

**THE SUPREME COURT OF OHIO**

**ARBORS EAST RE, LLC.**

**Appellant,**

**vs.**

**CASE NO. 2015-1410**

**Appeal from the Ohio Board**

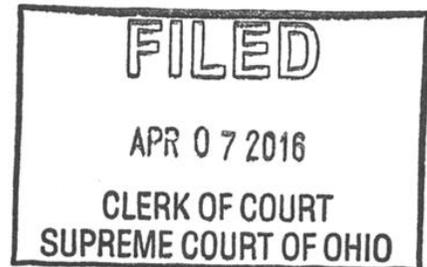
**of Tax Appeals, Nos. 2014-4527/4607**

**Franklin County Board of**

**Revision, *et al.*,**

**And Columbus City Schools Bd. of Edn.,**

**Appellees.**



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**REPLY BRIEF OF APPELLANT, ARBORS EAST RE, LLC.**

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In the recent decision of the Ohio Supreme Court in *Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd of Revision, Slip Opinion No. 2016-Ohio-7577*, the Court, on March 2, 2016 held that an expert appraisal and the appraiser's sworn testimony can be used to rebut the use of a prior sale of the property. The Court stated at page 7 of its opinion:

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“ At the outset, it should be noted that it is permissible to rely on information contained in an appraisal report and an appraiser's testimony to find that the presumptive validity of using the sale price has been rebutted. We have held that the appraiser's certification of the appraisal report, in Particular the factual statements contained in it, forms a sufficient basis to permit the use of such information in determining value. *AP Hotels of Illinois, Inc. v. franklin Cty. Bd. of Revision, 118 Ohio St. 3d 343, 2008-Ohio-2565, 889 N.E. 2d 115, Paragraph 16*. And we conclude that the sworn statements of an appraiser at hearing in conjunction with his appraisal report can, by extension, serve to rebut the presumption of validity of valuation of the property at issue based on its prior sale price.”

In the present matter, the facts of record clearly show that Appellant, Arbors East RE, LLC. Operated the subject property for twenty years under an operating lease from Nationwide Health Properties, Inc. which entity not only owned the physical facilities but also held the licenses ( “ certificates of need” or “ CON's” ). The nursing home herein was a fully licensed operating facility with dining rooms, therapy rooms and equipment, a beauty shop, a commercial kitchen and equipment, and other furnishings and fixtures as fully detailed in the appraisal report , Exhibit A, which the board of tax appeals , in its 3 ½ page “decision, sought to ignore. The BTA did , in fact find, nonetheless, that there were other assets and intangibles transferred in addition to the real estate but chose to ignore this fact fully supported by the record and evidence. This was in direct contravention of the Supreme Court direction that realty and non realty items be separated in determining the value of real estate. *See: Dublin Senior Community, L.P. v. Franklin Cty. Bd. of Revision (1997), 80 Ohio St. 3d 455, 687 N.E. 2d 426* .

In the recent BTA decision (appended) in *Board of Education of the New Albany-Plain Local Schools, (et. al.)v. Franklin County Board of Revision*, the BTA dealt with the valuation of a nursing home wherein the same appraisal expert, Mr. Samuel D. Koon, MAI, appraised the property using the same methodology as in this case. In that case, Mr. Koon separated the various components of the value of the operating entity and the separation, in not only the appraisal but his sworn testimony, was favorably viewed by the BTA in arriving at its determination of value. The BTA stated , at page 2 of the attached decision:

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“ We begin our analysis with Koon’s appraisal report. Which developed the income approaches to value as of the relevant tax lien date. Koon provided an overview of the long term care industry. His income approach relied on both market data and the subject property’s actual experience to prepare the pro forma used to determine the estimated gross income from all sources, i.e. Medicare and insurance payments and therapy services, \$8,784,715 , less the estimated operating expenses, i.e. nursing and dietary costs and non-reimbursable expenses, \$7,827,249. Koon then capitalized the \$957,466 net operating income at 14.16%, including a tax additur, to preliminarily conclude to a going concern value of \$6,800,000. **To glean the value of the real property at issue ( emphasis added)**, he reduced the going concern value by \$1,160,000 for FF&E; \$2,020,000 for certificates of need, and \$0 for business value; to finally conclude to an indicated value of \$3,620,000 as of January 1, 2013.”

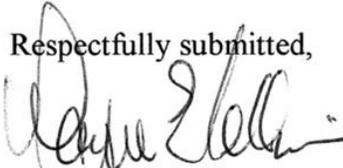
Mr. Koon , as in this case, also analyzed transfers of operating nursing homes sold on a going concern basis for his sales comparison approach and separated the various components to arrive at a real estate only value. In this matter, the BTA, totally refused to consider the appraisal and testimony of record.

The BTA, in this case under appeal, found it far easier to ignore evidence and summarily reject the testimony and evidence of record. The BTA was fully aware that this nursing home transferred as a going concern. In its decision the BTA stated at page 3 : “ 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, Paragraph 22*”.

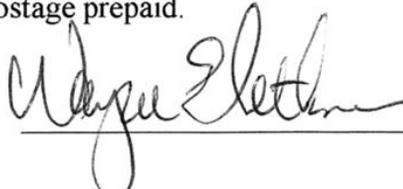
The BTA specifically found that “ The purchase agreement provides **that among other items, the seller { Nationwide Health } was required to deliver a deed, the lease termination agreement, and a bill of sale and assignment ‘ CONVEYING THE APPLICABLE LANDLORD PERSONAL PROPERTY TO BUYER’** “ ( emphasis added ) BTA Decision at Page 4.

Thus, while giving lip service to the Court, the BTA ignored its stated instruction. The Appellant urges the Court to find that the BTA decision is both unlawful and unreasonable and to reverse the BTA decision, remand the matter, and clearly instruct the BTA to determine a proper valuation of the real estate based on the evidence of record and expert testimony.

Respectfully submitted,  
  
Wayne E. Petkovic (0027086)  
Attorney for Arbors East RE, LLC

CERTIFICATE OF SERVICE

A copy of the foregoing Reply Brief was served upon all counsel of record this 7  
Day of April, 2016 by regular U.S. Mail, postage prepaid.

  
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OHIO BOARD OF TAX APPEALS

BOARD OF EDUCATION OF THE NEW  
ALBANY-PLAIN LOCAL SCHOOLS, (et. al.),

CASE NO(S). 2015-341

Appellant(s),

(REAL PROPERTY TAX)

vs.

DECISION AND ORDER

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

Appellee(s).

APPEARANCES:

For the Appellant(s) - BOARD OF EDUCATION OF THE NEW ALBANY-PLAIN LOCAL  
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5151 N. HAMILTON RD., LLC  
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Entered Friday, February 26, 2016

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

Appellant appeals a decision of the board of revision ("BOR") which determined the value of the subject real property, parcel number 545-187782-00, for tax years 2013 and 2014. This matter is now considered upon the notice of appeal, the transcript certified by the BOR pursuant to R.C. 5717.01, the record developed at this board's hearing, and any written argument submitted by the parties.

The subject property, a 112-bed skilled nursing facility, was initially assessed a true value of \$4,900,000. The property owner, 5151 N Hamilton Rd LLC ("5151"), filed a complaint with the BOR, which requested that the subject property's value be reduced to \$2,500,000. The affected board of education ("BOE") filed a counter-complaint, which objected to the request.

At the hearing before the BOR, both parties were represented by counsel. 5151 submitted the report and testimony of an appraiser, Samuel D. Koon, MAI. In his report, Koon employed the income capitalization and sales comparison approaches to valuation, and based upon such approaches, he valued the subject property at \$3,620,000 as of January 1, 2013. In doing so, Koon estimated the value of other aspects of the skilled nursing business, i.e., \$6,800,000 for going concern value; \$1,160,000 for furniture, fixtures and equipment ("FF&E"); \$2,020,000 for certificates of need; and \$0 for business value. The BOE cross-examined Koon about the methodologies used to derive his final conclusion of value. The BOR subsequently issued a decision, which reduced the subject property's value to \$3,620,000 for tax years 2013 and 2014, and this appeal ensued.

At the hearing before this board, only the BOE appeared to supplement the record with additional argument or evidence. The BOE submitted the testimony of an appraiser, Thomas D. Sprout, MAI, who provided a review of Koon's appraisal report. Sprout testified that he believed that Koon's report was credible; however, he also believed that the income approach to value utilized a \$597,666 figure for "total other non-reimbursable expenses," which was not supported by the subject property's historical data. Sprout asserted that such a high expense undervalued the subject property by \$1,000,000. Instead, Sprout testified that the "total other non-reimbursable expenses" should be reduced to \$439,235, based upon the average of such expense from 2011 to 2013.

Subsequent to the hearing, the parties more fully explained their respective positions by way of written argument. The BOE argued that Sprout's review sufficiently raised doubt as the competency and probative nature of Koon's final conclusion of value. The BOE requested that we recalculate Koon's income approach, consistent with Sprout's uncontested testimony, and value the subject property at \$4,700,650 as of January 1, 2013. Conversely, 5151 argued that Sprout's review of Koon's appraisal was unsupported and requested that we affirm the BOR's decision.

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. Then, typically, "the only rebuttal lies in challenging whether the elements of recency and arm's-length character between a willing seller and a willing buyer are genuinely present for that particular sale." *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, at ¶13. However, as the Supreme Court has pointed out, "such [sale] 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.

There is no indication that the subject property was the subject of a recent, arm's-length transfer upon which we could rely to determine the subject property's value. We proceed, therefore, to consider the parties' evidence.

We begin our analysis with Koon's appraisal report, which developed the income approach and sales comparison approaches to value as of the relevant tax lien date. Koon provided an overview of the long term care industry. His income approach relied on both market data and the subject property's actual experience to prepare the pro forma used to determine the estimated gross income from all sources, i.e., Medicare and insurance payments and therapy services, \$8,784,715, less the estimated operating expenses, i.e., nursing and dietary costs and non-reimbursable expenses, \$7,827,249. Koon then capitalized the \$957,466 net operating income at 14.16%, including a tax additur, to preliminarily conclude to a going concern value of \$6,800,000. To glean the value of the real property at issue, he reduced the going concern value by \$1,160,000 for FF&E; \$2,020,000 for certificates of need; and \$0 for business value; to finally conclude to an indicated value of \$3,620,000 as of January 1, 2013.

Under the sales comparison approach, Koon compared the subject property to seven other skilled nursing facilities located throughout Ohio, and after adjusting for any differences, he preliminarily concluded to a

going concern value of \$6,900,000. To glean the value of the real property at issue, he reduced the going concern value by \$1,160,000 for FF&E; \$2,020,000 for certificates of need; and \$0 for business value; to finally conclude to an indicated value of \$3,720,000 as of January 1, 2013.

Koon reconciled the values indicated by the various approaches, but placed the most emphasis on the income approach, and concluded to an overall value of the subject property to be \$3,620,000 as of January 1, 2013.

As noted above, the BOE requests that we recalculate Koon's income approach based upon Sprout's review of Koon's appraisal. The BOE also cites to the recent Supreme Court decision in *Sears, Roebuck & Co. v. Franklin Cty. Bd. of Revision*, Slip Opinion No. 2015-Ohio-4522 to argue that it may meet its evidentiary burden by presenting Sprout's expert testimony reviewing Koon's appraisal. In *Sears*, the court stated:

"It is not as though the school board lacked the means to make its case. Even if a board of education elects not to commission its own appraisal, it might in a proper case offer a different type of evidence: an expert review of the owner's appraisal. Here, the school board claims that the owner's appraisal is deeply flawed. Under such circumstances, the school board could hire an expert to perform an 'appraisal review' to highlight the errors. *See Appraisal Institute, The Appraisal of Real Estate* 590 (13th Ed.2008) ('The primary function of an appraisal reviewer is not to appraise the subject property but to examine the contents of a report and form an opinion as to its adequacy and appropriateness'). An appraisal review performed by an expert would make a greater claim on the BTA's attention because it would constitute conflicting evidence." *Id.* at ¶22.

Although we acknowledge the court's holding, we find, in this instance, that Sprout's review of Koon's appraisal report failed to impugn Koon's final conclusion of value. We have often acknowledged that inherent in the appraisal process is the fact that an appraiser must necessarily make a wide variety of subjective judgments in selecting the data to rely upon, effect adjustments deemed necessary to render such data usable, and interpret and evaluate the information gathered in forming an opinion. *See, e.g., Developers Diversified Realty Corp. v. Ashland Cty. Bd. of Revision* (Mar. 17, 2000), BTA Nos. 1998-A-500, et seq., unreported; *Armco Inc. v. Richland Cty. Bd. of Revision* (Nov. 19, 2004), BTA No. 2003-A-1058, unreported. We find, therefore, Koon's appraisal report sufficiently demonstrated of the subject property's value as of January 1, 2013.

In reviewing this matter, we are mindful of our duty to independently determine the subject property's value. *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13, 15 (BTA must reach its "own independent judgment based on its weighing of the evidence contained in [the BOR] transcript"). In so doing, we find that Koon's appraisal report was competent and probative evidence of the subject property's value and that the BOR properly relied on said appraisal report to determine the subject property's value as of January 1, 2013.

However, the BOR did not have jurisdiction to consider the subject property's value for tax year 2014. The BOR issued its decision on February 10, 2015. 5151 and BOE had until March 31, 2015 to file a complaint or counter-complaint, which challenged the subject property's value for tax year 2014. We have previously admonished the BOR not to exercise jurisdiction over a year for which a complaint may be filed, since such filing renders the earlier decision for the "open tax year" null and void. *See, e.g., Big Walnut Apartments, LLC v. Franklin Cty. Bd. of Revision* (Nov. 6, 2012), BTA No. 2012-K-767, unreported; *GnA Properties, LLC v. Franklin Cty. Bd. of Revision* (May 29, 2012), BTA No. 2012-K-688, unreported. Despite our prior admonitions, we are required to once again take similar action in this appeal. Accordingly, we conclude that the BOR's jurisdiction in this matter was limited to tax year 2013 and, as a consequence, we remand the BOR decision with instructions to vacate said decision as to tax year 2014.

It is therefore the order of this board that the subject property's true and taxable values as of **January 1,**

2013, are as follows:

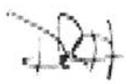
TRUE VALUE

\$3,620,000

TAXABLE VALUE

\$1,267,000

It is the order of the Board of Tax Appeals that the subject property be assessed in conformity with this decision and order.

<b>BOARD OF TAX APPEALS</b>		
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