

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

BEECHWOOD II, L.P.,	:	
Appellant,	:	CASE NO. CA2011-04-033
	:	
- vs -	:	<u>OPINION</u>
	:	10/24/2011
	:	
CLERMONT COUNTY BOARD OF	:	
REVISION, et al.,	:	
	:	
Appellees.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010 CVF 01556

Coolidge Wall Co., L.P.A., Jonas J. Gruenberg, David P. Pierce, Sasha Alexa M. Van DeGrift, 33 West First Street, Suite 600, Dayton, Ohio 45402, for appellant

Donald W. White, Clermont County Prosecuting Attorney, Allen L. Edwards, 101 East Main Street, Batavia, Ohio 45103, for appellees, Clermont Cty. Bd. of Revision and Linda L. Fraley, County Auditor

David C. DiMuzio, 810 Sycamore Street, Sixth Floor, Cincinnati, Ohio 45202, for appellees, West Clermont Local School District Board of Edn.

PIPER, J.

{¶1} Appellant, Beechwood II, L.P., appeals a decision of the Clermont County Court of Common Pleas affirming the administrative decision of the Clermont County Board of

Revision (BOR) regarding a real property valuation for the 2009 tax year.

{¶2} On May 8, 2008, appellant purchased an apartment complex located at 4704 Beechwood Road in Clermont County for \$10.1 million. At the time appellant purchased the property, it was valued by the county auditor at \$7 million for the 2008 tax year. Due to the discrepancy in the auditor's value and the purchase price, the West Clermont Local School District Board of Education appealed the assessment to the BOR. At that time, the BOR found the value to be the sale price of \$10.1 million. That determination is currently on appeal to the Board of Tax Appeals.

{¶3} In 2009, the auditor valued the property at the purchase price of \$10.1 million. Following the auditor's assessment, appellant appealed to the BOR. At the BOR hearing, Cynthia Hatton Tepe, a certified general real estate appraiser, testified on behalf of appellant. Tepe testified that the appraised value of the property was \$6.35 million, as of the tax date of January 1, 2009, based on restricted rents required to receive federal low income housing tax credits. Despite Tepe's testimony regarding the appraisal of the property, after seeking legal counsel, the BOR determined that in the event of a recent sale, the sale price was the best indication of value regardless of an appraisal and maintained the \$10.1 million value.

{¶4} Appellant appealed the BOR's decision to the common pleas court. The common pleas court affirmed the decision of the BOR, finding that the May 2008 sale was recent and an arm's length transaction. The common pleas court determined that because of the recent and arm's length sale, the sale price of \$10.1 million was the best reflection of the property's value.

{¶5} Appellant now appeals the common pleas court's affirmation of the \$10.1 million valuation of the apartment complex and raises three assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED BY ADOPTING THE BOARD OF REVISION'S

DECISION AND APPLYING THE 2008 SALE PRICE AS THE BEST EVIDENCE OF VALUE BECAUSE THE SALE DOES NOT SATISFY THE RECENCY FACTORS SET FORTH IN THE CASE LAW TO MAKE IT THE BEST EVIDENCE OF VALUE."

{¶8} Assignment of Error No. 2:

{¶9} "THE TRIAL COURT ERRED BY ADOPTING THE BOARD OF REVISION'S DECISION, FAILING TO REDUCE THE TAXABLE VALUE OF THE PROPERTY BY THE AMOUNT OF THE PURCHASE PRICE THAT REPRESENTS THE VALUE OF THE TAX CREDITS."

{¶10} Assignment of Error No. 3:

{¶11} "THE TRIAL COURT ERRED BY ADOPTING THE BOARD OF REVISION'S DECISION, FAILING TO REDUCE THE TAXABLE VALUE OF THE PROPERTY BECAUSE THE APPELLEES FAILED TO REBUT BEECHWOOD'S EVIDENCE."

{¶12} The general rules of law regarding property valuation are found in R.C. 5713.03. This section states: "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 * * *. 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." In addition, the statute provides that when the above conditions of a recent and arm's length sale are met, the sale price is reflective of the true value, subject to two exceptions: "(A) The tract, lot, or parcel of real estate loses value due to some casualty; (B) An improvement is added to the property." R.C. 5713.03.

{¶13} The Ohio Supreme Court has held "when the property has been the subject of a recent arm's-length sale between a willing seller and a willing buyer, the sale price of the

property shall be 'the true value for taxation purposes.'" *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 269, 2005-Ohio-4979, ¶13, quoting R.C. 5713.03.¹ "Quite simply, the uniform rule is that property should be valued in accordance with an actual sale price where the criteria of the recency and the arm's-length character of the sale are satisfied. Where there is no such sale, the uniform rule envisions that an appraisal will be prepared * * *." *Cummins Property Serv., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, ¶25. When a recent and arm's-length sale is present, "such a sale price is deemed to be the value of the property, and the only rebuttal lies in challenging whether the elements of recency and arm's-length character between a willing seller and a willing buyer are genuinely present for that particular sale." *Id.* at ¶13.

{¶14} The sale price of realty may include items such as personal property or tax credits. See *Woda Ivy Glen Ltd. Partnership v. Fayette Cty. Bd. of Revision*, 121 Ohio St.3d 175, 2009-Ohio-762. On appeal from the BOR to the common pleas court, the court "must decide not only whether a proffered sale price satisfies the criteria of recency and arm's-length character, but also what amount of the stated sale price pertains to the realty." *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision*, 125 Ohio St.3d 103, 2010-Ohio-1040, ¶22. "[I]f the record clearly establishes that a portion of a sale price pertains to personal property, the BTA should subtract that portion from the stated sale price to arrive at the amount of consideration paid for the realty. The latter figure will then constitute the true value of the realty." *Id.*

{¶15} In this case, the common pleas court found that the sale was an arm's length transaction, and appellant does not challenge that determination on appeal. Nor does

1. An appeal from a BOR decision may be taken to the court of common pleas or to the board of tax appeals (BTA). R.C. 5717.05; R.C. 5717.01. Therefore, "the common pleas court and the BTA fulfill the same function when reviewing a decision of a board of revision, and BTA case law may be applied to the common pleas court proceedings in such appeals." *Murray & Co. Marina, Inc. v. Erie Cty. Bd. of Revision* (1997), 123 Ohio App.3d 166, 172.

appellant challenge the propriety of the valuation based on the statutory exceptions. Therefore, the rebuttal of the sale price as the proper valuation lies in determining what portion of the sales price pertains to realty and whether the sale meets the recency requirement.

{¶16} Regarding the standard of review, on appeal from the common pleas court to an appellate court, the appellate court will not reverse the lower court's decision regarding the valuation absent an abuse of discretion. *Black v. Bd. of Revision of Cuyahoga Cty.* (1985), 16 Ohio St.3d 11, paragraph one of the syllabus. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶17} For convenience of analysis, we will address appellant's second assignment of error first. In this assignment of error, appellant argues that the common pleas court erred in failing to reduce the taxable value of the property by the amount of the purchase price that represents the value of the tax credits.

{¶18} Appellant stated in his brief to the common pleas court that the property was eligible for tax credits of a value of approximately \$2.5 million, and that the price for the tax credits was a restrictive covenant binding the property to operate as program-based low income housing for 15 years.

{¶19} Appellant accurately argues *Woda*, 2009-Ohio-762, allows for low income tax credits to be valued as separate from property. According to *Woda*, there is "ample reason to disregard them [tax credits] as constituting a part of the value of the realty to the extent that tax benefits are transferred apart from any transfer of the underlying fee interest in the property." *Woda* at fn. 4. However, "when real property is the subject of a sale and the sale involves an incidental transfer of tangible or intangible personal property, the proponent of allocating a portion of the sale price to assets other than the realty 'bears an initial burden of

showing the propriety of the allocation.'" *Olentangy* at ¶24, citing *St. Bernard Self-Storage, L.L.C. v. Hamilton Cty. Bd. of Revision*, 115 Ohio St.3d 365, 2007-Ohio-5249, ¶14.

{¶20} At the BOR hearing, appellant argued that the best way to value the property was "based on actual income and expense of the property, consistent with the Wood [sic] Ivy Glen case." Appellant's counsel stated: "We think we're far enough removed, the marketplace is what it is, so that now or effective January 1, 2009, we're valuing the real estate based upon market conditions and the operations. And the appraisal indicates what it would sell for as of that date in the marketplace and that should be the basis of the Board of Revision's valuation." The appraisal was conducted on a restricted rent basis, implying that the property qualified for the tax credit on January 1, 2009, the retrospective date of the appraisal. However, the appraisal does not indicate that a portion of the purchase price of the property went to purchase the tax credits.

{¶21} The following exchange took place between appellant's attorney and the certified general real estate appraiser at the BOR hearing:

{¶22} "Q. Cindy, just to kind of round out the look at value, did you consider if this property were not subject to the restrictions and based upon your knowledge of the marketplace do you have an opinion as to whether the net income obtainable from the property would be significantly different than what is being achieved?

{¶23} "A. It could be a little bit different because not subsidizing the expenses might be a little bit less.

{¶24} "Q. But not materially less?

{¶25} "A. No."

{¶26} This testimony may suggest that the tax credits were not intended to be transferred as part of the underlying interest in the real property, because income received by the property owner is similar whether or not the property is subject to restrictions based on

the receipt of low income housing tax credits with the appraisal value of \$6.35 million based on these rents. However, our review of the record reveals this is the only portion of testimony that indicates the purchase price may have included something other than real property.

{¶27} Nor does the documentary evidence provide any indication of a transfer of tax credits. Line 7f on the conveyance fee statement states: "Consideration for real property on which fee is to be paid (7d minus 7e).....\$10,100,00.00." Line 7e on the conveyance fee statement states: "Portion, if any, of total consideration paid for items other than real property.....\$0."

{¶28} Given the lack of evidence showing that a portion of the sales price went to purchase the tax credits, we find that the common pleas court did not abuse its discretion by failing to reduce the purchase price by the tax credits. See *Olentangy*, 2010-Ohio-1040 at ¶24.

{¶29} Accordingly, appellant's second assignment of error is overruled.

{¶30} In its first assignment of error appellant argues the common pleas court erred by using the 2008 sale price as the best evidence of value because the sale does not satisfy the recency factors set forth in the case law to make it the best evidence of value.

{¶31} In its third assignment of error appellant argues that the common pleas court erred by failing to reduce the taxable value of the property because the appellees failed to rebut appellant's evidence.

{¶32} Because they are related, we will address these assignments of error together.

{¶33} Appellant concedes that only a short period of time passed between the sale and the tax lien date. However, in the first assignment of error appellant argues that three items made the sale price unreliable for valuation for tax purposes: "1) [the] influence of the tax credits on the price, 2) the effect of the recorded Restrictive Covenant, and 3) the changes in the marketplace * * *." In the third assignment of error, appellant argues that it

presented evidence sufficient to rebut the presumption that the purchase price was the best evidence.

{¶34} "The reasonableness of the length of time - sometimes expressed as whether the sale was 'recent' relative to the tax lien date - encompasses all factors that would, by changing with the passage of time, affect the value of the property." *Cummins*, 2008-Ohio-1473 at ¶35. Relevant factors include "general developments in the marketplace" and "conditions that are specific to the property itself." *Id.*

{¶35} In order to determine whether the common pleas court abused its discretion in finding the sale recent, we must first address the proper function of the court in regard to a BOR decision. According to R.C. 5717.05, "[t]he court may hear the appeal on the record and the evidence thus submitted, or it may hear and consider additional evidence." The court must make an independent judgment on the taxable value of the property based on the evidence, but is not required to conduct a de novo trial. *Black*, 16 Ohio St.3d at 13-14. However, the common pleas court's review should be "more than a mere rubber stamping of the board of revision's determination." *Id.*

{¶36} "The initial burden on a party presenting evidence of a sale is not a heavy one, where the sale on its face appears to be recent and at arm's length." *Cummins* at ¶41. The "presentation of basic evidence of the sale and the sale price such as the conveyance-fee statement usually suffices to place a burden on the owner to rebut that the sale price is the value." *N. Royalton City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 129 Ohio St. 3d 172, 2011-Ohio-3092, ¶11.

{¶37} 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."

{¶38} It is undisputed that the conveyance fee statement was included in the record reflecting a purchase price of \$10.1 million in May 2008. This presentation of such facial evidence is enough to establish the presumption that the sale price is the value of the property.

{¶39} Appellant contends that it presented sufficient evidence to rebut this presumption. The only evidence presented by appellant at the BOR hearing was the testimony of a certified general real estate appraiser and the appraisal.

{¶40} Regarding the changes in the marketplace, while conceding that the Clermont County Auditor's 2009 Annual Report was not in evidence before the BOR, appellant asked the common pleas court to take judicial notice of the report. The common pleas court declined to consider the report because it was not before the BOR. However, the common pleas court found that even considering the report, appellant did not provide "sufficient evidence to rebut the recency of the voluntary sale of the subject multifamily property for a properly negotiated price in 2008." The common pleas court also found that if appellant "wished to place evidence in the record regarding any market changes or other considerations it wanted the Board of Revision to consider in making its decision, it could have done so at that hearing."

{¶41} Because appellant did not present evidence pertaining to changes in the marketplace at the BOR hearing, but could have presented such evidence, we cannot say the common pleas court upon review abused its discretion in not allowing additional evidence. Nor can we say the common pleas court abused its discretion in finding the recent sale to be the value of the property.

{¶42} Concerning conditions specific to the property itself, appellant presented evidence regarding the valuation of the property subject to an encumbrance with the benefit of the low income housing tax credits in an appraisal. Generally, real property is to be valued as if unencumbered. *Muirfield Assn. v. Franklin Cty. Bd. of Revision* (1995), 73 Ohio St.3d 710, 711. While the effect of low income housing tax credit use restrictions must be taken into account when appraising a property according to *Woda*, 2009-Ohio-762, *Woda* did not concern a recent sale. *Woda* at ¶14, 30.

{¶43} It is unclear from the record if the restrictive covenant was in place at the time of the sale.² In any event, receiving the tax credits is dependent upon the restrictive covenant in regard to low income housing, and therefore, we will analyze the restrictive covenant and tax credits together.

{¶44} Appellant argues that "the Restrictive Covenant did not exist on the Property when the Auditor valued the Property at \$7,000,000.00 in 2008." Appellant also states: "The Purchase Price included the value of the real estate, as well as the value of the opportunity to obtain \$2,500,000.00 in tax credits that the Property was eligible for based on its operation within the parameters of the Government Programs." If the low income housing tax credit use restrictions were not in place at the time of the sale, then appellant's argument lacks merit because the property would have been unencumbered property at the time of the sale, and the sale price is reflective of its value. There is no evidence in the record as to what

2. The common pleas court quoted the "Administrative Appellate Brief of Appellant Beechwood II, L.P." in its decision/entry, stating: "When Beechwood purchased the Property, the Property was compliant with some, but not all, of the federal subsidized housing programs. Beechwood had to arrange for some improvements to be made in order for the Property to qualify for the tax credits. Once those improvements were put in place, the Property was eligible for tax credits with a value of approximately [\$]2,500,000. The price for those credits was a restrictive covenant binding the Property to operate as program-based low income housing for 15 years." Appellant states in his brief to this court that "the Board of Revision should have disregarded the Purchase Price because it contains compensation for the encumbrance, rendering the sale an unreliable measure of the Property's true (unencumbered) value." Neither the actual date of the restrictive covenant nor the restrictive covenant itself is cited in the record.

"improvements" appellant may have made to qualify for the tax credits. We cannot say the common pleas court abused its discretion in holding that the addition of low income housing tax credits and the restrictive covenant did not take the facts of this case outside of the Ohio Supreme Court's holding in *Berea*, 2005-Ohio-4979, that the sale price is the true value for tax purposes in the event of a recent and arm's length sale.

{¶45} Even if the restrictive covenant was in place at the time of the sale, the common pleas court did not abuse its discretion in determining the sale price was the correct value. The Ohio Supreme Court in *Cummins* stated: "We hold that we erred in *New Winchester* [*New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision*, 80 Ohio St. 3d 36, 1997-Ohio-360] when we authorized the use of appraisals to adjust the price set in a recent, arm's-length transaction. To do so places the cart (appraisal) before the horse (an actual arm's-length sale). As we explained more than 40 years ago, the best method of determining value is an actual sale of the property, but because such information is not usually available, an appraisal becomes necessary. *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 412, 25 O.O.2d 432. When value is determined by appraisal, 'the various methods of evaluation, such as income yield or reproduction cost, come into action,' but the goal of the appraisal is 'to determine the amount which such property should bring if sold on the open market.' *Id.*" *Cummins* at ¶23.

{¶46} With this in mind, the Ohio Supreme Court held in *Cummins* that a deed restriction did not take the facts outside of the general rule that the sale price is reflective of true value as articulated in *Berea*, 2005-Ohio-4979. *Id.* at ¶24.

{¶47} The common pleas court stated in its decision/entry in reference to *Cummins*: "The court revisited its ruling in the *New Winchester* case (wherein a recent sale price was adjusted due to subsidies provided for government housing) and stated that to use appraisals when there was a recent arm's length sale was an error."

{¶48} With the arm's length sale, we cannot say the common pleas court abused its discretion in not taking into account the restrictive covenant or the tax credits in making its valuation and determining the sale recent.

{¶49} Appellant's first and third assignments of error are overruled.

{¶50} Judgment affirmed.

HENDRICKSON, P.J., and HUTZEL, J., concur.