

# OHIO BOARD OF TAX APPEALS

EOP-BP Tower, L.L.C.,	)	Case Nos. 99-M-1594 through
	)	99-1597
Appellant,	)	
	)	(REAL PROPERTY TAX)
	)	
vs.	)	DECISION AND ORDER
	)	
Cuyahoga County Board of Revision,	)	
the Auditor of Cuyahoga County and ,	)	Remanded on Appeal Nov. 26, 2002
Cleveland Municipal School District	)	Ohio Supreme Court
Board of Education,	)	
	)	
Appellees.	)	

## APPEARANCES:

For the Appellant -

Fred Siegel  
Annrita S. Johnson  
Fred Siegel Co. L.P.A.  
Pepper Pike Place, Suite 205  
30195 Chagrin Blvd.  
Cleveland, Ohio 44124-5703

For Cleveland Municipal School District -  
Board of Education

James H. Hewitt III  
James H. Hewitt, Co. L.P.A.  
The Groh Mansion  
3043 Superior Avenue  
Cleveland, Ohio 44114

For the County Appellees -

William D. Mason  
Cuyahoga County Prosecuting Attorney  
By: Timothy J. Kollin  
Assistant Prosecuting Attorney  
Courts Tower, 8th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

For the County Auditor -

Timothy J. Armstrong  
Victor Anselmo  
Armstrong, Mitchell, Damiani and Zaccagnini  
101 Prospect Avenue, West  
Cleveland, Ohio 44115

ENTERED: December 14, 2001

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

These causes and matters come to be considered by the Board of Tax Appeals upon notices of appeal filed by EOP-BP Tower, L.L.C. (“EOP-BP”), from a decision, dated August 30, 1999, of the Cuyahoga County Board of Revision (“BOR”), appellee herein.

The subject property is located in the Cleveland taxing district of Cuyahoga County, Ohio, and further identified as Parcel Nos. 101-26-001 and 101-26-006.

The Cuyahoga County Auditor found the true and taxable values of the subject property for tax year 1997 to be as follows:

Parcel No. 101-26-001

	True Value	Taxable Value
Land	\$ 14,250,000	\$ 4,987,500
Building	\$129,750,000	\$45,412,500
Total	\$144,000,000	\$50,400,000

Parcel No. 101-26-006

	True Value	Taxable Value
Land	\$10,208,800	\$ 3,573,080
Building	\$ 6,666,200	\$ 2,333,170
Total	\$16,875,000	\$ 5,906,250

Upon consideration of the complaint filed by EOP-BP, the BOR determined the true and taxable values assessed by the Auditor were correct and that there should be no change in value.

Through its notices of appeal, EOP-BP challenges the values assigned to the subject property by the Auditor and affirmed by the BOR. Both the Cleveland Municipal School District Board of Education (“BOE”) and the Cuyahoga County Auditor (“Auditor”) have entered appearances in this matter. Both EOP-BP and the

BOE presented appraisal testimony at the hearing held before this Board. EOP-BP asserts that the total fair market value of the office building should be \$116,700,000 as of tax lien date January 1, 1997. The BOE asserts that the total fair market value of the office building for tax year 1997 should be \$142,200,000. The parties agreed that the fair market value of Parcel No. 101-26-006, the parking garage connected with the office building, was \$17,150,000. (H.R. I, p. 12)

The matter was submitted to the Board of Tax Appeals pursuant to R.C. 5717.01 upon the notices of appeal, the statutory transcript certified by the Cuyahoga County Auditor as the secretary for the BOR, the testimony adduced at the hearing before this Board and the legal argument provided by counsel.

Prior to a consideration of the merits of this appeal, a number of procedural matters must be addressed. On September 12, 2000, EOP-BP filed a “Motion to Exclude the Cuyahoga County Auditor” as a party. On September 18, 2000, EOP-BP filed a similar motion to exclude the BOE as a party. At the evidentiary hearing held in this matter, both motions were overruled. Upon request of EOP-BP, we have reviewed the rulings of the attorney-examiner and such rulings are affirmed. EOP-BP has made no new arguments in favor of exclusion by way of post-hearing brief. In the past we have not looked favorably upon arguments based upon a mere misnomer of a proper party. *Whitehall City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Feb. 5, 1999), B.T.A. No. 96-N-519, unreported. *Pennington v. Fairfield Cty. Bd. of Revision* (5<sup>th</sup> Dist. 1992) Fairfield App. No. 27-C-92, unreported, the case which EOP-BP cites as controlling, has been addressed and accorded limited persuasive authority. *MRSLV Alliance LLC v. Stark Cty. Bd. of Revision* (Dec. 18, 1999), B.T.A. No. 98-N-510, unreported.

We also reject EOP-BP’s argument regarding the limitation of the auditor’s<sup>1</sup> right to participate. An auditor serves in a dual capacity with regard to complaints filed with a board of revision. The auditor not only serves as a member of

the deliberative body but, by virtue of the position as tax assessor under R.C. 5713.07, the auditor may be placed into the role of defending the value assessed. This Board has previously limited an auditor's right to appeal to only those matters in which the auditor voted against the majority. *Rhodes v. Hamilton Cty Bd. of Revision* (Mar. 2, 2001), B.T.A. No. 00-T-1382, unreported; *Perk v. Cuyahoga Cty. Bd. of Revision* (Aug. 24, 1971), B.T.A. No. 71-01-0195, unreported. The correlative of such a holding must be to permit the auditor to defend a challenge to a value affirmed by a board of revision. Therefore, we find the auditor's independent participation in these proceedings proper.

EOP-BP also has requested reconsideration of a ruling prohibiting the presentation of a rebuttal witness. EOP-BP attempted to present the testimony of Mr. Douglas Leary, an independent real estate broker and leasing agent. EOP-BP acknowledged that Mr. Leary's name did not appear on the final witness list presented to opposing counsel. However, EOP-BP claims that it should have been permitted to present Mr. Leary because it was forced to disclose its witness list prior to receiving the BOE's witness' appraisal report. EOP-BP argues that Mr. Leary's testimony would have been presented to rebut Mr. Racek's rental market overview and assumptions.

The valuation of an income-producing property will necessarily require a review of the rental market. EOP-BP's appraiser identified comparable properties leasing space similar to the subject property in size, location and amenities. In fact, many of the comparables identified by EOP-BP's appraiser and the BOE's appraiser were the same. Therefore, any argument that EOP-BP was surprised by the information contained in the BOE's appraiser's report is not well taken.

“Rebutting evidence is that which is given to explain, repel, counteract, or disprove facts given in evidence by the adverse party. It is that evidence which has become relevant or important only as an effect of some evidence introduced by the

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<sup>1</sup> Counsel for the auditor filed a notice of withdrawal as of October 24, 2001.

other side.” *Nickey v. Brown* (1982) 7 Ohio App.3d 32, 35. As the issue of comparable rental rates for the downtown Cleveland market was a critical factor for the appellant’s case-in-chief, its attempt to present a previously undisclosed witness in the guise of a rebuttal witness was properly subject to objection. The ruling is affirmed.

EOP-BP also objected to the submission of Appellee Auditor’s Exhibit 7. Ruling was reserved at the time of hearing. The parties offered no further argument by way of briefs. After consideration, the objection is found to be well taken and the Appellee Auditor’s Exhibit 7 is excluded from consideration.

Finally, EOP-BP has filed a “Motion to Supplement the Record,” requesting that this Board consider the bankruptcy filing of one of EOP-BP’s major tenants. EOP-BP argues that:

“During the course of hearing, there was substantial evidence about a recent lease in the subject property to LTV Steel. \*\*\*

“Subsequent to that hearing LTV filed for bankruptcy in Federal Court *In re LTV Steel Company*, United States Bankruptcy Court, Northern District of Ohio, Eastern Division, Case No. 00-43866. Just recently, EOP-BP Tower LLC learned that LTV is requesting authority from the bankruptcy court to reject the lease involving floors 12 through 16 and 39 through 41 in the subject property. Notice and Motion of Debtor Attached as Exhibit A. According to the motion LTV Steel will be vacating 237,747 square feet in the subject property but subleasing at a reduced rate BP space in the subject.

“The appellant believes that these developments have a substantial impact in value of the subject property as of tax lien date. The developments clearly establish that it is inappropriate to use an average over the term of the lease and that a discounting method is needed to establish market rent.”

The Board denies the motion to supplement the record. As the BOE points out, the valuation date in this matter is seven years prior to the filing of the bankruptcy. Moreover, both appraisers established a market rental rate for the subject considering leases both within and without the subject. The fact that a single tenant's actual obligations are not met according to its contract, seven years after the valuation date, should not affect value based upon a review of the marketplace during a relevant period.

The property under consideration consists of a 2.7495 acre parcel of land (including parking garage) located on the corner of Superior and Euclid Avenues in downtown Cleveland. The property is improved with a 41-story, multi-tenant office and retail complex, constructed in 1985 to serve as the headquarters of BP-America's predecessor, Standard Oil. The property is one of the most prestigious addresses on "Public Square," the core of Cleveland's central business district ("CBD"). When originally constructed, Standard Oil intended to lease only a small portion of the building to third parties and utilize the remainder of the 1,242,144 square feet of useable space for its operations. However, the sale of Standard Oil to British Petroleum, its reorganization to BP-America and eventual downsizing resulted in additional office space within the BP-America Building being commercially leased.

On or about September 5, 1996, BP-America sold the property to ZML-Cleveland Public Square, L.L.C. The purchase price was \$145,000,000, but included as a condition of the sale that the former owner lease approximately 370,000 square feet of the complex at an agreed-upon rental rate. The parties have stipulated that the sale did not meet the requirements of an arm's-length transaction for purposes of real property tax valuation. After review, the Board agrees. The sale did not involve only the sale of real estate. Among the many items of personalty included in the sale were seven pieces of modern art housed in the subject. (S.T., Contract of Sale) Such extraneous value clearly affected the price paid for the property as a whole and

therefore calls into question any reliance upon the purchase price as a measure of value. See *Ratner v. Stark Cty. Bd. of Revision* (1986), 23 Ohio St.3d 59.

As to the specific evidentiary burdens placed upon the parties to a real property valuation appeal, 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.<sup>2</sup> *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 competent and probative evidence of true value has been presented by an appellant, other parties asserting a different value then have a corresponding burden to provide sufficient evidence to rebut the appellant's evidence. *Springfield Local Bd. of Edn., supra*; *Mentor Exempted Village Bd. of Edn., supra*.

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<sup>2</sup> EOP-BP asserts by way of reply brief that the burdens of this appeal have been somehow changed by a stipulation entered into by the parties prior to the merit hearing. Through that stipulation, the parties agreed that the “Board of Tax Appeals should determine value based upon the testimony and other evidence adduced at the record hearing and should not rely upon the value initially determined by the Cuyahoga County Auditor and later determined by the board of revision.” A stipulation between contesting parties evidences an agreement between them, and is a commonly accepted device intended to avoid delay, trouble or expense in the conduct of the action itself. To the extent that a stipulation jointly made represents an agreed statement of the facts material to the case, it is a substitute for the evidence which would otherwise have to be adduced. When a stipulation of facts is entered into by the adversaries in a case, the trier of fact must accept what is set forth as a statement of settled fact that is undisputed and binding upon the parties to the agreement. The sole purpose of a stipulation is to make known to the Board that, had evidence been presented, such evidence would have tended to prove certain facts. However, the parties may not, by stipulation, agree to legal conclusions. *Newhouse v. Sumner* (Aug. 6, 1986), Hamilton App. No. C-850665, unreported. The parties cannot agree to modify presumptions or the burdens of persuasion. It is the tribunal that determines the legal effect of any stipulation of facts.

The record in this matter contains two professional opinions of value.<sup>3</sup> Both appraisers are well known to this Board, having testified before us numerous times. Both prepared written appraisals which were identified and made part of the record. Both appraisers utilized much of the same information in formulating individual opinions of value. However, the use of similar market information did not result in the expression of similar value opinions. When appraisal opinions vary significantly, the Board is mindful that “[t]he discipline itself is often inexact; [and] ultimate conclusions involve hearsay, suppositions, and subjective mental impressions as well as specific data.” *Cyclops Corp. v. Richland Cty. Bd. of Revision* (May 30, 1985), B.T.A. Nos. 82-A-566, *et seq.*, unreported, at 7.

EOP-BP presented the testimony of Mr. Roger Ritley to support its valuation claim of \$116,700,000. The BOE presented the testimony of Mr. Richard Racek to support its value claim of \$142,200,000. Both appraisers recognized the quality construction of the subject property as well as its prestigious location. However, both appraisers also recognized the functional obsolescence attendant to the property because of the change in its intended use. Mr. Ritley focused upon the design of the building. It was Mr. Ritley’s opinion that because the building was originally designed for a single occupant, certain luxuries were built that would not have been included in a multi-tenant building. Mr. Racek confirmed Mr. Ritley’s observations, specifically recognizing the cafeteria, fitness center and certain service areas as spaces which would be common in an owner-occupied building, but far less common in a multi-tenant operation. Both appraisers also criticized the amount of retail space contained in the subject, a design feature required by the City of Cleveland.

Both appraisers considered all three accepted methods of valuation. However, neither believed a cost approach calculation would add reliable evidence of

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<sup>3</sup> The record actually contains three opinions of value. A copy of a “limited appraisal report” appears as Exhibit “F” of the Statutory Transcript. Prepared by Robert Kocinski on behalf of EOP-BP, the report opines a

value because of the superadequacies discussed above. Nevertheless, both appraisers reviewed the CBD market and obtained vacant land sales comparable to the subject. It is worthy of note that some of the land sales dated back to the mid-1980s. Mr. Ritley provided a historical perspective on the downtown Cleveland market, indicating that it flourished in the mid-1980s and then faced a significant decline. Mr. Ritley testified that the market was only beginning to recover in 1997, when there appeared to be a flurry of sales activity. To support his testimony, Mr. Ritley identified not only land sales from both periods, but identified improved sales that had sold in the mid-1980s and again in the mid-1990s. Such sales, which will be discussed in greater detail, *infra*, do support Mr. Ritley's observations that market values had declined over the past decade and had not fully recovered.

Both appraisers next turned to the sales comparison approach. Both identified five sales in the CBD each believed were comparable to the subject. Both appraisers considered the sale of the Bond Court on or about May 29, 1997, for \$78.40 per square foot as comparable. This property contained 2.054 acres upon which a 612,276 square foot building was originally constructed in 1972. Mr. Ritley indicated that the seller purchased the building in December 1987 for \$78,500,000, or \$128.54 per square foot.

Both appraisers also considered One Cleveland Center, a Class A property of 634,125 square feet located on 3.24 acres. The appraisers differed slightly on a per-square-foot value as a result of their slight difference in gross building area. Mr. Racek utilized a gross building area of 634,125 and Mr. Ritley, 605,788. In any event, the price per square foot fell in a range of \$85.55 to \$89.85. Mr. Ritley indicated that the property sold in 1983 for \$73,500,000, or \$121.73 per square foot.

Another sale considered by both appraisers took place in December 1997. The National City Center building sold for \$82,500,000, or \$101.73 per square

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value of the building portion of the subject property of \$124,500,000.

foot, gross building area. The property, constructed in 1979, contained 810,948 square feet and was located on 2.365 acres.

Finally, both appraisers considered the sales of the East Ohio Building and the Eaton Center. Both appraisers recognized the East Ohio Building as a lesser quality building. Mr. Ritley indicated that the East Ohio Building had sold in December 1986 for \$30,750,000 and again in January 1997 for \$14,234,113. The Eaton Center is a Class A building of similar age to the subject, but was a sale of the improvements only.

The appraisers also presented an opinion of value under the income capitalization approach and both recognized that this approach was the most relevant when valuing an income-producing property such as the subject. Both appraisers reviewed the current rent rolls and expense statements and reviewed the market as well. To accurately estimate rental income, both appraisers considered the types of lessors common to Class A buildings in a major metropolitan business district. The appraisers clearly found that large users received discounts in return for renting significant amounts of space. In the subject, the appraisers categorized BP-America, LTV Steel and a law firm as large users of space. The three leases accounted for approximately one-half of the rentable space in the property.

All three of the major users of space within the subject executed leases which gradually increased rent over the lease term. Two of the three leases also provided for build-outs by the lessor which were reimbursed over the life of the lease. Both appraisers recognized that the expenses to bring a tenant into the building were immediate but the income stream increased over the lives of the leases. Therefore, both appraisers attempted to level the income stream by concluding to economic rents based upon current leases within the building as well as market leases in comparable properties. Mr. Ritley concluded that the appropriate average rent for the subject was \$18.00 for the office space and \$14.18 for the retail space. Mr. Racek concluded to an average economic rent of \$21.00 per square foot for the office space, \$19.50 per

square foot for the retail space and \$7.00 for space rented to BP-America which he described as “service area.” Both appraisers allowed for a vacancy and collection loss of approximately 10 per cent and deducted expenses. While Mr. Ritley’s expenses equaled \$6.29 per square foot and Mr. Racek’s \$6.78 per square foot, the appraisers handled some minor accounting calculations differently. Mr. Racek added utility reimbursements to gross income (an “above the line” addition to gross income) and Mr. Ritley netted such allocated income against the utility expense (a “below the line addition, after calculation of gross income). Mr. Ritley also included a significant deduction to account for future tenant improvements paid for by the lessor but reimbursed by the lessee over the life of the lease, as well as a deduction for future real estate commissions.

The appraisers utilized similar capitalization rates. Mr. Ritley utilized a rate of 11.56 per cent and Mr. Racek 11.40 per cent, both including a tax additur. After subtracting their projected operating expenses from their projected gross income, each appraiser applied a capitalization factor to the result. Mr. Ritley’s value conclusion under the income capitalization method was \$116,700,000 (rounded). Mr. Racek’s was \$140,673,318. Reconciling the values obtained from both the income capitalization approach as well as the sales comparison approach, the appraisers opined values as identified earlier.

The issue in an appeal from a board of revision is the true value of real property. As we have been instructed to do by the Supreme Court, this Board will proceed to make an independent determination of true value predicated upon the preponderance of the evidence. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120, 122. In so doing, this Board will 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, 19-20.

While we find the appraisers’ testimony credible, we are not required to accept the testimony of any appraiser. The BTA is vested with wide discretion in

determining the weight to be given evidence and credibility of witnesses. *Cardinal Federal S. & L. Assn. v. Bd. of Revision*, *id.* See, also, *Witt Co. v. Hamilton Cty. Bd. of Revision* (1991), 61 Ohio St.3d 155; *Wynwood Apartments, Inc. v. Bd. of Revision* (1979), 59 Ohio St.2d 34; *Elsag-Bailey, Inc. v. Lake Cty. Bd. of Revision* (1996), 74 Ohio St.3d 647.

In this regard, we must review the underlying evidence offered by an appraiser and consider whether such underlying evidence supports his opinion of value. After such review, we find Mr. Ritley's opinion of value, in general, to be better supported by the evidence before this Board. We do not find Mr. Racek's conclusions as to values are well supported by the market sales and income presented.

Mr. Racek's five market sales sold for a reported range of \$78.40 through \$116.73 per square foot, unadjusted. The subject property's size is nearly 50 per cent greater than the largest comparable, which sold for \$101.73 per square foot. Even though the subject is significantly larger than any of his comparables (which would argue for a lower per square foot sale price), after adjustments to his market sales, Mr. Racek concluded to a value for the subject of \$130.00 per square foot. Mr. Racek attempted to justify his high per square foot market rate with the sale of the subject property in September 1996. However, the Board has previously rejected this sale as evidence of fair market value. Therefore, any applicability as a market comparable should similarly be tainted. Moreover, Mr. Racek attempted to allocate value to what he considered a below-market rent contracted for by BP-America. However, the Board does not agree that the BP-America's rental rate was as advantageous as Mr. Racek appears to believe.

It was Mr. Racek's conclusion that market rent for large-space users during the relevant period before and after tax lien date was \$19.00 per square foot. Yet, he provided evidence that other large space users within the subject property itself were renting for \$15.28 and \$17.55 per square foot on an adjusted basis. The appraiser also brought forth evidence that similar users in other comparable buildings

were renting for \$17.74 per square foot (Appellee’s Exh. I, facing page 59). Given this market evidence, the Board concludes that Mr. Racek’s allocation to large-space users was excessive. Instead, we find from the evidence that the market better supports Mr. Ritley’s average rent for the building as a whole of \$18.22 per square foot. Mr. Ritley assigned market rents to each suite in the subject based upon the differences in finish, layout and location. These market rents ranged from \$16.00 per square foot for the BP space to \$26.00 per square foot. This methodology is a probative development of market rent.

While we find Mr. Ritley’s market income and market expenses reasonable, and accept his capitalization rate, we find no support for his deduction of \$1,178,900 from his capitalized value. Mr. Ritley indicates that this deduction represents the balance of the LTV tenant improvements and leasing commissions. The costs related to the LTV lease were essentially completed and commissions paid as of tax lien date and were the responsibility of the seller in the September 1996 sale. Therefore, no further deduction from the capitalized value is proper.

Therefore, the Board finds Mr. Ritley’s capitalized value under the income approach of the office building of \$117,800,000 (rounded) is both competent and probative of value.

Given the foregoing, and considering the full record before us, this Board finds that the preponderance of competent and probative evidence supports a finding that the office building’s value should be \$117,800,000. As the parties have stipulated to the value of the separate parcel containing the parking lot, we confirm their stipulation and find that the true and taxable value of the subject real property for tax year 1997 is as follows:

Parcel No. 101-26-001		
	True Value	Taxable Value
Land	\$ 10,900,000	\$ 3,815,000
Building	\$106,900,000	\$37,415,000
Total	\$117,800,000	\$41,230,000

Parcel No. 101-26-006

	True Value	Taxable Value
Land	\$ 6,175,000	\$ 2,161,250
Building	\$10,975,000	\$ 3,841,250
Total	\$17,150,000	\$ 6,002,500

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 this value be carried forward in accordance with the law.

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