

OHIO BOARD OF TAX APPEALS

Public Square West Limited Partnership,)	
)	
Appellant,)	CASE NO. 2002-P-2808
)	
vs.)	(REAL PROPERTY TAX)
)	
Cuyahoga County Board of Revision,)	DECISION AND ORDER
Cuyahoga County Auditor and the)	
Cleveland Municipal School District)	
Board of Education,)	
)	
Appellees.)	

APPEARANCES:

For the Appellant Property Owner	-	Baker and Hostetler, LLP Lawrence V. Lindberg 3200 National City Center 1900 East Ninth Street Cleveland, Ohio 44114-3485
For the County Appellees	-	William D. Mason Cuyahoga County Prosecuting Attorney Timothy J. Kollin Assistant Prosecuting Attorney Courts Tower, Ninth Floor 1200 Ontario Street Cleveland, Ohio 44113
For the Appellee Board of Education	-	James H. Hewitt Co., L.P.A. James H. Hewitt The Groh Mansion 3043 Superior Avenue Cleveland, Ohio 44114-4340

Entered March 4, 2005

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

In this appeal Public Square West Limited Partnership seeks review of the valuation placed upon its 1.166± acre parcel of land situated adjacent to “Public Square” in the central business district of downtown Cleveland, Ohio. It acquired the subject property in 1988 with the intent of developing a high-rise office and hotel complex. When its plan failed to materialize, Public Square West Limited

Partnership elected to operate a surface parking lot as an interim use until development once again became feasible. The parking lot use commenced in 1992 and continued through the date of our merit hearing.

The auditor placed a true value of \$12,780,000¹ upon the subject property for tax year 2000. Disagreeing with the auditor's valuation, Public Square West Limited Partnership filed an original complaint asserting the true value of the subject property was \$7,500,000.² The Cleveland Municipal School District Board of Education responded with a counter-complaint seeking to uphold the auditor's value. After conducting a hearing upon the matter, the Cuyahoga County Board of Revision determined the true value of the subject property to be \$10,000,000.³ Public Square West Limited Partnership now seeks review of that determination. The record before us consists of the notice of appeal, the statutory transcript filed by the Cuyahoga County Auditor in accordance with the provisions of R.C. 5717.01, the record from the merit hearing we conducted upon the matter, and the legal memoranda submitted by counsel for the respective parties. Upon careful review of that record, we find that Public Square West Limited Partnership has established its right to a reduction.

Before we address the merits of this appeal, however, a preliminary matter requires resolution. On the day before our merit hearing, the board of education filed a motion seeking to exclude Douglas L. Miller, vice-president of Public Square

¹ Taxable value = \$4,473,000.

² Taxable value = \$2,625,000.

³ Taxable value = \$3,500,000.

West Limited Partnership, from offering testimony at our hearing. We denied the motion,⁴ noting that the board of education elected to deposit its motion in the regular mail several days before our merit hearing rather than file by telephonic facsimile transmission, thus providing us with very little time to consider the issues raised.⁵ We requested that the board of education renew its motion in writing after the merit hearing if it desired further consideration of the matter. The board of education has now complied with our request by filing a renewed written motion to exclude Mr. Miller's testimony. That motion asserts - - - as a factual matter - - - that Mr. Miller did not appear or offer testimony before the board of revision. As a consequence, the board of education argues, Mr. Miller is precluded from now offering testimony before us. It bases its argument upon the provisions of R.C. 5715.19(G).⁶

But the statutory transcript certified by the auditor in accordance with the provisions of R.C. 5717.01 discloses that "Doug Miller, V.P. Operations" *is listed* as a person in attendance at the board of revision's hearing.⁷ Mr. Miller may be heard near the beginning of the board of revision's tape-recorded hearing record identifying

⁴ H.R. – 13.

⁵ Our ruling was predicated upon Ohio Adm. Code 5717-1-12, which provides: "Except for good cause shown, motions shall be filed within a reasonable time following filing of the notice of appeal so as to permit the board to consider and respond thereto in the orderly course of the board's business."

⁶ R.C. 5715.19(G) provides: "A complainant shall provide to the board of revision all information or evidence within the complainant's knowledge or possession that affects the real property that is the subject of the complaint. A complainant who fails to provide such information or evidence is precluded from introducing it on appeal to the board of tax appeals or the court of common pleas, except that the board of tax appeals or court may admit and consider the evidence if the complainant shows good cause for the complainant's failure to provide the information or evidence to the board of revision."

⁷ See Statutory Transcript, Exhibit F, "Oral Hearing Worksheet and Journal Entry."

himself to the board. Mr. Miller later provides responses to questions promulgated to him concerning the subject property. This testimony appears on the board of revision's hearing tape immediately after Mr. Kell's testimony. Mr. Miller can be heard addressing questions concerning the financial statements, the number of parking stalls situated upon the subject property, market conditions in regard to the future development of the property, and the prospects of a sale of the property. Counsel for the board of education elected not to cross-examine Mr. Miller. Because the record before us fails to support the factual assertions that the motion is predicated upon (i.e., that Mr. Miller failed to attend or offer testimony before the board of revision), the motion is overruled.

We turn now to the merits of this appeal. We begin by observing that a party that asserts a right to an increase or a decrease in the value of real property has the burden of proving its right to the value it asserts. *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* (1998), 37 Ohio St.3d 318. It is incumbent upon a party challenging a decision of the board of revision to come forward and offer evidence that demonstrates a right to the value it seeks. *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 value is presented by an appellant, other parties asserting a different value then have a corresponding burden to provide

evidence to rebut the appellant’s evidence of value. *Springfield Local Bd. of Edn.*, supra, *Mentor Exempted Village Bd. of Edn.*, supra.

Section 2, Article XII, of the Ohio Constitution provides: “Land and improvements thereon shall be taxed by uniform rule *according to value* ***.”

(Emphasis added.) And R.C. 5713.03 provides:

“The county auditor, from the best sources of information available, shall determine, as nearly as practicable, the *true value* of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon ***.” (Emphasis added.)

The Supreme Court has held that the best evidence of true value is an actual, recent sale of the subject property in an arm’s-length transaction negotiated in the open market between a willing seller and a willing buyer.⁸ But here there is no evidence of such a sale. In these circumstances, the Supreme Court has indicated that we may consider appraisal evidence to assist us in determining true value.⁹

Public Square West Limited Partnership offers a “Complete Real Estate Appraisal Report Presented in Summary Form,” together with the sworn testimony of Lawrence A. Kell, a senior member of the American Society of Real Estate Appraisers (“ASA”), a member and past president of the American Society of Real Estate Counselors (“CRE”), and a “General Appraiser” duly certified by the state of

⁸ See *Zazworsky v. Licking Cty. Bd. of Revision* (1991), 61 Ohio St.3d 604, *Hilliard City School Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1990), 53 Ohio St.3d 57, *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129, *State ex. rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, *Bd. of Edn. of the Princeton City School District v. Butler Cty. Bd. of Revision* (Dec. 20, 1991), BTA No. 1990-J-829, unreported, *Bd. of Edn. of the Princeton School District v. Butler Cty. Bd. of Revision* (May 8, 1992), BTA No. 1990-C-820, unreported.

Ohio. Mr. Kell has been engaged in the appraisal of commercial real estate since 1963 and has valued many parcels within the greater Cleveland market area. At the time of our hearing he served as chairman of the Ohio Appraisal Board.

Mr. Kell freely acknowledges that: “The valuation of this parcel poses some interesting *** challenges to the appraiser - - - among these being the lack of plentiful comparable land sales in the immediate area of the subject property.”¹⁰

An historical examination of the downtown Cleveland marketplace provides insight into why such a dearth of recent comparable sales transactions exists. When Public Square West Limited Partnership acquired the subject property in 1988, an expectation existed that it could use the subject property together with additional land holdings it planned to assemble for the purpose of developing a corporate headquarters for Ameritrust Bank as well as a Hyatt hotel. Two similar acquisitions by other developers preceded Public Square West Limited Partnership’s purchase of the subject property. Both were also adjacent to Public Square. A corporate headquarters for Sohio (now known as the “BP America” building) was constructed on one site, while a signature building for Society National Bank (now known as the “Key Bank” building) was developed on the other site. A Marriott hotel was included as a part of the later development. Unfortunately, Ameritrust Bank merged with Society Bank after Public Square West Limited Partnership acquired the subject property, thereby obviating the need for the planned signature corporate headquarters

Footnote contd.

⁹ *Ratner v. Stark Cty. Bd. of Revision* (1986), 23 Ohio St.3d 59.

building for Ameritrust Bank. Years passed after the 1988 acquisition, but no new prospects of a similar stature could be located. In 1992, Public Square West Limited Partnership elected to transform the subject property into a surface parking lot until such time as development would once again become viable. The market has not improved significantly since that time. Mr. Kell explained at our merit hearing:

“I think right now our vacancy in downtown Cleveland is about 5 million square feet. That’s 10 times the size of a building that might be built here. So no one is going to build a new office building for some considerable amount of time.” H.R. at 54.

Mr. Kell’s highest and best use analysis takes into account the subject property’s interim use as a surface parking lot. His appraisal report also gives consideration to the longer-term development potential of the subject property as a high-rise building. In this regard, we would observe that The Appraisal of Real Estate (12th Ed. 2001) 323 – 324, the authoritative publication of the Appraisal Institute, provides:

“The use to which a site or improved property is put until it is ready for its future highest and best use is called an *interim use*. (Emphasis sic.) Thus, interim use is a current highest and best use that is likely to change in a relatively short time - - - say, five to seven years. Farms, *parking lots*, golf courses, old buildings, and temporary buildings may be interim uses. ***

“The principle of consistent use, which holds that land cannot be valued based on one use while improvements are valued based on another, must be considered when properties are devoted to temporary, interim uses. The use

Footnote contd.

¹⁰ Appellant’s Exhibit A, Appraisal Report, page 2.

value of a site under an interim use may differ substantially from the market value of the same site as though vacant and available for development under its long-term highest and best use. Many outmoded improvements clearly do not resemble the ideal improvement, but they do create increments of value over the value of the vacant land. These improvements may appear to violate the principle of consistent use, but in fact the market simply acknowledges that, during the transition to a new use, the value contributed by old improvements to an improved property make the land and the existing improvements worth more than the vacant land.”

To arrive at his opinion of value Mr. Kell first examined the interim use as a surface parking lot. He began by examining revenues and expenses for 1998 through 2001, concluding average annual net operating income was \$489,000±. Mr. Kell testified before the board of revision that he reviewed “Korpacz Surveys” to determine a proper capitalization rate.¹¹ He determined that a 9.5% capitalization rate was appropriate, which when combined with the tax additur of 2.28%, produced an overall capitalization rate of 11.75% (rounded). Net operating income of \$489,000 was then capitalized at 11.75%, yielding a value indication of \$4,200,000±.

Next, Mr. Kell examined sales of other vacant properties, concluding that parking lot properties sold in a range from \$80 to \$95 per square foot:

“Q. Okay. Did you also take into account sales of vacant land?”

“A. Yes, I did. Identified seven sites that had sold primarily in the – what we call our Warehouse Square

¹¹ Presumably a reference to the “Korpacz Real Estate Investor Survey” periodical that is published quarterly.

district, which is further to the west, but would abut the property immediately to the west across West 3rd Street.

“And from those sales, it determined that the property would, as a parking lot would be valued at about 80 to \$95 a square foot.” H.R. at 58.

He concluded that the range of \$4,000,000± to \$4,800,000± obtained from an analysis of the other parking lot sales generally confirmed the \$4,200,000± value indication determined by his income analysis.¹² Mr. Kell reconciled his value indications to a value of \$4,500,000 solely for use as a parking lot as of the January 1, 2000 tax lien date.

Because commercial parking is merely an interim use, Mr. Kell next examined the future development potential of the subject property. He did so by considering a hypothetical building likely to be constructed at some future point in time. In that regard, we would observe that Ohio Adm. Code 5705-03-07(C)(3) provides:

“The land residual method estimates land value by capitalizing the residual income imputable to land as derived from actual *or hypothetical new improvements* assuming highest and best use. *This method is useful in arriving at land value when there are few or no sales or as a check against the market approach.*”¹³ (Emphasis added.)

Mr. Kell began his hypothetical model by examining land sales for the most recent office buildings constructed in the vicinity of the subject property. These

¹² 50,794 sq. ft. x \$80 per sq. ft. = \$4,063,520; 50,794 sq. ft. x \$95 per sq. ft. = \$4,825,430.

¹³ Ohio Adm. Code 5705-03-07(C) was recodified as Ohio Adm. Code 5703-25-11(C), effective September 18, 2003.

include the Bank One Building, McDonald Investment Center, Eaton Building, Diamond Building, and Renaissance on Playhouse Square.¹⁴ The much larger Key Tower and Sohio headquarters (now BP America) were also considered. Mr. Kell determined that the average building size was approximately ten times the land area. He conjectured that the subject property at 50,000± square feet would likely accommodate a 500,000± square foot building.

Next, Mr. Kell studied the price per square foot paid for land that was ready for development, noting:

“The most recent sale of the Bank One building site yielded a value of approximately \$168.00 per square foot including land acquisition and demolition cost. The next most recent building, the Renaissance Center building site, cost was approximately \$125.00 per square foot. The land cost for Key Tower including demolition of buildings was approximately \$269.00 per square foot of land and the Sohio (now BP building) assemblage was approximately \$150.00 per square foot including demolition.”¹⁵

Mr. Kell indicated that: “From these sales and a study of other land sales and assessed values in the CBD [Cleveland Business District] and in suburban office areas, it has been determined that office building sites, when related to the properties constructed, fall in the range of \$10.00 to \$20.00 per square foot.”¹⁶ He determined that \$15.00 per square foot of building area was the proper unit of value. Accordingly, Mr. Kell concluded that the land value for a hypothetical 500,000 square

¹⁴ See Appellant’s Exhibit A, Appraisal Report, page 10.

¹⁵ Appellant’s Exhibit A, Appraisal Report, page 10.

¹⁶ See Appellant’s Exhibit A, Appraisal Report, page 11.

foot building to be erected upon the subject property would be \$7,500,000.¹⁷ But this value does not take into account the cost to hold the subject property until construction once again becomes feasible. Therefore, Mr. Kell employs an 11.75% discount rate over an assumed five-year holding period to arrive at a true value for the subject property as of the tax lien date of January 1, 2000 of \$6,100,000.¹⁸

Of course, we would prefer to have more recent sales data before us. But one must take the market as he or she finds it. We would also prefer the additional supporting information customarily provided in a complete appraisal report, rather than the summary format offered. Nonetheless, we still find that the appraisal evidence offered by Public Square West Limited Partnership constitutes competent, credible, and probative evidence of the true value of the subject property.

We turn now to the appellees' case. Both the board of education and the county appellees have elected not to present any evidence of value.¹⁹ The Supreme Court stated in *Westhaven, Inc. v. Wood Cty. Bd. of Revision* (1998), 81 Ohio St.3d 67:

“Where the county auditor and the board of revision are appellees before the BTA, they are not required to present any evidence. ***

¹⁷ \$15.00 per sq. ft. X 500,000 sq. ft. = \$7,500,000.

¹⁸ This is the same rate Mr. Kell used for his capitalization rate. Thus, it appears he may also have relied upon the “Korpacz Real Estate Investor Survey” to determine the appropriate discount rate.

¹⁹ Public Square West Limited Partnership's reply brief references an appraisal report prepared by Richard Racek filed by the board of education at the board of revision's hearing. But this evidence does not appear within the statutory transcript. We would observe that counsel bears the responsibility to see that the record on appeal is complete and contains all of the evidence that it desires to rely upon.

“At the conclusion of Westhaven’s case before the BTA, the auditor and the BOR *** had two choices: (1) they could have presented evidence to rebut that presented by Westhaven, or (2) they could have presented no evidence and relied on their cross-examination of Westhaven’s appraiser to have discredited him or his appraisal.

“***

“If the appellee before the BTA in a valuation case does not present any evidence to rebut appellant’s evidence, the appellee takes the chance that the BTA may, as in this case, find the valuation evidence presented by the appellant to be competent and probative, and adopt it as the true value.” (Emphasis added.)

Public Square West Limited Partnership offers us evidence of value that we find competent, credible and probative. On the other hand, the board of education and county appellees have elected not to present any evidence of value whatsoever. Accordingly, we find the evidence presented by Public Square West Limited Partnership persuasive and determine the taxable value of the subject property to be as follows as of the applicable tax lien date of January 1, 2000:

TAXABLE VALUE

<u>PERMANENT PARCEL NUMBER</u>	<u>LAND</u>	<u>BUILDING</u>	<u>TOTAL</u>
101-07-008	\$2,122,230	\$12,770	\$2,135,000

The Cuyahoga County Auditor is directed to correct his records to reflect these values and to cause the same to be carried forward in accordance with applicable law.

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