

## OHIO BOARD OF TAX APPEALS

Willoughby-Eastlake City School District Board of Education,	)	CASE NO. 2003-B-1654
	)	
Appellant,	)	(REAL PROPERTY TAX)
	)	
vs.	)	DECISION AND ORDER
	)	
Lake County Board of Revision, the Lake County Auditor, and Cleveland Clinic Foundation,	)	
	)	
Appellees.	)	

APPEARANCES:

For the Appellant	-	Wayne E. Petkovic Attorney at Law 840 Brittany Drive Delaware, Ohio 43015
For the County Appellees	-	Charles E. Coulson Lake County Prosecuting Attorney 105 Main Street P. O. Box 490 Painesville, Ohio 44077
For the Cleveland Clinic Foundation	-	Hahn, Loeser & Parks, LLP Robert D. Markus 3300 BP Tower 200 Public Square Cleveland, Ohio 44114-2301

Entered May 20, 2005

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

This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal filed on November 6, 2003 on behalf of above-named appellant. Appellant appeals a decision of the Lake County Board of Revision (“BOR”), mailed on October 7, 2003, in which it determined the taxable value of the subject property as of tax lien date January 1, 2002.

The matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript (“S.T.”) certified to this board by the BOR, the record of the evidentiary hearing (“H.R.”) before this board, and briefs of counsel. At the hearing, appellant and the Cleveland Clinic Foundation (“Foundation”) appeared by and through counsel, whereas the county appellees made no appearance. The Foundation also presented the testimony of Mr. Peter C. Volas, Director of Real Estate for the Foundation and its appraisers Mr. Paul O. Van Curen and Mr. Lawrence A. Kell.

The subject property is located in the Willoughby Eastlake taxing district and appears in the records of the Lake County Auditor (“Auditor”) as parcel number 31-A-011-E-00-033-0. The subject property is described as a

“(t)hree story multi-tenant office building with storage and mechanical areas on the lower level. The building was constructed in 1988. The building contains 76,930 square feet of gross area and 63,557 square feet of rentable area.”  
H.R. at Ex. I.

The auditor initially valued the property as follows:

<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>	
Land	\$ 3,240,860	Land	\$ 1,134,300
Building	<u>9,759,140</u>	Building	<u>3,415,700</u>
Total	\$ 13,000,000	Total	\$ 4,550,000

Thereafter, the BOR determined that the subject property had the following true and taxable values:

<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>	
Land	\$ 240,860	Land	\$ 84,300
Building	<u>8,019,140</u>	Building	<u>2,806,700</u>
Total	\$ 8,260,000	Total	\$ 2,891,000

In its notice of appeal, appellant asserts that the value originally assigned the subject property by the auditor should be reinstated.

In an appeal filed pursuant to R.C. 5717.01, there exists no presumption that the values found by a county board of revision are correct. *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336, 337, and *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493, 495. Nevertheless, an appellant bears the burden of presenting evidence in support of the value which it has asserted. *Western Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340, 342. Once competent and probative evidence of value has been presented, then the other parties to the appeal have the burden of providing evidence which rebuts that of the appellant. *Id.*; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318, 319. While this board may ultimately find that a property has the same value as that previously determined by a county board of revision, either because the evidence supports such a conclusion or the appellant has failed to prove otherwise, see, e.g., *Westlake Med. Investors, L.P. v. Cuyahoga Cty. Bd. of Revision* (1996), 74 Ohio St.3d 547, 549; *National Church Residence v. Licking Cty. Bd. of Revision* (1995), 73 Ohio St.3d 397, such a conclusion will be the result of an independent, de novo determination which is predicated upon the preponderance of the evidence.

The sole issue which is presented in this appeal is whether the BOR improperly rejected, as the best evidence of value for ad valorem tax purposes for tax year 2002, the price at which the subject property sold on October 15, 2001. The

statutory transcript includes a copy of a conveyance fee statement which indicates that the property was transferred from “Corporate Ninety Associates” to appellant on October 15, 2001 for \$13,000,000.

In considering appellant’s challenges, we first refer to the requirements imposed by R.C. 5713.03:

“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 \*\*\*. In determining the true value of any tract, lot, or parcel of real estate under this section, *if such tract, lot or parcel has been the subject of an arm’s length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor shall consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes.* \*\*\*” (Emphasis added.)

Appellant argues that the BOR erred in decreasing the true value of the subject property to \$8,260,000 because it was the subject of a recent arm’s-length sale.

The Foundation argues that the sale cannot be considered to be arm’s length because it was not placed on the open market and because it was economically compelled to acquire the subject property in order to fulfill its desire to establish a presence in the area.

In paragraph one of its syllabus in *Conalco v. Bd. of Revision* (1977), 50 Ohio St.2d 129, the Supreme Court acknowledged the reliability of a “qualifying” sale for ad valorem tax purposes:

“The best evidence of the ‘true value in money’ of real property is an actual, recent sale of the property in an *arm’s-length transaction.* (State, ex rel. Park Investment

*Co., v. Bd. of Tax Appeals*, 175 Ohio St. 410, approved and followed.)” (Emphasis added.)

In its syllabus in *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Ohio

St.3d 23, the Supreme Court succinctly described an arm’s-length sale as follows:

“An arm’s-length sale is characterized by these elements: it is voluntary, *i.e.*, without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest.”

Elaborating within the body of its opinion, the court stated:

“We have never defined ‘arm’s-length sale.’ \*\*\* In its opinion below, the BTA defined it as ‘\*\*\* one which encompasses bidding and negotiation on the open market between a ready, willing and able buyer, and a ready, willing and able seller, both being mentally competent, and neither acting under duress or coercion.’ According to Black’s Law Dictionary (5 Ed. 1979) 100, in an arm’s-length transaction ‘\*\*\* each [party] act[s] in his or her own self interest \*\*\*.’ In sum, an arm’s-length sale is characterized by these elements: it is voluntary, *i.e.*, without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest. \*\*\*” *Id.* at 25. (Footnote omitted.)

With respect to the Foundation’s challenge that the property was not placed on the open market, we note that in its decision in *Walters*, *supra*, the Supreme Court pointed out that arm’s-length sales “generally” occur in the open market. In *Bd. of Edn. of Plain Local Schools v. Franklin Cty. Bd. of Revision* (June 9, 1995), BTA No. 1994-S-361, unreported, we rejected the notion that sales must *always* occur in such a manner in order to constitute the best evidence of a property’s value:

“The county appellees assert that this sale was not an arm’s-length transaction because the property was not offered for sale on the open market. We disagree. While the lack of advertisement on the open market may have

influenced the price paid for the subject property, it does not necessitate a finding that the subject sale was not arm's length in nature." *Id.* at 10.

See, also, *Dublin City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (May 5, 1995), BTA No. 1993-T-1107, unreported, affirmed (Mar. 7, 1996), Franklin App. No. 95APH06-718, unreported; *MACQ, Inc. v. Marion Cty. Bd. of Revision* (Sept. 11, 1998), BTA No. 1996-K-1457. Accordingly, merely because the subject property was not openly advertised as being for sale does not require a finding that its sale was other than arm's length.

Further, in *Poley v. Montgomery Cty. Bd. of Revision* (Sept. 24, 2004), BTA No. 2003-M-1784, unreported, this board observed as follows:

"We note that Mr. Poley presented evidence of his purchase to the BOR. Apparently the BOR rejected the sale as a valid indicator of the true value of the subject property. While the BOR did not provide any justification for its rejection of the sale, it did pose questions to Mr. Poley as to whether a realtor was involved in the purchase transaction. Tape of BOR hearing. However, this board has held that not being offered on the 'open market' in the traditional sense does not necessarily render a sale less than arm's length. *DePrie v. Hamilton County Board of Revision* (Mar. 26, 2004), BTA No. 2003-M-337, unreported (sale between executor of estate and private party); *Griesemer v. Montgomery Cty. Bd. of Revision* (Aug. 29, 2003), BTA No. 2002-A-1949, unreported (sale between executor/seller and former neighbor/purchaser); *South-Western City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision* (July 20, 2001), BTA No. 1999-T-1808, unreported (sale between landlord/seller and tenant/purchaser).

"In *22 North Park Place Ltd. v. Licking Cty. Bd. of Revision* (Mar. 3, 2000), BTA No. 1998-S-704, unreported, this board held:

“Further, this Board has previously held that, while the lack of advertisement on the open market may have influenced the price paid for the subject property, it does not necessitate a finding that the subject sale was not arm’s length in nature. See *Dublin City School District Board of Education v. Franklin Cty. Bd. of Revision* (May 5, 1995), BTA No. 1993-T-1107, unreported; *Bd. of Edn. of Plain Local Schools v. Franklin Cty. Bd. of Revision* (June 9, 1995), BTA No. 1994-S-361, unreported. We consider the ‘openness’ of market generally to relate to the ability of persons without a special interest in the property to learn of a property’s availability. *Jack Beatley, Trustee v. Franklin Cty. Bd. of Revision* (June 18, 1999), BTA Nos. 1997-M-262, 263, unreported. Based upon the foregoing, we find the fact that the property was not listed with a realtor at the time of the sale does not affect the reliability of the sale price.’ *Id.* at 7.

“The board finds that Mr. Poley’s purchase of the subject property evidences a transaction in which neither party was compelled to purchase or to sell. While there is no evidence that a realtor was involved in the transaction, it does not appear that Mr. Poley was a preferential purchaser. He had no relationship with the prior owner(s) of the property and worked through an intermediary to complete the transaction. These factors are sufficient for this board to conclude that the sale was arm’s length.” *Id.* at 6-7.

The Foundation also maintains that it was compelled to purchase the subject property at a price which is not reflective of its market value. In support of this contention, the Foundation compares the sale of the subject property with a sale which was considered by the Tenth District Court of Appeals in *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Jan. 28, 1992), Franklin App. Nos. 90AP-317, 90AP-324, unreported. In that case, the property owner, Grange Mutual Casualty Company (“Grange”), was effecting an assemblage of property in a city block. The court noted that Grange had presented evidence before this board that it had “paid a premium for

the property in order to protect its prior investment of other adjoining property (on both sides of subject property) to complete its assemblage of property in the block.” Id. at 7-8. Continuing, the court concluded that the sale could not be considered arm’s length because the evidence demonstrated that “Grange was compelled to purchase the property in order to protect its present investment in adjoining property in the same block and to insure its future development of that property.” Id. at 8. In determining whether a sale was the result of compulsion or duress, the subjective motives of the seller and buyer must be examined. The appeals court also noted that the property owner has the burden of proving that it was not a “willing buyer.” Id. at 10.

In *Tele-Media Co. v. Lindley* (1982), 70 Ohio St.2d 284, the Ohio Supreme Court held that a property owner has the burden to prove that the sale was not an arm’s-length transaction.

“Thus, \*\*\*, a recent sale of the property is the best evidence of true value. In order to establish an alternate true value, the taxpayer has the burden of proving that the recent sale is not the best evidence of true value and that another indicator is a more accurate representative of that value.” Id. at 286-287.

See, also, *Dublin City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Mar. 7, 1996), Franklin App. No. 95APH06-718, unreported, and *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Sept. 29, 1992), Franklin App. No. 91AP-281, unreported.

In *South-Western City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision* (July 20, 2001), BTA No. 1999-T-1808, unreported, the appellant argued that

the sale transaction was not arm's length because of the long-term landlord/tenant relationship between the parties. However, this board found that:

“While it is apparent that Georgesville considered the landlord-seller to be a difficult negotiator, a position of strength does not necessarily demonstrate that duress was a factor in the sale of the subject property.”

Furthermore, in that case the board found that despite a fifteen-year relationship, the sale was still arm's length because the parties' only relationship during that time was as landlord and tenant, there was no evidence of any collusion between the parties, negotiations did, in fact, occur, and it was apparent that both parties acted in their own self-interest.

In *Lakeside Ave. Ltd. Partnership v. Cuyahoga Cty. Bd. of Revision*, 75 Ohio St.3d 540, 1996-Ohio-175, the Ohio Supreme Court found economic duress to be present based on several factors. First, the sales price was non negotiable. Second, the buyer felt compelled to purchase the property for the stated price. Third, the property was not offered for sale on the open market. Fourth, the purchaser's primary lender would not finance the acquisition of the property. Fifth, failure to purchase the property would have resulted in the purchaser's bankruptcy. The court opined:

“The record clearly establishes that Lakeside never had any real choice but to purchase the property in question. The choice between Triton's survival on the one hand and swift and sure corporate death (bankruptcy) on the other hand presented Lakeside with no true alternative but to pay the price demanded by the seller.” *Id.* at 549.

Herein, the Foundation presented the testimony of three witnesses to support its contention.

However, we note that the Foundation's first witness, Mr. Peter Volas, was not employed by the company until *after* the subject property was under contract. The Foundation contends that Mr. Volas "did review the record as to the reports and the documentation of the subject transaction" and testified from that record. H.R. at 15. We find his testimony to be of very limited value in this regard. When asked if the records reflected anything as to how the purchase price was derived, Mr. Volas answered in the negative. H.R. at 19. Although Mr. Volas testified that "we had no choice other than to purchase this building for our business to expand. So at least we knew that location," his rather general statement does not establish that the Foundation was compelled to purchase the subject property at a price unreflective of its market value. We note that although Mr. Volas testified that he reviewed lease files, financial information and strategic plans, we are given little information as to how Mr. Volas came to the aforestated conclusion via such information. H.R. at 8, 9. His lack of personal knowledge of the transaction in question weakens the credibility of his testimony before us and we find his testimony to lack any substantial probative value in this regard.

The Foundation's second witness, Mr. Paul Van Curen, testified as to his appraisal presented before the BOR. The appraisal was an opinion of value for the subject property for \$6,950,000 as of November 4, 1999. H.R. at 31. At the Board of Tax Appeals' evidentiary hearing, he testified that as of the tax lien date of January 1, 2002: "I think \*\*\* (the) value would have been the same, or if anything, less because the market was not as good as of January 1, 2002 as it was in late '99, early 2000. We

had an economy slowing down. I think there's a large supply of office buildings, and we had the effect of 9-11." H.R. at 32. We note that Mr. Van Curen was not asked to do an update of his appraisal for 2002 and that he testified that he "did not do a formal update of the appraisal." H.R. at 32. In light of this, his opinion that, "I think \*\*\* the value would have been the same" and "I think there's a large supply of office buildings," does little to support the Foundation's contention. This is especially true as he testified under cross-examination as follows:

"Q: Was it the desire of the Cleveland Clinic to acquire this parcel, to assemble this entire triangular portion of this map, a reason they might have paid a premium?"

"A: I'm not really--I don't really know exactly what their thinking was. But, certainly they paid a large premium, and I would assume it would be for business reasons."  
H.R. at 38, 39.

Mr. Van Curen also testified that he was not involved with the subject sale negotiations or the sale contract. H.R. at 36. Mr. Van Curen had no personal knowledge of the details of the subject sale and, other than providing support for the proposition that he valued the property at a substantially lower value than the sale price of a transaction occurring about 10 months later, we find little probative evidence in his testimony. He could only "assume" the reason that a premium over market value might have been paid by the Foundation.

The Foundation's final witness, Mr. Lawrence Kell, prepared a written appraisal of the subject property for January 1, 2002 for which he estimated a value of \$7,000,000. But we again note that this witness did not have personal knowledge of the sale in question. Indeed counsel for the Foundation argued at hearing "I don't

know how the appraiser (Mr. Kell) has any knowledge of the Cleveland Clinic’s motivations or assumptions or business plans.” H.R. at 58. Although Mr. Kell’s appraisal may have been supportive of other testimony or evidence that the Foundation was compelled or forced to purchase the subject property, it is of little value by itself. We have no probative evidence before us to show how the Foundation was compelled or forced to buy the subject property. Thus, having insufficient evidence before us to show that the sale price was not indicative of value, we note that past court decisions reflect that other evidence of value is appropriately considered only in the absence of a qualifying sale. See, e.g., *Bd. of Edn. v. Fountain Square Assoc., Ltd.* (1984), 9 Ohio St.3d 218, 219 (“Appraisals based upon factors other than sales price are appropriate for use in determining value only when no arm’s-length sale has taken place \*\*\* or where it is shown that the sales price is not reflective of true value \*\*\*.”); *Pingue v. Franklin Cty. Bd. of Revision* (1999), 87 Ohio St.3d 62, 64 (“It is only when the purchase price does not reflect the true value that a review of independent appraisals based upon other factors is appropriate.”).

The Foundation has failed to satisfy its burden of proof, with evidence which is both competent and probative, that the October 15, 2001 sale of the subject property is not the best evidence of the property’s true value as of tax lien date.

It is therefore the decision of the Board of Tax Appeals that the subject property had the following true and taxable values as of January 1, 2002:

<u>TRUE VALUE</u>		<u>TAXABLE VALUE</u>	
Land	\$ 3,240,860	Land	\$ 1,134,300
Building	<u>9,759,140</u>	Building	<u>3,415,700</u>
Total	\$ 13,000,000	Total	\$ 4,550,000

It is ordered that the Auditor of Lake County shall list and assess the subject real property in conformity with this decision and order. It is further ordered that these values be carried forward in accordance with the law.

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