Supreme Court of Ohio Clerk of Court - Filed March 11, 2016 - Case No. 2015-0323

IN THE SUPREME COURT OF OHIO

STEAK N SHAKE, INC. NKA STEAK N SHAKE OPERATIONS, INC.,	)	CASE NO. 2015-0323
Appellant,	)	Appeal from the Ohio Board of Tax Appeals
-vs-	)	Board of Tax Appeals Case No. 2013-6104
WARREN COUNTY BOARD OF REVISION, WARREN COUNTY AUDITOR, MASON SCHOOL DISTRICT BOARD OF EDUCATION AND TAX COMMISSIONER OF OHIO,	)	
Appellees.	)	

STEAK N SHAKE, INC. NKA STEAK N SHAKE OPERATIONS, INC.'S NOTICE OF ISSUANCE OF BOARD OF TAX APPEALS' DECISION

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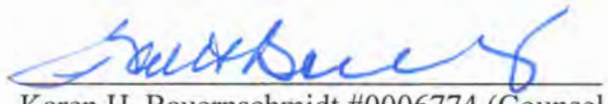
Attorneys for Appellees Mason City School District Board of Education

Pursuant to the Court's March 7, 2016 entry in the above-captioned case, Steak N Shake, Inc. nka Steak N Shake Operations, Inc. (hereinafter, the "Appellant") hereby notifies this Court that the Board of Tax Appeals issued its decision as a result of the Court's order to remand set forth in *Steak 'n Shake, Inc. v. Warren Cty. Bd. of Revision*, Slip Opinion No. 2015-Ohio-4836 (hereinafter "*Steak 1*").

A copy of the Court's March 7, 2016 entry is attached hereto as **Exhibit A**. A copy of the Board of Tax Appeals decision resulting from *Steak 1*, which was also issued March 7, 2016, is attached hereto as **Exhibit B**.

Counsel for Appellant has not had an opportunity to discuss the BTA's recent decision with counsel for the Warren County Auditor or counsel for the Mason City School District Board of Education. Appellant is hopeful that the BTA's recent decision on the 2009 tax year will spur settlement of the 2012-tax-year case that is before the Court. Accordingly, Appellant asks that this matter be returned to mediation.

Respectfully submitted,



Karen H. Bauernschmidt #0006774 (Counsel of Record)
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Attorneys for Appellant

PROOF OF SERVICE

I hereby certify that a copy of the foregoing *Notice of Issuance of Board of Tax Appeals Decision* was served on this 11th day of March, 2016 by email to the following persons:

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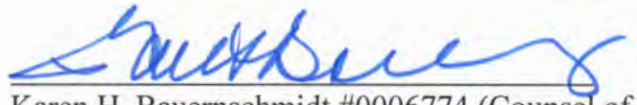

Karen H. Bauernschmidt #0006774 (Counsel of Record)
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STEAK/10179-12
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Exhibit A

The Supreme Court of Ohio

FILED
MAR - 7 2016
CLERK OF COURT
SUPREME COURT OF OHIO

Steak N Shake, Inc. nka Steak N Shake Operations, Inc., [et al.]

v.

Warren County Board of Revision, [et al.]

Case No. 2015-0323

ENTRY

This cause is pending before the court as an appeal from the Board of Tax Appeals.

Upon consideration of appellant's motion to stay briefing schedule, it is ordered by the court that the motion is granted. The parties shall notify the court immediately upon the issuance of the Board of Tax Appeals decision in the previously remanded case of *Steak 'n Shake, Inc. v. Warren Cty. Bd. of Revision.*

(Board of Tax Appeals; No. 2013-6104)

Maureen O'Connor
Chief Justice

Exhibit B

OHIO BOARD OF TAX APPEALS

STEAK N SHAKE, INC. NKA STEAK N SHAKE OPERATIONS, INC., (et. al.),

Appellant(s),

vs.

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

Appellee(s).

CASE NO(S). 2010-3527

(REAL PROPERTY TAX)

DECISION AND ORDER

APPEARANCES:

For the Appellant(s) - STEAK N SHAKE, INC. NKA STEAK N SHAKE OPERATIONS, INC.
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MASON CITY SCHOOL DISTRICT BOARD OF EDUCATION
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Entered Monday, March 7, 2016

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

This matter is before this board, on remand from the Supreme Court, which reversed our prior decision and instructed us to make a "determination of value based on the property owner's appraisal and/or any other evidence in the record." *Steak 'n Shake, Inc. v. Warren Cty. Bd. of Revision*, Slip Opinion No. 2015-Ohio-4836, ¶2. Acting under pertinent provisions of R.C. 5717.04, the Board of Tax Appeals gives effect to the court's decision and certifies this matter is before this board for a determination of the subject property's valuation for tax year 2009. We consider this matter once again upon the notice of appeal, the transcript certified by the BOR pursuant to R.C. 5717.01 ("S.T."), the record of this board's hearing ("H.R."), the court's directive, and the parties' written argument, as filed on remand.

Specifically, in *Steak 'n Shake*, the court determined that the appraisal evidence upon which this board

relied in rendering its decision, i.e., the "Rinck appraisal," improperly utilized unadjusted sale prices in its sales comparison approach, thereby failing "to remove the effect that long-term leases would have had on those prices." The court went on to conclude that "[s]ince the property at issue was unencumbered by a lease, it would likely have sold for less." Id. at ¶33.

The court has directed this board, on remand, to render a new determination of value, specifically taking into consideration the "Wilkins appraisal" and any other evidence in the record. Accordingly, we revisit the Wilkins ("Ex. A") and Rinck appraisals ("Ex. 1") herein.

We first note than in our initial decision, we restricted our comments regarding Mr. Wilkins' report to his sales comparison approach; we held that "in examining Wilkins' report, we find his use of comparable properties that 'had gone dark,' had extended stays on the market, and that were in a second generation use, unpersuasive." *Steak 'n Shake, Inc. v. Warren Cty. Bd. of Revision* (Apr. 15, 2014), BTA No. 2010-3527, unreported at 3. Upon review, we find our concerns, as stated, well founded, and do not abandon such criticisms herein. Upon further consideration of Mr. Wilkins' report, however, we find the income approach that was undertaken is appropriately utilized to value the subject. In fact, R.C. 5715.01 specifically provides that "in determining the true value of lands or improvements thereon for tax purposes *** the income capacity of the property, if any *** shall be used."

Using the income approach, Mr. Wilkins considered seven lease comparables to estimate the subject's potential gross income. Four of the comparables were Steak 'n Shake properties in the general vicinity of the subject which clearly supported Mr. Wilkins' rent conclusion of $22 per square foot. Considering the subject's good visibility from the adjacent freeway and location in a "relatively affluent" area, H.R. at 15, 40, the 5% vacancy rate attributed to the subject is supportable. Mr. Wilkins testified that most restaurants like the subject would operate on a triple net basis, i.e., the tenant would be responsible for most expenses, leaving the owner responsible for management fees, general/administrative fees, and reserves for replacement. H.R. at 31; Ex. A at 21. While Mr. Wilkins based his expenses upon unidentified comparables and his appraisal experience, H.R. at 55, we find nothing in the record to dispute the minimal amounts to which he concluded. Finally, we find Mr. Wilkins' capitalization rate is well supported using three different means of calculation. Ex. A at 22-23.

As Mr. Rinck's income approach was not discussed by the court, we are compelled to review its conclusions, as a part of the "other" evidence in the record. We conclude that Mr. Rinck's income approach constitutes an "incomplete" analysis, at best. Specifically, Mr. Rinck's report contains no discussion of, nor calculations relating to, vacancy or expenses and provides no explanation of how the capitalization rates, as derived through sales, were adjusted to arrive at the final rate or whether a tax additur was used/considered; without same, this board is left to speculate as to the details of Mr. Rinck's income approach, which we must conclude, does not provide competent, probative evidence of value.

It is therefore the order of this board that the true and taxable values of the subject property, as of January 1, 2009, shall be that to which Mr. Wilkins opined in his income approach, as follows:

Parcel #16324750060

TRUE VALUE

$732,000

TAXABLE VALUE

$256,200

The Warren County Auditor is hereby ordered to list and assess the subject property in conformity with this

decision and order.

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