer his opinion of fair market value, Clarke testified in his capacity as both an owner of the subject real property and as a real estate broker with experience in the local market and knowledge of

> recent sales of commercial real estate in the area. Because Clarke is an owner of the property, he is competent to offer his opinion of fair market value. The BOE acknowledged Clarke's competency at the proceedings before the BTA, but objected to his opinion of fair market value on other grounds. Because the BTA decision contains no finding regarding Clarke's competency and no ruling upon the objection interposed by the BOR, we are unable to determine whether the BTA engaged in the burden-shifting analysis required by *Worthington*.
>
> {¶ 36} In *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 132 Ohio St.3d 371, 2012-Ohio-2844, the Supreme Court "recognized that the ***BTA 'has the duty to state what evidence it considered relevant in reaching its determination,' and we thereby require that the BTA evaluate the evidence before it in making its findings***." *Id*. at ¶ 18, quoting *HealthSouth Corp. v. Levin*, 121 Ohio St.3d 282, 2009-Ohio-584, ¶ 34, 36. The court further stated:
>
>> We hold that the BTA erred by ignoring and failing to weigh the significance of the testimony regarding the seller's tax motivations in allocating the sale price to the subject property. Because it is the duty of the BTA to weigh the evidence and determine the facts concerning valuation, we must remand for proper consideration of the effect of that testimony.
>>
>> * * *
>>
>> When the BTA's decision is "silent on the subject" of potentially material evidence, that silence makes the court " 'unable to perform its appellate duty,' " with the result that the proper course is to remand so that the BTA may afford the taxpayer the review of the evidence that is its due. *Dublin Senior Community L.P. v. Franklin Cty. Bd. of Revision*, 80 Ohio St.3d 455, 462, 687 N.E.2d 426 (1997), quoting *Howard v. Cuyahoga Cty. Bd. of Revision*, 37 Ohio St.3d 195, 197, 524 N.E.2d 887 (1988). *Id*. at ¶ 3, 29.

In remanding the decision back to the BTA with an order to "examine and evaluate all the evidence before it." the *Bank Street* Court specifically stated:

> The ***BTA decision also lacks the type of critical analysis*** that was cited with approval by the Supreme Court in *Vandalia-Butler*. ***Given the state of the BTA decision, we cannot conclude that the BTA satisfied its duty*** to weigh the evidence and determine the facts concerning valuation. *Id*. at ¶ 38.

The very same thing can be said about "the state of the BTA decision" in the present matter. The BTA decision clearly "lacks the type of critical analysis that was cited with approval by the Supreme Court in *Vandalia-Butler*" and there is simply no way for this Court to determine whether the BTA satisfied its "duty to *independently* weigh all of the evidence before it." In fact, other than citing to the three largely irrelevant factors that the appraisal had the correct "as of" date, was "prepared for tax valuation purposes," and "attested to by a qualified expert" it is quite clear that the BTA performed no actual analysis of the evidence whatsoever. Otherwise, the BTA would have had to have discussed its own conflicting decision in *Cambridge Arms* and this Court controlling authority affirming the BTA's decision therein. Without such analysis, it is clear that the BTA merely rubber stamped the BOR's decision.

Reply to Appellee's Proposition of Law No. 3:

Appellee misconstrues the arguments made by Appellant in its Proposition of Law No. 3. In Proposition of Law No. 3, Appellant pointed out that Miller's appraisals were not consistent with law and with prior BTA decisions, one of which was affirmed by this Court, which govern how an appraiser is to treat an apartment complex that is specifically designed to have smaller-sized units but which have large amounts of common area to offset the smaller unit sizes. See *Cambridge Arms Ltd. v. Hamilton Cty. Bd. of Revision*, BTA Nos. 90-M-1352 and 90-M-1353, 1992 Ohio Tax LEXIS 1365 (Oct. 30, 1992), and C*ambridge Arms v. Hamilton Cty. Bd. of Revision*, 69 Ohio St.3d 337, 632 N.E.2d 496 (1994), discussed by Appellant on pages 13 and 14 of its Merit Brief. The typical senior citizens housing project, such as the apartment complex involved in this appeal, has smaller units with special features in the units and large amounts of common area that provide additional amenities to the elderly residents and that offset the small

size of the individual units. In the two *Cambridge Arms* decisions cited above, both the BTA and this Court held that an appraiser could not disregard the large amounts of common space and amenities in this type of property.

In his appraisal of the subject property, Miller placed no value on any of the common areas; he did not describe the common areas in his appraisals; and four of the five comparable sales used to value the properties had no common areas at all. Miller testified at the BOR that he placed little or no value on any of the common areas.

Appellee's response in its Merit Brief does not address this issue. Instead, Appellee argues that an appraiser does "not need [to do] a separate valuation" of the common areas. Appellee Merit Brief at 8. Appellee appears to claim that Appellant argued that an appraiser needs to "value common areas separately" and that the "common areas" had to "be valued separately." Appellee Merit Brief at 8, 9. Of course, Appellant made no such claim. What Appellant did state in Proposition of Law No. 3 was that the laws governing the determination of the true value of real property require the appraiser to take into account the fact that the property he or she was appraising has large amounts of common areas. Even Appellee admits that the common areas of the two subject properties "ha[ve] value" and that "[i]f the common areas did not have value they would not have been built." See Appellee Merit Brief at 9.

The issue, then, is not whether the common areas have to be "valued separately," but rather whether the property owner's appraiser attributed the appropriate value to the common areas through adjustments to his comparables. There is no evidence in this case to show that Miller gave the common areas *any* value at all, and indeed Miller's appraisal and testimony shows that he gave the common areas no value.

As stated above, in his market or sales comparison approach, Miller gave the common areas no value at all. Four of the five comparable sales he relied upon had no common areas. Only one had a "clubhouse" of undisclosed size or condition. Miller made a downward or negative adjustment to his comparable sales to reflect the fact that the living units in the comparable sales were larger than the units in the subject property. However, Miller made no positive or upward adjustments to the sale price of the comparables to reflect the fact that the two subject properties had large common areas as additional amenities for the residents. In *Cambridge Arms Ltd. v. Hamilton Cty. Bd. of Revision*, BTA Nos. 90-M-1352 and 90-M-1353, 1992 Ohio Tax LEXIS1365 (Oct. 30, 1992), the BTA held that in order to reflect the value of large common areas in properties like the subject property for real property tax purposes, the appraiser must appraise the property using either: (1) sales data taken directly from similar non-subsidized elderly housing projects; or (2) if the appraiser uses simple apartment complexes as comparable data, the ***appraiser must make the necessary "adjustments" to the data*** to account for the large amounts of "common space" and other amenities found in the elderly housing project. Miller stated in his appraisal that the "applicability [of the market approach] in this case is good" and that the market approach was used "to support the primary approach, the income capitalization approach" (Miller appraisal at 37). However, the values arrived at by Miller is his market approach cannot be correct, which necessarily means that his income approach must be flawed because an even higher value under the sales comparison approach does not support Miller's income approach.

Once again, Appellee argues that *some* of Miller's "rent comparables," but none of his sales comparables, had common areas, such as clubhouses. Appellee Merit Brief at 9. There is

no evidence in Miller's appraisal to show that he distinguished between the rent comparables that had common areas from those that did not in determining the market rents for the subject property. Appellee argues that "to do so would require an analysis of what common area the subject has, and what common areas the comparables have." Appellee Brief at 9. This is an absolutely correct statement and is the reason that Miller's appraisal must be rejected. As the original complainant before the BOR, Appellee was required to present competent and probative evidence of value. Presenting an appraisal for a property with 30+% common area with no descriptions of that common area and no descriptions of the common areas of those comparables that had any common areas at all means that the report itself was incomplete and the proper analysis to determine whether or not the entire property was properly valued could not have been conducted by the either the BOR or the BTA.

The incompetency of Miller's report is further illustrated by the fact that four out of five of Miller's sales comparables had no common areas, and that his downward adjustments for the "size" of the units without a compensating upward adjustment for the large amounts of common areas made his sales comparison approach incorrect, and the sales comparison approach, according to Miller, was a "good" indicator to the value of the property. Consequently, his income approach to value was then suspect as a correct market approach would provide no support to Miller's income approach and in fact would result in a substantially higher value.

Reply to Appellee's Proposition of Law No. 4:

Appellee misstates Appellant's Proposition of Law No. 4. Appellant's Proposition of Law No. 4 states that "The BTA is required to address and decide issues raised by a statutory party that directly relate to the proper determination of the true value of real property."

Appellant specifically referred to the issue that the property owner's appraiser failed to make any adjustments to his comparable sales or rent comparables to account for the fact that the property had a substantial amount of common area that was not found in the comparables. This issue was presented to the BTA in the Appellant's briefs. However, the BTA made no reference to either this issue or to the brief submitted by Appellant. The refusal of the BTA to address a critical issue raised by a party in the appeal, and the refusal of the BTA to even acknowledge that it gave any consideration to this issue, is both unreasonable and unlawful. See *Bank Street Partners*, 2015-Ohio-1780, supra.

Appellee responds by claiming that "[t]he BTA is not required to address *each* issue raised by a party." Appellee Merit Brief, at 11. (emphasis added.) Appellant did not argue that the BTA was required to address "each issue" or all issues put to it, but that it was required to address issues relating to the laws governing the determination of the true value of real property. The requirement to value all parts of real property and to insure that no parts of the subject property were improperly exempted from taxation meant that the BTA was required to address the issue of whether the property owner's appraiser, in fact, valued the subject property as it actually existed or whether he, in fact, valued the property as if the large amounts of common areas were exempt from taxation. By refusing to address one of the main issues in the appeal before it, the BTA has not satisfied its statutory duty to independently evaluate all of the evidence properly before it and to independently determine value.

Lastly, the crux of the Board of Education's argument can be summed up in what has to be one of the most ludicrous statements ever argued in the real property tax realm. On page 11 of its brief Appellee makes the following argument:

> Because the BTA has the option to "confine itself to the record and the evidence certified to it by the BOR" they do not have to entertain briefs. Because they do not have to entertain briefs, they may elect not to address issues raised in briefs in the BTA decisions.

Appellee cites no authority for this utterly ridiculous statement because not only does no authority exist, but this Court's prior decisions are in direct contradiction to Appellee's preposterous claim. First of all, the basic tenant of an "appeal" of a prior decision is the right to argue the case before the appellate tribunal either orally or in writing or both. In other words "the school board plainly possesses a *statutory* right to be heard in the context of valuation appeals." *MB West Chester v. Butler Cty. Bd. of Revision*, 126 Ohio St.3d 430, 2010-Ohio-3781. Furthermore, in *Vandalia-Butler City School Dist. Bd. of Edn. v. Montgomery Cty. Bd. of Revision*, 106 Ohio St.3d 157, 2005-Ohio-4385, 833 N.E.2d 271, this Court unequivocally held that:

> The board of education could meet its burden of proof before the BTA by showing through cross-examination of Timberlake's appraiser ***and in a posthearing brief*** that the board of revision had erred when it reduced the value from the amount first determined by the auditor. (emphasis added.)

Under Appellee's unsupportable theory, the BTA could effectively eliminate any appellant's right to be heard or any ability to meet its burden as appellant by refusing to hold a hearing or reviewing briefs. This could be a very effective tool to be used by the BTA to clear its docket by issuing summary decisions with no analysis and could be easily used by property owner attorneys to effectively eliminate a board of education's ability to ever defend against an improper or illegal reduction in value.

It must be remembered that in a case where the owner has filed an original complaint seeking a reduction in value, the board of education has no opportunity to conduct discovery

before the county board of revision as there are no provisions allowing for such a process at the county level.[1] Therefore, it is routine practice for property owners to refuse to permit an appraiser hired by a board of education to inspect the property or to review the financial statements for the subject property for the sole purpose of hindering a board of education's ability to combat the owner's evidence. It is also routine practice for property owner attorneys to produce all evidence at the hearing where the board of education sees it for the first time while the hearing is already in progress. The Board of Education is then charged with reviewing an appraisal for the first time *during the ongoing testimony of the appraiser*. There is no opportunity given to the board of education to research or otherwise vet the appraisal by viewing the comparables or otherwise ensuring that the report meets all of the legal requirements for an appraisal to be competent and probative evidence of value. The first opportunity to perform any such analysis is on appeal before the BTA. To hold that the BTA is not required to read, review and rule upon arguments properly presented to it on appeal and in a merit brief renders the appeal process meaningless since such a ruling would mean that the BTA is not required to listen to, read or ever comment on any legal arguments presented to it.

Finally, the BTA's own rules state:

> (A) Parties are encouraged to file written legal argument in support of their respective positions in compliance with the case management schedules set forth in rules 5717-1-06 or 5717-1-07 of the Administrative Code as applicable. If a hearing is conducted, the board may request briefs from the parties, and parties may file briefs without being so requested. If any party fails to submit a brief within the established time limit, the board may proceed to determine the appeal and exclude the brief from its consideration. After the deadline for submission of briefs has passed, a

[1]A property owner never has this situation arise since they own the subject property; they already have knowledge of the relevant information.

> party may file, as additional authority, relevant cases subsequently decided, but without further argument. OAC 5717-1-16.

The BTA "encourages" parties to file written legal arguments. The rule states that "parties may file briefs without being [] requested. It is only when a brief is untimely filed that the BTA "*may* proceed to determine the appeal and exclude the brief from its consideration." That did not happen in this case. The BTA requested briefs from the parties by the issuance of a briefing schedule. The BTA claimed to have considered the "written argument submitted by the parties." However, as is argued by the BOE and admitted by Appellee, there is no evidence in the BTA's decision that it even read the briefs as there is certainly no mention of any of the arguments made or more importantly, any analysis or determinations of those arguments.

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 Franklin County Auditor's original appraised value of the $2,050,000 for the subject property because no competent and probative evidence exists which proves that the properties have a lower or different value, or in the alternative to remand these appeals back to the BTA with instructions that it address the specific issues raised by Appellant in each appeal and that it specifically determine 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 the following by email transmission and/or regular U.S. mail this 6th day of July 2015.

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5717-1-16 Briefs.

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(B) With the exception of this board's decisions, copies of any unreported decisions cited in a brief shall be attached to the brief.

(C) Briefs amicus curiae may be filed with leave of the board and shall be filed according to the briefing deadlines established by the board.

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