

OHIO BOARD OF TAX APPEALS

Copley-Fairlawn City School District)	CASE NOS. 99-J-1490
Board of Education,)	99-J-1491
)	
Appellant,)	(REAL PROPERTY TAX)
)	
vs.)	ORDER
)	
Summit County Board of Revision,)	(Denying Motion to Dismiss)
Summit County Auditor and)	
Montrose Mayfield, Inc.,)	
)	
Appellees.)	

APPEARANCES:	For the Appellant -	Karrie M. Kalail David H. Seed Means, Bichimer, Burkholder & Baker Co., L.P.A. Summit One, Suite 540 4700 Rockside Road Cleveland, Ohio 44131
	For the County Appellees -	Michael Callahan Prosecuting Attorney of Summit County Susan Poulos Gates Assistant Prosecuting Attorney 908 Key Building - 9 th Floor 159 South Main Street Akron, Ohio 44308
	For Montrose Mayfield, Inc. -	Todd W. Sleggs Todd W. Sleggs & Associates 1015 Euclid Avenue – 3 rd Floor Cleveland, Ohio 44115

ENTERED: December 15, 2000

Mr. Johnson, Ms. Jackson, and Mr. Manoranjan concur.

This cause and matter is before the Board of Tax Appeals upon a Motion to Dismiss filed on June 9, 2000 by Montrose Mayfield, Inc. (“Montrose”). A brief in opposition to Montrose's Motion to Dismiss was filed by Copley-Fairlawn

City School District Board of Education (“BOE”) on July 21, 2000 and the Reply to the BOE’s Brief in Opposition was filed on July 31, 2000. The matter is submitted upon the statutory transcript, the motion to dismiss and the memoranda of counsel.

The BOE filed a complaint with the Summit County Board of Revision (“BOR”) against the valuation of Montrose’s property in Bath Township, Summit County for the tax year 1998. Prior to the hearing of the matter before the BOR, counsel for the BOE submitted a letter in which he summarized a description of the property, the Auditor’s valuation and a sales comparison approach to value using ten sales. In this letter, counsel asserted an opinion of adjustments he believes need be made to the Auditor’s value and suggests a new taxable value. Accompanying the letter was a spreadsheet of the comparable sales, a copy of the property card and 1998 tax bill summary for parcel number 0500049, and copies of photographs of said property. In opposition to the BOE’s complaint and in support of its counter-complaint, counsel for Montrose submitted what purports to be the owner’s opinion of value. This owner’s opinion of value contained rent rolls, a profit and loss statement for the property and a summary of the income approach to value.

At the hearing before the BOR, counsel for the BOE made an oral statement of his findings and conclusions to the board. Counsel for Montrose questioned whether a BOE could have an opinion of value. This objection is essentially the basis for Montrose’s arguments for dismissal of this appeal.

Montrose makes two arguments in its motion to dismiss. The first argument is that dismissal is appropriate because of the BOE's failure to prosecute. Counsel for Montrose maintains that the information submitted to the BOR by the BOE were conclusions of value drawn by the BOE's counsel, who was not a professional appraiser or property owner. Counsel for Montrose concludes that the evidence submitted by the BOE "is not competent, probative, credible or reliable evidence under Ohio case law." Montrose's Motion to Dismiss Memorandum in Support, at page 4.

We would agree with Montrose's counsel that the BOE provided no competent or probative evidence of value supporting its complaint. A presentment of sales of real property taken from public records is not relevant or probative without establishing comparability. The valuation of real property is a matter of opinion testimony of qualified expert witnesses upon perceived data and facts. Evid. R. Article VII. An owner of real property, however, is competent to present testimony regarding valuation including an opinion of value. *Amsdell v. Cuyahoga Cty. Bd. of Revision* (1994), 69 Ohio St.3d 572. We have previously been critical of the practice of counsel presenting owner's opinions of value to boards of revision which have not been authenticated in any way, or any foundation laid for the owner's opinion. See, *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision, et al.*, (December 18, 1998), B.T.A. No. 97-M-848, unreported; *Grand Development Co. v. Cuyahoga Cty. Bd. of Revision* (June 5, 1998), B.T.A. No. 97-J-312, unreported;

Society Nat'l Bank v. Montgomery Cty. Bd. of Revision (August 25, 1995), B.T.A. No. 94-P-875, unreported; *Society Nat'l Bank v. Carroll Cty. Bd. of Revision* (June 9, 1995), B.T.A. No. 97-J-450. unreported; *Parkview Manor Company v. Cuyahoga Cty. Bd. of Revision* (June 9, 1995), B.T.A. No. 94-A-228, unreported.

The Supreme Court has considered the efficacy of the owner's opinion of value before a board of revision in *Snavely v. Erie Cty. Bd. of Revision* (1997), 78 Ohio St.3d 500. In this case, the owner did not appear at the hearing and the Court commented that this could be a "factor that the BOR may consider in deciding how much weight should be accorded the Owner's Opinion of Value." And the Court also indicated that the "failure of the owner to sign or verify in writing his written opinion of value would be another factor that may be weighed by the BOR." *Ibid.* page, 502. In the instant appeal, the BOR was justified upon the lack of any competent or probative evidence of value to enter its order of no change.

Montrose seeks a dismissal of this appeal before us. We conclude that the motion to dismiss is not well-taken on the authority of *Snavely*, *supra*. As the Court wrote in concluding its consideration of the *Snavely* appeal:

"How a party seeking a change in valuation attempts to meet its burden of proof before a board of revision is a matter for that party's judgment. However, if the evidence provided to a board of revision by a party seeking a change in valuation is determined to be unpersuasive and/or inadmissible, then that party will probably fail to meet its burden of proof. Failure to meet the burden of proof will justify a board of revision in fixing the valuation at the amount assessed by the county auditor.

But failure of the burden of proof before a board of revision does not justify dismissal.” *Ibid.* at page 502.

Montrose attempts to distinguish *Snavely* from the instant appeal, stating that here the BOE’s counsel prepared an opinion of value, and in *Snavely* the property owner prepared an opinion of value. The point of distinguishing these cases is to argue that *Snavely* does not apply to these facts, where an opinion of value generated by one other than the property owner is not evidence and the lack of evidence should be held to be a failure to prosecute. We see the factual difference between *Snavely* and this appeal but we conclude that *Snavely* is dispositive of this issue of inappropriate use of dismissal where there is a lack of evidence.

Montrose also directs our attention to *LCL Income Properties v. Rhodes* (1995), 71 Ohio St.3d 652. However, the Court in *LCL Income* quoted one of their earlier opinions as conclusive.

“As we said in paragraph nine of the syllabus of *Swetland Co. v. Evatt* (1941), 139 Ohio St. 6, 21 O.O. 511, 37 N.E.2d 601, ‘[a] county board of revision *** is a *quasi*-judicial body, and where a taxpayer files a complaint against the assessed value of his real property and thereafter fails to attend a hearing of which he had notice and no evidence in support of such complaint is offered by or on behalf of the taxpayer, a county board of revision is justified in fixing the valuation complained of in the amount assessed by the county auditor.’” *Ibid.* at pages 652, 653.

Thus, the basis for dismissal by the BOR for a failure to prosecute would be non-appearance at hearing and a total lack of evidence supporting the

complaint, not as Montrose now suggests, merely insufficient evidence. Here, the BOE counsel attended the hearing before the BOR and offered incompetent and insufficient evidence to the board as demonstrated by the statutory transcript. However, “where jurisdiction has been properly vested in a county board of revision, it must fulfill its statutory duty of determining value.” *Friendly’s v. Franklin Cty. Bd. of Revision, et al.* (February 18, 1994), B.T.A. Case No. 92-K-1399, unreported.

We do not find error by the BOR having proceeded to determine value in this case. We will conduct a hearing in this matter to obtain sufficient evidence upon which we can make our independent determination of value of the subject property. R.C. 5717.01

The second issue raised in Montrose’s motion to dismiss is the purported testimony of counsel for the BOE before the board of revision. Counsel for Montrose argues that “counsel for the BOE’s preparation of valuation evidence is in violation of the Code of Professional Responsibility Section DR7-106 (3) and (4) where attorney is precluded from a statement of his personal opinion or state his personal knowledge in a proceeding. Further, Section DR5-102 requires the withdrawal of counsel when a lawyer becomes the witness in a proceeding.” The latter is not an entirely new issue for this Board. We have previously addressed such matters, however we are not the appropriate body to address violations of the disciplinary rules. In *Senior Chateau v. Hamilton Cty. Bd. of Revision* (October 2, 1992), BTA Case No. 92-J-361, unreported, we stated:

“The Board is of the view that, as a quasi-judicial body and its proceedings constituting the record upon which a judicial appeal is taken, it has the inherent authority to regulate the practice before it and protect the integrity of such proceedings. Hopefully, without appearing to be presumptuous, the Board would be prepared to assume such authority to see to the ethical conduct of attorneys practicing before it.”

We also referred to *Mentor Lagoons, Inc. v. Rubin*, (1987), 31 Ohio St.3d 256, and the syllabus by the Court:

1. “DR 5-102(A) does not render an attorney incompetent to testify as a witness in a proceeding in which he is representing a litigant. When an attorney seeks to testify, his employment as counsel goes to the weight, not the competency, of his testimony.
2. When an attorney representing a litigant in a pending case requests permission or is called to testify in that case, the court shall first determine the admissibility of the attorney’s testimony without reference to DR 5-102(A). If the court finds that the testimony is admissible, then that attorney, opposing counsel, or the court sua sponte, may make a motion requesting the attorney to withdraw voluntarily or be disqualified by the court from further representation in the case. The court must then consider whether the attorney may testify and continue to provide representation. In making these determinations, the court is not deciding whether a Disciplinary Rule will be violated, but rather preventing a potential violation of the Code of Professional Responsibility.”

We went on to say in *Senior Chateau* that:

“We share the view that ethical problems may arise when an attorney seeks to testify on behalf of his or her client, and an attorney should strive to avoid such

situations. However, the litigant's interests are of primary concern in obtaining a full and complete consideration of his or her appeal. We must also observe that the Board should be able to objectively view the evidence without regard to whether the witness is also attorney for a party. The opportunity for prejudice that one might find in a proceeding before a jury, for example, would not occur before this Board. *** When an attorney representing a litigant requests permission to testify, the Board will, at that time, make the determinations required of it.”

The facts of the instant appeal regarding the purported testimony of counsel before the board of revision are similar to *Senior Chateau*. See also, *Loveland Pines v. Hamilton Cty. Bd. of Revision, et al.*, (February 23, 1990), B.T.A. Case No. 88-G-926, unreported; *Delhi Estates, Ltd. v. Hamilton Cty. Bd. of Revision, et al.*, (February 23, 1990), B.T.A. Case No. 88-E-925, unreported; *Northwest Local School District v. Hamilton Cty. Bd. of Revision et al.*, (November 6, 1992), B.T.A. Case No. 91-H-1326, unreported; *White Cliff Apartments v. Hamilton Cty. Bd. of Revision, et al.*, (February 23, 1990) B.T.A. Case No. 88-J-927, unreported; *Donald W. Isaacs v. Hamilton Cty. Bd. of Revision, et al.*, (May 24, 1991), B.T.A. Case No. 90-1661, unreported; and *Friendly Ice Cream Corp. v. Hamilton Cty. Bd. of Revision, et al.*, (November 12, 1993), B.T.A. Case No. 93-H-1028, unreported.

In keeping with our previous decisions concerning the offer of testimony of an attorney on behalf of his client, the Board finds this question to be premature.

IT IS ORDERED that the Montrose's Motion to Dismiss be and hereby is, denied.

