

OHIO BOARD OF TAX APPEALS

KE&G Enterprises, LLC,)
)
 Appellant,)
)
 vs.) (REAL PROPERTY TAX)
)
) DECISION AND ORDER
 Lorain County Board of Revision,)
 Lorain County Auditor, and the)
 Elyria City School District Board)
 of Education,)
)
 Appellees.)

APPEARANCES:

- For the Appellant - Trigilo & Stephenson, PLL
Richard R. Mellott, Jr.
5750 Cooper Foster Park Road, W
Suite 102
Lorain, OH 44053-4132

- For the Appellee
BOE - Armstrong, Mitchell, Damaini
& Zaccagnini
Timothy J. Armstrong
1725 The Midland Building
101 Prospect Avenue, West
Cleveland, OH 44115-1091

- For the County
Appellees - Dennis Will
Lorain County Prosecuting Attorney
John G. Morrisson
Assistant Prosecuting Attorney
226 Middle Avenue, 4th Floor
Elyria, OH 44035

Entered March 11, 2005

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

These cases are considered by the Board of Tax Appeals upon notices of appeal filed by appellant KE&G Enterprises (“KE&G”) from the determination of the Lorain County Board of Revision (“BOR”). The BOR determined the taxable value of the subject property owned by KE&G for tax year 2002.

The subject real property is an 11.79-acre lot, improved with a 221,520-square-foot commercial/industrial use building. The subject property is located in the Elyria City Schools taxing district, Lorain County, Ohio, and appears on the Lorain County Auditor's ("auditor") records as permanent parcel number 06-25-012-105-008.

The values of the subject, as originally determined by the auditor for tax year 2002, are as follows:

	TRUE VALUE	TAXABLE VALUE
LAND	\$ 359,380	\$125,780
BUILDING	<u>\$1,947,450</u>	<u>\$681,610</u>
TOTAL	\$2,306,830	\$807,390

KE&G filed a complaint against the valuation of the subject parcel for tax year 2002 with the BOR, requesting the subject's true value be decreased to \$330,000, based on the sale of the property on April 30, 2002. See Statutory Transcript, ("S.T."), Ex. A. After conducting a hearing, the BOR reduced the value of the subject to \$1,500,000, based upon the testimony of Mr. Gerald E. Fulkroad, Sr., managing partner of KE&G, and the testimony and appraisal report of Mr. Richard D. Masters, MAI.¹ S.T. at Ex. E.

In its notices of appeal² KE&G maintains that the BOR erred in not accepting the subject property's 2002 sale price as the best evidence of value.

¹ The appraisal report of Mr. Masters concludes to an opinion of value of \$1,500,000 for the subject property. S.T. at D, attachment IV.

² BTA No. 2004-V-1459 represents a notice of appeal filed by Mr. Fulkroad, whereas BTA No. 2004-V-1473 was filed by counsel for KE&G. Both appeals were timely filed and both appeals concern themselves with the same decision of the BOR regarding the subject property. Therefore we consolidate both appeals as it relates to our decision today.

This matter was submitted to the Board of Tax Appeals upon the notices of appeal, the hearing conducted before this board and the statutory transcript certified by the BOR.

Initially, this board notes the decisions in *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 68 Ohio St.3d 336, 1997-Ohio-498 and *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision*, 68 Ohio St.3d 493, 1994-Ohio-501, wherein the Supreme Court of Ohio held that an appealing party has the burden of coming forward with evidence in support of the value which it has claimed. Once competent and probative evidence of true value has been presented, the opposing parties then have a corresponding burden of providing evidence which rebuts appellant's evidence of value. *Id.*; *Mentor Exempted Village Bd. of Edn. v. Lake Cty. Bd. of Revision* (1988), 37 Ohio St.3d 318, 319.

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 that it seeks. *Cincinnati School Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 78 Ohio St.3d 325, 1997-Ohio-212. 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 the evidence presented. *Cardinal Fed. S. & L. Assn. v. Cuyahoga Cty. Bd. of Revision* (1975), 44 Ohio St.2d 13.

Pursuant to Section 2, Article XII, Ohio Constitution, land and improvements are to be taxed according to “value”:

“Land and improvements thereon shall be taxed by uniform rule *according to value* ***.” (Emphasis added.)

R.C. 5713.03 further mandates that each separate tract be valued according to its “true value”:

“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 ***.

“***

“[I]f 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 tax lien date, the auditor shall consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes.”

In *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, the Supreme Court addressed the manner by which the value of real estate is to be ascertained:

“The best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so. Paragraph two of the syllabus in *In Re Estate of Sears* [(1961)], 172 Ohio St. 443, 178 N.E. (2d), 240. This, without question, will usually determine the monetary value of the property. However, such information is not usually available, and thus an appraisal becomes necessary. It is in this

appraisal that the various methods of evaluation, such as income yield or reproduction cost, come into action. Yet no matter what method of evaluation is used, the ultimate result of such an appraisal must be to determine the amount which such property should bring if sold on the open market.” Id. at 412.

See, also, *Zazworsky v. Licking Cty. Bd. of Revision* (1991), 61 Ohio St.3d 604; *Hilliard City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1990), 53 Ohio St.3d 57.

Complementing the above-quoted statute is R.C. 5713.04, which provides:

“Each separate parcel of property shall be valued at its taxable value ***. The price for which such property would sell at auction or forced sale shall not be taken as the criterion of its value.”

Before the BOR and this board, KE&G presented evidence of a sale of the subject property on April 30, 2002. S.T., Ex. D, attachments I through V. Said documents include correspondence and settlement statements which chronicle KE&G’s purchase of the subject for \$330,000³ after becoming the high bidder at an auction held on April 30, 2002.

Additionally, KE&G provided the testimony and written appraisal report of Mr. Masters to the BOR, which arrives at a value of \$1,500,000. S.T. at D, attachment IV.

³ The high bid on the subject of \$300,000 was assigned to KE&G by the high bidder. KE&G found it necessary to purchase an additional strip of land (for \$30,000) from another entity to make access to the subject’s buildings more feasible, resulting in a total price of \$330,000. H.R. at 49-51.

Despite its own evidence provided to the BOR, KE&G seeks to now distance itself from its own appraisal evidence of value presented to the BOR, and have the 2002 values lowered further.

Through the testimony of Mr. Fulkroad, KE&G argues that the property's valuation should be lowered.⁴ Mr. Fulkroad testified that his attempts to market and sell the subject property for an amount well below the \$1,500,000 value determined by the BOR have been unfruitful. Furthermore, Mr. Fulkroad testified that a predecessor in title purchased the subject in 2001 for \$900,000.⁵

In *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Ohio St.3d 23, the court defined an arm's-length sale to be one that: "encompasses bidding and negotiation in 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 coercion." In short, the court found an arm's-length sale to be 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. See, also, *Cardinal Federal S. & L. Assn.*, *supra*, at 21, fn. 5. (quoting R.C. 5713.04, which states that "[t]he price for which such real property would sell at auction or forced sale shall not be taken as the criterion of its value."); *Tanson Holdings, Inc. v. Darke*

⁴ In its notice of appeal filed before this board, KE&G requests the value be lowered to \$825,000. Before this board, Mr. Fulkroad testified about his purchase at auction for \$330,000, and further described that he was recently unable to market the property for \$750,000. H.R. at 16, 20, 31, and 49-51.

⁵ Mr. Fulkroad described that the subject property is but a portion of what was once a larger tract of land and that said sale in 2001 also included the personal property associated with the former foundry. H.R. at 21. Nevertheless, Mr. Fulkroad was not personally involved in the prior sale. H.R. at 51.

Cty. Bd. of Revision (1996), 74 Ohio St.3d 687 (addressing a sale of property between corporations owned by the same shareholder and a sale which results from the settlement of a lawsuit); *Dublin Senior Community L.P. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 455 (in context of a congregate care facility, court rejected a rather complicated sheriff's sale as a means by which to determine a property's value).

In *Walters*, supra, the court held that the sales prices of parcels sold at auction were nevertheless the best evidence of value when all of the elements of an arm's-length sale are present. The court reasoned that the auction sales were valid given there was no evidence to show that there was any forcible inducement in what was a voluntary sale. *Id.* at 25-26. See, also, *Kozak v. Summit Cty. Bd. of Revision* (Dec. 20, 1996), BTA No. 1995-M-211, unreported (in relying upon the sale price to determine true value, the board concluded not all sales of real property at an auction constitute "forced sales"); *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Jan. 3, 1997), BTA Nos. 1995-T-275, et seq., unreported (addressing claim sale price must be rejected because the subject property's developer had fallen into bankruptcy subsequent to the sale); *Beljon v. Portage Cty. Bd. of Revision* (Aug. 1, 1997), BTA No. 1996-T-996, unreported ((1) relying upon *Kozak*, supra, *Mills v. Lucas Cty. Bd. of Revision* (Apr. 29, 1994), BTA No. 1992-Z-553, unreported, and *Nicholson Cleveland Terminal Co. v. Cuyahoga Cty. Bd. of Revision* (July 12, 1985), BTA Nos. 1981-G-373, et seq., unreported, for proposition foreclosure actions do not necessarily render a sale less than arm's length; and (2) adding back into the property's value the amount

of back taxes a buyer agreed to pay); *Murray Hill Properties LP v. Franklin Cty. Bd. of Revision* (Sept. 19, 1997), BTA No. 1996-A-1005, unreported (relying on *Mills*, supra, and holding purchase from mortgagor following acquisition at sheriff's sale did not necessarily render sale other than arm's length); *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Jan. 15, 1999), BTA No. 1997-J-1385, unreported (sale at auction not to be automatically rejected when determining property's value for tax purposes).

If evidence exists which calls into question the validity of a sale, the party placing reliance thereon to support its contention of value must show that the sale was made at arm's length. *Tanson Holdings*, supra; *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (Jan. 3, 1997), BTA Nos. 1995-T-275, 276, unreported.

The evidence before this board is clear that KE&G's purchase of the property was through an auction. Nevertheless, there is no evidence before this board concerning the arm's-length nature of the sale. Mr. Fulkroad generally described that the previous owner of the property (Park Corporation) had offered the property (which included additional acreage not before us today) for sale and KE&G rejected the offer. H.R. at 10. In December 2001 the subject property, additional acreage, and personal property were sold to Asset Sales, a sale that Mr. Fulkroad admits he was not personally involved with. H.R. at 12, 51. Mr. Fulkroad has identified a "buyer's guide" he obtained the day of the auction which lists the various items of personalty

auctioned on April 30, 2002. Said guide includes the name of Asset Sales, Inc. on the face of the guide, which describes itself as “auctioneers, liquidators, appraisers.”

We are unable to conclude, based upon the limited information before us, that the sale at auction carried with it the elements of an arm’s-length sale. Therefore, we find that appellant KE&G has failed to meet its burden to demonstrate that it is entitled to a further reduction in value.

Based upon the foregoing, we find that the decision of the BOR to lower the value based upon the appraisal report to be supported by the record below.

There being no other evidence of value offered in the record before us, we find and determine the true and taxable values of the subject real property as of January 1, 2002, to be:

	TRUE VALUE	TAXABLE VALUE
LAND	\$ 359,380	\$125,780
BUILDING	<u>\$1,140,620</u>	<u>\$399,220</u>
TOTAL	\$1,500,000	\$525,000

It is the decision and order of the Board of Tax Appeals that the Lorain County Auditor shall list and assess the subject property in conformity with this decision and carry the same values forward in accordance with applicable law.

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