

OHIO BOARD OF TAX APPEALS

Lowes Home Centers Inc.,)	CASE NO. 2006-K-2225
)	
Appellant,)	(REAL PROPERTY TAX)
)	
vs.)	DECISION AND ORDER
)	
Allen County Board of Revision and the)	
Allen County Auditor,)	
)	
Appellees.)	

APPEARANCES:

For the Appellant	- Siegel, Siegel, Johnson & Jennings Co., L.P.A. Nicholas M. J. Ray 3001 Bethel Road, Suite 208 Columbus, Ohio 43220
For the County Appellees	- Rich, Crites & Dittmer, LLC James R. Gorry Special Assistant Allen County Prosecuting Attorney 300 East Broad Street, Suite 300 Columbus, Ohio 43215-3704

Entered February 6, 2009

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

This cause and matter is considered by the Board of Tax Appeals as a result of a notice of appeal¹ filed on behalf of appellant, Lowes Home Centers Inc. Appellant challenges a decision of the Allen County Board of Revision (“BOR”) in which it determined the value of certain real property for purposes of ad valorem taxation for tax

¹ The decision notices from which this appeal is taken, having been filed with this board on November 28, 2006, were mailed to appellant via certified mail on November 1, 2006. Although the BOR represents on DTE Form 3 that appellant’s appeal was not received and filed with it until December 11, 2006, a date beyond the period prescribed by R.C. 5717.01, a copy of the notice of appeal included within the transcript reveals service was effected on November 30, 2006. S.T., Ex. G. It appears the December 2006 reference reflects the date on which the BOR received this board’s docket notices advising it of our own receipt of appellant’s appeal.

year 2005. The property in issue is identified in the records of the Allen County Auditor (“auditor”) as parcel numbers G25-36-1604-01-018.000, comprised of approximately eleven and one-half acres of unimproved land, and G25-36-2100-01-003.001, an approximately seventeen-acre parcel improved with a surface parking lot and a single-story, 132,539-square foot structure constructed circa 1996 and used by appellant in its retail business operations.

As of the pertinent tax lien date, i.e., January 1, 2005, the subject property was initially assessed by the auditor consistent with the following values:

Parcel No.: G25-36-1604-01-018.000

	<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>
Land	\$528,400	Land	\$184,940
Building	<u>\$ -0-</u>	Building	<u>\$ -0-</u>
Total	\$528,400	Total	\$184,940

Parcel No.: G25-36-2100-01-003.001

	<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>
Land	\$1,827,200	Land	\$ 639,520
Building	<u>\$4,592,200</u>	Building	<u>\$1,607,270</u>
Total	\$6,419,400	Total	\$2,246,790

Appellant initiated its value challenge by filing a complaint² with the BOR and asserting the subject property’s true and taxable values should be reduced to \$4,600,000 and \$1,610,000,³ respectively. In support of its complaint, appellant submitted, under cover

² We note that the Elida Board of Education also filed a complaint with the BOR pursuant to R.C. 5715.19(B), requesting that the auditor’s values be retained. While it appears the BOR provided notice to the BOE and its counsel of the filing of the present appeal as required by R.C. 5717.01, see S.T., Ex. H, the BOE has not entered an appearance as required by Ohio Adm. Code 5717-1-03(B) or otherwise sought to participate in the proceedings before this board.

³ In its complaint and subsequently in its notice of appeal, appellant challenged the common level of assessment used by the county auditor in calculating taxable value, asserting it was less than 35% percent of true value. Although appellant represented evidence would be presented in support of this contention, no such evidence has been provided and therefore this issue will not be further addressed. See, generally, *Columbus Bd. of Edn. v. J.C. Penney Properties, Inc.* (1984), 11 Ohio St.3d 203; *Wolf v. Cuyahoga Cty. Bd. of*

letter of its counsel, “the owner’s description and opinion of value” for the subject property which counsel discussed at the BOR hearing.⁴ Ultimately, the BOR decided to retain the auditor’s values and the present appeal ensued.

Although appellant initially asserted in its notice of appeal that the subject’s total true value was \$4,620,000, at the hearing convened before this board, counsel amended the claim to \$5,300,000⁵ so as to comport with the opinion expressed by its expert, Curtis P. Hannah, a certified general real estate appraiser, who testified regarding the appraisal which he developed for the subject property. Within his written appraisal,⁶ Hannah conducted an

Footnote contd.

Revision (1984), 11 Ohio St.3d 205, 207. See, also, *Black v. Cuyahoga Cty. Bd. of Revision* (1985), 16 Ohio St.3d 11, 16-17; *J.C. Penney Properties, Inc. v. Franklin Cty. Bd. of Revision* (Aug. 27, 1992), Franklin App. Nos. 91AP-872, et seq., unreported, motion to certify overruled, (1993), 66 Ohio St.3d 1496; *State ex rel. Columbus Bd. of Edn. v. Thompson* (Oct. 19, 1989), Franklin App. No. 89AP-60, unreported.

⁴ Although appellant now relies principally upon the opinion of value expressed by its appraiser who testified before this board, we consider aspects of its original submission to the BOR to be worthy of comment. As indicated above, counsel’s cover letter represented its submission, which included copies of “comparable sales” data and a “sales comparison approach to value,” constituted “the owner’s description and opinion of value.” However, only counsel appeared before the BOR on appellant’s behalf. While a presentation by counsel on his client’s behalf is sufficient to avoid the dismissal of a complaint for failure to prosecute, see, e.g., *Snavelly v. Erie Cty. Bd. of Revision* (1997), 78 Ohio St.3d 500, this board has typically been reluctant to accord evidentiary weight to “owner’s opinions” where the owner is a separate legal entity and it is uncertain whether the data gathered and appraisal techniques developed actually constituted the owner’s opinion or that of its counsel, see, e.g., *Corporate Exchange Bldgs. IV & V, L.P. v. Franklin Cty. Bd. of Revision* (1998), 82 Ohio St.3d 297, 299, or some undisclosed individual unavailable for examination. See, e.g., *N. Olmsted Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Mar. 10, 1995), BTA Nos. 1993-A-347, et seq., unreported, affirmed (1996), 75 Ohio St.3d 595; *1524 Indianola Ave. LLC v. Franklin Cty. Bd. of Revision* (Oct. 12, 2007), BTA Nos. 2005-T-1605, et al., unreported; *MG-Mapleview Ltd. v. Greene Cty. Bd. of Revision* (June 24, 2008), BTA No. 2006-V-759, unreported.

⁵ Although the values claimed by appellant have varied during the course of these proceedings, a party is not restricted to an amount set forth in its original complaint filed with a county board of revision as it “places neither minimum nor maximum limitations on the court’s determination of value, and there are none save the judicial requirement that the determination be supported by the evidence.” *Jones & Laughlin Steel Corp. v. Lucas Cty. Bd. of Revision* (1974), 40 Ohio St.2d 61, 63. See, also, *Cleveland Elec. Illum. Co. v. Lake Cty. Bd. of Revision* (1998), 80 Ohio St.3d 591, 595 (“There is no requirement that the value of the property, as determined by the board of revision, must match the opinion of value set forth in the complaint.”).

⁶ The appraisal report submitted to this board, i.e., Ex. 1, was signed and certified to not only by Hannah, but also by Robin M. Lorms, and includes an additional signature of Sean M. Valerio, an analyst who provided research assistance in the appraisal assignment. Such shared responsibilities among members of the same appraisal firm is not uncommon. See, e.g., *Orange City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1996), 74 Ohio St.3d 415, 416-417.

economic analysis of Allen County, as well as the Lima, Ohio area in which the subject is located, evaluating population, employment, and personal income trends for a ten-year period prior and subsequent to tax lien date, expressing the view that “[o]verall, the economic outlook for Allen County is neutral. Total population is projected to increase slightly. The area is projected to experience flat employment growth. Based on this analysis, it is anticipated Allen County will remain stable. The expected growth should provide an economic base that supports demand for real estate in the subject neighborhood and for the subject property. These conditions should stimulate increases in general property values within the foreseeable future.” Ex. 1 at 13.

Similar to other appraisal assignments in appeals in which his efforts have been considered by this board, Hannah prepared a retail market analysis wherein he considered national and regional trends impacting the development and marketability of “big box”⁷ retail stores in Ohio, the category within which he considers the subject’s improvements to fall, ultimately opining that “the fee simple market value of these properties is substantially lower than replacement costs, not only due to physical depreciation but also obsolescence. This obsolescence occurs the day they are completed, thus even brand new big box stores are worth less than their cost to develop.” Id. at 26. In spite of this, he concluded that the subject’s “continued discount storeroom use is maximally productive as improved and therefore the highest and best use of the site as improved.” Id. at 40.

⁷ Elsewhere within his appraisal, particularly in his valuation analyses, Hannah elaborates upon the unique aspects of appraising “big box” properties.

Having made the preceding determination, Hannah proceeded to estimate the subject property's value by employing the cost, sales comparison, and income capitalization approaches to value. See, generally, Ohio Adm. Code 5703-25-07(D) (describing the three approaches approved by the Tax Commissioner for use by county auditors in estimating true value). In the cost approach, the estimated site value is added to the costs necessary to reproduce or replace the existing improvements less depreciation. See *The Appraisal of Real Estate* (13th Ed. 2008), at 142. In valuing the subject's land component, Hannah considered the area having improvements, i.e., approximately 17.42 acres, separately from the remaining 11.5 unimproved acreage. A total of seven land sales and one offering were considered,⁸ the sales having taken place between October 2001 and June 2007, involved between approximately eight and thirty-five acres, and sold on a per acre basis of approximately \$53,700 to \$220,000. He concluded the smaller, or "excess," land area had a value of \$60,000 per acre, or \$690,000, while the larger area was considerably more valuable at \$225,000 per acre, or \$3,919,500, which when added together and rounded, reflected a site value of \$4,600,000. In estimating the subject's improvements' replacement costs, Hannah used Marshall Valuation Service and derived a "replacement cost new" estimate of \$4,861,301, which he reasoned should be depreciated by \$3,607,001.⁹ Adding

⁸ During his testimony, Hannah corrected references to his land comparables one and eight, see Ex. 1 at 54, indicating that the property identified was not the subject property, but instead a Home Depot property located in Lima for which an appraisal had also been undertaken.

⁹ Hannah went into considerably more detail regarding his estimation of improvement costs and the amount by which they were entitled to be depreciated than we consider necessary to set forth within the body of this decision. In doing so, he discussed the functional obsolescence resulting from the fact that most national retailers of the type likely to occupy a property such as the subject are predisposed to use their own building design. See, also, *Wal-Mart Real Estate Business Trust v. Fulton Cty. Bd. of Revision* (July 15, 2005), BTA No. 2003-T-913, unreported. We concur in Hannah's view that the age of the subject's improvements and the

his depreciated improvement replacement costs to his land value, Hannah concluded to a rounded value through the cost approach of \$5,900,000.

Through the sales comparison approach, the appraiser attempts to estimate the value of the property under consideration by comparing it to other properties recently sold, making adjustments where necessary in order to account for various elements of comparison, e.g., location, physical characteristics, timing of sale, etc. The Appraisal of Real Estate, at 141-142. Within his report, Hannah cited to ten properties, eight of which had sold between March 2001 and June 2007, with one currently in contract and the other merely an asking amount.¹⁰ The eight sales, one of which involved an inferior property, two of which were similar, and the remaining superior to the subject, indicated a value range from \$16.92 to \$47.93 per square foot. Based upon his consideration of all ten properties referenced within his report, Hannah applied a unit value of \$35 per square foot to the subject's 132,539-square foot gross leasable area to arrive at \$4,638,865, which he then added to his value of \$690,000 for the unimproved eleven acres of the subject to arrive at a rounded value through the sales comparison approach of \$5,300,000.

The income approach to value, developed in this instance by using the direct capitalization method, "convert[s] an estimate of a single year's income expectancy into an indication of value in one direct step, either by dividing the net income estimate by an

*Footnote contd.*_____

difficulty in accurately estimating accrued depreciation mitigate against the utility of this approach. See Ohio Adm. Code 5703-25-07(D).

¹⁰ We accord no weight to those properties included as part of Hannah's sales comparison approach which have not actually been the subject of an arm's-length transaction. See, e.g., *Sandelman, Trustee v. Licking Cty. Bd. of Revision* (Sept. 2, 2005), BTA No. 2003-M-1508, unreported ("Listings are not persuasive evidence of value. See *Gupta v. Cuyahoga County Bd. of Revision* (1997), 79 Ohio St. 3d 397."); *Lowes Home Centers, Inc. v. Fairfield Cty. Bd. of Revision* (May 27, 2008), BTA No. 2006-R-801, unreported, at 10.

appropriate capitalization rate or by multiplying the income estimate by an appropriate factor.” The Appraisal of Real Estate, at 499. In projecting a market rent for the subject property, Hannah considered ten properties having leasable areas of approximately 37,000 to 122,000 square feet with base rents ranging from \$2.33 to \$4.00 per square foot. From this data, he forecast rent at \$3.50 per square foot for the subject’s 132,539 square foot space and added \$259,677 for expense reimbursements. Vacancy/collection loss was projected at seven percent, with owner expenses totaling \$306,270, which resulted in an anticipated net operating income (“NOI”) of \$366,644. Estimating a capitalization rate through a “review of published investor surveys, personal interviews of investors and the band of investment method,” Ex. 1 at 81, Hannah concluded to a nine percent rate which when applied to his NOI reflected a value of \$4,073,823. Adding the attributed “excess land” value of \$690,000 for the unimproved acreage, he concluded to a rounded value through the income approach of \$4,800,000.

Hannah then proceeded to reconcile the values suggested by the three approaches, i.e., cost approach - \$5,900,000, sales comparison approach - \$5,300,000, and income approach - \$4,800,000, concluding to an opinion of value for the subject as of tax lien date of \$5,300,000, reasoning as follows:

“The cost approach is most reliable for newer properties that have no significant level of accrued depreciation. The subject was constructed in 1996 and exhibits some physical depreciation. In addition, discount storerooms inherently have significant amounts of functional and external obsolescence which must be accurately quantified in order to appropriately apply this method. Finally, purchasers of properties such as the subject do not typically rely upon the cost approach. Accordingly, we have given this approach least reliance in reconciling to an opinion of value.

“***

“The sales comparison approach is most reliable in an active market when a sufficient number of sales are available for analysis. In this case, an adequate number of sales were [sic] available to support a value conclusion. In addition, several of these sales are highly comparable to the subject property and require few adjustments. Therefore, greatest reliance is placed on the sales comparison approach.

“***

“An investor is a possible purchaser of the appraised property. The income capitalization approach is usually given greatest weight in valuing investment properties because it simulates the thought process of market participants in the investment property arena. The reliability of this approach is diminished by the limited number of sales of discount storerooms which have been entirely leased to a second generation tenant. In most cases, sales of discount storerooms leased to second generation tenants were demised for smaller retailers, thus increasing market rent and the overall value of the subject property. Due to the lack of sales of second generation, single tenant properties, appropriate expense allocations and capitalization rates that reflect an investor in this property types [sic] are less supportable. Therefore, the income capitalization approach is given secondary consideration and is used as support for the sales comparison approach.” Id. at 85.

In considering an appeal from a value determination rendered by a county board of revision, an appellant has an affirmative burden to prove its right to the increase or decrease sought and is successful only upon production of competent and probative evidence supporting its claim. See, e.g., *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564; *Amsdell v. Cuyahoga Cty. Bd. of Revision* (1994), 69 Ohio St.3d 572. Typically, an arm’s-length sale of a property is considered the “best evidence” of its value, see, e.g., *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, yet where such transfer is lacking, as

in the present appeal, the Supreme Court has approved this board's reliance upon an appraisal. See, e.g., *State ex rel. Park Investments Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410.

Appellant was the only party to present evidence of the subject's value before this board, the county appellees having chosen to rely upon their counsel's cross-examination of appellant's expert and arguments advanced by way of brief. Although a party offering evidence of a lesser value is "not entitled to the deduction claimed merely because no evidence is adduced contra his claim," *W. Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340, 342, an opposing party risks such unrebutted evidence being found persuasive:

"If the appellee before the BTA in a valuation case does not present any evidence to rebut appellant's evidence, the appellee takes the chance that the BTA may, as in this case, find the valuation evidence presented by the appellant to be competent and probative, and adopt it as the true value. On the other hand, the appellee may present evidence and the BTA may or may not find that evidence to be credible and probative in rebutting the appellant's evidence." *Westhaven, Inc. v. Wood Cty. Bd. of Revision* (1998), 81 Ohio St.3d 67, 70-71.

See, also, *Am. Tele-Legal Information Servs., Ltd. v. Lucas Cty. Bd. of Revision*, Lucas App. No. L-06-1109, 2006-Ohio-5911, at ¶¶12-13; *Fairlawn Assoc. Ltd. v. Summit Cty. Bd. of Revision*, Summit App. No. 22238, 2005-Ohio-1951, at ¶12.

Upon consideration of the expert appraisal opinion submitted on its behalf, we find appellant has satisfied its assigned burden of proof that the subject property has been overvalued by the county auditor and board of revision. While the county appellees criticize appellant's expert's opinion, asserting it places a nominal value on the subject's improvements predicated upon distressed and/or "deed-restricted" comparables secured

from a market dissimilar to that in which the subject competes, and that he improperly excluded from consideration sales of properties transferring in the market place which sold encumbered by existing leases, we have previously rejected such arguments, and do so today, as speculative when they are unsupported by the evidence. See, e.g., *Meijer Stores L.P. v. Wood Cty. Bd. of Revision* (July 15, 2005), BTA No. 2003-A-1204, unreported; *Target Corp. v. Greene Cty. Bd. of Revision* (May 27, 2008), BTA No. 2006-V-751, unreported; *Retail Trust IV v. Wood Cty. Bd. of Revision* (Jan. 13, 2009), BTA Nos. 2006-T-1130, et al., unreported; *Lowes Home Centers Inc. v. Clinton Cty. Bd. of Revision*, BTA No. 2006-K-1016, unreported, announced this date. Compare *Meijer Stores L.P. v. Franklin Cty. Bd. of Revision* (May 27, 2008), BTA Nos. 2005-T-441, et al., unreported, appeal pending Sup. Ct. No. 2008-1248.

It is the decision of the Board of Tax Appeals that the best evidence of the subject property's value is reflected by the opinion of value expressed by appellant's expert and therefore the true and taxable values of the subject property,¹¹ as of January 1, 2005, are found to be as follows:

Parcel No.: G25-36-1604-01-018.000

	<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>
Land	\$690,000	Land	\$241,500
Building	\$ -0-	Building	\$ -0-
Total	\$690,000	Total	\$241,500

¹¹ In his appraisal of the subject property, Hannah accorded a value of \$690,000 to the unimproved portion of the subject correlating to parcel number G25-36-1604-01-018.000, and a land value of \$3,919,500 correlating to parcel number G25-36-2100-01-003.001. Heeding the court's admonition in *Polaris Amphitheater Concerts, Inc. v. Delaware Cty. Bd. of Revision*, Slip Opinion No. 2008-Ohio-2454, at ¶17, we attribute the remaining value to the subject's improvements as reflected above. See, also, *Dayton-Montgomery Cty. Port Auth. v. Montgomery Cty. Bd. of Revision*, 113 Ohio St.3d 281, 2007-Ohio-1948.

Parcel No.: G25-36-2100-01-003.001

	<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>
Land	\$3,919,500	Land	\$1,371,830
Building	<u>\$ 690,500</u>	Building	<u>\$ 241,680</u>
Total	\$4,610,000	Total	\$1,613,510

It is the order of this board that the Allen County Auditor list and assess the subject property in conformity with our decision as announced herein.

ohiosearchkeybta