

OHIO BOARD OF TAX APPEALS

Duke Realty Ltd. Part.,)	CASE NO. 00-M-656
)	
Appellant,)	(REAL PROPERTY TAX)
)	
vs.)	ORDER
)	
Cuyahoga County Board of Revision,)	(Denying Motion to Reconsider
the Cuyahoga County Auditor and)	Continuance Request)
Independence Board of Education,)	
)	
Appellees.)	
)	

APPEARANCES:

For the Appellant	- Karen H. Bauernschmidt Karen H. Bauernschmidt Co., LPA The Hoyt Block 700 W. St. Clair Avenue, Suite 214 Cleveland, OH 44113
For the County Appellees	- William D. Mason Cuyahoga County Prosecuting Attorney By: Timothy Kollin Assistant Prosecuting Attorney Courts Tower, Ninth Floor 1299 Ontario Street Cleveland, OH 44113
For the Bd. of Education	- Timothy J. Armstrong Armstrong, Mitchell, Damiani & Zaccagnini 1725 The Midland Building 101 Prospect Avenue, West Cleveland, OH 44115

Entered: September 24, 2001

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

This matter is considered by the board of tax appeals upon a motion for reconsideration filed by appellant, Duke Realty Ltd., Part. (“Duke”). The motion is in response to a denial of a continuance request made by letter and dated September 18,

2001, for a hearing scheduled for October 2, 2001. The request for a continuance was denied by the board's attorney examiner by letter dated September 19, 2001.

The motion seeks a continuance of the captioned appeal on the grounds that Duke's appraiser will be unable to attend the hearing currently scheduled because he will be out of the state on the hearing date. Duke's counsel asserts that because of the appraiser's unavailability, she will be unable to meet the appraisal exchange requirements of Ohio Adm. Code 5717-1-15. She further asserts that she will be forced by this ruling to proceed to trial without an expert witness. Finally, Duke's counsel asserts that "[t]he postponement request was not made in an attempt to delay the hearing in this matter." She further submits that she "will attempt to confirm available dates within the months of October and/or November with opposing counsel."

A short procedural history is critical to our determination of this matter. The notice of appeal was filed with the Board on June 5, 2000. The matter was scheduled for two mediation conferences, one on October 6, 2000 and one on October 23, 2000. Thereafter, the matter was scheduled for merit hearing on April 27, 2001. Duke's counsel immediately gave notice that she would be unavailable for that hearing date and provided certain dates, to-wit, June 22 through June 30, 2001 that she would also be unavailable. To comply with her request, the Board rescheduled the matter for May 30, 2001.

On May 9, 2001, Duke's counsel requested a continuance of the scheduled hearing, claiming that she had committed to another hearing with this board. Despite the fact that she requested the previous continuance and that continuance was granted, she did not attempt to obtain an agreed-upon hearing date. When the latter continuance request was denied for failure to provide a date upon which the matter could go forward, Duke's counsel provided a date upon which she had a previously scheduled matter with this Board. Therefore, that continuance request was also denied. At the final hour, Duke's counsel was permitted to select a date upon which this matter would go forward. It is significant to note that while the

previously scheduled hearings were in April and May, the next scheduled date was October 2, 2001, with which we are now concerned. According to the attorney examiner presiding over this appeal, the October 2, 2001 date was a date provided by Duke's counsel as one on which neither she nor the appraiser would have further conflicts. It should be apparent to counsel that she not only commits to her own availability for the hearing but also for her witnesses.

Now Duke's counsel informs the board fourteen days prior to the hearing date that her appraiser is unable to complete his appraisal seven days prior to hearing or attend the hearing as he has a previous commitment out of the state. Counsel suggests that her staff had erred in maintaining the calendar which indicated the availability of her witness for the scheduled hearing date. No representation is made as to whether the appraiser had properly entered the hearing date upon his calendar, either at the time of the prior continuance or upon notice of the hearing issued June 12, 2001. The cursory affidavit of the appraiser is silent as to his prior commitment to attend the scheduled hearing on October 2, 2001, and the reasons for his inability to complete an appraisal for which he had at the very least seven months notice following the first notice of hearing issued by the assignment commissioner under date of February 13, 2001.

It is the expectation of the board that upon the filing of a notice of appeal, trial preparation, witness selection, and discovery will commence. After a matter has been pending for fifteen months, scheduled for two mediation conferences and then three merit hearings over a seven-month period, good cause is not demonstrated by claims of mistakes in one's calendar, press of other business and an unexplained absence of a witness from the state. If this matter were being heard by the board, we would most certainly inquire as to the appraiser's date of employment, his scheduling of the appraisal and the amount of work completed, the nature of the engagement out of state and when this competing obligation may have been undertaken, and any unanticipated delay, emergency or casualty that may have interfered with the timely completion of the appraisal. The board, under the

circumstances presented from the record, is hard pressed to find good cause for any further continuances.

In *Coats v. Limbach*, (1990), 47 Ohio St.3d 114, the supreme court held that the standard to be utilized by the board of tax appeals for granting continuances was the same standard utilized by a trial court, the sound discretion of the tribunal. In *State v. Unger* (1981), 67 Ohio St.2d 65, 67, the court held that the objective factors that may be considered by the trial court in assessing the propriety of a motion for continuance include “the length of the delay requested; whether other ** continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the [moving party] contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.” *Id.* at 67-68.

In this matter, we find that Duke’s counsel has received two previous continuances which has delayed the resolution of this appeal. Further, we question the appropriateness of the request, as Duke’s counsel provided the date upon which this hearing was scheduled, some five months prior to the appointed date. There is no explanation for the fact that Duke’s counsel did not learn of the appraiser’s inability to complete the appraisal or attend the scheduled hearing until exactly two weeks prior to the hearing, thus meeting the board’s rule for continuance requests.

We acknowledge the decision of *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1990), 53 Ohio St.3d 254, in which the court held that the board of tax appeals’ denial of a continuance was an abuse of discretion when an appraiser was unavailable. In that appeal the court set forth the following criteria to guide this board in granting requests for continuances:

“[T]he witness’s absence must be unavoidable, the witness’s testimony must be critical, the request must be made in good faith, and the witness’s attendance at a future hearing must be probable.”

Given the absence of any substantive facts which establish good cause that might justify a further continuance in the present matter, we are not inclined to grant reconsideration of the attorney examiner's prior denial of the continuance. At the same time we are concerned that the taxpayer's interest in the determination of value of its property is jeopardized without any apparent fault on its part. Certainly the taxpayer had an expectation that its appraiser would complete an appraisal on a timely basis and present himself at a scheduled hearing for which there was over three months notice.

Upon due consideration and for the foregoing reasons, we find the motion for reconsideration is not well taken. If Duke's counsel had offered the board good cause and an alternative by providing a date for the merit hearing agreed upon by all counsel and to which all witnesses had committed, and such date was within the month of October, reconsideration and the reassignment of the date of hearing might have been favorably considered.

It is Ordered that the hearing of this matter shall commence on October 2, 2001 at 9:00 a.m. at the Board's offices, 30 East Broad Street, 24th Floor, Columbus, Ohio.

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