

OHIO BOARD OF TAX APPEALS

Board of Education of the Olentangy)
Local Schools,)
)
Appellant/Appellee,) (REAL PROPERTY TAX)
)
and) DECISION AND ORDER
)
Federated Retail Holdings, Inc. (Per)
County Records: The May Department)
Stores Co.),)
)
Appellee/Appellant,)
)
vs.)
)
Delaware County Board of Revision and)
the Delaware County Auditor,)
)
Appellees.)

APPEARANCES:

For the - Bd. of Edn.	Rich & Gillis Law Group Mark H. Gillis 300 East Broad St., Suite 300 Columbus, Ohio 43215
For the County Appellees -	David Yost Delaware County Prosecuting Attorney Kevin L. Shoemaker Shoemaker & Howarth, LLP 471 East Broad Street, Suite 2001 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
Notice to -	Polaris Lifestyle Center, LLC 150 East Gay Street Columbus, Ohio 43215 ¹

¹ Notice is sent to Polaris Lifestyle Center, LLC as this board was informed that this entity purchased the subject property on June 20, 2007. See R.C. 5717.03; *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 114 Ohio St.3d 1224, 2007-Ohio-4007.

Entered February 10, 2009

Ms. Margulies and Mr. Dunlap concur; Mr. Johrendt not participating.

These causes and matters come to be considered by the Board of Tax Appeals upon notices of appeal filed with this board on October 10, 2006 (by Federated Retail Holdings, Inc., hereafter “Federated”) and October 12, 2006² (by Olentangy Local Schools Board of Education, hereafter “BOE”). Both Federated and the BOE challenge a decision, mailed September 13, 2006, of the Delaware County Board of Revision (“BOR”), appellee. The matters were consolidated by board order on January 5, 2007.

The property which is the subject of this appeal is located in the Columbus Corporation – Olentangy Local Schools taxing district of Delaware County, and is identified on the auditor’s records as parcel numbers 318-431-01-014-918 and 318-431-01-014-000. The value of the property determined by the Delaware County Auditor as of January 1, 2005 was as follows:

Parcel No.	True Value	Taxable Value
318-431-01-014-918		
Land	\$ 3,937,500	\$1,378,130
Building	\$ 10,821,900	\$3,787,670
Total	\$ 14,759,400	\$5,165,800

Parcel No.

² The statutory transcript certified by the Delaware County Auditor indicates that the BOE’s notice of appeal was filed with the BOR on October 16, 2006. A filing on that date would be outside the prescribed period for filing notices of appeal. R.C. 5717.01. However, R.C. 5717.01 provides a deemed filing date for those notices of appeal which are filed by certified mail. In such cases, the date of mailing is treated as the filing date. In the present matter, the record includes a copy of a transmittal letter indicating mailing by certified mail as well as a copy of the envelope in which the notice of appeal was mailed. That envelope also carries a certified mail receipt and a date stamp of October 12, 2006.

318-431-01-014-000

	True Value	Taxable Value
Land	\$ 118,900	\$ 41,620
Building	\$ -0-	\$ -0-
Total	\$ 118,900	\$ 41,620

Upon consideration of a complaint filed by Federated and the counter-complaint filed by the BOE, the BOR determined that the value of the subject property as of tax lien date 2005 was as follows:

Parcel No.
318-431-01-014-918

	True Value	Taxable Value
Land	\$ 3,937,500	\$1,378,130
Building	\$ 6,394,080	\$2,237,930
Total	\$ 10,331,580	\$3,616,060

Parcel No.
318-431-01-014-000

	True Value	Taxable Value
Land	\$ 118,900	\$ 41,620
Building	\$ -0-	\$ -0-
Total	\$ 118,900	\$ 41,620

Both the BOE and Federated challenge the BOR's findings. The BOE seeks a return to the auditor's values, claiming that the value of the subject property is \$14,878,300. Federated claimed through its notice of appeal that the correct value for the subject property is \$7,750,000. However, at hearing and through brief, Federated claims that the property should be valued in accordance with a sale of the subject taking place June 20, 2007, for a price of \$8,000,000.

The matter was submitted to the Board of Tax Appeals, pursuant to R.C. 5717.01, upon the notice of appeal, the statutory transcript certified by the Delaware County Auditor as secretary of the BOR, and the testimony and other evidence

presented at the hearing held before the board. We also have the benefit of legal argument submitted by the parties.

During the relevant period, the subject property consisted of two plats of land improved with a retail department store of approximately 200,000 square feet. The store, Kaufmann's, was an anchor location within the Polaris Fashion Place development ("Polaris"). The property transferred in June 2007 for a purchase price of \$8,000,000. The seller was Macy's Retail Holdings, Inc., formerly known as The May Department Stores Company. The purchaser was Polaris Lifestyle Center, LLC. Mr. Danny Brown, Macy's Director of Property Taxes, provided testimony regarding the sale. In 2005, The May Company, the parent company of Kaufmann's, was purchased by Federated, the parent company of Macy's. As Macy's already operated a store in Polaris (the former Lazarus), the Kaufmann's store was placed on the market.

According to the testimony presented at hearing, a market exists for department stores. Mr. Brown explained that there is a network of retailers, specifically department store chains, that are interested in expanding when stores come available in non-served markets. The Kaufmann's store was offered through this network. H.R. at 36. Eventually, however, the store was not sold to another retailer, but was sold to the Polaris developer, the Glimcher Company ("Glimcher"), under the name "Polaris Lifestyle Center, LLC." According to testimony at hearing, the property was eventually redeveloped for use, as the name implied, as a lifestyle center similar to the Easton shopping area in northeast Franklin County. H.R. at 56.

At the BOR's hearing, Mr. Brown presented sales of department stores taking place in the Columbus area. The evidence included the sale of a Marshall Field's store by Dayton Hudson to The May Department Stores, and the sale of the Lord & Taylor location in Polaris from The May Department Stores to Glimcher and then from Glimcher to Von Maur. These sales took place in 2003 and 2005. The sales prices ranged from \$37.63 per square foot to \$45.00 per square foot. S.T., BOR Hearing Record; Ex. 8.

Based upon the evidence presented to it, the BOR reduced value. Both Federated and the BOE appealed. During the pendency of this appeal, the subject was sold and the improvements razed. Evidence presented at the board's hearing included the purchase agreement executed June 8, 2007, the purchaser's closing statement dated June 20, 2007, and a copy of a signed but unfiled real property conveyance fee statement dated July 3, 2007. Appellant Property Owner's Exs. A, B, C.

We begin our review of this 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 City 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 competent and probative evidence of true value has been presented by an appellant, 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.

Therefore, the board is charged with the duty to examine the available record and determine value based upon the evidence before us. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120; *Clark v. Glander* (1949), 151 Ohio St. 229. In so doing, we determine the weight and credibility to be accorded to the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

In order to make an assessment of property at its taxable value, the county auditor must first determine its true value. R.C. 5713.03. It is well established that when property has been the subject of a recent arm's-length sale between a willing buyer and a willing seller, 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; *Zazworsky v. Licking Cty. Bd. of Revision* (1991), 61 Ohio St.3d 604; *Hilliard City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1990), 53 Ohio St.3d 57; *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129, at the syllabus.

Accordingly, where there exists an actual sale of real property which is both recent and arm's length, R.C. 5713.03 requires the county auditor to consider such a sale as the best evidence of the property's true value. *Berea*, supra; *Conalco*,

supra; *State ex rel. Park Investment Co., v. Bd. of Tax Appeals* (1972), 32 Ohio St.2d 28. In the present matter, the subject property sold on June 20, 2007, for a sales price of \$8,000,000.

We must first determine whether the present sale meets the definition of an arm's-length sale. An arm's-length sale is comprised of three elements: 1) the sale is voluntary; 2) it generally takes place in an open market; and 3) the parties act in their own self interests. *Walters v. Knox Cty. Bd. of Revision* (1988), 47 Ohio St.3d 23. In *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, the Ohio Supreme Court held that when a sale has occurred, the only challenge to the sale price as the indication of value is to the elements of recency and to whether the arm's-length character of a willing seller and willing buyer is present.

We first consider the arm's-length character of the sale. The evidence supports a finding that the relationship between Polaris Lifestyle Centers, LLC, and Macy's was that of the purchaser and the seller, and of lessor and lessee. The purchase contract memorializes the fact that no other relationship exists. Appellant Property Owner's Ex. A, Item 3.11. The BOE, however, claims that the relationship of lessor/lessee disqualifies any sale between the two from consideration as an arm's-length transaction. The BOE claims that when a mall is originally developed, both the landlord and the tenant enter into a mall operating agreement. That agreement obligates each party to complete construction of new stores and defines the relationship as it relates to operating the mall itself. The BOE claims that the mall

operating agreement “prevented any sale of the Macy’s property on the open market, at arm’s-length, and to the highest bidder.” Appellant BOE’s brief at 4. The BOE further claims that the price paid “had no relationship to the value of the property.” Id. The BOE supports this claim by pointing out that Glimcher originally did not charge The May Company for the cost of the land upon which the Kaufmann’s was constructed. Therefore, the BOE argues, Glimcher would not pay The May Company’s successor for something that was originally given “for free.”

In *Lazarus Real Estate, Inc., nka Rich’s Department Stores, Inc. v. Muskingum Cty. Bd. of Revision* (Apr. 21, 2006), BTA No. 2004-T-1116, unreported, this board considered the effect of a mall operating agreement on a sale of a Lazarus Department Store. In that appeal, the store was located at the Colony Square Mall in Zanesville, Ohio. The property, having been unprofitable for a number of years, had closed and Lazarus had exposed the property to the market, eventually completing a sale to a movie theater developer.

Upon challenge to the Muskingum County Board of Revision, that body concluded that the sale did not meet the definition of arm’s length because the purchaser was subject to the mall operating agreement upon purchase. The board of revision concluded that the mall operating agreement was an encumbrance on the subject property that affected the sale price.

The Ohio Supreme Court had recently decided *Berea City School District Bd. of Edn.*, *supra*. Therein the court concluded that consideration of the effect an encumbrance had on the value of real property was not appropriate when the

property recently had been sold. This board applied the court's holding and concluded the arm's-length nature of the sale was not affected by the existence of the mall operating agreement.

After the board's decision, the Ohio Supreme Court reaffirmed its holding in *Berea*. In *Cummins Property Servs., L.L.C.*, *supra*, the court held that "encumbering property typically represents an owner's attempt to realize the full value of property." *Id.* at ¶27. The court held that the test to be applied when encumbrances are present is "whether those encumbrances themselves were entered into at arm's length." *Id.* at ¶30. In *AEI Net Lease Income & Growth Fund v. Erie Cty. Bd. of Revision*, 199 Ohio St.3d 563, 2008-Ohio-5203, the court again concluded that the issue was not an encumbrance itself (in that case, a sale-leaseback), but whether the encumbrance was entered into with the intent to depress property value for tax purposes.

In the present matter, there is no evidence that the mall operating agreement was an attempt between the parties to depress value for ad valorem tax purposes. Execution of the agreement is common in new mall development, and, according to the testimony presented, can enhance the value of mall property as it allows the major anchors of a mall property to coordinate hours of operation after the mall development has been completed, and to have some say in the type and quality of the potential retail tenants for the mall space. H.R. at 69. Moreover, the sales of anchor stores in the Columbus area reveal purchase prices in line with the \$39.20 per square foot received by Macy's.

The BOE next claims that the mall operating agreement limits the entities to which the subject property can be offered for sale. We do not agree. Section 5.6(a) of the mall operating agreement provides “Except as provided in Section 5.6(b)³ below as to the Sears Auto Center Parcel, a Major⁴ may Transfer its Site at any time and from time to time.” Notwithstanding the sections identified by the BOE, we find that the language of the above-cited section contemplates that department stores are purchased and sold, as has been evident in the Columbus market.

We also do not agree with the BOE’s claim that conditions found in the sale purchase contract support a finding that the sale was not arm’s length. Apparently, because Glimcher was redeveloping the site into an open-air configuration, the other major anchors were required to amend the mall operating agreement to allow changes to promised parking availability and to agree to changes in the site plan. Appellant Property Owner’s Ex. A, Section 3.10(c). However, contingencies found in a purchase contract do not affect the purchase price, but, instead, affect whether a sale will be concluded. *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision* (Mar. 18, 2005), BTA No. 2003-G-1835, unreported. Therefore, the purchase price remains the best evidence of value. *Id.* Thus, we reject the BOE’s claim that the sale was not made at arm’s length.⁵

³ Section 5.6(b) applies to a Sears Auto Center and is not relevant to the transaction under consideration.

⁴ The mall operating agreement defines a “major” as the anchor department stores executing the agreement.

⁵ In its brief submitted at the conclusion of the hearing, the BOE argued that Macy’s has no legal interest in the proceedings and no right to continue with the appeal. Brief of the Appellant BOE at 1. The BOE indicated that a motion to dismiss Macy’s as a party to the appeal was to be filed with the board. No motion was filed. To the extent that the BOE argues that Macy’s is no longer a proper party because of the sale after

We next determine whether the sale taking place 30 months after tax lien date may be considered recent for purposes of assessing value. The Supreme Court has recognized that a sale may be considered recent for purposes of R.C. 5713.03 even though the sale occurs some 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. In *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36,⁶ the court held:

“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.” *Id.* at 44.

A review of the board’s decisions reveals that we have both accepted and rejected sales taking place over two years prior to tax lien date. Compare *Gahanna-Jefferson Public Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Mar.

Footnote contd. _____

tax lien date, we can find no case law which stands for the proposition that a former owner, who properly filed a real property complaint, lost standing to pursue that complaint after a sale.

⁶ The holding in *New Winchester Gardens Ltd.* was recently revisited and limited in *Cummins Property Servs.*, supra. The Supreme Court, however, did not overrule its holding regarding the application of a sale based upon the recentness of the transaction.

17, 1995), BTA No. 1994-T-789, unreported (where the board accepted a sale that took place thirty-three months before tax lien date, after finding that there was no material change in the value of the property between the tax lien date and the sale date) with *Pavic v. Lake Cty. Bd. of Revision* (Feb. 1, 2008), BTA No. 2006-M-970, unreported (where the board rejected a sale price garnered in 2002 as indicative of value for tax lien date 2005). In both cases, however, the critical inquiry was into the economic climate in which the sales took place and whether the market was rapidly changing during the period of time between sale date and tax lien date.

In the present matter, the evidence of other market sales taking place in 2003 and 2005 at nearly identical sales prices per square foot as the sale taking place in 2007 connotes a stable market for anchor department stores. Therefore, we find that the sale price garnered is the best indication of the value of the subject.

Considering the record before us and based upon a preponderance of competent evidence, this board finds that the correct values of the subject property for tax year 2005 are as follows:

Parcel No.		
318-431-01-014-918		
	True Value	Taxable Value
Land	\$ 3,937,500	\$1,378,130
Building	\$ 3,943,600	\$1,380,260
Total	\$ 7,881,100	\$2,758,390

Parcel No.		
318-431-01-014-000		
	True Value	Taxable Value
Land	\$ 118,900	\$ 41,620
Building	\$ -0-	\$ -0-
Total	\$ 118,900	\$ 41,620

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

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