

**OHIO BOARD OF TAX APPEALS**

Board of Education of the )  
South Euclid-Lyndhurst City )  
School District, )  
)  
)  
)  
Appellant, ) (REAL PROPERTY TAX)  
)  
vs. )  
)  
) DECISION AND ORDER  
)  
Cuyahoga County Board of Revision, )  
Cuyahoga County Auditor, and )  
Hilltop Plaza, LLC, )  
) **Appeal Filed March 4, 2009**  
) **Ohio Supreme Court No. 2009-430**  
)  
Appellees. )

APPEARANCES:

For the Appellant - Brindza, McIntyre & Seed, LLP  
Bd. of Edn. David H. Seed  
1111 Superior Avenue, Suite 1025  
Cleveland, Ohio 44114

For the County - William D. Mason  
Appellees Cuyahoga County Prosecuting Attorney  
Timothy J. Kollin  
Assistant Prosecuting Attorney  
Courts Tower, Ninth Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

For the Appellee - Karen H. Bauernschmidt Co., LPA  
Property Owner Karen H. Bauernschmidt  
Sam A. Benson  
1370 West 6<sup>th</sup> St., Suite 200  
Cleveland, Ohio 44113

Entered February 6, 2009

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

The Board of Education of the South Euclid-Lyndhurst City School District (“BOE”) appeals to the Board of Tax Appeals (“BTA”) from a decision of the Cuyahoga County Board of Revision (“BOR”), in which the BOR determined the true value of the subject property for tax year 2004.

The Auditor of Cuyahoga County had determined the values of the subject property for tax year 2004 to be as follows:

<u>Permanent Parcel No.</u>		<u>True Value</u>	<u>Taxable Value</u>
662-30-007	Land	\$1,419,400	\$ 496,800
	Building	\$4,105,600	\$1,437,000
	Total	\$5,525,000	\$1,933,800
662-30-089	Land	\$ 151,700	\$ 53,100
	Building	\$ 416,300	\$ 145,700
	Total	\$ 568,000	\$ 198,800
662-30-109	Land	\$2,436,500	\$ 852,800
	Building	\$5,752,700	\$2,013,400
	Total	\$8,189,200	\$2,866,200
662-30-116	Land	\$ 287,300	\$ 100,600
	Building	\$ 0	\$ 0
	Total	\$ 287,300	\$ 100,600

The BOR determined the values of the subject property for tax year 2004 to be as follows:

<u>Permanent Parcel No.</u>		<u>True Value</u>	<u>Taxable Value</u>
662-30-007	Land	\$1,419,400	\$ 496,800
	Building	\$5,005,600	\$1,752,000
	Total	\$6,425,000	\$2,248,800
662-30-089	Land	\$ 151,700	\$ 53,100
	Building	\$ 446,800	\$ 156,400
	Total	\$ 598,500	\$ 209,500

662-30-109	Land	\$2,436,500	\$ 852,800
	Building	\$6,752,700	\$2,363,400
	Total	\$9,189,200	\$3,216,200
662-30-116	Land	\$ 287,300	\$ 100,600
	Building	\$ 0	\$ 0
	Total	\$ 287,300	\$ 100,600

The subject property is a one-story strip shopping center located in the Richmond Heights taxing district. For tax year 2004, the BOE filed a complaint with the BOR, seeking an increase in the subject property's value. S.T., Ex. A. In support, the BOE presented a copy of a limited warranty deed, which showed that the subject sold on February 15, 2005 for a total purchase price of \$23,950,000. S.T., Ex. D. The BOE argued that the sale price should be adopted as the true value of the subject. The property owner, Hilltop Plaza, LLC ("Hilltop"), filed a counter-complaint and appeared before the BOR. S.T., Ex. F. Apparently, complaints were also filed by Hilltop and the Richmond Heights Local School District Board of Education for the subject property for tax year 2005, and these cases were heard together with the subject 2004 complaints at the BOR hearing.<sup>1</sup>

The BOE and Hilltop appealed the decision of the BOR to this board. However, Hilltop subsequently voluntarily dismissed its cases before the BTA. *Hilltop Plaza, LLC v. Cuyahoga Cty. Bd. of Revision* (Nov. 25, 2008), BTA Nos. 2006-B-1298, 1299, unreported.

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<sup>1</sup> This latter complaint has not been appealed to this board. This second board of education apparently filed the complaint to protect any possible interest it had in the matter. It believed that a portion of the subject property may have been in its jurisdiction. S.T., Audio Tape.

On August 15, 2008, this board conducted the scheduled evidentiary hearing. No one appeared on behalf of the county appellees. The BOE and Hilltop were represented by counsel.

As a preliminary matter, Hilltop contended, at the BTA hearing and in its November 5, 2008 brief, that “the BOE incorrectly listed the main parcel number on its 2004 tax complaint.” Hilltop argued that neither the BOR nor the BTA has jurisdiction over the matter by reason of the purportedly defective complaint. *Id.* at 14 and BTA Hearing, Audio Recording. This issue was also raised at the BOR hearing. At that hearing, counsel for the BOE stated it was a “typo” and that the property was properly identified in other locations of the complaint. The BOR determined that the error was typographical in nature and that Hilltop was not harmed by the mistake. *S.T.*, Audio Tape. The subject complaint listed the parcel as “622-30-007” under line 8 of the complaint whereas the correct parcel number is “662-30-007.” However, we note that line 6 of the complaint listed the correct parcel number as well as the address of the subject property. This rendered adequate notice to the parties as evidenced by Hilltop’s counter complaint. *S.T.*, Ex. B. Hilltop’s motion<sup>2</sup> is denied.

We begin our review of this matter by noting that “[w]hen 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 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, at 566. In determining value, we will determine the weight and credibility to be accorded the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

It is not enough, however, to simply come forward with some evidence of value. Neither is it sufficient to grant the requested increase or decrease merely because no evidence is offered to challenge the claim. *W. Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340; *Hibschman v. Bd. of Tax Appeals* (1943), 142 Ohio St. 47. An appellant must present competent and probative evidence to make its case. *Columbus*, supra, at 566.

With regard to the sale now before us, R.C. 5713.03 provides that if “a 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.” In construing R.C. 5713.03, the Ohio Supreme Court has specified, “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.’” *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, at ¶13. See, also, *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059.

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<sup>2</sup> We interpret Hilltop’s jurisdictional argument as a motion to remand with orders to the BOR to dismiss

We have previously held that evidence of a sale exhibited through a deed or conveyance fee statement, not otherwise controverted, is competent and probative evidence of value in an arm's-length sale. *Clearview Bd. of Edn. v. Lorain Cty. Bd. of Revision* (May 1, 1998), BTA No. 1996-M-1192, unreported; *Bounds v. Butler Cty. Bd. of Revision* (Aug. 7, 1992), BTA No. 1990-M-838, unreported.

In the instant matter, Hilltop argued that the sale price of the subject should not be relied upon for tax valuation purposes because “the purchase price was based on the misrepresentations made by the seller regarding the level of income generated by the subject property.” Hilltop points out that “Mr. Ridgley [Hilltop’s witness at the BOR hearing] testified that the seller improperly inflated the amount of income which was generated by the subject property. Specifically, [he] testified that the seller provided the Property Owner with a Rent Roll as of the date of acquisition, which misrepresented the number of tenants that were paying rent at the subject property \*\*\* [and Mr. Ridgley] identified the specific tenants on the Rent Roll who were not paying rent, which was misrepresented by the seller.” Hilltop November 5, 2008 Brief at 4.

The testimony of the property owner’s representative, Scott Ridgley, does reflect the loss of numerous tenants after the sale. Mr. Ridgley also testified that the seller promised two tenants (leases) which never materialized, and that the seller did not disclose approximately 30 city code violations which cost Hilltop

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the BOE’s complaint and reinstate the auditor’s original values.

approximately \$200,000 in related expenses. He also stated that repair needs to the parking lot could not be visibly assessed because of the snow at the time of inspection. However, when asked about the due diligence taken by Hilltop prior to the sale, the witness appeared to assume due diligence was taken but was “not sure what was done.” He testified that Hilltop allowed a “little bit of ... faith where we shouldn’t have.” We also note that many of Mr. Ridgley’s examples regarding the tenants pertained to valid leases which were subsequently breached. S.T., Audio Tape.

In reviewing challenges to sale prices, we note the Supreme Court’s holding in *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 118 Ohio St.3d 45, 2008-Ohio-1588, in which it stated, “Under *Berea*, \*\*\* a sale price is deemed to be the value of the property, and the only rebuttal lies in challenging whether the sale was sufficiently recent and genuinely at arm’s length between a willing buyer and a willing seller.” *Id.* at ¶8. See, also, *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 008-Ohio-1473, at ¶13 (“[a] sale price is deemed to be the value of the property, and 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.”).

“[A]n 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* (1989), 47 Ohio St.3d 23, at the syllabus. The absence of a single one of these factors is sufficient to demonstrate that a transaction was not conducted at arm's length. *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 112 Ohio St.3d 309, 2007-Ohio-6, at ¶13, citing *Kroger Co. v. Hamilton Cty. Bd. of Revision* (1993), 67 Ohio St.3d 145. See, also, *RLG Properties, LLC v. Franklin Cty. Bd. of Revision*, 2006-Ohio-5096.

In the instant matter, based upon the existing record, we conclude that the sale was made at arm's length. Indeed, at the BOR hearing Hilltop's counsel stated that Hilltop was "not arguing [that the sale was] not arm's length." S.T., Audio Tape. Mr. Ridgley testified that this was an "open market sale" listed at \$23,950,000 and Hilltop made an offer which was accepted by the seller. S.T., Audio Tape. There is nothing in the record to indicate that the sale was not voluntary. There is no evidence of duress.

In the case of *Chesapeake Mill Ltd., Partnership v. Franklin Cty. Bd. of Revision* (Mar. 15, 2002), BTA No. 2000-S-322, unreported, the appellant therein claimed that the sale price did not reflect the true value because it relied upon the misrepresentations of the seller regarding the potential income of the property and condition of the property. In that case, this board stated as follows:

"[A]ll of the defects claimed by Chesapeake were in existence at the time of the sale and could have been discovered by Chesapeake had it performed a full inspection of the subject property prior to the sale. Appellant's witness, Mr. Scott, recognized this fact in his testimony before the BOR when he stated that the buyer 'should have known' about the claimed defects and the

buyer ‘fell down on’ its duty to investigate. The fact that Chesapeake relied upon alleged representations made by the seller rather than performing its own due diligence inspection of the property does not establish that the sale was other than arm’s-length.” Id. at 6.

While this board may sympathize with appellant’s situation, Hilltop has offered insufficient evidence to indicate that it failed to negotiate in its own best interest. Unfortunately, it appears that Hilltop may not have performed proper due diligence in verifying income, assessing the condition of the property, or in checking the status of potential and current tenants of the subject property. There is nothing in the record to indicate that the sale was not arm’s length in nature. See *Clarkin v. Franklin Cty. Bd. of Revision* (Sept. 17, 1999), BTA No. 1998-T-462, unreported.

A sale must also have been made within a reasonable time of tax lien date for purposes of determining value. Here, the sale occurred almost 14 months after tax lien date. There is nothing in the record before us, however, that would lead us to conclude that the sale was remote for purposes of determining the subject’s 2005 value. See, generally, *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36 (overruled on other grounds); *Hilliard City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1990), 53 Ohio St.3d 57, at 59.

However, it is uncontroverted that the sale price of \$23,950,000 was actually “\$450,000 less than the seller took because they set aside money to repair the roof.” S.T., Audio Tape. At the BOR hearing, the BOE counsel did not

oppose this amount as an appropriate deduction to reflect true value for the subject property. We agree that \$450,000 should be deducted from the sale price in determining value for the subject property. Also, Mr. Ridgley testified that the sale price included property which was not part of the case.<sup>3</sup> He stated that this property was sold immediately after the subject sale for \$150,000. Absent evidence to the contrary, we determine this also to be an appropriate deduction from the sale price in the case before us.

In conclusion, we have before us an arm's-length sale. We therefore accept the \$23,350,000 price, minus the above-stated deduction, as the value of the property. *Berea* and *Lakota*, supra. Accordingly, the Board of Tax Appeals finds, upon a preponderance of the evidence, that the true and taxable values of the subject property are as follows for tax year 2004:<sup>4</sup>

<u>Permanent Parcel No.</u>		<u>True Value</u>	<u>Taxable Value</u>
662-30-007	Land	\$ 1,419,400	\$ 496,800
	Building	\$ 7,622,040	\$2,667,710
	Total	\$ 9,041,440	\$3,164,510
662-30-089	Land	\$ 151,700	\$ 53,100
	Building	\$ 762,200	\$ 266,770
	Total	\$ 913,900	\$ 319,870
662-30-109	Land	\$ 2,436,500	\$ 852,800
	Building	\$10,670,860	\$3,734,800
	Total	\$13,107,360	\$4,587,600
662-30-116	Land	\$ 287,300	\$ 100,600
	Building	\$ 0	\$ 0
	Total	\$ 287,300	\$ 100,600

<sup>3</sup> Described as a "land pad" or separate parcel or parcels of land by Mr. Ridgley at the BOR hearing.

<sup>4</sup> Land values followed the auditor's valuations, whereas the remaining sale value was apportioned to each building in accordance with the original auditor's figures.

We order the Auditor of Cuyahoga County to list and assess the subject property in conformity with this decision and order.<sup>5</sup>

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<sup>5</sup> In this regard, we note that a complaint was filed by the parties for the subject property for tax year 2005. S.T., Audio Tape. That matter is not before this board.