ORIGINAL

THE SUPREME COURT OF OHIO

ARBORS EAST RE, LLC.

CASE NO. 2015-1410

Appellant,

Appeal from the Ohio Board of Tax Appeals, Nos. 2014-4527/4607

vs.

Franklin County Board of Revision, *et al.*,

And Columbus City Schools Bd. of Edn.,

Appellees.

MERIT BRIEF OF APPELLANT, ARBORS EAST RE, LLC.

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Section 5713.03 does not mandate that competent and probative evidence is not to be considered with regard to a sale of real property when the record clearly shows, and the Board of Tax Appeals finds, that the "price" of assets transferred included not only real property but personalty and intangibles. The decision in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of revision, 106 Ohio St. 3d 269, 2005-Ohio-4979* does not mandate that the BTA cannot consider evidence that militates against the use of mixed transfer of realty, personalty and other assets..... 8

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STATEMENT OF FACTS:

This matter is before the Court upon an appeal by the Appellant , Arbors East RE, LLC, from a Decision and Order of the Ohio Board of Tax Appeals taken from a determination of the Franklin County Board of Revision. A brief history of the litigation concerning the subject property is in order.

This cause and matter began with the filing of a complaint by the Appellee Board of Education ("BOE") for the Tax Year 2011 and Appellant, herein referred to as "Arbors East", also filed a complaint, both complaints having been consolidated by the Board of Revision ("BOR"). The BOE took the position that a transfer of the business on April 5, 2011 should be deemed the value of the real estate. In response and in support of its own complaint, Arbors East presented the testimony and appraisal of Samuel D. Koon, MAI, a state licensed and certified real estate appraiser whose narrative appraisal report was marked as Exhibit A by the BOR.

The subject property is a nursing home facility located at 5500 East Broad Street , Columbus, Franklin County, Ohio. There are 2 land parcels involved herein.

The parcels are designated as parcel 010-196382 and 010-198395 on the

records of the Franklin County Auditor and have a total land area of 7.499 acres, improved with a one-story building constructed in 1984 containing a State licensed 100 bed nursing home of 28,272 square feet.

A detailed description is contained in BOR Exhibit A (Appraisal report, of MAI Samuel Koon "BOR" Ex A.) The business, including the land, building, furniture and fixtures, as well as the licenses and intangible property sold in a bulk transaction in April, 2011. The buyer of the property, Arbors East RE, LLC. had been the tenant of the property pursuant to a long-term operating lease which began in 1991 . The property was owned by Nationwide Health Properties, Inc. which leased the real estate, and allowed the Appellant to operate under its licensure (Certificates of Need , hereinafter "CON's") for the 100 bed facility. Appellant leased the entire operating business which included furniture, fixtures and equipment. The building includes a main reception area, public restrooms, administrative offices, lounges, a therapy room (and equipment), activity rooms, nurses stations, a central dining room (and furnishings), a small dining room and furnishings), a beauty shop, and a commercial kitchen (and equipment). A detailed description is contained in the full narrative appraisal report of Samuel D. Koon, MAI which is part of the record and was marked Exhibit A by the Board of Revision.

After having leased the property for 20 years and operated the business

under such operating lease, Appellant purchased the land, improvements, furniture, fixtures and assignment of the Certificates of Need in April 2011.

In its four page decision, the Board of Tax Appeals ("BTA) determined that it would not consider the appraisal report of record and further stated " **The purchase agreement provides that among other items, the seller was required to deliver a deed, the lease termination agreement, and a bill of sale and assignment ' conveying the applicable Landlord Personal Property to Buyer'.** " (BTA decision at page 4). Notwithstanding this statement and finding by the BTA, it determined that the sale of the business was indicative of the value of the land and building. The only appraisal evidence of record is that provided by the taxpayer, the appraisal report of Mr. Koon, MAI in which he detailed the value of all of the assets transferred, His breakdown, at page E-24 of Exhibit A is as follows: Going concern value-$7,300,000; Certificates of need (licenses) - $1,800,000; Furniture, fixtures & equipment (FF&E)- $300,000; Value of the business- $ 750,000; and the value of the land and building $4,450,0000. Mr. Koon's apprasisal of the "going concern" mirrored the transfer price and, as indicated, his opinion of the fair market value of the land and building was 4.45 million dollars which was in excess of the Franklin County Auditor's original value of $195,800 for parcel 10-196382 and $3,804,200 for parcel 10-198395 for a total of $4,000,000 as the value of the land and building only.

It is axiomatic that the burden of proof is upon the party that filed the

appeal from the BOR. ***Cleveland Bd. of Edn. v. Cuyahoga Cty.Bd. of Revision (1994), 68 Ohio St. 3d 336; Crow v. Cuyahoga Cty. Bd. of Revision(1990), 50 Ohio St.3d 55; Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision(1994), 68 Ohio St. 3d 493.*** Appellant has done so. The BTA found that the "sale" involved more than the transfer of realty.

The subject property is a nursing home facility. Such a property involves a combination of real estate and business activities and as such, in order to value the real estate, the two activities must be kept separate. SEE: ***Dublin Senior Community L. P. v. Franklin Cty. Bd. of Revision (1997), 80 Ohio St. 3d 455.***

The BTA has repeatedly stated the axiom that transfers of congregate facilities and nursing homes involve an admixture of realty, personalty , licenses and other items. In this matter it is clear that the value of the real estate (land and buildings) was $4,450,000. The proper method of valuing a property such as the subject is to separate the value of business operations and other non realty items from the real property, ***Harbor Court Ltd. Partnership v. Cuyahoga Cty .Bd. of Revision, BTA No. 91-P-245, 1993 WL 384198 (Sept. 24, 1993***. *[cited by the Ohio Supreme Court in* ***Health Care REIT, Inc. v. Cuyahoga Cty. Bd. of Revision, 2014-Ohio-2547****]*. The purchase contract and other documents in the record clearly show that a landlord-tenant relationship existed between the parties and that, in addition to a transfer of merely the land and building, other valuable items and rights were transferred.

The BTA, in its "Decision" , as stated, specifically found that the transfer from Nationwide Health Properties, Inc. to Appellant, who had operated the nursing home in issue for twenty years, involved more than the transfer of real estate. (BTA Decision at unnumbered page 4), yet ignored its own finding.

Proposition of Law #1. When making a determination of the fair market value of real estate which has been the subject of a transfer of both realty, personalty and intangibles, the Board of Tax Appeals must separate the value of the realty from non-realty items transferred.

In ***St. Bernard Self-Storage, L.L. C. v. Hamilton Cty. Bd. of Revision, 115 Ohio St. 3d 365, 2007-Ohio-5249,*** the Court discussed the difference between a sale of real property and a transfer that involved realty and non- realty and stated at page 6: " In all such cases, a question arises beyond the basic pronouncement of ***Berea*** [106 Ohio St. 3d 269, 2005-Ohio 4979, 834 N.E. 2d 782] : whether the proffered allocation of [the] bulk sale price to the particular parcel of real property is 'proper', which is the same as asking whether the amount allocated reflects the true value of the parcel for tax purposes". The Court also discussed the possibility that a contractual allocation of the various forms of property might not reflect the value of the real property because of federal tax considerations or some other reasons for an arbitrary allocation. This is not the case in this matter

inasmuch as competent and probative appraisal evidence was presented that specifically valued the components of the going concern transfer of the subject property and it was erroneous for the BTA to summarily ignore and dismiss the appraisal evidence which clearly indicated the value of the non-realty items involved in the going- concern transfer herein . In ***Beford Bd. of Edn. v. Cuyahoga Cty. Bd. of revision,, 2-12-Ohio-2844,*** the Court held , at page 5 & 6, that the BTA had a duty to state what evidence it deemed dispositive and to "**evaluate the evidence before it."** See also: ***HealthSouth Corp. v. Levin, 121 Ohio St. 3d 282, 2009-Ohio-584, 903 N.E. 2d 1179.*** In ***St. Bernard*** *(Id.), the BTA found that the transfer involved " a certain amount of personal property..."* The BTA herein specifically found that the going-concern transfer between Nationwide Health properties, Inc. and Appellant, Arbors East who had operated the property for 20 years, also involved the conveying of the applicable " Landlord Personal Property to Buyer." In ***Dublin Senior Community L.P. v. Franklin Cty. Bd. of Revision (1997), 80 Ohio St. (1997), 80 Ohio St. 3d 455, 687 N.E. 2d 426,*** the Court mandated that realty and non- realty items be separated when the BTA undertakes the task of deciding the value of the real estate upon appeal. The BTA, although cognizant that the transfer herein involved more than realty, simply ignored its stated function. The BTA is to independently evaluate the evidence before it and that testimony as to" **property value is not admissible (** other than by an owner **) unless it is the professional opinion of an expert**". ***Worthington City Schools Bd.***

of Edn. v. Franklin Cty. Bd. of Revision, 140 Ohio St. 3d 248, 2014-Ohio- 3620. When the record contains sufficient evidence to negate an auditor's or board of revision's value, the BTA must perform an independent valuation and cannot simply affirm either the auditor or board of revision. ***Colonial Village Ltd. v. Washington Cty. Bd. of Revision, 123 Ohio St. 3d 268, 2009-Ohio-4975, 915 N.E. 2d 1196; Apple Group Ltd. v. Medina Cty. Bd. of Revision, 139 Ohio St. 3d 434, 2014-Ohio-2381, per curiam***

In the recent *per curiam* decision of the Supreme Court in ***Warrensville Hts. City. School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, slip opinion No. 2015-Ohio-78, (January 13, 2016)*** the Court dealt with a sale of a racetrack with a stated sales price of $43,000,000. The transaction involved the 128 acres of land , grandstand, race track and ancillary barns. At the BTA, competent appraisal evidence (adopted by the BTA) demonstrated that the real estate value was $13,800,000. The BTA relied on this appraisal evidence and the Court noted at page 9 that the "sale" involved furniture, fixtures and the buyer " obtaining Thisledown's racing license". The bulk of the price was attributed to the licensure [$27,950,000 , and furniture, fixtures and equipment [$1,200,000] with other non-realty items. The Court found that the competent appraisal as adopted by the BTA was proper. The BTA relied upon an appraisal of the various realty and non-realty components of the sale whereas , in this case the BTA completely

ignored such competent and probative evidence notwithstanding its own finding that more than realty was transferred.

PROPOSITION OF LAW #2. The Board of Tax Appeals has a duty to independently weigh all the evidence before it and has a duty to evaluate all the evidence before it. It is error for the Board of tax Appeals to fail to weigh the significance of the evidence before it.

PROPOSITION OF LAW #3. Section 5713.03 does not mandate that competent and probative appraisal evidence is not to be considered with regard to a sale of real property when the record clearly shows, and the Board of tax Appeals finds, that the "price" of the assets transferred included not only real property but personalty and intangibles. The decision in ***Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, 106 Ohio St 3d 269, 2005-Ohio-4979*** does not mandate that the BTA cannot consider evidence that militates against the use of a mixed transfer of realty, personalty and other assets.

In ***Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, 132 Ohio St. 3d 371, 2012-Ohio-2844***, (Id at paragraph 18) the Supreme Court clearly stated that the BTA must clearly state what evidence it considered relevant. See also: ***HealthSouth Corp. v. Levin, 121 Ohio St 3d 282, 2009-Ohio-584,*** (@ Paragraphs 34, 36). In its decision under appeal, the BTA stated "This matter is now considered upon the notices of appeal, the transcripts certified by the BOR, pursuant to R.C. 5717.04, the record of a hearing before this board, and the parties written arguments." In its decision, however the BTA refused to consider or evaluate the Appellant's appraisal report, and rejected it from any consideration at page 4. The BTA did note that transaction also involved the

conveyance of "landlord Personal property to Buyer." In this instance the buyer, Appellant Arbors East, who had leased the property under an operating lease for twenty years purchased the going concern. Having done business as a nursing home for twenty years, Arbors East was confronted with two choices, it could either stop doing business, or buy the going concern which was a fully licensed nursing home. To discontinue business would have put many people in various states of the human condition in peril. Appellant could not simply move its nursing home business, as it was the premises that was licensed for nursing home purposes. In his appraisal report, Appraiser Samuel D. Koon, detailed the nuances of nursing home licensing. The state licensed the premises and those licenses were in the name of Nationwide Health from whom Arbors East had done business under an operating lease for twenty years. Appellant had an economic necessity in acquiring the going concern and could not have abandoned the property leaving the people in the nursing home to shift for themselves. The State of Ohio limits the number of licenses (Certificates of Need "CON's), and their transfer to other locations, and it was neither possible nor feasible to move its business. (*See Ex. A., Appraisal of Samuel D. Koon,MAI.)*

The BTA , in this case, is ostensibly under the mistaken legal view that a sale of a going concern with all of the attendant personalty, realty and licensure, precludes any appraisal consideration or analysis, yet did in fact do and hold the opposite in ***Warrensville Hts.*** *supra,* when deciding to find a 43+ million dollar

sale not dispositive in deciding that the real estate was worth 13+ million **based upon appraisal evidence.**

It should be noted that the BTA did give lip service to the fact that this Court has instructed [the BTA] to subtract that portion of the sale price paid which pertains to realty and that the " 'applicable standard is whether the record contains "corroborating indicia" or " **best available evidence that supports an allocation of the aggregate purchase price."'.** (BTA decision at page 3). It should also be noted that in ***Warrensville Hts.*** the Court did not strictly apply former R.C. 5713.03 which mandated, but no longer does, that an auditor shall use the sale price of property as its value. In this case, exigent circumstances required Arbors to buy the going concern at the expiration of the 20 year operating lease. While those circumstances may not necessarily rise to the level of "duress" as defined by this Court, the business compulsions certainly warrant a review of the appraisal evidence. The BTA was certainly erroneous in its application of law in summarily dismissing the appraisal evidence, and although it was much easier to dispose of the controversy before it in a 4 page diatribe, without analysis, such activity runs contrary to the legal requirements under which the BTA is to determine cases.

The Franklin County Auditor originally valued this property (land and building) on a cost approach at $4 million. The appraisal of Appellant's witness ascribed a land and building value somewhat higher based on several recognized

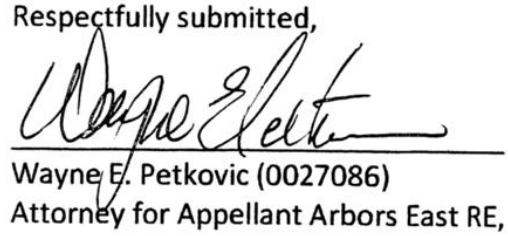
appraisal methods not a cost approach. In ***LTC Properties, Inc. v. Licking Cty. Bd. of Revision. 133 Ohio St. 3d 111, 2012-Ohio-3930,*** the Court noted " When Sale Prices are compared, the sale price of a congregate-care facility may include elements of business value...." (*Id.* at *p. 9*). The Court also discussed the validity of an Auditor's cost approach and its acceptability for valuing real estate. In this case, the Auditor determined a value of $4 million, slightly less than the appraisal of Appellant's expert. As the Court noted at page 11, a cost approach generally " establishes an upper limit " of value. Also to be remembered the advice provided by Justice Pfeifer that: " if a corporate entity wants to challenge a valuation, it should send a certified appraiser". In this case, the board of education filed the initial complaint and it was Appellant that followed Justice Pfeifer's cautionary tale for practitioners by providing the expert opinion and appraisal of a certified appraiser.

In ***Sears, Roebuck & Co. v. Franklin Cty. Bd. of Revision, 2015-Ohio-4522*** the Court noted at page 8, paragraph 19 that the failure of the BTA to consider an appraisal warranted remand of the matter to the BTA when the appraisal was part of the record. Here, the BTA summarily ignored the appraisal.

CONCLUSION:

In this appeal, it is patently clear that the BTA did not consider all of the evidence before it and the matter requires reversal and a remand to the BTA.

Respectfully submitted,



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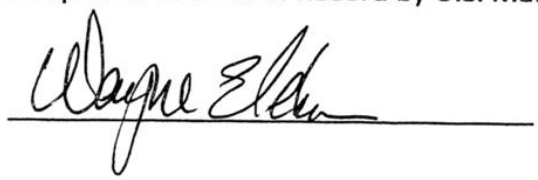
CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief was served upon all counsel of Record by U.S. Mail, postage prepaid, this first day of February, 2016,



THE SUPREME COURT OF OHIO

Arbors East RE, LLC, *et al.*,

Appellants,

vs.

Franklin County Board of Revision, *et al.*,

Appellees.

15-1410

CASE NO._____

Appeal from the Ohio Board Tax Appeals, Case Nos. 2014-4527 & 2014-4607

NOTICE OF APPEAL OF ARBORS EAST RE, LLC., *et al.*

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FILED
AUG 27 2015
CLERK OF COURT
SUPREME COURT OF OHIO

Appellants, Arbors East RE, LLC *et al,* hereby give notice of their appeal, pursuant to the pertinent provisions of R.C 5717.04, from a Decision and Order of the Ohio Board of Tax Appeals in the matter of **Arbors East Re, LLC., *et al.* v. Franklin County Board of Revision, *et al.,*** being Case Numbers 2014-4527 and 2014-4607. The final order of the Board of Tax Appeals (hereinafter "BTA") was journalized by the BTA on July 30, 2015 and a copy of said final order is appended hereto and fully incorporated herein.

Appellant states that the Decision and Order of the BTA is unlawful and erroneous in the following respects:

1. The BTA decision and order ignores the appraisal and other evidence of the fair market value of the subject real property and ignores the determinations of the Franklin County Auditor which valued only the real estate.

2. The BTA Decision and Order is unlawful and erroneous in that it adopts a transfer of assets comprised of land, buildings, licenses and other personal and intangible property as solely the value of the real estate.

3. The BTA decision is contrary to the Supreme Court determination in *Dublin Senior Community , L.P. v. Franklin Cty. Bd. of Revision (1997), 80 Ohio St. 3d 455* in that the determination of the BTA does not separate real estate values from business, personalty and intangible values.

4. The BTA failed to recognize that the property was never on the open market and it was necessary for the Appellant to purchase the property or discontinue business.

5. The BTA unlawfully and erroneously determined that an arms-length sale existed, when in fact the transaction was between a landlord and tenant and the latter was mandated to buy the property, including realty, personalty and intangibles.

6. The BTA decision fails to recognize that the licenses to operate a nursing home on the subject property are site specific and it was a business imperative for Appellant to purchase the property.

7. The BTA decision is unlawful and erroneous in that the BTA did not determine a proper valuation of the real estate when it had appraisal evidence and other evidence of the separate categories of items involved in the transfer of the property and unlawfully and erroneously determined that there was an arms length transfer of only the real estate contrary to the Supreme Court holding in *St. Bernard Self-Storage, LLC. V. Hamilton Cty. Bd. of Revision, 115 Ohio St. 3d 365, 2007-Ohio-5249* and in *Sapina v. Cuyahoga Cty. Bd. of Revision, 136 Ohio St. 3d 188, 2013-3028.*

8. The BTA unlawfully and erroneously rejected reliable, probative appraisal evidence in lieu of the non arms-length transfer price and erroneously determined that such transfer mandated such determination and ignored the purchase contract which refuted the BTA assumptions.

9. The BTA erroneously shifted the burden of proof to Appellant with regard to the assertion of the board of education of an arms length sale when the burden of proof in that regard was upon the party (board of education) to prove the existence of an arms-length sale and the evidence clearly refuted such contention.

10. The BTA erroneously determined that the Appellant was a "willing" buyer when the record clearly established that it was necessary for the Appellant to acquire the property or discontinue business.

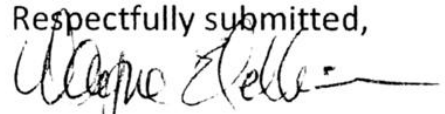
11. The BTA decision is unlawful and erroneous in that it ignored the Supreme Court decision in *N. Royalton City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision, 129 Ohio St 3d 172, 2011-Ohio-3092.*

12. The BTA ignored the Court's direction : " if the record clearly establishes that a portion of a sale price pertains to personal property, the BTA should subtract that portion from the stated sale price to arrive at the amount of consideration paid for the realty" as mandated in *Olentangy Local Schools Bd. of Edn.v.Delaware Cty Bd. of Revision, 125 Ohio St. 3d 103, 2010-Ohio-1040, Paragraph 22.*

13. The BTA ignored the "best evidence" of value for the subject real property and erroneously and unlawfully determined that it was constrained to find the transfer price of all of the assets as the sole value of the realty contrary to the evidence of record.

The Appellant herein respectfully requests the Supreme Court of Ohio reverse the decision and order of the Ohio Board of Tax Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was served upon all counsel by certified mail:

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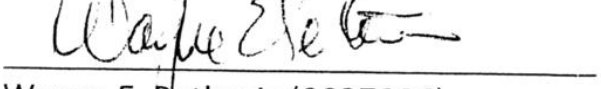
This 27th day of August, 2015



Wayne E. Petkovic (0027086)

OHIO BOARD OF TAX APPEALS

ARBORS EAST RE, LLC., (et. al.),

Appellant(s),

vs.

FRANKLIN COUNTY BOARD OF REVISION, (et. al.),

Appellee(s).

CASE NO(S). 2014-4527, 2014-4607

(REAL PROPERTY TAX)

DECISION AND ORDER

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Entered Thursday, July 30, 2015

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

Appellant appeals decisions of the board of revision ("BOR"), which determined the value of the subject real property, parcel numbers 010-196382-00 and 010-198395-00, for tax years 2011-2013. This matter is now considered upon the notices of appeal, the transcripts certified by the BOR pursuant to R.C. 5717.01, the record of the hearing before this board, and the parties' written argument.

The subject's total true value was initially assessed at $4,000,000. Appellant filed a decrease complaint with the BOR seeking a reduction in value to $3,500,000. The appellee board of education ("BOE") filed an original complaint seeking an increase to $7,490,000, and also a countercomplaint in support of maintaining the auditor's values. At the BOR hearing, the BOE provided evidence of an April 2011 sale of the subject property. Appellant did not dispute the recency or arm's-length nature of

the sale, but asserted that the total purchase was for the business's going concern and included items other than real property. Appellant presented the testimony and written report of appraiser Samuel D. Koon, MAI, who described the subject property as a 100-bed skilled nursing and rehabilitation facility, opining a total true value of $4,640,000 as of January 1, 2011 for the subject real property. Although he also performed the sales comparison and income capitalization approaches to value to determine the going concern value of subject property, Mr. Koon testified that he relied on the subject sale price, considering it to encompass the purchase price for the entire going concern. Mr. Koon then reduced the $7,490,000 purchase price to account for the $1,800,000 value of the certificates of need, $300,000 value for the furniture, fixtures, and equipment, and the $750,000 value of the business, including goodwill. Appellant also presented the testimony of Bill McVeigh, property tax manager for the operator, who explained that company who had operated the subject property for roughly 20 years made a business decision to purchase the property rather than continue operation under a lease. The BOR issued a decision increasing the initially assessed valuation to $7,202,900, reducing the total purchase price by the value of the personal property reported on appellant's tax filings, noting that the property owner had not provided sufficient evidence to deduct any other items from the sale price. From this decision, appellant filed the instant appeal.

Although a hearing was convened before this board, neither party presented any additional evidence, instead requesting the opportunity to rely on written argument. Appellant argues that because the subject property is a nursing home facility, the property involves a combination of real estate and business activities, both of which must be kept separate in order to value the real property. Appellant further argued that the proper method to value this type of property is to separate the value of the business operations and other non-realty from the real property. Appellant further argues that because a prior landlord-tenant relationship existed between the buyer and seller and it was not listed on the open market, the sale was not arm's-length. Because the reported purchase price cannot be relied upon to establish value, appellant argues, the only evidence as to the subject's true value is Mr. Koon's report, opining a value of $4,450,000. The BOE argued that the sale was the best evidence of value and that the property owner had failed to show that listed purchase price should be reduced to account for items other than real property.

It appears from the BOR's decision recording that appellant provided additional documents after the BOR hearing, including amendments to the original lease and a federal tax filing. Although the BOR expressly relied on at least one of these documents, they were not included in the transcript certified to this board. As previously noted, appellant had the opportunity to supplement the record at this board's hearing, but did not present these or any other documents. Accordingly, we are unable to consider such evidence in our decision. We remind the BOR of its statutory duty to create and maintain a record capable of being reviewed on appeal, including the evidence relied upon to reach its decision. R.C. 5715.08; R.C. 5717.01; *Sapina v. Cuyahoga Cty. Bd. of Revision*, 136 Ohio St.3d 188, 2013-Ohio-3028, ¶35. It is important to note that parties and various tribunals rely upon boards of revision to fulfill their statutory duties. The Supreme Court has noted that "[f]ailure to certify the entire evidentiary record may prejudice the interest of the proponents of omitted items, and therefore, boards of revision should take care to comply with the statutory duty to certify the *entire* record." *Vandalia-Butler City Schools Bd. of Edn. v. Montgomery Cty. Bd. of Revision*, 130 Ohio St.3d 291, 2011-Ohio-5078, fn. 4. (Emphasis in original.)

"When cases are appealed from a board of revision to the BTA, the burden of proof is on the appellant, whether it be a taxpayer or a board of education, to prove its right to an increase [in] or decrease from the value determined by the board of revision." *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564, 566. See, also, *Shinkle v. Ashtabula Cty. Bd. of Revision*, 135 Ohio St.3d 227, 2013-Ohio-379. In *EOP-BP Tower, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 1, 2005-Ohio-3096, ¶6, the court elaborated: "In order to meet that burden,

the appellant must come forward and demonstrate that the value it advocates is a correct value. Once competent and probative evidence of value is presented by the appellant, the appellee who opposes that valuation has the opportunity to challenge it through cross-examination or by evidence of another value. *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493, ***. The appellee also has a choice to do nothing. However, the appellant is not entitled to the valuation claimed merely because no evidence is adduced opposing that claim. *W. Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340, 342, ***." Id. at ¶5-6. (Parallel citations omitted.)

It has long been held by the Supreme Court that "the best evidence of the '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, paragraph one of the syllabus. 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, 412. See, also, *LTC Properties, Inc. v. Licking Cty. Bd. of Revision*, 133 Ohio St.3d 111, 2012-Ohio-3930 (Pfeifer, J., concurring).

In order for a recent sale to qualify as the best evidence of a property's value, "a key consideration *** is whether the seller and buyer were both willing." *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 134 Ohio St.3d 529, 2012-Ohio-5680, ¶28. In *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Ohio St.3d 23, 25, the court held that "an arm's-length sale 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."

In the present matter, it is undisputed that the subject property transferred from Nationwide Health Properties, Inc. to Arbors East RE, LLC on April 5, 2011 for $7,490,000. Absent an affirmative demonstration such sale is not a qualifying sale for tax valuation purposes, we find the existing record demonstrates that the transaction was recent, arm's-length, and constitutes the best indication of the subject's value as of tax lien date. We note that sales between landlord and tenant have previously been found to be arm's-length. See, e.g., *N. Royalton City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 129 Ohio St.3d 172, 2011-Ohio-3092, ¶¶32-34. The Supreme Court further held that "[t]he case law does not condition character of a sale as an arm's-length transaction on whether the property was advertised for sale or was exposed to a broad range of potential buyers." Id. at ¶29.

Appellant further asserts that the recorded purchase price encompassed consideration for the entire going concern, including not only the real property, but also personal property and certificates of need. An owner who seeks to reduce the valuation of real property below the full sale price bears the burden of showing the propriety of allocating some portion of that reported price to other assets. *FirstCal Indus. 2 Acquisitions, L.L.C. v. Franklin Cty. Bd. of Revision*, 125 Ohio St.3d 485, 2010-Ohio-1921; see, also, *St. Bernard Self-Storage, L.L.C. v. Hamilton Cty. Bd. of Revision*, 115 Ohio St.3d 365, 2007-Ohio-5249. The Supreme Court has instructed this board that "if the record clearly establishes that a portion of a sale price pertains to personal property, the BTA should subtract that portion from the stated sale price to arrive at the amount of consideration paid for the realty." *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision*, 125 Ohio St.3d 103, 2010-Ohio-1040, ¶22. Further, the court has found "the applicable standard is whether the record contains 'corroborating indicia' or 'best available evidence' that supports an allocation of the aggregate purchase price." *Sapina v. Cuyahoga Cty. Bd. of Revision*, 136 Ohio St.3d 188, 2013-Ohio-3028, ¶18, quoting *St. Bernard*, supra, at ¶17.

In the instant appeal, we find that appellant did not unequivocally establish a basis for allocating a portion of the sale price to the personal property that was transferred. Cf. *St. Bernard Self-Storage LLC*,

supra. Although appellant is correct in its assertion that the valuation of a nursing home facility may be done by extracting the value of the real property after determining the value of the going concern through appraisal analysis, this does not apply to the instant appeal because there is a recent arm's-length sale of the property, which is presumed to establish its true value. See, *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, ¶13 ("At the very heart of *Berea* [*City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979] lies the rejection of appraisal evidence of the value of the property whenever a recent, arm's-length sale price has been offered as evidence of value."). (Footnote omitted.) While the appellant alleges through testimony of Mr. Koon and arguments of counsel that the purchase price was for going concern value, all documentation submitted to the county auditor reflects a value for realty only. See *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 481, 2010 Ohio 687.

Appellant did not provide any allocation of the purchase price that was performed contemporaneous with the sale or testimony from someone who was involved with the sale. In fact, both of appellant's witnesses testified that to their knowledge, no breakdown of the total sale price was available. It was only after the sale, in order to challenge the property's value for real property taxation purposes, did the appellant claim that the price allocated to the subject was for a going concern value, a value above the value of the real estate itself. The purchase agreement provides that among other items, the seller was required to deliver a deed, the lease termination agreement, and a bill of sale and assignment "conveying the applicable Landlord Personal Property to Buyer." Although the record contains a duly executed deed and a copy of the lease termination agreement, no bill of sale was provided or alleged to exist. As such, we are unable to verify which items other than the real property described in the sale documents in fact transferred or the portion of the overall purchase price attributable to those items. We further note that in addition to deductions for personal property and certificates of need, Mr. Koon's valuation includes a deduction for goodwill, which the Supreme Court has found is not an asset separable from the realty. See *Hilliard City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 128 Ohio St.3d 565, 2011-Ohio-2258, ¶ 33.

It is therefore the order of this board that the subject property's true and taxable values, as of January 1, 2011, 2012, and 2013, were as follows:

PARCEL NUMBER
010-196382-00
TRUE VALUE
$366,640
TAXABLE VALUE
$128,320

PARCEL NUMBER
010-198395-00
TRUE VALUE
$7,123,360
TAXABLE VALUE
$2,493,180

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Ms. Clements		
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

NOTICE

This slip opinion is subject to formal revision before it is published in an advance sheet of the Ohio Official Reports. Readers are requested to promptly notify the Reporter of Decisions, Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, of any typographical or other formal errors in the opinion, in order that corrections may be made before the opinion is published.

SLIP OPINION NO. 2016-OHIO-78

BOARD OF EDUCATION OF THE WARRENSVILLE HEIGHTS CITY SCHOOL DISTRICT, APPELLANT, *v.* CUYAHOGA COUNTY BOARD OF REVISION ET AL., APPELLEES.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Warrensville Hts. City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, Slip Opinion No. 2016-Ohio-78.]

Taxation—Real-property valuation—R.C. 5713.04—Amount received for real property sold at auction or forced sale does not establish its value.

(No. 2014-0516—Submitted May 5, 2015—Decided January 13, 2016.)

APPEAL from the Board of Tax Appeals, Nos. 2010-1715, 2012-1748, and 2012-1749.

Per Curiam.

{¶ 1} The Board of Education of Warrensville Heights City School District appeals from a decision of the Board of Tax Appeals ("BTA") finding the tax year 2010 value of Thistledown Racetrack in Cuyahoga County to be $13,800,000. The

BTA determined that the purchase of the racetrack for $43,000,000 at a bankruptcy sale six months after the tax-lien date did not establish the true value of the property, because "sales conducted under supervision of a court order are forced sales which are not indicative of true value." BTA Nos. 2012-1715, 2012-1748, and 2012-1749, 2014 WL 1155691, at *2 (Mar. 6, 2014).

{¶ 2} The school board maintains that Thistledown Racetrack sold in a recent arm's length transaction and that the $43,000,000 sales price establishes the true value of the property.

{¶ 3} In this case, the BTA reasonably and lawfully applied R.C. 5713.04, which states that the price received for real property at auction or forced sale does not establish its value, and the evidence presented to the BTA supports its finding that the true value of Thistledown Racetrack was $13,800,000 as of the tax-lien date.

{¶ 4} For these reasons, we affirm the decision of the BTA.

Facts

The property and its 2010 sale in bankruptcy

{¶ 5} The subject property, parcel Nos. 771-03-001 and 761-18-001, is Thistledown Racetrack, a thoroughbred-racing facility located in Cuyahoga County that is home to the Ohio Derby. Thistledown includes 128 acres of land improved by a one-mile racetrack, an eight-story grandstand, and numerous barns and support structures.

{¶ 6} In 2009, the year preceding the tax-lien date, New Thistledown, L.L.C., owned Thistledown Racetrack, and its parent company, Magna Entertainment Corporation, petitioned for Chapter 11 bankruptcy relief and received authority to sell the racetrack at auction.

{¶ 7} Magna Entertainment received three qualifying bids; Harrah's Ohio Acquisition Company, L.L.C., submitted the best and highest offer, and in September 2009, it agreed to purchase Thistledown for $89,500,000. The sales

agreement, however, provided for a closing purchase price of $42,000,000, a contingent payment of $42,500,000 due if Harrah's earned at least $1.00 from the operation of video lottery terminals ("VLTs") at the racetrack, and a contingent payment of $5,000,000 payable if the voters of Ohio rejected Issue 3 (which would allow four casinos in Ohio) at the November 2009 election. The sale was also contingent on Harrah's acquiring Thistledown's racing license and approval to operate VLTs at the racetrack. The sale never closed because the conditions were not satisfied.

{¶ 8} On May 25, 2010, Magna Entertainment held a second auction, and Harrah's again submitted the winning bid to purchase Thistledown. The contract stated that in exchange for $43,000,000, Harrah's would assume ownership of the real property as well as equipment, inventory, deposits, advertising and marketing materials, transferable permits, intellectual property rights, goodwill, and insurance proceeds, among other things. Magna Entertainment also agreed to "submit to the [racing commission] a preliminary request to transfer all Licenses and Racing Approvals." The sale was contingent on Harrah's ability to obtain Thistledown's racing license from the racing commission but had no conditions related to VLTs. The bankruptcy court approved the sale on June 17, 2010, and Harrah's filed the deed on July 28, 2010, after it received the racing license.

Valuation and board of revision proceedings

{¶ 9} For tax year 2010, the Cuyahoga County fiscal officer assigned a total value of $14,264,000 to the parcels comprising Thistledown. The school board filed a complaint with the board of revision ("BOR"), seeking an increase in valuation to $89,500,000, the initial sale price Harrah's had bid for Thistledown. Harrah's filed counter-complaints seeking a decrease to $12,000,000, and it subsequently amended the counter-complaints to request a reduction to $5,500,000.

{¶ 10} At a hearing, the school board introduced evidence of the purchase agreement between Harrah's and Magna Entertainment as well as the bankruptcy

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court's order authorizing the sale, which stated that $43,000,000 "constitutes reasonably equivalent value and fair consideration for the Purchased Assets." Harrah's responded with the testimony of Kathleen Floyd, its property-and-sales-tax director, who explained that the 2010 sale included real property as well as other assets, and she emphasized that Harrah's bought Thistledown to obtain its racing license in the hopes of operating VLTs, which were permitted only at racetracks. In addition, Carla Bishop, a property-tax consultant, testified that she could not value the property using the income, sales-comparison, and cost approaches; she therefore compared Thistledown to five other Ohio racetracks that had been assessed, concluded that the real estate had little contributory value to the overall purchase, and valued the real property at $5,500,000.

{¶ 11} The BOR retained the fiscal officer's initial valuation of $14,264,200.

BTA proceedings

{¶ 12} The school board appealed to the BTA, requesting an increase to $43,000,000, the price Harrah's ultimately paid for Thistledown, and Harrah's requested a decrease to $13,800,000. The school board relied on the 2010 sale and argued that the $43,000,000 sale price reflected the value of the real property. In response, Floyd, the property-and-sales-tax director for Harrah's, reiterated her prior testimony that the sale price reflected the purchase of other assets in addition to real property and that Harrah's bought Thistledown hoping to obtain a license to operate VLTs at the racetrack. Harrah's also submitted a new appraisal and testimony from David Sangree, an appraiser, who testified that the income-capitalization approach was not effective for valuing properties like Thistledown that had been losing money, and he therefore conducted sales-comparison and cost approaches to valuation. He testified that 65 percent of the $43,000,000 purchase price—or $27,950,000—could be attributed to obtaining Thistledown's racing license in the hope of operating VLTs at the racetrack, and he opined that the

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furniture, fixtures, and equipment were worth approximately $1,200,000, and after rounding valued the real property at $13,800,000.

{¶ 13} The BTA rejected the 2010 sale price as evidence of value, explaining that "[a]lthough it is clear that the subject property sold recent to [the] tax lien date, we do not find the sale to have been arm's-length because it was subject to the approval of a bankruptcy court." 2014 WL 1155691 at *2. It therefore considered the appraisal evidence, found Sangree's opinion to be "reasonable and well supported," and valued the real property at $13,800,000. *Id.* at *2-3.

{¶ 14} On appeal to this court, the school board presents three propositions of law:

> Proposition of law No. 1: A recent arm's length sale of property is the best evidence of value and must be accepted for ad valorem taxation.
>
> Proposition of law No. 2: It has not been established that an allocation of the purchase price was made to property other than real estate.
>
> Proposition of law No. 3: The appraisal report should not be considered due to the recent arm's length sale.

{¶ 15} Ultimately, the school board asks us to "determine the value of the subject property to be $43,000,000 for the 2010 tax year or in the alternative remand the case back to the BTA with instructions to consider the $43,000,000 sale in its determination of value."

Law and Analysis

{¶ 16} Pursuant to R.C. 5717.04, this court reviews a decision of the BTA to determine whether it is reasonable and lawful. In our review, we defer to the

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BTA's factual findings if they are supported by reliable and probative evidence in the record. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶ 14. And as we indicated in *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 481, 2010-Ohio-687, 923 N.E.2d 1144, ¶ 13, a decision of the BTA will be affirmed if it correctly applies the law.

{¶ 17} During the tax year at issue, former R.C. 5713.03 set forth how real estate is to be valued for tax purposes:

> 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.

Am.Sub.H.B. No. 260, 140 Ohio Laws, Part II, 2665, 2722. We construed this statute in *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, and explained that "when the property has been the subject of a recent arm's-length sale between a willing seller and a willing buyer, the sale price of the property shall be 'the true value for taxation purposes.' " *Id.* at ¶ 13, quoting R.C. 5713.03. As the court noted in *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, 885 N.E.2d 222, ¶ 13, "at the very heart of *Berea* lies the rejection of appraisal evidence of the value of the property whenever a recent, arm's-length sale price has been offered as evidence of value."

{¶ 18} R.C. 5713.04, however, provides that "[t]he price for which such real property would sell at auction or forced sale shall not be taken as the criterion of its value." We have explained that "this statutory pronouncement codifies the basic

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proposition that a sale must be voluntary from the standpoint of both seller and buyer in order to qualify as an arm's-length transaction." *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 127 Ohio St.3d 63, 2010-Ohio-4907, 936 N.E.2d 489, ¶ 19.

{¶ 19} For this reason, in *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision*, 141 Ohio St.3d 243, 2014-Ohio-4723, 23 N.E.3d 1086, we held that if the underlying transaction is an auction or forced sale, "the proponent of the sale price bears the burden to prove that the sale was nevertheless an arm's-length transaction between typically motivated parties and should therefore be regarded as the best evidence of the property's value." *Id.* at ¶ 43.

{¶ 20} The BTA reasonably and lawfully determined that the sale price did not establish the property's true value for two reasons:

{¶ 21} First, Thistledown Racetrack sold at auction. For purposes of R.C. 5713.04, the term "auction" means " '[a] public sale of property to the highest bidder,' " *Olentangy Local Schools* at ¶ 30, quoting *Webster's Third New International Dictionary* 142 (1993) and *Black's Law Dictionary* 149 (9th Ed.2009), and it includes "both voluntary and involuntary auctions," *id.* at ¶ 27. Here, Magna Entertainment elicited and received qualified bids, Hannah's submitted the highest bid, and the bankruptcy court found that "the bidding process afforded a full and fair opportunity for any entity to make a higher or otherwise better offer" and therefore established the purchase price. Pursuant to R.C. 5713.04, the sale price for Thistledown obtained at the auction does not establish the true value of the property.

{¶ 22} Second, reliable and probative evidence in the record supports the finding that Thistledown sold at a forced sale within the meaning of R.C. 5713.04. A "forced sale" is a "hurried sale by a debtor because of financial hardship or a creditor's action." *Black's Law Dictionary* 1538 (10th Ed.2014). We have indicated that a sale does not establish a property's value when it "occurs under the

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compulsion that the property be liquidated for the benefit of creditors," *Cincinnati School Dist.*, 127 Ohio St.3d 63, 2010-Ohio-4907, 936 N.E.2d 489, ¶ 3, and "[a] sale conducted under duress is characterized by 'compelling business circumstances * * * clearly sufficient to establish that a recent sale of property was neither arm's-length in nature nor representative of true value,' " *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of* Revision, 112 Ohio St.3d 309, 2007-Ohio-6, 859 N.E.2d 540, ¶ 16, quoting *Lakeside Ave. Ltd. Partnership v. Cuyahoga Cty. Bd. of Revision*, 75 Ohio St.3d 540, 548, 664 N.E.2d 913 (1996). The school board acknowledges that "[t]he economic problems faced by a debtor in both a chapter 7 and chapter 11 bankruptcy may cause the debtor to accept less than the full value of its property."

{¶ 23} Harrah's bought the racetrack at a bankruptcy sale conducted pursuant to 11 U.S.C. 363(b), which authorizes sale of property of the bankruptcy estate "other than in the ordinary course of business." The bankruptcy court supervising the sale found "compelling circumstances" to consummate the sale because "there is substantial risk of depreciation of the value of Purchased Assets if the sale is not consummated quickly." Further, the transaction was not between typically motivated parties—the bankruptcy court approved the sale after finding that time was of the essence in order to maximize the value of the bankruptcy estate's assets and that it was in the best interests of Magna Entertainment *and its creditors and other parties in interest*. Thus, sufficient evidence shows that the bankruptcy sale occurred at least in part to liquidate assets for the benefit of Magna Entertainment's creditors.

{¶ 24} Accordingly, the BTA acted reasonably and lawfully in determining that the 2010 sale price does not establish the true value of Thistledown Racetrack, and it therefore properly considered appraisal evidence in valuing the property. Because the school board challenged the BOR's valuation, it had the burden of going forward with evidence showing its right to any increase in valuation. *Dublin*

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City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision, 139 Ohio St.3d 193, 2013-Ohio-4543, 11 N.E.3d 206, ¶ 16. However, the school board presented nothing apart from the 2010 sale and the sale order as establishing the value of the real property.

{¶ 25} In contrast, Harrah's submitted Sangree's appraisal to prove that the real estate had a fair market value of $13,800,000. Based on comparisons he made with sales of other racetracks, Sangree indicated that $27,950,000 of the $43,000,000 purchase price could be attributed to obtaining Thistledown's racing license in the hope of operating VLTs at the racetrack, opined that the furniture, fixtures, and equipment were worth approximately $1,200,000, and, after rounding, valued the property at $13,800,000. This testimony corroborated other evidence showing that Harrah's bought Thistledown in order to acquire its racing license and operate VLTs, as well as the recitals in the purchase agreement transferring both real property and other assets and requiring transfer of the racing license as a condition of the sale.

Conclusion

{¶ 26} Accordingly, the BTA reasonably and lawfully determined that the 2010 sale did not establish the true value of Thistledown Racetrack, and the evidence presented supports its finding that Thistledown Racetrack was worth $13,800,000 as of the tax-lien date. We therefore affirm the decision of the BTA.

Judgment accordingly.

O'CONNOR, C.J., and PFEIFER, O'DONNELL, LANZINGER, KENNEDY, FRENCH, and O'NEILL, JJ., concur.

Kolick & Kondzer, Thomas A. Kondzer, and Matthew Marsalka, for appellant.

Ice Miller, L.L.P., Paul M. Jones Jr., and Alan G. Starkoff, for appellee Harrah's Ohio Acquisition Company, L.L.C.

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