

OHIO BOARD OF TAX APPEALS

Huber Heights City Schools)	CASE NO. 2002-M-1747
Board of Education,)	
)	(REAL PROPERTY TAX)
Appellant,)	
)	DECISION AND ORDER
vs.)	
)	
Montgomery County Board of)	
Revision, Montgomery County Auditor)	
and Henry A. Harlamert, et al.,)	
)	
Appellees.)	

Appearances:

For the Board of Education	- Rich, Crites & Wesp Mark H. Gillis 300 East Broad Street, Suite 300 Columbus, Ohio 43215
For the County Appellees	- Mathias Heck, Jr. Montgomery County Prosecuting Attorney Douglas M. Trout Assistant Prosecuting Attorney 301 W. Third St., 5 th Floor Dayton, Ohio 45402
For the Property Owner	- Gary H. Dicker, Esq. 307 East Livingston Ave. Columbus, Ohio 43215

Entered: March 7, 2003

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

This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal filed on behalf of the Huber Heights City Schools Board of Education (hereinafter “Appellant” or “BOE”). The BOE challenges the decision of the Montgomery County Board of Revision (hereinafter “BOR”) in which said body

determined the value of the subject property for tax year 1998.¹ The Montgomery County Auditor (hereinafter “Auditor”) found the true and taxable values for the subject property for tax year 1998 to be as follows:

Parcel No. P70-39-8-3

Auditor’s 1998 True Value		Auditor’s 1998 Taxable Value	
Land	\$ 240,000	\$	84,000
Buildings	<u>\$ 2,007,340</u>	\$	<u>702,570</u>
Total	\$ 2,247,340	\$	786,570

Upon review of the complaint and counter-complaint, the BOR found the true and taxable values for the subject property for tax year 1998 to be as follows:

Parcel No. P70-39-8-3

BOR’s 1998 True Value		BOR’s 1998 Taxable Value	
Land	\$ 240,000	\$	84,000
Buildings	<u>\$ 1,560,000</u>	\$	<u>546,000</u>
Total	\$ 1,800,000	\$	630,000

The BOE objects to the BOR’s determination of value for the subject property and asserts that the value should be as determined by the auditor.

This matter is now considered by the Board of Tax Appeals pursuant to R.C. 5717.01, upon the notice of appeal, the statutory transcript (ST.) of the

¹ We previously dismissed an appeal of this same value determination by the Montgomery County Board of Revision in accordance with the Supreme Court’s decision in *Cleveland Elec. Illum. Co. v. Lake Cty. Bd. of Revision*, 96 Ohio St.3d 165, 2002-Ohio-4033. *Huber Heights City Schools Bd. of Edn. v. Montgomery Cty. Bd. of Revision* (Oct. 23, 2002), BTA No. 1999-M-1422, unreported. At the time of that dismissal the parties had waived merit hearing and both the appellant board of education and appellee property owner had submitted legal argument. Following our dismissal, the board of revision provided notice of its decision to the Tax Commissioner. See statutory transcript filed Nov. 21, 2002. The present appeal ensued. The parties were accorded an opportunity to request a hearing for the purpose of presenting additional evidence, but all waived such opportunity. Thus, the board considers this matter ripe for consideration.

proceedings before the BOR as certified by the auditor, and the briefs submitted to the board by counsel for the property owner and the BOE. The parties originally waived the evidentiary hearing before this board and, upon refiling, again waived the opportunity to present additional evidence. In addition, the county originally waived the filing of legal briefs.

The BOE initially moved the BOR to dismiss the underlying complaint on jurisdictional grounds asserting that the complaint was prepared by a non-attorney non-owner. The record reveals that Mr. Allan L. Johnston, vice-chairman of The Gem Real Estate Group, was retained by Irvin H. Harlamert, agent and attorney for the property owners, Henry A. Harlamert, et al. (hereinafter property owner) to appraise the subject property. Irvin Harlamert is also the prior owner of the subject property and the father of the present owners. The information provided on the complaint form was apparently typed by someone in Mr. Johnston's office. The BOE claimed that the complaint was jurisdictionally defective based on the Supreme Court's decisions in *Worthington City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1999), 85 Ohio St.3d 156 and *Sharon Village Ltd. v. Licking Cty. Bd. of Revision* (1997), 78 Ohio St.3d 479. The BOR, however, considered the underlying complaint and determined value for the subject property without specifically addressing the jurisdictional issue. The BOR's position is supported by *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (2001), 91 Ohio St.3d 308.

The subject property, known as Countryside Acres Apartments, is located at 6896 St. Rt. 201, in the Huber Heights taxing district of Montgomery County, Ohio.

The property consists of 6.799 acres with twelve 8-unit apartment buildings built in 1969. Each of the 96 units is approximately 875 sq. ft. and includes two bedrooms and one bath. The units are all electric and separately metered for payment by each tenant. There is a separate laundry facility with leased equipment for use by the tenants. A copy of the property record card for the subject is included in the statutory transcript at Exhibit C.

In support of the requested reduction in value, the property owner presented the testimony of Allan L. Johnston, Jr., a state-certified general appraiser and a general associate member of the Appraisal Institute. (ST. at Ex. D) Mr. Johnston testified that he was retained by attorney Harlamert to do an appraisal or evaluation analysis. (ST. at Ex. D, hearing record p. 3, 5) The appraiser also submitted to the BOR “supplemental information and appraisal data” for the subject property. (ST. at Ex. D) The BOE did not present any additional evidence to the BOR regarding the subject’s value. At the BOR’s hearing on the BOE’s counter-complaint, counsel advised the BOR that the BOE had filed the counter-complaint simply to become a party to the action pursuant to R.C. 5715.19. Counsel for the BOE urged that the auditor’s value be maintained.

Following the hearings on the complaint and counter-complaint, the BOR reduced the value of the buildings’ portion of the subject property for an overall net reduction in value as set forth above. The BOE filed the instant appeal claiming that the BOR lacked sufficient reliable, probative and competent evidence to grant any reduction in the value of the subject property.

We begin our review by acknowledging 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. *Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325. An appellant is not entitled to a reduction or an increase in valuation merely because no evidence is presented against its claim. *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564, citing *Hibschman v. Bd. of Tax Appeals* (1943), 142 Ohio St. 47. In an appeal filed pursuant to R.C. 5717.01 there exists no presumption that the values found by the board of revision are correct. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336; and *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493. Rather, it is incumbent upon the appellant to come forward with credible, competent, and probative evidence to demonstrate its right to the value the appellant has asserted. *Freshwater v. Belmont Cty. Bd. of Revision* (1997), 80 Ohio St.3d 26; *WJJK Investments, Inc. v. Licking Cty. Bd. of Revision* (1996), 76 Ohio St.3d 29; *Rocco v. Cuyahoga Cty. Bd. of Revision* (1994), 71 Ohio St.3d 103.

In the instant case, no additional testimony or appraisal evidence was presented to this board. As we stated above, the parties waived their appearance at the hearing before the board, and submitted the matter on the statutory transcript including the record from the hearing before the BOR, and the legal briefs of the parties. The Supreme Court has addressed our obligations in such circumstances in *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13:

“We find that the BTA in this case is required to meet the standard enunciated in *Black [v. Cuyahoga Cty. Bd. of Revision]* (1985), 16 Ohio St.3d 11]. Thus, if the only evidence before the BTA is the statutory transcript from the board of revision, the BTA must make its own independent judgment based on its weighing of the evidence contained in that transcript.”

We turn now to the testimony of the appellee property owner's appraiser presented to the BOR. The appraiser stated that the subject property's actual income and expense history for calendar years 1995 through 1998 was provided by the property owner and included in his submission to the BOR. The stated monthly rent for the subject is \$425 per unit; however, the appraiser testified that the “achievable potential gross rent as of the date of appraisal was only slightly less than \$404 a month” per unit. While the appraiser testified that the subject's rents were supported by market data, nowhere is there testimony or data presented as to what the market rent for the subject property is, or how the gross income for calendar years 1995 through 1998 was calculated.

Included in the information presented by the appraiser to the BOR was a rent roll that indicated 27 of the 96 units were vacant as of January 1998, resulting in a vacancy rate of 28.13%. The appraiser stated that the market vacancy rate at that time for the greater Dayton area and the northwest sector of Dayton was substantially lower, at 7.19% and 6.27% respectively. The appraiser attributed the high vacancy rate for the subject property to its overall physical condition and the high turnover rate.

It was the appraiser's opinion that there was significant deferred maintenance due to the subject property's age. The deferred maintenance items

included striping and resealing the parking lot, landscaping, roof repairs, and the replacement of appliances. The appraiser did not attribute any value for the cost of the deferred maintenance items. The appraiser acknowledged that all of the units were rentable as of the tax lien date, but attributed the higher than normal operating expenses to the routine cosmetic improvements that were associated with the subject property's high turnover rate. This expense was not quantified. After deducting the reported expenses from the reported revenues for each of the four years, the appraiser calculated an average annual net operating income of \$195,152 for the subject property.

Eight recent sales of what the appraiser believed to be similar properties were selected from his database. The eight sales involved properties containing 84 to 148 units, each located within Montgomery County. The appraiser calculated a per unit selling price of from \$11,384 up to slightly more than \$25,000 per unit for the eight sales. Then the appraiser calculated a mean selling price per unit of \$18,260 and a weighted average selling price per unit of \$18,251. The appraiser indicated the overall capitalization rates of five of the eight comparable sales ranged from a low of 10.86% to a high of 12.98%. The appraiser calculated the average overall capitalization rate for these five sales at 11.90%. From this, the appraiser concluded to an overall capitalization rate of 11.50% for the subject property. Applying his assumed 11.50% capitalization rate to his calculated average net operating income of \$195,152 for the subject property, the appraiser concluded that the indicated market value for the subject property was \$1,700,000 rounded.

Referring again to the eight comparable sales listed in the data submitted to the BOR, the appraiser stated in his report and before the BOR that he determined the subject property to have a per unit market value of \$17,700 for a total market value of \$1,700,000 rounded as of January 1, 1998. The appraiser's report states that due to the subject property's "advanced age and indicated physical condition as of the effective date of appraisal, the cost approach is not considered pertinent to a market valuation" of the subject property. Based upon his review of the market, the appraiser concluded that the subject property's indicated market value as of January 1, 1998 was "approximately \$1,700,000."

Although boards of revision are presumed to perform their duties in good faith and in the exercise of sound judgment, as stated above, this board is charged with the duty of reviewing the evidence presented to the BOR. R.C. 5717.01; R.C. 5717.03; *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (2001), 90 Ohio St.3d 564; *Edbow, Inc. v. Franklin Cty. Bd. of Revision* (1999), 85 Ohio St.3d 656. This board finds that the information regarding the subject property as submitted to the BOR by the property owner's appraiser was incomplete and does not support the value conclusion reached by the BOR. There are several significant problems with the appraiser's analysis that render his opinion of value unreliable.

We begin our review of the appraiser's testimony and "appraisal data" with the income analysis performed for the subject property. As noted above, the subject property was experiencing a nearly 30% vacancy rate as of January 1998. This necessarily impacted the total income for the subject property. Although the appraiser

stated that the market vacancy rate was 6.27% to 7.19%, he used the subject's actual vacancy rate in arriving at his average net operating income. The result distorts the subject's market income. The appraiser also used the stated rents and expenses as provided by the owner when calculating a market value for the subject property. Although the appraiser stated that he reviewed the marketplace as to rents and expenses, no information regarding the market rents for similar units was presented to the BOR or included in the written submission to the BOR. As the subject's actual vacancy rate was so much greater than the norm, it does not seem reasonable that the subject's income and/or expenses would not be similarly affected. Therefore, without some support from the actual income and expenses within the marketplace, the appraiser's statements are not supported by the record.

The appraiser stated that the subject property suffered from deferred maintenance, but did not quantify the detrimental effect or indicate a reasonable amount to correct through a reserve for replacement expense. Moreover, the subject property's expenses as set forth in the submission to the BOR include many expense items identified for maintenance and repair of the property, leading this board to conclude that significant dollars were allocated to keep the property in an acceptable condition. The actual expenses included a category for "maintenance and repair" of the building, grounds, and painting, and a second category for "repair" of carpet and appliances. In addition, there are "supply" expenses listed for the categories of plumbing, electric, building, carpet and appliances. Within the supply expenses there is

also listed a “general” supply expense which reflects significant annual expenses for the subject property, but the purpose is not detailed.

The appraiser also included real estate taxes in the subject’s expenses, rather than removing them and including a tax additur in the capitalization rate. The foregoing deficiencies render unreliable the ultimate use of the subject’s average net income as an indicator of what the market income for the subject property should be.

With respect to the selection of a capitalization rate, the appraiser set forth capitalization rates for five other properties in his report. There is nothing, however, in the submitted report or in his testimony to indicate how those capitalization rates were derived. There is no information as to whether the selected sales are truly comparable to the subject property, either in age, amenities or net income. Even assuming the capitalization rates were properly calculated, the stated capitalization rates are for sales that occurred between August 1993 and March 1998. Nothing is indicated as to whether these derived capitalization rates include a tax additur factor or involved special financing. There is no testimony as to the market cost of capital as of the tax lien date in issue. At the hearing before the BOR, the appraiser simply stated that “[t]he mean of them, average of these overall rates, was slightly less than 12%, at 11.90%.” (ST. at Ex D, p. 10) The appraiser concluded that the overall capitalization rate for the subject should be 11.5% without explanation or support and then applied this capitalization rate to the subject’s actual average net operating income to arrive at a value of \$1,700,000 rounded for the subject property. Id.

The board also cannot conclude that the eight comparable sales selected by Mr. Johnston and reflected in his submission to the BOR were truly comparable to the subject. Mr. Johnston could only identify the unit mix for sale number one and sale number eight. Comparable sale numbers 4, 5, 6, 7, and 8 all occurred 2.5 to 4.5 years before the tax lien date in issue, but the appraiser made no adjustments for time of sale to any of the comparables. In fact the appraiser admitted that he simply averaged the selling prices per unit, and made no adjustments to any of his eight comparable sales for any purpose. (ST. at Ex. D, p. 22.)

Based upon the foregoing, this board must find that the value conclusion presented to the BOR did not support the BOR's actions in lowering value. Although the BOE did not present any evidence or testimony itself to establish the subject's value at the BOR, the BOE correctly objected to the BOR's reliance on the testimony and appraisal data submitted by the property owner's appraiser as a basis for reducing the subject's fair market value.

The BOE asserts, and we agree, that the BOR cannot reduce the value of the subject based upon the evidence before it. Although the BOR did not adopt the value asserted by the appraiser as the value of the subject on tax lien date, there is no other evidence in the record before the BOR or this board to support any reduction from the auditor's value.

In the instant case, the only evidence presented to the BOR to consider was the appraiser's brief testimony and incomplete report. Had that same opinion been presented to this board, we would have rejected it for being incomplete and

unsupportable. There being no other evidence of the value of the property presented to the BOR, and no additional factual or expert witnesses presented at an evidentiary hearing before this board, we conclude that it was error on the part of the BOR to modify the auditor's value for the subject property.

Upon consideration of the existing record and the applicable law, the Board of Tax Appeals finds and determines that the true and taxable values of the subject property as of January 1, 1998 was:

Parcel No. P70-39-8-3

	True Value	Taxable Value
Land	\$ 240,000	\$ 84,000
Buildings	<u>\$ 2,007,340</u>	<u>\$ 702,570</u>
Total	\$ 2,247,340	\$ 786,570

It is the order of the Board of Tax Appeals that the Auditor of Montgomery County list and assess the subject property in conformity with this decision and order, and that the same be carried forward in accordance with applicable law.