

OHIO BOARD OF TAX APPEALS

Mason City School District)
Board of Education,)
)
Appellant,) CASE NO. 2003-T-1355
)
vs.) (REAL PROPERTY TAX)
)
Warren County Board of Revision,) DECISION AND ORDER
Warren County Auditor, and Duke)
Realty Ohio,)
) **Remanded upon Settlement of Appeal**
) **September 19, 2005**
Appellees.) **Ohio Supreme Court**

APPEARANCES:

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Entered April 1, 2005

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

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by the Mason City School District Board of Education. Mason appeals from a decision of the Warren County Board of Revision, in which the BOR

determined the true value of certain real property to be \$25,657,050 for tax year 2002. Mason claims in its notice of appeal that the correct true value should be \$30,243,250.

We consider this matter upon the notice of appeal and the transcript certified to this board by the county auditor. All parties agreed to waive an opportunity to present additional evidence at a hearing before this board, electing to submit the matter upon the record and their briefs.¹ In this regard, we remind the parties that our duty is to conduct a de novo review of the record and to “determine the value of the property.” R.C. 5717.03. Where the parties elect to present no additional evidence on appeal, our review is conducted pursuant to the principles set forth by the Ohio Supreme Court in *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, (1996), 76 Ohio St.3d 13:

“The parties herein apparently waived presentation of further evidence and agreed that only the evidence presented to the BOR was to be considered by the BTA. The situation faced by the BTA in this case is analogous to that faced by the common pleas court in *Black v. Cuyahoga Cty. Bd. of Revision* (1985), 16 Ohio St.3d 11, 16 OBR 363, 475 N.E.2d 1264. The court in *Black* had before it an appeal from a board of revision under R.C. 5717.05, the alternative appeal provision to R.C. 5717.01. The only evidence before the common pleas court was the statutory transcript from the board of revision. We stated in *Black* that the common pleas court was not required to hold an evidentiary hearing or a trial *de novo*, but that the common pleas court ‘has a duty on appeal to independently weigh and evaluate all evidence properly before it. The court is then required to make an independent determination concerning the valuation of the property at issue. The court’s review of the evidence should be thorough and comprehensive, and should ensure that its final determination is more than a mere rubber stamping of

¹ Although the board set forth a briefing schedule, only Mason and the county appellees have elected to file a brief for our consideration. Duke Realty Ohio has not filed a brief.

the board of revision's determination.' *Id.* at 13-14, 16 OBR at 5 365, 475 N.E.2d at 1267. Our conclusion in *Black* was that R.C. 5717.05 'contemplates a *decision de novo*.' (Emphasis *sic.*) *Id.* at 14, 16 OBR at 365, 475 N.E.2d at 1268.

"The duty of both the BTA and the common pleas court upon an appeal is to 'determine the taxable value of the property.' See R.C. 5717.03 and 5717.05. We find that the BTA in this case is required to meet the standard enunciated in *Black*. 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." *Id.* at 15.

The subject property is identified in the Warren County Auditor's records as permanent parcel numbers 16-32-428-016-1 and 16-32-428-016-2 and is comprised of approximately 15.6303 acres of land.² The land is improved with two Class-A office buildings. Both buildings are six stories in height, and each contains approximately 320,000 square feet in space. The first, known as "Building A," was completed in January 2001. The second, known as "Building 2," was under construction on tax lien date and considered approximately 90% complete.

This matter came before the BOR pursuant to a decrease complaint filed by Duke. The auditor had originally set the value of the subject property at \$30,243,250. Duke argued before the BOR that the value should be lower based upon the costs expended for the improvements. In support, Duke offered financial statements showing the total costs for the two buildings, including complete costs for

² The parcels are also identified in the auditor's records as account numbers 0823077 (parcel no. 16-32-428-016-1) and 0823466 (parcel no. 16-32-428-016-2). For clarity, we shall refer only to the parcel numbers.

Building A and costs as of January 1, 2002 for Building 2. Hard costs totaled \$25,519,427. Additional soft costs for both buildings totaled \$5,551,477. Duke also offered the testimony of William McVeigh, a real property tax consultant, who testified as to the costs of the improvements, the current lease levels of the holdings, and other expenses incurred by Duke in the operation of the property.

In addition, the BOR heard the testimony of Ed Rinck, an appraiser with the mass appraisal firm that contracts with Warren County and which acts as an advisor to the BOR. Mr. Rinck opined a value for the subject property based upon the actual hard costs expended as of tax lien date. He did not consider soft costs because he opined that any value attributed to such costs would be captured during the next triennial update. He concluded, “we catch up with the soft costs once the building is up and running anyway.” S.T., BOR Hearing Transcript, at 6.³ Finally, Mr. Rinck deducted from hard costs on Building 2 an obsolescence factor of ten percent to account for its unfinished state. Mr. Rinck thus opined a value for the subject of \$25,466,310.

Mason presented no additional evidence before the BOR but argued that a review of all costs associated with the subject’s improvements supported the auditor’s value. Upon review of the information presented, the BOR determined the value of the subject to be \$25,657,050, a decrease from the auditor’s value of

³ We note that the transcript provided to this board was evidently transcribed from an audiotape, which was not submitted. Several portions of the record, including some of those pertaining to Mr. Rinck’s testimony, are marked with the identifier, “(inaudible).” As indicated, the parties elected to waive hearing in this matter. In making this election, the parties must ensure that the record developed before the BOR is adequate or bear the results produced by any limitations in that record.

\$4,586,200. Mason now argues on appeal that the BOR erred when it (a) relied upon Mr. McVeigh's testimony, (b) failed to include soft costs in its valuation of the subject property, and (c) included an obsolescence factor of ten percent for the unfinished Building 2.

We begin our review of the evidence by noting that a party who asserts a right to an increase or a decrease in the value of real property has the burden to prove its right to the value asserted. *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* (1988), 37 Ohio St.3d 318. Consequently, it is incumbent upon an appellant challenging the decision of a board of revision to come forward and offer evidence that demonstrates its right to the value sought. *Cleveland Bd. of Edn.*, supra; *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493.

It is not enough, however, to simply come forward with some evidence of value. Neither is it sufficient to grant the requested increase or decrease merely because no evidence is adduced in contradiction to the claim. *Western Industries, Inc. v. Hamilton Cty. Bd. of Revision* (1960), 170 Ohio St. 340. In short, there is a burden of persuasion that rests with the appellant to convince this board that the appellant is entitled to the value which it seeks. *Cincinnati School Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325. Accordingly, this board must proceed to examine the available record and to determine value based upon the evidence before it. *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120; *Clark v. Glander*

(1949), 151 Ohio St. 229. In so doing, we will determine the weight and credibility to be accorded to the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

In the instant matter, Mason does not offer any additional evidence of value. Instead, Mason argues that the BOR erred in its treatment of the evidence presented to it and asks us, in our de novo capacity, to value the subject at the amount Mason asserts.

Initially, Mason objects to any consideration of testimony offered at the BOR by Mr. McVeigh. We note that no adequate testimony was offered as to Mr. McVeigh's background, education, or qualifications to offer any opinion concerning the subject's value. While Mr. McVeigh proceeded to support his ability to offer credible testimony regarding the subject property, we find that, without an adequate foundation being laid for his testimony, we are unable to give weight to his testimony and opinions.⁴ See *Society Natl. Bank v. Franklin Cty. Bd. of Revision* (Oct. 6, 1995), BTA No. 1994-A-1418, unreported, and *Bowman v. Hamilton Cty. Bd. of Revision* (May 20, 1994), BTA No. 1992-T-1366, unreported (BTA gave no weight to broker's testimony or report concerning the value of real property where the real estate broker did not qualify as an expert in appraising property).

⁴ We have been critical previously of Mr. McVeigh's qualifications and have questioned whether his opinions and analyses should be considered "expert opinion" for purposes of providing an opinion of value. See, e.g., *Vandalia Butler City School Dist. Bd. of Edn. v. Montgomery Cty. Bd., of Revision* (Jan. 23, 2004), BTA No. 2002-V-1596, unreported, appeal pending, Sup. Ct. No. 04-343; *Monarch Properties, L.P. v. Medina Cty. Bd. of Revision* (Oct. 3, 2003), BTA No. 200-M-1392, unreported, remanded upon settlement of the parties, Sup Ct. No. 2003-1925.

Second, we concur with Mason that the BOR should have taken into account the improvements' soft costs for purposes of determining value. The BOR applied the cost approach to valuing the subject property. Under the cost approach, value is derived by estimating the current cost of replacing or reproducing the improvements, deducting from that cost the estimated physical depreciation and all forms of obsolescence, if any, and then adding the market value for land. Ohio Adm. Code 5705-3-01(D); *The Appraisal of Real Estate* (12th Ed. 2001), at 50.

In order to determine the value of real property under the cost approach, the method must account for all costs associated with the development of the property. These include direct (hard) costs, indirect (soft) costs, and entrepreneurial profit.⁵ Direct costs are those costs for labor and materials in the actual construction. These include, inter alia, building permits, materials and products, equipment, labor, security, utility installation and costs, performance bonds, and the contractor's profit and overhead. *The Appraisal of Real Estate*, at 359-360. Indirect costs are costs and allowances, other than labor and materials, that are necessary for construction but that are not typically part of the construction contract. Indirect costs include such items as architectural and engineering fees, surveys, environmental studies, legal fees, consulting fees, accounting, costs of carrying the investment in land and contract payments during construction (financing), insurance, taxes during construction, and

⁵ Some appraisers, however, believe that entrepreneurial profit is often an intangible in owner-built and owner-occupied properties. Entrepreneurial profit is realized only when the property is first sold, which may not occur in owner-occupied properties. Even if the property is sold, the sale usually takes place years after the property was built, by which time entrepreneurial profit is obscured by any appreciation in the value of the property. *The Appraisal of Real Estate*, at 361. Given that the subject is owner occupied, we find the BOR's decision to not include entrepreneurial profit to be reasonable.

administrative expenses. *Id.* at 359-360. Entrepreneurial profit is the difference between the total cost of development and the market value of the property after completion. It is a market-derived figure that represents an amount that an entrepreneur expects to receive as repayment for his or her investment. *Id.* at 360.

The cost method must include all categories of costs to accurately reflect the value of the improvements. *Wenk v. Cuyahoga Cty. Bd. of Revision* (May 21, 1999), BTA No. 1997-T-816, unreported; *The Higbee Co. v. Cuyahoga Cty. Bd. of Revision* (Dec. 12, 2003), BTA Nos. 2002-T-2552, 2569, 2571, unreported, appeal pending, Sup. Ct. No. 04-52; *The Appraisal of Real Estate*, at 358 (“To develop cost estimates for the total building, appraisers must consider direct (hard) and indirect (soft) costs.”) and 360 (“When direct and indirect costs of developing a property are used to provide an indication of value, the appraiser must also include an economic reward sufficient to induce an entrepreneur to incur the risk ***.”).

Here, the BOR, in adopting Mr. Rinck’s opinion of value, did not include any indirect costs because Building 2 was not completed as of tax lien date.⁶ Such expenditures, however, are a necessary part of the cost method, and Mr. Rinck’s decision to omit such costs from actual costs leads us to find these calculations to be unreliable. *Wenk*, *supra*. Although Building 2 was incomplete as of tax lien date, applicable law requires the auditor to list, value and assess all improvements under construction based upon the improvement’s value or the percentage of its completion.

⁶ Mr. Rinck did not testify as to how the decision to ignore soft costs applies to Building A. It is clear from the record that Building A was complete as of tax lien date. We can find no rationale that would support a finding that the incomplete status of Building 2 would have an impact on the inclusion of Building A’s soft costs.

Duffy v. Erie Cty. Bd. of Revision (June 11, 2004), BTA No. 2003-T-864, unreported; R.C. 5713.03; Ohio Adm. Code 5703-25-06(G).

We also find the county's argument that soft costs would be picked up during the next update or reappraisal to be unavailing. The county admits in its brief that its method of valuing the subject utilizes only 90.3% of actual costs, "which brings the value concluded by Warren County in line with the acceptable range of market values at 90.3%." Appellees' Brief, at 3. By admission, the county's method fails to conform to the requirement that all real property must be valued at its "true value in money." Section 2, Article XII of the Ohio Constitution; R.C. 5713.01; *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410; *In re Estate of Sears* (1961), 172 Ohio St. 443; *Conalco*, supra.

Simply adding all of the costs, however, does not necessarily reflect the value of an improvement. "In determining the value of property for the purposes of taxation, the assessing body must take into consideration all factors which affect the value of the property." *The B.F. Keith Columbus Co. v. Franklin Cty. Bd. of Revision* (1947), 148 Ohio St. 253, at paragraph one of the syllabus. Factors such as depreciation, deficiencies, superadequacies, and other forms of obsolescence may be present.

The determination of obsolescence is a two-step inquiry. First, the appraiser must identify the causes of the obsolescence; second, the appraiser must quantify the amount of obsolescence to be applied. See *Meijer, Inc. v. Montgomery Cty. Bd. of Revision* (1996), 75 Ohio St.3d 181, 186. See, also, *Clark v. State Bd. of*

Tax Comm'rs (Indiana Tax Ct. 1999), 694 N.E.2d 1230. “Where a taxpayer asserts that functional depreciation [i.e., obsolescence] should be considered in valuing his property for the purpose of taxation, the burden is upon the taxpayer to prove such depreciation.” *Rollman & Sons Co. v. Hamilton Cty. Bd. of Revision* (1955), 163 Ohio St. 363, at paragraph one of syllabus. Here, Mr. Rinck generally accounted for obsolescence within his depreciation calculations. The appraiser has not offered us facts and figures to corroborate his decision to include obsolescence, nor do we know the type of obsolescence applicable to the subject property. His testimony contains little beyond his opinion that such factors need to be included because Building 2 was not complete on tax lien date.

In addition, Mr. Rinck did not consider any depreciation for Building A. We have previously found that new construction can be subject to obsolescence factors even before building begins. *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (July 6, 2001), BTA Nos. 1998-T-595, 596, 602, unreported; *The Appraisal of Real Estate*, at 365, 392-393. Building A was not fully leased as of tax lien date. We know not how external obsolescence may have impacted the subject. In addition, Mr. Rinck undertook no examination of any potential design flaws that might contribute to depreciation. *The Appraisal of Real Estate*, at 365. We find that the inadequacy in Mr. Rinck’s opinion is not that he considered such factors and found them lacking but that he failed to consider them at all, assuming instead that new construction simply would not be subject to obsolescence. *Strongsville*, supra.

Upon review, we find that the record lacks sufficient evidence upon which to determine an appropriate depreciation factor to be applied to the total construction costs of the subject's improvements. We are unable to accept an ambiguity, such as this, that leaves it to this board to determine the precise nature of the obsolescence being sought and whether the evidence quantifies it. *Rollman & Sons Co.*, supra, at paragraph two of the syllabus. See, also, *The Higbee Co.*, supra, at 18.

Upon review, we find that the BOR's application of the evidence failed to take into account the soft costs of the subject's two improvements. We also find that the record does not support the depreciation factor applied by the BOR to Building 2.

Having rejected the methodology applied by the BOR in reaching value, and where, as here, there exists no credible explanation regarding the specific manner by which the BOR adjusted the auditor's value, which resulted from the auditor's review of information submitted to him while performing his valuation duties imposed by R.C. Chapter 319, we are constrained to revert to the auditor's valuation. *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (Jan. 18, 2002), BTA No. 1999-A-1364, et al., unreported, at 4-5; *Columbus*, supra. Therefore, the Board of Tax Appeals finds the value of the subject property to be as follows for tax year 2002:

Parcel 16-32-428-016-1	TRUE VALUE	TAXABLE VALUE
LAND	\$190,740	\$ 66,760
BUILDINGS	\$ _____-0-	\$ _____-0-
TOTAL	\$190,740	\$66,760

Parcel 16-32-428-016-2	TRUE VALUE	TAXABLE VALUE
LAND	\$ 2,153,810	\$ 753,830
BUILDINGS	<u>\$27,898,700</u>	<u>\$ 9,764,550</u>
TOTAL	\$30,052,510	\$10,518,380
	TRUE VALUE	TAXABLE VALUE
TOTAL, ALL PARCELS	\$30,243,250	\$10,585,140

The Auditor of Warren County is hereby ordered to list and assess the subject property in conformity with this decision and order and to carry forward the determined values in accordance with law.

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