Supreme Court of Ohio Clerk of Court - Filed August 17, 2015 - Case No. 2015-0389

IN THE SUPREME COURT OF OHIO

Board Of Education of the West Carrollton City Schools,	:	Case No. 2015-0389
Appellant,	:	Appeal from the Ohio Board of Tax Appeals Case No. 2012-4862
vs.	:	
Montgomery County Board of Revision, et al.,	:	
Appellees,	:	

BRIEF OF APPELLANT BOARD OF EDUCATION OF THE WEST CARROLLTON CITY SCHOOL DISTRICT

Mark H. Gillis (0066908)
Karol C. Fox (0041916)
COUNSEL OF RECORD
Rich & Gillis Law Group, LLC
6400 Riverside Drive, Suite D
Dublin, Ohio 43017
(614) 228-5822
Fax (614) 540-7474

Attorneys for Appellant West Carrollton City Schools Board of Education

The Honorable Mike Dewine (0009181)
Ohio Attorney General
30 East Broad Street
Columbus, Ohio 43215

Attorney for Appellee Tax Commissioner of the State of Ohio

John R. Koverman, Jr., Esq. (0021083)
COUNSEL OF RECORD
1300 Liberty Tower
120 West Second Street
Dayton, Ohio 45402
(937) 222-6926
Fax (937) 222-6901

Attorney for Appellee Carmax Auto Superstores, Inc.

Mathias H. Heck, Jr. (0014171)
Montgomery County Prosecuting Attorney
Laura G. Mariani (0063284)
Assistant Prosecuting Attorney
COUNSEL OF RECORD
301 West Third Street, Suite 500
Dayton, Ohio 43402
(513) 225-5757

Attorneys for Appellees County Auditor And Board of Revision

TABLE OF CONTENTS

Section **Page(s)**

Table of Authorities ii

Statement of the Case and Facts 1

Law and Argument 4

Introduction 4

Appellant's Proposition of Law No. 1:

The BTA Erred In Rejecting A Land Sale That It Had Previously Determined To Be An Arm's-Length Sale On The Sole Basis That The Sale Occurred More Than 24 Months Prior To The Tax Lien When The Tax Lien Date Was Not A Reappraisal Year 4

Appellant's Proposition of Law No. 2:

Actual Construction Costs Provide The Best Evidence Of Value For A Newly Built Special Purpose Property 9

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

The BTA Erred By Failing To Independently Determine The Value Of The Property When The Evidence Affirmatively Negated The Auditor's Value 11

Conclusion 15

Certificate of Service 16

Appendix **Appx. P.**

Notice of Appeal 1

BTA Decision and Order 10

R. C. 5313.03 13

TABLE OF AUTHORITIES

Cases

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 ..... 7, 8

Amsdell v. Cuyahoga Cty. Bd. of Revision, 69 Ohio St. 3d 572, 574, 635 N.E.2d 11 (1994) 14

Board of Edn. of the Columbus City Sch. Dist. v. Franklin Cty. Bd. of Revision, 90 Ohio St.3d 564, 565, 740 N.E.2d 276 (2001) 13

Board of Edn. of the West Carrollton City Schools v. Montgomery Cty. Bd. of Revision, BTA No. 2009-K-3910, 2012 Ohio Tax LEXIS 4494 (Sep. 11, 2012) 1, 2

Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, 115 Ohio St.3d 449, 2007-Ohio-5237, 875 N.E. 2d 913 12

Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, 106 Ohio St.3d 269, 2005-Ohio-4979, 834 N.E. 2d 782 4

Cleveland v. Budget Comm., 47 Ohio St. 2d 27, 31, 350 N.E.2d 924 (1976) 13

Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision, 76 Ohio St.3d 13, 16, 665 N.E.2d 1098 (1996) 5, 14

Columbus City Schools v. Franklin Cty. Bd. of Revision, BTA No. 2010-W-3563, 2013 Ohio Tax LEXIS 967 (Feb. 20, 2013) 11

Cummins Prop. Servs. v. Franklin Cty. Bd. of Revision, 117 Ohio St.3d 516, 2008-Ohio-1473, 885 N.E.2d 222 5

Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision, 113 Ohio St.3d 281, 2007-Ohio-1948, 865 N.E.2d 22 ..... 10, 11, 12

Dinner Bell Meats, Inc. v. Cuyahoga Cty. Bd. of Revision, 12 Ohio St.3d 270, 466 N.E.2d 909 (1984) 9

Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222 13

FirstCal Indus. 2 Acquisitions, L.L.C. v. Franklin Cty. Bd. of Revision, 125 Ohio St.3d 485, 2010-Ohio-1921, 929 N.E.2d 426 5

Francis v. Shelby Cty. Bd. of Revision, BTA No. 2006-M-1064, 2008 Ohio Tax LEXIS 60 (Jan. 11, 2008) 11

HIN, L.L.C v. Cuyahoga Cty. Bd. of Revision, 124 Ohio St.3d 481, 2010-Ohio-687, 923 N.E.2d 1144 7

Howard v. Cuyahoga Cty. Bd. of Revision, 37 Ohio St.3d 195, 197; 524 N.E.2d 887 (1988) 13

Lakota Local Sch. Dist. Bd. of Educ. v. Butler Cty. Bd. of Revision, 108 Ohio St.3d 310, 2006-Ohio-1059, 843 N.E.2d 757 4

Meijer Stores Ltd. Partnership v. Franklin Cty. Bd. of Revision, 122 Ohio St.3d 447, 2009-Ohio-3479, 912 N.E.2d 560 9

New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision 80 Ohio St.3d 36, 684 N.E.2d 312 (*1997*) 6

Olmsted Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, 122 Ohio St.3d 134, 2009-Ohio-246, 909 N.E.2d 597 6

Rhodes v. Hamilton Cty. Bd. of Revision, 117 Ohio St.3d 532, 2008-Ohio-1595, 885 N.E.2d 2365

Simmons v. Cuyahoga Cty. Bd. of Revision (1998), 81 Ohio St.3d 47, 689 N.E.2d 22 10

Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision, 68 Ohio St.3d 493, 628 N.E.2d 1365 (1994) 5

Wal-Mart *Stores, Inc. v. Medina Cty. Bd. of Revision*, BTA No. 1994-T-660, 1995 Ohio Tax LEXIS 1345 (Nov. 9, 1995) 11

Statutes

R. C. 5713.03 4

STATEMENT OF THE CASE AND FACTS

This is an appeal from the Ohio Board of Tax Appeals (BTA) involving the determination of the tax year 2011 value of a newly constructed auto superstore built on 15.211 acres of land (the property) in Miamisburg, Montgomery County. Appellee Montgomery County Auditor (Auditor) lists the property as parcel numbers K48004150010 and K48004150011.

Apellee Carmax Auto Superstores, Inc. (Carmax) purchased the land on January 9, 2008 for $5,850,000 and subsequently constructed the building in 2009 at a cost of $7,015,740. In a previous case the Board of Tax Appeals (BTA) determined the land sale to be a recent arm's-length transaction and the best evidence of the value of the land for tax years 2008, 2009, and 2010. *Board of Edn. of the West Carrollton City Schools v. Montgomery Cty. Bd. of Revision*, BTA No. 2009-K-3910, 2012 Ohio Tax LEXIS 4494 (Sep. 11, 2012) (Carmax 2008).

Subsequent to the *Carmax 2008* BTA decision, the auditor's total value for the property was $8,828,560 for tax years 2009 and 2010. Tax year 2011 was a new triennial period but not a reappraisal year for Montgomery County but, instead of applying the update factor to the existing 2010 value, the auditor reduced the value for the entire property (land and improvements) to only $4,664,230. Because the auditor's total 2011 value was less than the owner had recently paid for just the vacant land, Appellant West Carrollton City Schools Board of Education (BOE) filed a Board of Revision (BOR) complaint seeking an increase in value.

At the BOR hearing, Appellant presented a copy of the deed and conveyance fee statement from the sale of the land and requested that the land value be increased to the sale price. BOR Recording. Although Carmax participated in the BOR hearing through counsel, it offered no witnesses or documentary evidence to even attempt to refute Appellant's sale evidence. BOR Recording. Despite the uncontroverted recent sale evidence and the previous

BTA decision, the BOR did not increase the value of the property and the BOE appealed that decision to the BTA.

During the course of the BTA appeal Appellant was, for the first time, able to issue discovery and obtain information from the owner regarding the actual costs of the newly constructed auto superstore. That information confirmed that the owner spent $7,015,740 on the hard costs of constructing the improvements and that the improvements were completed in October of 2009 – just fourteen months prior to the January 1, 2011 tax lien date. (App. BTA Exh. A , Supp. 1-21.) At the BTA hearing Appellant BOE relied upon the conveyance fee statement and deed from the land sale that were already contained in the statutory transcript from the BOR. (BOR St. Tr., Supp. 66-71.) Appellant also presented documentary evidence of the construction costs of the new building, including a stipulation from the owner that the improvements cost $7,015,740 and that all of that amount was attributable to real property. (App. BTA Exh. A, Supp. 1.) Appellant requested that the land be valued at the recent sale price of $5,850,000, and that the improvements be valued at their actual cost of $7,015,740 for a total value of $12,865,740.

The owner's evidence before the BTA consisted solely of the testimony of appraiser Michael Moorhead and a document printed from the internet regarding the sale of another property. The owner did not present an appraisal report because Mr. Moorhead had not appraised any portion of the property for tax year 2011. He never appraised the improvements on this property and had only appraised the land for the prior case with a value estimate for tax year 2008. (BTA Hearing Record p. 46, Supp. 34.) The BTA rejected Mr. Moorhead's appraisal and relied upon the recent arm's-length sale in that case. *Carmax 2008, supra*.

Instead of offering appraisal testimony at the hearing in this case, Moorhead simply testified about a land sale of another property that he found on the internet (the Loop Road sale) that occurred on January 22, 2014 – further from tax lien date than the sale of the subject property. Mr. Moorhead relied upon public records for his information about the Loop Road sale and failed to verify the transaction with anyone involved in the sale. (BTA Hearing Record p. 46 & 47, Supp. 34.) Mr. Moorhead relied upon the Loop Road sale as support for his 2008 value still applying to tax year 2011 or, in other words, claiming that the market had not changed from 2008 to 2011 for the land. (BTA Hearing Record p. 34, Supp. 31.)

Mr. Moorhead agreed that a cost approach was a very appropriate method to use to value the subject property since the improvements were so new. (BTA Hearing Record p. 40, 49, Supp. 32, 34.) He also confirmed that the Carmax building was a special purpose building and that appraisal standards recommend using a cost approach when valuing special purpose buildings. (BTA Hearing Record p. 49, Supp. 34.) Finally, when questioned by the owner's counsel regarding the ease of locating sales that would be comparable to the subject property, Mr. Moorhead admitted that finding comparable sales would be very difficult. (BTA Hearing Record p. 51, Supp. 35.)

Despite all of the uncontroverted evidence that affirmatively negated the auditor's value, the BTA retained the auditor's original values that totaled $4,664,230 – only about a third of the price that had recently been paid by the owner for this property. The auditor's total 2011 value for the land was $2,529,260 or 43% of the $5,850,000 paid by the owner less than three years prior. The auditor's 2011 building value was $2,187,430 or 31% of the actual cost of the improvements (without soft costs) that were built less than two years before tax lien date. In its

decision, the BTA improperly rejected the recent land sale and failed to even recognize that Appellant had presented cost evidence for the new improvements.

LAW AND ARGUMENT

Introduction:

The issue in this appeal is whether the BTA acted unreasonably and unlawfully when it affirmed the decision of the BOR after it improperly rejected the recent arm's-length sale of the subject land and failed to even acknowledge Appellant's cost evidence for the newly constructed building - evidence that affirmatively negated the Auditor's original valuation.

Appellant's Proposition of Law No. 1

> **The BTA Erred In Rejecting A Land Sale That It Had Previously Determined To Be An Arm's-Length Sale On The Sole Basis That The Sale Occurred More Than 24 Months Prior To The Tax Lien When The Tax Lien Date Was Not A Reappraisal Year.**

R.C. 5713.03 sets forth the sale price definition of "true value" for real property tax purposes and, as of January 1, 2011, that statute read in part: "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. 13.)

This Court has repeatedly reaffirmed that R.C. 5713.03 means exactly what is says and that the price paid for real property in an arm's-length sale must be taken as its true value in money as a matter of law. *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, 834 N.E. 2d 782, at ¶13 and *Lakota Local Sch. Dist. Bd. of Educ. v. Butler Cty. Bd. of Revision,* 108 Ohio St.3d 310, 2006-Ohio-1059, 843 N.E.2d 757, at ¶22. The sale price is required to be taken as the true value of real property even when unusual

circumstances exist with regard to the property involved in the sale. *Rhodes v. Hamilton Cty. Bd. of Revision*, 117 Ohio St.3d 532, 2008-Ohio-1595, 885 N.E.2d 236 and *Cummins Prop. Servs. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, 885 N.E.2d 222.

This Court has consistently held that the only duty of a board of education relying on an actual sale of the property for purposes of R.C. 5713.03 is to present the deed and conveyance fee form showing the details of the sale. *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13, 16; 665 N.E.2d 1098 (1996) (*Nestle Foods Corp.)*, and *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision*, 68 Ohio St.3d 493, 628 N.E.2d 1365 (1994). In *FirstCal Indus. 2 Acquisitions, L.L.C. v. Franklin Cty. Bd. of Revision*, 125 Ohio St.3d 485, 2010-Ohio-1921, 929 N.E.2d 426, this Court reconfirmed this stating

> (w)e have held that the "initial burden on a party presenting evidence of a sale is not a heavy one, where the sale on its face appears to be recent and at arm's length." Indeed, our cases acknowledge that the school board, as the proponent of using a sale price to value real property, typically makes a prima facie case when it presents a recent conveyance-fee statement along with a deed to evidence the sale and the price. Moreover, the basic documentation of a sale invokes a "rebuttable presumption that the sale has met all the requirements that characterize true value."

In this case, the BOE established that the underlying land that is the subject of this appeal sold for $5,850,000 less than three years prior to the tax lien date by presenting copies of the deed and conveyance fee statement. Carmax never disputed the arm's-length nature of the sale in this case and never presented the testimony from any witness with first-hand knowledge about the sale. In the 2008 case involving this same property, Carmax did attempt to prove that the sale was not an arm's-length sale but, after considering all of the owner's evidence, the BTA determined the sale to be a recent arm's-length transaction. So even if Carmax had attempted to dispute the arm's-length nature of the sale in this case, the doctrine of collateral estoppel applied and prohibited the re-litigation of that issue. *New Winchester Gardens, Ltd. v. Franklin Cty. Bd.*

of Revision 80 Ohio St.3d 36, 684 N.E.2d 312 (1997), and *Olmsted Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 122 Ohio St.3d 134, 2009-Ohio-246, 909 N.E.2d 597.

Having already lost on the issue of the arm's-length nature of the sale, the owner's only argument against using the sale for tax year 2011 was recency but Carmax failed to present any probative evidence to establish that the January 2008 sale was not recent to January 1, 2011.[1] In fact, the only evidence offered by Carmax confirmed that the market for this property had not really changed from January 1, 2008 to January 1, 2011. As previously stated, Carmax presented no evidence at all to the BOR so the only evidence of value that the BOR had consisted of the BOE's unrefuted sale documents.

At the BTA hearing, the only evidence offered by Carmax was the testimony of appraiser Michael Moorhead who had appraised the land for the prior case as of January 1, 2008. (BTA Hearing Record p. 33, Supp. 30.) Mr. Moorhead did not appraise the property again for this case but he did "look at some additional market data" for purposes of reviewing his 2008 land value and he discussed the Loop Road sale, which was a January 22, 2014 sale of a property "within a very close proximity" to the subject property. Although the Loop Road sale took place further from the tax lien date than the subject's 2008 sale and despite the fact that he never verified the Loop Road sale to confirm that it was an arm's-length sale, Mr. Moorhead relied on the Loop Road sale when he concluded that it supported his 2008 value of the land. (BTA Hearing Record p. 34, Supp. 31.) So, in the opinion of the owner's own appraiser, the market for the land value was essentially the same in 2011 as it was at the time the property sold in January of 2008 and

[1] Before the BTA, Carmax argued that the sale was really more than three years from the tax lien date because the price had been negotiated in 2007 but this Court has previously determined that "for purposes of determining true value under R.C. 5713.03, the date of filing of the conveyance-fee statement should be used as the time of sale rather than the date the sale was

not decreased by 57% (The difference between the auditor's land value and the price paid for the land by Carmax).

The only other testimony offered by Mr. Moorhead that had anything to do with a potential change in the market was in response to counsel's question regarding a possible change in the market for the building since 2008. (BTA Hearing Record p. 41, Supp. 32.) Moorhead responded to this question very abstractly stating "there was a downturn in most buildings" but was referring to the time period of "2007 or 2008 to the present time" (meaning 2014 when the BTA hearing was held.) BTA Hearing Record p. 41, Supp. 32.) Moorhead offered no paired sales or any other evidence whatsoever in support of his generalization about the market. He offered no specific opinion regarding exactly if or how the market changed from the end of 2009 when the building construction was complete to January, 2011 and he certainly did not establish that the market for this specific type of building changed at all, let alone decreasing in value by 69% (the difference between the auditor's value and the actual cost of the improvements.)

The BTA's decision makes no mention of whether or not Carmax met its burden of proof regarding recency because the BTA improperly applied this Court's decision 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, and presumed that the sale was not recent based solely upon the fact that it was more than 24 months away from the tax lien date. The rejection of the sale in this case was not based on a factual finding by the BTA but was based on a question of law that the BTA misapplied.

This Court made it clear in its decision that the shifting of the normal presumption of recency occurred in *Akron* due to very specific facts – facts that do not exist in this case. In

---

negotiated or closed." *HIN, L.L.C v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 481, 2010-

Akron, the recency presumption shifted to the proponent of the sale because the sale was more than two years prior to a **reappraisal** year for the county and the auditor's appraiser's did not rely upon the sale. Specifically, this Court held

> a sale that occurred more than 24 months before the lien date and that is reflected in the property record maintained by the county auditor or fiscal officer should not be presumed to be recent when a different value has been determined for that lien date as part of the six-year reappraisal. *Id*. at ¶ 26.

This Court went on to explain that the reason for its decision was to "prevent a remote sale from controlling over a more recent appraisal" and to "harmonize the fiscal officer's duties under former R.C. 5713.03, which stressed the primacy of the sale price, with R.C. 5713.01(B), which calls for a reappraisal every six years." *Id.* at ¶ 27.

This Court's holding in *Akron* does not apply to this case because the critical facts are different. Tax year 2011 was not a reappraisal year for Montgomery County and the subject property was not reappraised by the auditor's office for 2011. It was unlawful for the BTA to apply a bright line test and disregard the land sale in this case simply because it occurred more than 24 months prior to the tax lien date. Even if 2011 had been a reappraisal year for Montgomery County and, in that case, *Akron* would apply, the BTA's rejection of the sale based only upon proximity in time would still have been improper. The BTA would still have had a duty to consider the evidence before it and determine what the evidence established with regard to recency. In this case, Carmax's own expert witness confirmed that the market did not significantly change from the time of the sale in January 2008 to January 1, 2011, thereby reestablishing the presumption of recency.

Ohio-687, 923 N.E.2d 1144.

Appellant's Proposition of Law No. 2

Actual Construction Costs Provide The Best Evidence Of Value For A Newly Built Special Purpose Property.

After purchasing the land for $5,850,000 in 2008, Carmax constructed an auto superstore that was completed at the end of October, 2009. The hard costs for the improvements totaled $7,015,740 and Carmax stipulated before the BTA that those costs were for real property improvements. (Appellant's BTA Exh. A, Supp. 3-6.) The owner's appraiser at the BTA hearing confirmed that utilization of a cost approach would absolutely be appropriate due to the recency of construction and also because the auto superstore was a special purpose use of the property. (BTA Hearing Record p. 40, 49, Supp. 32, 34.) The appropriateness of using a cost approach was also reinforced by the appraiser's testimony that finding truly comparable market sales for this property would be very difficult. (BTA Hearing Record p. 51, Supp. 35.) A review of the county property record cards shows that the county's appraisers also concluded that the proper methodology for valuing the property was the cost approach and that was the approach utilized by the county. However, the values used by the county were radically lower than the actual costs of this property with the county's land value being only 43% of the price recently paid by the owner to acquire the land and the county's building value being only 31% of the actual construction costs for the new improvements.

Both the BTA and this Court have affirmed the propriety of utilizing a cost approach when valuing new or special use properties. See for example, *Dinner Bell Meats, Inc. v. Cuyahoga Cty. Bd. of Revision*, 12 Ohio St.3d 270, 466 N.E.2d 909 (1984), in which the BTA utilized a cost a approach to value a "special purpose" building and this Court affirmed that decision despite the owner's claims that the BTA's decision constituted a value in use. More recently in *Meijer Stores Ltd. Partnership v. Franklin Cty. Bd. of Revision*, 122 Ohio St.3d 447,

2009-Ohio-3479, 912 N.E.2d 560, the Court relied upon and discussed its holding in *Dinner Bell Meats* stating:

> (i)n so holding, we acknowledged that the present use of a property may be considered when "a building in good condition [is] being used currently and for the foreseeable future for the unique purpose for which it was built"; otherwise, "the owner of a distinctive, but yet highly useful, building [would be able] to escape full property tax liability." *Id*., quoting *Fed. Res. Bank of Minneapolis v. State* (Minn.1981), 313 N.W.2d 619, 623. We have followed the doctrine of *Dinner Bell Meats* in later cases, including a case involving the valuation of a Meijer store. See *Oakwood Club v. Cuyahoga Cty. Bd. of Revision* (1994), 70 Ohio St.3d 241, 243-244, 1994 Ohio 347, 638 N.E.2d 547; *Meijer, Inc. v. Montgomery Cty. Bd. of Revision* (1996), 75 Ohio St.3d 181, 1996 Ohio 223, 661 N.E.2d 1056.

While the previous cases all involve appraisers utilizing the cost approach to value new or special purpose properties, this Court has also determined that actual cost data outside of an appraisal report can be sufficient to establish a value for newly constructed property. In *Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision*, 113 Ohio St.3d 281, 2007-Ohio-1948, 865 N.E.2d 22, the Court considered a case with relevant facts very similar to this case in that the owner sought to value newly constructed improvements based upon the owner's actual costs rather than the auditor's cost approach. The BTA had rejected Dayton-Montgomery's actual costs to value the property and adopted the auditor's values because it determined the "actual-cost analysis * * * was incomplete." *Id.* at ¶ 15. While it acknowledged that its prior decision in *Simmons v. Cuyahoga Cty. Bd. of Revision* (1998), 81 Ohio St.3d 47, 689 N.E.2d 22, allowed for affirmation of a BOR's decision when "there is no evidence from which the BTA can independently determine value," the *Dayton-Montgomery* Court went on to determine that *Simmons* did not apply because the cost evidence in the record provided "an adequate basis for the BTA to determine a cost valuation of the building." The Court made this determination despite the BTA's concerns that the cost evidence did not include entrepreneurial

profit (soft costs) and that the costs may not have represented market costs on tax lien date. *Id.* at ¶ 18.

The BTA also relied upon *Simmons* in this case, just as it did in *Dayton-Montgomery* but in this case the BTA failed to even acknowledge that Appellant had presented any evidence at the BTA hearing. After improperly rejecting the land sale, the BTA declared that "in the absence of a qualifying sale, appellant was required but failed to provide a competent appraisal of the subject property". Then, without even mentioning Appellant's cost evidence, evidence that was stipulated to by the owner and established a value of more than seven million dollars just for the new improvements, the BTA stated that "based upon our review of the record, we find the bases cited insufficient to support the claimed adjustment to value."

In this case the BTA's decision is in direct conflict with its own precedent in numerous cases where it found the cost approach to be the most appropriate method to value newly constructed or special purpose buildings. See for example, *Columbus City Schools v. Franklin Cty. Bd. of Revision*, BTA No. 2010-W-3563, 2013 Ohio Tax LEXIS 967 (Feb. 20, 2013), *Wal-Mart Stores, Inc. v. Medina Cty. Bd. of Revision*, BTA No. 1994-T-660, 1995 Ohio Tax LEXIS 1345 (Nov. 9, 1995); *Francis v. Shelby Cty. Bd. of Revision*, BTA No. 2006-M-1064, 2008 Ohio Tax LEXIS 60 (Jan. 11, 2008), in addition to *Dinner Bell Meats and Meijer, supra.*

Appellant's Proposition of Law No. 3

The BTA Erred By Failing To Independently Determine The Value Of The Property When The Evidence Affirmatively Negated The Auditor's Value.

After the Court determined that the actual construction costs provided reliable evidence of value in *Dayton-Montgomery*, it then concluded that the BTA's reversion to the auditor's values was improper. Specifically, the Court held:

> when the evidence presented to the board of revision or the BTA contradicts the auditor's determination in whole or in part, and when no evidence has been adduced to support the auditor's valuation, the BTA may not simply revert to the auditor's determination. Whenever it does so, the BTA is acting unlawfully by making a finding of value that is affirmatively contradicted by the only evidence in the record. *Id*. at ¶ 27.

As previously discussed, Appellant presented unrefuted evidence before both the BOR and the BTA that affirmatively negated the auditor's values for the subject property. At the BOR hearing, Appellant presented a deed and conveyance fee statement establishing the recent arm's-length sale of the land for $5,850,000 – a value more than twice the auditor's land value. That sale had already been determined to be an arm's-length sale by the BTA in a previous case and Appellee Carmax offered no evidence whatsoever to disprove the recency of that transaction. In fact, the appraiser who testified before the BTA on behalf of Carmax confirmed that there had been no significant change in the market from the time of the sale to tax lien date of January 1, 2011.

At the BTA hearing, Appellant presented additional evidence that affirmatively refuted the auditor's improvement value. Appellant's BTA exhibit consisted of documentation that was stipulated to by the owner and established that the actual construction costs for this newly built, special purpose property were $7,015,740. Appellant's exhibit confirmed that these costs were for real property construction costs and that the construction was completed only fourteen months prior to the tax lien date. This evidence affirmatively negated the auditor's building value of only $2,187,430, which was less than one-third of the actual cost.

In *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 115 Ohio St.3d 449, 2007-Ohio-5237, 875 N.E. 2d 913, ¶ 12, the Court relied upon *Dayton-Montgomery* and concluded that the BTA's reversion to the auditor's value was "not justified, because the taxpayer had presented evidence contrary to the auditor's determination." The recent sale and cost evidence

presented by the BOE in this case was certainly as probative and reliable as the income data relied upon by the owner in *Bedford* and the evidence in this case even more drastically negated the auditor's values. As in *Bedford* and *Dayton-Montgomery*, the record in this case contains no evidence in support of the auditor's values – evidence that was required once Appellant presented evidence that affirmatively negated those values.

The BTA's decision also failed to set forth any analysis that might allow Appellant or this Court to know what evidence it actually considered in making its determination as required by *Howard v. Cuyahoga Cty. Bd. of Revision*, 37 Ohio St.3d 195, 197; 524 N.E.2d 887 (1988). See also, *Cleveland v. Budget Comm.*, 47 Ohio St. 2d 27, 31, 350 N.E.2d 924 (1976) (the BTA's decision must "set out adequate reasons, supported by the evidence, for its finding"); and *Board of Edn. of the Columbus City Sch. Dist. v. Franklin Cty. Bd. of Revision*, 90 Ohio St.3d 564, 565, 740 N.E.2d 276 (2001) ("We also require the BTA to state what evidence it considers relevant in reaching a value determination.").

In *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision* 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222, this Court on reconsideration of its original decision held:

> After it considered and rejected East Bank's arguments, the BTA reinstated the auditor's valuations for each parcel. *Dublin City Schools Bd. of Edn.*, 2012 Ohio Tax LEXIS 3545, 2012 WL 3166815, at *6. In this court's prior opinion, we held that the BTA erred in reverting to the auditor's valuations. *Dublin City Schools I*, 139 Ohio St.3d 193, 2013-Ohio-4543, N.E.3d. at ¶ 26. That portion of our prior decision remains unchanged.
>
> Rather than adopt the auditor's valuations, the BTA should have conducted its own analysis and made an independent determination as to the taxable values of the properties. *See, e.g.*, *Vandalia-Butler City Schools Bd. of Edn. v. Montgomery Cty. Bd. of Revision*, 130 Ohio St.3d 291, 2011-Ohio-5078, 958 N.E.2d 131, ¶ 26 "When there is sufficient evidence to permit the BTA to perform an independent valuation * * * the BTA must do so"); *Colonial Village, Ltd. v. Washington Cty. Bd. of Revision*, 114 Ohio St.3d 493, 2007-Ohio-4641, 873 N.E.2d 298, ¶ 23-25.

Because the BTA failed to even mention the evidence that was presented to it in this case it is impossible to know which evidence it may or may not have found to be probative. Regardless, there was a substantial amount of evidence presented that affirmatively negated the auditor's values and the BTA was required to make its own independent value determination rather than simply reverting back to those of the auditor.

This Court has strongly discouraged the BTA from "rubber stamping" BOR decisions, which are not presumptively valid on appeal. *Amsdell v. Cuyahoga Cty. Bd. of Revision*, 69 Ohio St. 3d 572, 574, 635 N.E.2d 11 (1994); *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* ("*Nestle Foods Corp.*"), 76 Ohio St.3d 13, 15-16, 665 N.E.2d 1098 (1996). Instead, the BTA is obligated and has a statutory duty to not only consider any evidence presented to it but also to perform a de novo review of the evidence that was presented to the BOR. There are numerous reasons for the lack of deference in these matters, including "the possible conflict inherent in the roles of the board members." *Nestle Foods Corp*. at 15, citing *Alliance Towers, Ltd. v. Stark Cty. Bd. of Revision*, 37 Ohio St. 3d 16, 25, 523 N.E.2d 826 (1988).

But the BTA failed to perform its statutory duty in this case. It failed to properly consider the sale evidence that had been presented to the BOR solely because the sale occurred more than 24 months prior to the tax lien date. It also failed to consider any of the evidence that was presented at the BTA hearing regarding the actual cost of the new improvements since none of that evidence was even mentioned, let alone analyzed in its decision. And it failed to independently determine the value of the subject property after substantial sale and cost evidence was presented that affirmatively negated the auditor's values.

CONCLUSION

For the reasons set forth herein, this Court is respectfully requested to reverse the decision of the Board of Tax Appeals and determine that the recent arm's-length sale of the land and the actual construction costs of the improvements provided the best evidence of value of the subject property. In the alternative, this Court should remand the matter back to the BTA with instructions that it perform its mandatory statutory duties and independently determine the value of the subject property based upon the cost evidence in the record.

Respectfully Submitted,

/s/ Mark H. Gillis

Mark H. Gillis (0066908)
Karol C. Fox (0041916)
Rich & Gillis Law Group, LLC
6400 Riverside Drive, Suite D
Dublin, Ohio 43017
(614) 228-5822; (614) 540-7476 fax
mgillis@richgillislawgroup.com
Attorneys for Appellant Board of Education of the West Carrolton City School District

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon the following by electronic mail and/or by placing a true and correct copy in the United States mail, postage prepaid, this 17th day of August, 2015.

John R. Koverman, Jr., Esq. (0021083)
1300 Liberty Tower
120 West Second Street
Dayton, Ohio 45402
jkovlaw@yahoo.com

Laura G. Mariani (0063284)
Assistant Prosecuting Attorney
301 West Third Street, Suite 500
Dayton, Ohio 43402
MarianiL@mcohio.org

The Honorable Mike Dewine
Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, OH 43215-3428
Christine.Mesirow@ohioattorneygeneral.gov

/s/ Mark H. Gillis
Mark H. Gillis (0066908)

ORIGINAL

FILED/RECEIVED
BOARD OF TAX APPEALS
2015 MAR -9 AM 8:42

IN THE SUPREME COURT OF OHIO

Board of Education of the West Carrollton City Schools	:	
Appellant,	:	Case No. 15-038
v.	:	Appeal from the Ohio Board of Tax Appeals - Case Nos. 2012-4862
Montgomery County Board of Revision and Montgomery County Auditor,	:	
Appellees.	:	

NOTICE OF APPEAL OF THE BOARD OF EDUCATION OF THE WEST CARROLLTON CITY SCHOOLS

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

Attorneys for Appellant
Board of Education of the West Carrollton City School District

Mike Dewine (0009181)
Ohio Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio, 43215
Attorney for Appellee Tax Commissioner

John R. Koverman, Jr., Esq. (0021083)
1300 Liberty Tower
120 West Second St.
Dayton, OH 45402
(937) 222-6926
Fax(937) 222-6901
jkovlaw@yahoo.com

Attorney for Appellee Carmax Auto Superstores, Inc.

Mathias H. Heck, Jr. (0014171)
Montgomery County Prosecuting Attorney
Laura G. Mariani (0063284)
COUNSEL OF RECORD
Assistant Prosecuting Attorney
301 West Third Street, Suite 500
Dayton, OH 43402
(513) 225-5757
MarianiL@mcohio.org

Attorneys for Appellees County Auditor and Board of Revision

FILED
MAR 09 2015
CLERK OF COURT
SUPREME COURT OF OHIO

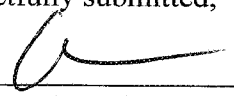
IN THE SUPREME COURT OF OHIO

Board of Education of the West Carrollton City Schools	:	
	:	Case No. _____
Appellant,		
	:	Appeal from the Ohio Board of Tax Appeals - Case Nos. 2012-4862
v.		
	:	
Montgomery County Board of Revision and Montgomery County Auditor,	:	
Appellees.	:	

NOTICE OF APPEAL OF THE BOARD OF EDUCATION OF THE WEST CARROLLTON CITY SCHOOLS

Now comes Appellant, the Board of Education of the West Carrollton 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 *West Carrollton City Sch. Bd. of Edn. v. Montgomery Cty. Bd. of Revision, Montgomery County Auditor, and Carmax Auto Superstores, Inc.,* BTA Case No. 2012-4862, rendered on February 5, 2015, a copy of which is attached hereto as Exhibit B. The Errors complained of therein are set forth herein as Exhibit A.

Respectfully submitted,



Mark H. Gillis (0066908)
Rich & Gillis Law Group, LLC
6400 Riverside Drive, Suite D
Dublin, Ohio 43017
(614) 228-5822

Attorneys for Appellant Board of Education of the West Carrollton City Schools

EXHIBIT A - STATEMENT OF ERRORS

(1) The Ohio Board of Tax Appeals (BTA) erred in its application of *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision,* 139 Ohio St.3d 92, 2014-Ohio-1588 when it held that the January 9, 2008 sale of the vacant land for $5,850,000 was not a "reliable indication of value" because it was "remote from the tax lien date" when there was no intervening "six-year reappraisal" by the county auditor between the sale date and the tax lien date in question.

(2) The BTA erred by failing to value the underlying land at the January 9, 2014 sale price of $5,850,000.

(3) The BTA erred by failing to independently determine the true value of the subject property when it had before it the land acquisition cost and the cost of construction of the improvements before it.

(4) The BTA erred when it failed to perform a de novo review of the record such that it failed to recognize evidence within the record that affirmatively negated the Auditor's original valuation.

(5) The BTA erred when it failed to perform a de novo review of the record such that it failed to recognize evidence within the record which was sufficient for the BTA to independently determine the value of the subject property.

(6) The BTA erred in rejecting the January 9, 2014 sale of the underlying land for $5,850,000 based solely upon its temporal proximity to the tax lien date in a misapplication of *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision,* 139 Ohio St.3d 92, 2014-Ohio-1588.

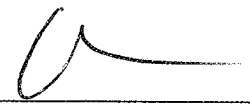
(7) The BTA erred in failing to presume that the January 9, 2014 sale of the underlying land for $5,850,000 was recent to the tax lien date.

(8) The BTA erred by failing to even acknowledge let alone specifically address any of the cost evidence and arguments presented by the Board of Education that demonstrated the flaws in the Auditor's original value.

(9) The BTA erred by affirming the Auditor's original value when it had been affirmatively negated by the evidence in the record.

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 9th day of March, 2015.

John R. Koverman, Jr., Esq.
1300 Liberty Tower
120 West Second St.
Dayton, OH 45402

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

Mathias H. Heck, Jr.
Montgomery County Prosecuting Attorney
Laura G. Mariani
COUNSEL OF RECORD
Assistant Prosecuting Attorney
301 West Third Street, Suite 500
Dayton, OH 43402

Mark Gillis (0066908)
Attorney for Appellants

IN THE SUPREME COURT OF OHIO

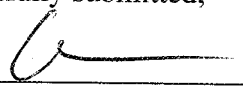
Board of Education of the West Carrollton City Schools	:	
Appellant,	:	Case No. _____
v.	:	Appeal from the Ohio Board of Tax Appeals - Case Nos. 2012-4862
Montgomery County Board of Revision and Montgomery County Auditor,	:	
Appellees.	:	

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 *West Carrollton City Sch. Bd. of Edn. v. Montgomery Cty. Bd. of Revision, Montgomery County Auditor, and Carmax Auto Superstores, Inc.*, BTA Case No. 2012-4862, rendered on February 5, 2015, 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

CARROLLTON CITY SCHOOLS BOARD OF EDUCATION, (et. al.),	CASE NO(S). 2012-4862
Appellant(s),	(REAL PROPERTY TAX)
vs.	DECISION AND ORDER
MONTGOMERY COUNTY BOARD OF REVISION, (et. al.),	
Appellee(s).	

APPEARANCES:

For the Appellant(s) - CARROLLTON CITY SCHOOLS BOARD OF EDUCATION
Represented by:
MARK H. GILLIS
RICH & GILLIS LAW GROUP, LLC
6400 RIVERSIDE DRIVE, SUITE #D
DUBLIN, OH 43017

For the Appellee(s) - MONTGOMERY COUNTY BOARD OF REVISION
Represented by:
LAURA G. MARIANI
ASSISTANT PROSECUTING ATTORNEY
MONTGOMERY COUNTY
301 WEST THIRD STREET
P.O. BOX 972
DAYTON, OH 45422

CARMAX AUTO SUPERSTORES, INC.
Represented by:
JOHN R. KOVERMAN, JR.
1300 LIBERTY TOWER
120 WEST SECOND STREET
DAYTON, OH 45402

Entered Thursday, February 5, 2015

Mr. Williamson and Mr. Johrendt concur.Mr. Harbarger not participating.

Appellant appeals a decision of the board of revision ("BOR") which determined the values of the subject real properties, parcel numbers K48-00415-0011 and K48-00415-0010. This matter is now considered upon the notice of appeal, the transcript certified by the BOR pursuant to R.C. 5717.01, the record of hearing before this board, and the briefs submitted by the parties. The subjects' total true values were initially assessed at $4,664,230 and $52,460, respectively. An increase complaint was filed with the BOR seeking an increase in the total of the subject parcels value to $5,850,000. A counter complaint was filed on behalf of the property owner seeking an aggregate value of $1,157,430. The BOR issued a decision maintaining the initially assessed valuation, which led to the present appeal.

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. It has long been held by the Supreme Court that "the best evidence of 'true value in money' of real property is an actual, recent sale of the property in an arm's-length transaction." *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129. However, several factors may render a sale an unreliable indicator of value, e.g., changes have occurred to the property/market between the sale and tax lien dates rendering the sale remote for valuation purposes, the exchange occurred between related parties, the transfer is considered involuntary, i.e., duress. In determining whether a sale is considered recent to or remote from a tax lien date, courts have declined to establish a "bright line" test for such determination, recognizing that a variety of factors, in addition to time, may have a bearing. See, generally, *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36, overruled in part on other grounds; *Worthington City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 124 Ohio St.3d 27, 2009-Ohio-5932. Additionally, in *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Ohio St.3d 23, the Supreme Court explained that a qualifying sale for tax purposes is conducted at arm's length, between unrelated parties, and is "characterized by these elements: it is voluntary, i.e. without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest." *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Ohio St.3d 23, 25.

In the present matter, although the subject property transferred between 3555 M-C, Ltd. and Carmax Auto Superstores, Inc. on January 9, 2008 for $5,850,000, we do not find such sale to be a reliable indication of value because we find the sale to be remote from the tax lien date, January 1, 2011. See *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision,* 139 Ohio St.3d 92, 2014-Ohio-1588.

In the absence of a qualifying sale, we are mindful of the Supreme Court's longstanding pronouncement holding that while a qualifying sale typically provides "[t]he best method of determining value *** 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. See, also, Justice Pfeifer's concurrence in *LTC Properties, Inc. v. Licking Cty. Bd. of Revision*, 133 Ohio St.3d 111, 2012-Ohio-3930. In the absence of a qualifying sale, appellant was required, but failed, to provide a competent appraisal of the subject property, attested to by a qualified expert, for the tax lien date in issue.

Accordingly, based upon our review of the record, we find the bases cited insufficient to support the claimed adjustment to value. See, e.g., *Simmons v. Cuyahoga Cty. Bd. of Revision* (1998), 81 Ohio St.3d 47, 49 ("Where the BTA rejects the evidence presented to it as not being competent and probative, or not credible, and there is no evidence from which the BTA can independently determine value, it may approve the board of revision's valuation, without the board of revision's presenting any evidence."). It is therefore the order of this board that the true and taxable values of the subject properties, as of January 1, 2011, were as follows:

PARCEL NUMBER

K48-00415-0011

TRUE VALUE

$4,664,230

TAXABLE VALUE

$1,632,480

PARCEL NUMBER

K48-00415-0010

TRUE VALUE

$52,460

TAXABLE VALUE

$18,360

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson	Yes	
Mr. Johrendt	Yes	
Mr. Harbarger		

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.

Kathleen M. Crowley, Board Secretary

5713.03 County auditor to determine taxable value of real property.

The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the true value of the fee simple estate, as if unencumbered but subject to any effects from the exercise of police powers or from other governmental actions, 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. The auditor 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 may 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. The auditor 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.

Amended by 129th General AssemblyFile No.186, HB 510, §1, eff. 3/27/2013.

Amended by 129th General AssemblyFile No.127, HB 487, §101.01, eff. 9/10/2012.

Effective Date: 09-27-1983

Related Legislative Provision: *See 129th General AssemblyFile No.186, HB 510, §3*

See 129th General AssemblyFile No.127, HB 487, §757.51.