

# OHIO BOARD OF TAX APPEALS

John C. Kogelman (Co-Trs) and )  
Irene D. Kogelman (Co-Trs) (The )  
Kogelman Family Trust), )  
 )  
Appellants, ) (REAL PROPERTY TAX)  
 )  
 )  
vs. )  
 )  
 )  
Cuyahoga County Board of )  
Revision, the Auditor of Cuyahoga )  
County, and the Board of Education )  
for the Berea City School District, )  
 )  
Appellees. )  
 )

## APPEARANCES:

For the Appellants - Karen H. Bauernschmidt  
Karen H. Bauernschmidt Co., LPA  
The Hoyt Block  
700 West St. Clair Avenue, Suite 214  
Cleveland, Ohio 44113

For the County Appellees - William D. Mason  
Cuyahoga County Prosecuting Attorney  
By: Timothy J. Kollin  
Assistant Prosecuting Attorney  
Courts Tower, 8<sup>th</sup> Floor  
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Cleveland, Ohio 44113

For the Appellee Rita M. Jarrett  
Bd. of Edn. - Kadish, Hinkel & Weibel  
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Cleveland, Ohio 44114

ENTERED: October 19, 2001

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

This matter is considered by the Board of Tax Appeals upon a Motion to Dismiss filed by counsel for the appellee Board of Education (“BOE”). Said motion provides in pertinent part as follows:

“Now comes Appellee Board of Education for the Berea City School District, by and through its undersigned counsel, who respectfully requests this Board issue an order dismissing the property owner’s appeal in the within matter for the reason that the complaint is the second filing within the triennium and it fails to meet the criteria which permits a second filing within a triennium as set forth in O.R.C. §5715.19(A)(2) and affirm the Board of Revision’s decision to dismiss the complaint on that basis.”

The matter is submitted to the Board of Tax Appeals upon the notice of appeal, the motion to dismiss, which we will construe as a motion to affirm the dismissal of appellant’s complaint, and the brief in support of said motion as well as the statutory transcript certified to this Board by the Cuyahoga County Auditor. The appellants (“Kogelman”) did not file a brief in opposition to the motion to dismiss.

R.C. 5715.19(A)(2) provides restrictions on the filing of a complaint with county boards of revision. That section provides, in pertinent part, as follows:

“No person, board, or officer shall file a complaint against the valuation or assessment of any parcel that appears on the tax list if it filed a complaint against the valuation or assessment of that parcel for any prior tax year in the same interim period, unless the person, board, or officer alleges that the valuation or assessment should be changed due to one or more of the following circumstances that occurred after the tax lien date for the tax year for which the prior complaint was filed and that the circumstances were not taken into consideration with respect to the prior complaint:

“\* \* \*

“(d) An increase or decrease of at least fifteen per cent in the property’s occupancy has had a substantial economic impact on the property.”

Kogelman initially filed a complaint against the valuation of the subject property for tax year 1997 with the Cuyahoga County Board of Revision (“BOR”). At that time, the subject property had one tenant occupying the entire building. The BOR found a reduction in value to be warranted. Kogelman appealed that decision of the BOR, and the appeal docketed as B.T.A. No. 99-L-804. A stipulation of value was entered into by the parties and accepted by order of the Board, entered September 14, 2001, unreported.

In November 1999, the subject property became one hundred percent vacant when the sole tenant moved out. On March 24, 2000, Kogelman filed a decrease complaint with the BOR for tax year 1999 contending that the property’s occupancy changed by at least 15 percent. The BOR dismissed the complaint for the reason that it was the second filing within the same triennium and it failed to meet the requirements of R.C. 5715.19(A)(2). Kogelman then appealed that decision to this Board.

The triennial period for Cuyahoga County includes 1997, 1998, and 1999. The instant complaint is the second complaint filed in the same interim period. In order to satisfy R.C. 5715.19(A)(2), circumstances must be set forth clearly on the face of the complaint which permit the filing of a second complaint in the same interim period. “The statute clearly places the burden on the taxpayer to allege one of the enumerated circumstances in order to file a second complaint in the same interim period.” *Columbia Toledo Corp. v. Lucas Cty. Bd. of Revision* (1996), 76 Ohio St.3d 361. Failure to assert one of the exceptions in R.C. 5715.19(A)(2)(a) through (d) results in a jurisdictional deficiency in the complaint. *Gammarino v. Hamilton Cty. Bd. of Revision* (1994), 71 Ohio St.3d 388.

The Board finds the response to Question 14 of DTE Form 1, asserting “Property’s

occupancy changed by at least 15%,” together with the supporting statement “Property became 100% vacant 11/99,” sufficient to satisfy one of the circumstances specified by R.C. 5715.19(A)(2)(d). We must now address whether the evidence of record corroborates Kogelman’s allegation of the specific circumstance, within the meaning of R.C. 5715.19(A)(2)(d).

The BOE relies on “occupancy” as defined in *Mellon Bank, NA v. Franklin Cty. Bd of Revision* (1996), 74 Ohio St.3d 651, to assert that the one month of 0% occupancy results in an 8.4% change in occupancy over the calendar year. As defined in *Mellon Bank*, “Occupancy means the actual, continuous, and exclusive use and possession of a parcel by a person having a lawful right to such use and possession.” *Id.* at 653. The BOE asks this Board to apply the definition as it applies to the tenant's use and possession as an average for the entire year. Therefore, the BOE argues the second filing by appellant would not qualify as a proper second filing within the same triennial period under R.C. 5715.19(A)(2)(d) because there was only an 8.4% change, not the requisite 15% change in occupancy. We disagree.

The Court in *Mellon Bank* held that the 15% change in occupancy requirement established in R.C. 5715.19(A)(2)(d) means an actual change in occupancy, not a change in income stream. The relevant criteria in the definition of “occupancy” are “use” and “possession.” *Mellon Bank, supra*, at 653. Once the tenant abandoned the subject property, the property was no longer in “use” or in the tenant’s “possession” thereby rendering it unoccupied (100% change in occupancy).

R.C. 5715.19(A)(2)(d) states that in order for a complainant to be entitled to file a

second complaint within the same interim period a 15% change in occupancy must have occurred. The statute does not define when the change in occupancy should occur, or how the 15% change requirement should be interpreted. Although the BOE contends the 15% should be calculated on an annual average, this Board will interpret the statute as written, specifically, that after the tax lien date for the tax year for which the prior complaint was filed there existed a 15% change in occupancy for the subject property. This Board concludes the tenant's complete abandonment of the subject property, albeit late in the calendar year, resulted in a change in occupancy greater than the statutorily imposed 15% change in occupancy requirement of R.C. 5715.19(A)(2)(d).

The second prong of R.C. 5715.19(A)(2)(d) states in pertinent part, "An increase or decrease of at least fifteen percent in the property's occupancy *has had a substantial economic impact on the property.*" (Emphasis added.) The BOE seeks to prove that the change in occupancy for the subject property did not result in a substantial economic impact on the property. The statutory transcript includes expense and income reports for the 1999 tax year showing a \$4,500 loss due to the tenant's abandonment for the month of December. Again, the BOE asserts that an annual percentage should be calculated, and that we then determine if the change is "substantial."

Webster's Ninth New Collegiate Dictionary defines "substantial," in part, as "considerable in quantity." Here, Kogelman has lost the monthly rental for a lease term which would have continued through May 31, 2001. (S.T. Exhibit C) Kogelman also estimates it will cost over \$100,000 to fix the damage caused by the vacating tenant. (S.T. Exhibit C) We find these circumstances establish "substantial economic impact."

Upon consideration of the motion and the record before us, the Board of Tax Appeals finds jurisdiction was established before the BOR and hereby remands this matter to the BOR to determine the taxable value of the subject property for the tax year in question.

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