

OHIO BOARD OF TAX APPEALS

Sonnet Investments, LLC, a California)
LLC and Circuit City Stores, Inc.,)
Appellants,)
vs.)
Cuyahoga County Board of Revision,)
Cuyahoga County Auditor, and)
Warrensville Heights Board of)
Education,)
Appellees.)

CASE NO. 2006-A-320
(REAL PROPERTY TAX)
DECISION AND ORDER
Dismissed on Appeal 7/6/09
Ohio Supreme Court

APPEARANCES:

- For the Appellants - Karen H. Bauernschmidt Co., LPA
Karen H. Bauernschmidt
1370 West 6th Street, Suite 200
Cleveland, Ohio 44113
- For the County Appellees - William D. Mason
Cuyahoga County Prosecuting Attorney
Timothy J. Kollin
Assistant Prosecuting Attorney
Courts Tower, 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113
- For the Appellee Bd. of Edn. - Kolick & Kondzer
John P. Desimone
24500 Center Ridge Road, Suite 175
Westlake, Ohio 44145-5697

Entered August 12, 2008

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal filed by appellants, Sonnet Investments, LLC, a California LLC and Circuit City Stores, Inc. (“Sonnet”) from a decision of the Cuyahoga County Board of Revision (“BOR”). In said decision, the board of revision determined the taxable value of the subject real property for tax year 2004.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the county board of revision, the record of the hearing before this board, and the briefs filed by counsel to the appellant and appellee board of education.

The subject real property, a one-story retail building containing 41,393 square feet, is located on 3.46 acres in the North Randall taxing district, Cuyahoga County, Ohio, and appears on the auditor’s records as parcel number 771-08-012. Constructed in 1978, the building is in average/fair condition, after being vacated in February 2005. H.R. at 36, 89. The value of the parcel, as determined by the auditor and retained by the board of revision, is as follows:

Parcel No. 771-08-012

	True Value	Taxable Value
Land	\$ 538,500	\$ 188,500
Building	\$ 1,749,200	\$ 612,200
Total	\$ 2,287,700	\$ 800,700

Appellants contend that the auditor and board of revision have overvalued the subject and claim the property’s market value is \$1,550,000, as

supported by an appraisal¹ of the subject. The board of education contends that the value of the subject should be adjusted to reflect the price obtained by its sale in April 2002 for \$2,300,000.

We begin our analysis of the instant matter 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.

As we consider the appellants' position in this matter, it is clear that the property owners do not believe that the price obtained in the sale of the subject

¹ We note that two different appraisals of the subject property were offered by the appellants, one to the BOR and one to this board. While both reports were authored by the same appraisers and concluded to the same overall values for the subject property, the report accepted into evidence by this board, while similar to the one received by the BOR, did contain some changes, including, but not limited to, changes in the market value of the sale of the subject property after adjusting it for the effects of an above-market lease, changes to the sales comparison grid, sales analysis, and valuation derived using the sales comparison approach, changes to the lease comparison grid and lease analysis, and changes to the entire income approach, including the valuation derived thereunder.

property in April 2002 is indicative of its true value as of January 1, 2004. As a result, Sonnet has offered an appraisal of the subject to support the appellants' position to this board. However, before we consider such appraisal, we must first determine whether the sale in question is still representative of the subject's value, some twenty months later.

In support of the position that the April 2002 sale of the subject represents the best evidence of value of the subject, the appellee Warrensville Heights Board of Education entered into evidence copies of the deed and conveyance fee statement from such transaction. Exs. A, B. The deed and conveyance fee statement indicate that the subject was transferred on April 16, 2002, to Sonnet Investments LLC for the amount of \$2,300,000. Counsel for the BOE contends that this sale constitutes a valid, recent, arm's-length sale, and, as such, the transfer price should be considered the best evidence of the value of the subject property as of January 1, 2004. We agree.

R.C. 5713.03 provides, in pertinent part, that:

“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 *** to be the true value for taxation purposes.”

The Ohio Supreme Court has consistently held that the best evidence of true value of real property is an actual, recent, arm's-length sale. Specifically, in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d

269, 2005-Ohio-4979, the Supreme Court held “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.’ R.C. 5713.03.” *Berea*, at 5. See, also, *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059. 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.” *Walters v. Knox Cty. Bd. of Revision* (1988), 47 Ohio St.3d 23.

First, in considering whether the April 2002 sale of the subject property can be considered recent enough to be indicative of its value, we note that the Supreme Court has recognized that a sale may be considered recent for purposes of R.C. 5713.03 even though the sale occurs months either before or after tax lien date. See *R.R.Z. Associates v. Cuyahoga Cty. Bd. of Revision* (1988), 35 Ohio St.3d 198; *Hilliard City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1990), 53 Ohio St.3d 57; *W.S. Tyler Co. v. Lake Cty. Bd. of Revision* (1991), 57 Ohio St.3d 57. “The question of how long after a sale the sale price is to be considered the best evidence of true value will vary from case to case. R.C. 5713.03 provides that if there has been ‘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 *** to be the true value for taxation purposes.’ *** One of the factors that must be considered in determining what is ‘a reasonable length of time’ is a consideration of the changes that have occurred in the market. If the market is

changing rapidly, then the selling price will not be the best evidence of true value for as long a period of time as when the market is not changing or changing very slowly.” *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36, 44 (overruled on other grounds); *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473). See, also, *Dublin-Sawmill Properties v. Franklin Cty. Bd. of Revision* (1993), 67 Ohio St.3d; *U.S. Postal Serv. v. Lorain Cty. Bd. of Revision* (Mar. 29, 1985), BTA Nos. 1982-B-501, et al., unreported; *Self Service Mini Storage v. Cuyahoga Cty. Bd. of Revision* (May 13, 1994), BTA No. 1992-X-850, unreported; *Bd. of Edn. of the Gahanna-Jefferson Public Schools v. Franklin Cty. Bd. of Revision* (Mar. 17, 1995), BTA No. 1994-T-789, unreported; *Hickman v. Franklin Cty. Bd. of Revision* (July 28, 1995), BTA Nos. 1994-K-1151, et seq., unreported; *Behrends v. Franklin Cty. Bd. of Revision* (Feb. 16, 1996), BTA Nos. 1994-N-1396, et seq., unreported; *Bd. of Edn. of the Delaware City Schools v. Delaware Cty. Bd. of Revision* (Sept. 20, 1996), BTA No. 1995-P-1201, unreported; *S. Euclid-Lyndhurst City School Dist. Bd. of Edn v. Cuyahoga Cty. Bd. of Revision* (May 13, 2005), BTA No. 2003-G-1041, unreported.

There is no evidence in the record to demonstrate that the general real estate market sufficiently changed between April 16, 2002 and January 1, 2004 so as to require this board to reject the April 2002 sale price as the best evidence of the value of the subject property as of January 1, 2004. In fact, appellants’ own appraiser’s report to this board did not reflect any consideration being given to changes in the market place between the sale year and the tax lien year, as he made no

adjustments to his sales comparables or rent comparables for time, which he admitted, on cross-examination before this board, was a mistake. H.R. at 34, 70-72. The appraiser's use of four out of five sales comparables that pre-date the tax lien date in question, with no adjustment for time, contradicts the appellants' argument that the subject sale cannot be relied upon because it is not reflective of market conditions in 2004, due to "drastic changes." Further, the inception dates of the three lease comparables utilized by appellants' appraiser also pre-date the tax lien date in question, and none of those were adjusted for time. In addition, included in the market analysis in appellants' appraiser's report is information indicating that while population has declined over the years in that area, income and home values increased. H.R. at 33; Ex. 1 at 17-19. Further, the subject, while currently vacant, was occupied by its lessee, Circuit City Stores, Inc., until February 2005, some thirteen months after the tax lien date in question. Thus, we are constrained to find that no evidence of a material event or changing market conditions tending to affect the value of the subject property between the sale and the tax lien date has been submitted, and therefore, we find that the April 2002 sale constitutes a "recent" sale for purposes of determining the subject property's value for tax year 2004.

Next, with regard to whether the April 2002 sale can be considered arm's length, we find that the subject sale had all the indicia of, and consequently was, an arm's-length sale. We find there is nothing in the instant record to dispute that the subject sale was arm's length. While the property owner's appraiser testified about the sale of the subject, he did not have personal knowledge about the motivations of

the buyer and seller in the transaction or the specific terms of the lease in existence at the time of the sale; he testified that he did not speak to any agents of the seller or the buyer and did not review the entire lease, only a summary. H.R. at 61. When asked whether the subject sale met all of the criteria for an arm's-length transaction, as set forth in his appraisal, the appraiser testified that while he did not know whether, with regard to the sale, "[a] reasonable time [was] allowed for exposure in the open market," he believed all of the other indicia of an arm's-length transaction had been met except for his final requirement that "the price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale." Ex. 1 at 4; H.R. at 61-62. He indicated that it was his belief that the subject was purchased subject to a long-term, above-market lease which directly affected the ultimate sale price that was achieved. H.R. at 27-28, 62. He elaborated, stating:

"Well, I think the first step was at the time of the transaction, was the Circuit City lease above market, was it below market, or was it at market? If it was at market, then it was purchased, maybe that would represent—even though this is a lease-fee value, it may still represent a market value also. So at the time of the sale, the property was leased for \$5.89 a square foot. Now, ***, I concluded the property is being offered for \$5 a square foot. So it would appear quite clearly that the leased fee is above market by at least 89 cents.

"Now, as an appraiser, we can make adjustment for different factors in a sale. So *** I went through an analysis where I adjusted the sale to compensate for the fact it was above market and what the proper price would be if this lease was at market as of the date of our valuation.

“In other words, it was leased for \$5.89 per square foot. The proper market rent was no higher than \$5 because that is what they were offering for the property. That is a difference of 89 cents a square foot. If we apply that to the size of Circuit City, which is 41,000 square feet and change, that would indicate above-market rental of \$36,840 per year.

“***We take that rental and capitalize it into value. I used an eight-and-a-half percent cap rate, which gave me an above-market price they paid of \$433,000 and change.

“So to bring this sale to compensate for the fact that it was leased at above-market terms at the time of transfer, I subtracted that amount, the above-market rental capitalized from the sale price.

“In other words, 2-million-3 less the above-market value indicated by the above-market lease would be subtracting \$433,000, which would leave a value of \$1,866,000 for the subject property.” H.R. at 28-29.

We find no support in the record for the foregoing comments/analysis made by appellants’ appraiser. There is nothing before us to support his conclusion that the subject was leased at above-market terms at the time of its sale. He cites to the subject’s eventual lease offering rate of \$5.00 per square foot as support for his conclusion that the \$5.89 per square foot rate at which the subject was leased at the time of its transfer as evidence of the subject’s above-market transfer. However, his own lease comparables #1-#3 reflect existing lease rates that are comparable to or higher than the subject’s. Further, the subject’s lease offering rate and the offerings of lease comparables #4-#5 cannot be relied upon as indicative of the market, as this board has held on many occasions that the price at which property is “listed” for sale or lease is not necessarily indicative of market value and also does not constitute the

“outer limit” at which the property would sell or lease. See, e.g., *Soc. Natl. Bank v. Carroll Cty. Bd. of Revision* (Apr. 19, 1996), BTA No. 1994-M-454, unreported. Further, and perhaps most importantly, we question the indicia of an arm’s-length transaction upon which the appraiser based his conclusions; the Supreme Court has clearly set forth what the elements of an arm’s-length sale are. See *Walters*, supra. The price paid for a property and whether it constitutes the “normal consideration” for such property or above/below market pricing is not an indicium of an arm’s-length transaction. Thus, based upon the foregoing, we find that no evidence or testimony was offered by the property owner in this matter to dispute that the sale in question was arm’s length in nature.

Finally, appellants argue that the sale of the subject cannot be used to determine its value because the transaction represents the sale of a leased fee. We note, however, that after *Berea*, supra, this board has had occasion to review the valuation of several buildings encumbered by leases at the time of their transfer. In many of these cases, the board concluded that the sale price of the leased fee interest was controlling for ad valorem tax purposes. See *Hon. Dusty Rhodes v. Hamilton County Bd. of Revision* (Mar. 9, 2007), BTA No. 2005-M-1098, unreported, affirmed 118 Ohio St.3d 263, 2008-Ohio-2450; *Bd. of Edn. of the Columbus City Schools v. Franklin Cty. Bd. of Revision* (June 30, 2006), BTA No. 2005-A-381, unreported, appeal dismissed, 114 Ohio St.3d 1224, 2007-Ohio-4007; *Dayton School District Bd. of Edn. v. Montgomery Cty. Bd. of Revision* (Jan. 6, 2006), BTA No. 2004-V-73, unreported. But, see, *RX Bedford Investors, LLC vs. Cuyahoga Cty. Bd. of Revision*

(Feb. 3, 2006), BTA No. 2002-R-2509, unreported, settled upon appeal, Sup. Ct. No. 06-448.

The Supreme Court has also considered the issue of the valuation of leased fees upon their sale. In *Berea*, supra, and *Rhodes*, supra, the court considered the valuation of properties that sold while encumbered by long-term leases. Specifically, in *Rhodes*, the court held:

“MA Richter [the property owner] generally contends that *Berea* does not apply here because the property in this case is encumbered by a long-term lease to Walgreens. That position is not well taken. In *Berea*, where long-term leases also encumbered the property, we held 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., 106 Ohio St.3d 269, 2005-Ohio-4979, 834 N.E.2d 782, ¶ 13, quoting R.C. 5713.03. Although *Berea* involved an encumbrance of a lease for ‘below market’ rent and this case involves ‘above market’ rent, this is a distinction without legal significance. Just as the recent, arm’s-length sale price in *Berea* constituted the true value of the property, despite the existence of the long-term leases, the sale price here also reflects the true value of the property.” Id. at ¶ 3.

See, also, *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 118 Ohio St.3d 263, 2008-Ohio-2450, affirming this board’s decision that the sale price of a leased fee interest was controlling for ad valorem tax purposes “on the authority” of *Berea*, supra, and *Rhodes*, supra.

Thus, with no competent or probative evidence in the record rebutting the presumption that the sale price is the best evidence of value, we find the price paid by the property owner for the subject property best represents the true value of

the property for tax year 2004 and consequently, it would be unnecessary for this board to consider appraisal evidence in the valuation of the subject. The property owner did not meet its burden of proving that the sale was not recent or arm's length, and, as such, the value of the subject parcel as of January 1, 2004, shall be its April 2002 sale price, allocated² as follows:

Parcel No. 771-08-012

	True Value	Taxable Value
Land	\$ 552,000	\$ 193,200
Building	\$ 1,748,000	\$ 611,800
Total	\$ 2,300,000	\$ 805,000

It is the order of the Board of Tax Appeals that the Auditor of Cuyahoga County list and assess the subject real property in conformity with this decision and order. It is further ordered that these values be carried forward in accordance with the law.

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² The land and building values are derived using the same proportions between land and building and total that the county auditor utilized in assigning values.