

OHIO BOARD OF TAX APPEALS

Board of Education of the Olentangy)	CASE NOS. 2006-A-1506
Local Schools,)	2006-A-1550
)	
Appellant/Appellee,)	(REAL PROPERTY TAX)
)	
and)	DECISION AND ORDER
)	
Richs Department Stores, Inc.)	
)	Voluntarily Dismissed on Appeal Mar. 20, 2009
Appellee/Appellant,)	Ohio Supreme Court No. 2008-2412
)	
vs.)	
)	
Delaware County Board of Revision)	
and Delaware County Auditor,)	
)	
Appellees.)	

APPEARANCES:

For the Bd. of Edn.	- Rich, Crites & Dittmer, LLC Mark H. Gillis 300 East Broad Street, Suite 300 Columbus, Ohio 43215
For the Property Owner	- Karen H. Bauernschmidt Co., LPA Karen H. Bauernschmidt 1370 West 6 th Street, Suite 200 Cleveland, Ohio 44113
For the County Appellees	- Shoemaker, Howarth & Taylor, LLP Kevin L. Shoemaker 471 East Broad Street, Suite 2001 Columbus, Ohio 43215

Entered November 25, 2008

Ms. Margulies and Mr. Eberhart concur. Mr. Dunlap concurring separately.

This cause and matter came on to be considered by the Board of Tax Appeals upon two notices of appeal filed herein by the above-named board of education and property owner from a decision of the Delaware County Board of Revision. In said decision, the board of revision determined the taxable value of the subject property for tax year 2005.

The matter was submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcript¹ certified to this board by the county board of revision, the record of the evidence and testimony presented at the hearing before this board, and the briefs submitted by all counsel.

Situated on approximately 13 acres, the subject real property, a two-story mall anchor store containing approximately 180,486² square feet, was built in 2000. Located in the Columbus corporation-Olentangy Local Schools taxing district, the subject consists of two parcels. The value of the parcels, as determined by the auditor and by the board of revision, is as follows:

	PARCEL # 318-433-01-001-922	
	AUDITOR	
	TRUE VALUE	TAXABLE VALUE
Land	\$ 4,031,000	\$ 1,410,850
Building	9,012,800	3,154,480
Total	\$ 13,043,800	\$ 4,565,330

¹ At hearing, this board granted the property owner's unopposed motion to supplement the statutory transcript with the BOR hearing record of a related case. Further, at hearing, this board requested that the BOR supplement the statutory transcript with a certified copy of the subject property record card, which was received on September 25, 2008. H.R. at 8-9.

² The board will utilize the square footage figure as corrected by the property owner's witness before the board. H.R. at 44, 65. 87-89. We note that the BOE apparently conceded to the corrected figure, based upon its utilization of that number in its post-hearing brief. Brief at 1. While the BOR questioned the accuracy of the corrected figure at hearing, the square footage was confirmed on the certified property record card filed by the BOR post-hearing.

BOARD OF REVISION		
	TRUE VALUE	TAXABLE VALUE
Land	\$ 4,031,000	\$ 1,410,850
Building	5,099,600	1,784,860
Total	\$ 9,130,600	\$ 3,195,710

PARCEL # 318-433-01-001-004		
AUDITOR & BOARD OF REVISION		
	TRUE VALUE	TAXABLE VALUE
Land	\$156,200	\$ 54,670
Building	-0-	-0-
Total	\$156,200	\$ 54,670

Through their notices of appeal, the property owner contends that the auditor and the board of revision have overvalued the property in question and claims the property's market value is \$8,500,000, while the board of education contends that the auditor properly valued the subject property at a market value of \$13,200,000.

First, in reviewing how these cases came to us, we note that in March 2006, Richs Department Stores, Inc. filed an original complaint against the valuation of real property with the Delaware County Board of Revision seeking a decrease in the subject's total true value to \$7,220,000³ for tax year 2005. S.T., Ex. 1. In May 2006, the Board of Education of the Olentangy Local Schools filed a counter-complaint, seeking to retain the auditor's assigned true value of \$13,200,000. S.T., Ex. 2. On September 12, 2006, the BOR issued its decision for tax year 2005, decreasing the value assigned by the auditor for the subject property to a total market value of \$9,286,800. S.T., Ex. 5. Thereafter, both the board of education and the property owner appealed the BOR's determination to us.

³ The property owner later amended that value to \$8,500,000 at the hearing before the BOR. S.T., Ex. 4 at 7.

We begin our analysis by noting that a party who asserts a right to an increase or decrease in the value of real property has the burden to prove the right to the value asserted. *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; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318. Consequently, it is incumbent upon an appellant challenging the decision of a board of revision to come forward and offer evidence which demonstrates its right to the value sought. *Cleveland Bd. of Edn.*, supra; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493. Once an appellant has presented competent and probative evidence of true value, other parties asserting a different value then have a corresponding burden of providing sufficient evidence to rebut the appellant's evidence. *Springfield Local Bd. of Edn.*, supra; *Mentor Exempted Village Bd. of Edn.*, supra.

First, we will consider the evidence and testimony presented by the property owner herein. Richs Department Stores, Inc. (hereinafter "Richs") offered the testimony of Danny S. Brown, CMI, director of property taxes for Macy's, Inc.⁴ Mr. Brown's testimony was not offered as that of an expert appraiser, but as a longtime employee of Macy's, with significant experience in the retail business involving sales and acquisitions. H.R. at 49-51. In that capacity, he testified that he belongs to the

⁴ In the early 1990s, Federated Department Stores purchased Macy's, Inc. H.R. at 41. Federated also owned Richs Department Stores, Inc., the owner of the subject property at the time the subject complaint was filed. H.R. at 41. In 2005, Federated's name was changed to Macy's, Inc. H.R. at 41-42.

Institute of Professionals in Taxation, the International Association of Assessing Officers, and various assessment groups.

In his presentation to this board, Mr. Brown testified about four sales of anchor stores in the subject's vicinity which he believed provided valuation information pertinent to the subject. The first sale occurred at Tuttle Crossing Mall in 2003 and involved the sale of a Marshall Field's store, owned by Dayton Hudson, to May Department Stores for \$10,215,000, or approximately \$45 per square foot. H.R. at 53-54. The second sale occurred at the mall at which the subject is located, Polaris Fashion Place, between May Department Stores and Glimcher Polaris, the mall developer, for an existing Lord & Taylor store, in May 2005, for \$5,250,000, or \$37.63 per square foot. The third sale occurred a few months after the second sale, involving the second sale property again, but this time between Glimcher Polaris and Von Maur for \$5,250,000, or \$37.63 per square foot. H.R. at 54-55. The fourth sale occurred at Polaris Fashion Place in June 2007 between Federated Department Stores and Glimcher Polaris, which purchased an existing Kaufmann's store for \$8,000,000, or \$40.00 per square foot. H.R. at 55, 59. Based upon the foregoing sales, Mr. Brown argued that the subject should be valued at \$38 per square foot, or \$6,900,000 for the tax year in question. H.R. at 64.

As we consider the evidence and testimony presented to the board of revision and ultimately to this board by Mr. Brown, we find that we can accord only limited weight to Mr. Brown's conclusion of value. First, we do not recognize Mr. Brown as an expert appraisal witness. While we recognize that he has many years of

experience in the retail industry, we find that an insufficient foundation for Mr. Brown's testimony was laid with regard to his knowledge and experience in real estate valuation. The opinions expressed by Mr. Brown were in the nature of expert testimony; he concluded to a value for the subject by basing it on the prices obtained in the sales of four properties which he considered to be similar to the subject, i.e., he arguably employed some type of sales comparison approach. This board, however, does not find that Mr. Brown was sufficiently qualified as an appraiser to make such a conclusion. While Mr. Brown's conclusions appear to be based in a sales comparison analysis, none of his analysis leading up to his conclusion of \$38 per square foot was shared with this board or the board of revision. There is no indication in the record about the comparability of the sales to the subject and whether any adjustments to the sale prices per square foot were necessary. By not developing a sufficient foundation to establish an appropriate expertise in appraisal methods and the derivation of true value for a particular piece of real property, this board does not find Mr. Brown's testimony to be overly probative and will not give said testimony significant weight. Thus, since this board is vested with wide discretion in determining the weight to be given to evidence and the credibility of a witness who comes before the board, we choose not to rely upon Mr. Brown's valuation conclusion. *Witt Co. v. Hamilton Cty. Bd. of Revision* (1991), 61 Ohio St. 3d 155; *Cardinal Federal Savings & Loan Association v. Board of Revision* (1975), 44 Ohio St. 2d 13.

The board of education takes the position in this matter that the property owner's analysis of the value of the subject does not provide competent or probative

evidence of its true value. The BOE further argues that the prices paid for mall anchor stores that are subject to a mall operating agreement are not the result of arm's-length sales. See Exs. A, B. In its brief, the BOE contends that “[t]he essential purpose of a mall operating agreement is to require the anchor tenant to use the land and the improvements thereon for the very limited and specific purposes which are set forth in the agreement and to prevent the anchor tenant from conveying the land and improvements to anyone else.” Brief at 8. While, arguably, it may be possible for the terms of a mall operating agreement to affect the sale of a mall property, we have said before that the BOE “only offers conjecture as to the impact, if any, the operating agreement may have had upon the sale. No evidence rebutting the sale, or the sale price, is before us.” *Lazarus Real Estate, Inc. v. Muskingum Cty. Bd. of Revision* (Apr. 21, 2006), BTA No. 2004-T-1116, unreported. The BOE’s mere suppositions about the comparable sales offered by Richs in support of the valuation it seeks are insufficient to rebut the presumption that these sales are the best evidence of value of the subject property. See *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979. As the Supreme Court said in *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, at ¶15, “[m]ere speculation is not evidence.” We find the copies of the real property conveyance fee statements and/or deeds from the foregoing sales, not otherwise controverted, are competent and probative evidence of value in arm's-length sales. See, e.g., *Bounds v. Butler Cty. Bd. of Revision* (Aug. 7, 1992), BTA No. 1990-M-838, unreported; *Clearview Bd. of Edn. v. Lorain Cty. Bd. of Revision* (May 1,

1998), BTA No. 1996-M-1192, unreported; *Princeton City School Dist. v. Butler Cty. Bd. of Revision* (May 8, 1992), BTA No. 1990-C-820, unreported. Thus, while we agree with the BOE that the property owner's evidence alone is insufficient to support the value it seeks, we disagree with the BOE's contention that the comparable sales of other mall stores cannot be utilized in valuing the subject property.

Thus, having determined that neither the property owner nor the BOE has provided this board with sufficient, probative evidence of the value of the subject property, we must now evaluate the BOR's valuation of the subject, which amounted to a reduction in value from the auditor's original determination. Our analysis of a BOR's valuation determination routinely has begun with the Supreme Court's holding in *Simmons v. Cuyahoga Cty. Bd. of Revision* (1988), 81 Ohio St.3d 47, 49, that "[w]here 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." However, the foregoing holding in *Simmons*, supra, appeared to have been tempered in *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564, 567, where the court held "[w]hen the BTA reviews the evidence in a case in which the statutory transcript is the only evidence, the BTA must review the transcript and 'make its own independent judgment based on its weighing of the evidence contained in the transcript.' *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13, 15 ***. When the BTA reviewed the transcript in this case, it found that

‘there is no evidence or other information in the statutory transcript to explain the action taken by the BOR.’ By affirming the BOR’s valuation, the BTA affirmed a valuation that was not supported by any evidence.” Under the latter pronouncement, we would find somewhat limited evidentiary support for the BOR’s value herein.

Now, more recently, in *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 113 Ohio St.3d 281, 2007-Ohio-5237, the Supreme Court concluded that “the BTA erred in reinstating the auditor’s determination of value when the taxpayer had presented sufficient evidence to the BOR to justify the reduction the BOR ordered.” The court relied on its holding in *Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision*, 113 Ohio St.3d 281, 2007-Ohio-1948, where it 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.” *Id.* at ¶27. Even though this board did not find a stated explanation for the BOR’s adjustment, the court criticized the board for reinstating the auditor’s determination as the default value. *Bedford Bd. of Edn.*, *supra*.

Thus, the question for us becomes what constitutes “sufficient” evidence to justify a reduction in valuation. In the instant record, there is limited evidence to support the valuation adopted by the BOR. A brief discussion between the BOR members on a related case seems to indicate that the third comparable sale, between Glimcher Polaris and Von Maur, offered by the property owner, may have served, at least, in part, as the basis for that particular valuation as well as the subject’s valuation,

where the BOR appeared to be seeking “consistency” within its decisions. S.T. Supp H.R. at 11; S.T. H.R. at 7. While we have previously rejected such evidence alone as not being competent and probative of value, we recognize that the BOR saw fit to reduce the subject’s valuation. Arguably, the auditor must have conceded to the reduced valuation for the subject, since there is no indication in the record that the auditor attempted to defend and/or maintain the auditor’s original valuation. Further, we acknowledge that the value determined by the BOR clearly fell within the range of per square foot values that resulted from the four previously discussed comparable sales. However, we note that the BOR’s final valuation of the subject was based upon the conclusion that the subject contained 221,717 square feet at a value of \$41.88 per square foot. Since we have now concluded that the subject actually contains 180,486 square feet, the BOR’s dollar per square foot conclusion will be applied to the corrected square footage and the overall value will be adjusted accordingly.

Thus, based upon the foregoing, the value of the subject parcels as of January 1, 2005, shall be as follows:

	PARCEL # 318-433-01-001-922 ⁵	
	TRUE VALUE	TAXABLE VALUE
Land	\$ 3,257,120	\$ 1,139,990
Building	4,145,430	1,450,900
Total	\$ 7,402,550	\$ 2,590,890

⁵ The valuation of parcel #318-433-01-001-922 has been adjusted in accordance with the ratios that the BOR used (as between land and building).

	PARCEL # 318-433-01-001-004 ⁶	
	TRUE VALUE	TAXABLE VALUE
Land	\$156,200	\$ 54,670
Building	-0-	-0-
Total	\$156,200	\$ 54,670

The Auditor of Delaware County is hereby ordered to cause the county records to reflect the value determined herein for the subject real property and to assess the same in accordance therewith as provided by law.

Mr. Dunlap concurring separately.

While I concur with the outcome in the foregoing decision and order, I note my disagreement with a portion of the analysis.

My colleagues place “limited weight” on Mr. Brown’s testimony and corresponding opinion of value, finding him insufficiently qualified to offer his conclusions. As a result, the majority rejects the property owner’s evidence as inadequate to support the value sought.

In my view, a general exclusion of evidence and testimony for the reason that the proponent is not a certified “expert” operates as an unreasonable limitation on this board’s overall ability to determine valuation. While I recognize the decisions cited by the board of education to support its position, i.e., since appellant’s witness is

⁶ Because both the auditor and the BOR agreed upon the valuation of parcel #318-433-01-001-004, this board has maintained the auditor’s valuation for such parcel.

neither the “owner” nor a qualified expert appraiser, his testimony and corresponding opinion is not probative and cannot be considered, I do not read these holdings to support a categorical exclusion of all valuation testimony from a witness, who, by virtue of experience, market knowledge and/or a demonstrated significant connection with the subject property, may present evidence this board may consider probative and therefore, helpful in determining an accurate value, even though that individual is not a certified expert real property appraiser.

It seems counter productive, as well as unduly burdensome, to require a proponent of change to employ an “appraiser” when knowledgeable testimony regarding value is available, presented, and uncontroverted. Each case is unique and a preemptory rejection of any opinion evidence and related testimony, other than that of an “expert,” may operate to contravene this board’s statutory obligation to find value.

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