

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

KROGER CO., ET AL	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Patricia A. Delaney, J.
Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 15-CA-37
LICKING COUNTY BOARD OF	:	
REVISION, ET AL	:	
	:	<u>OPINION</u>
Appellants	:	

CHARACTER OF PROCEEDING: Civil appeal from the Ohio Board of Tax Appeals, Case No. 2013-199

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: January 20, 2016

APPEARANCES:

For Board of Education of Reynoldsburg For Kroger Co.

RONALD NOGA	STEVEN SMISECK
1010 Old Henderson Road, Suite 1	52 East Gay Street
Columbus, OH 32220	Columbus, OH 43215

*Gwin, P.J.*

{¶1} Appellant appeals the May 5, 2015 Decision and Order of the Ohio Board of Tax Appeals determining the value of the property.

*Facts & Procedural History*

{¶2} The property at issue in the above-captioned case is located at 8460 East Main Street, in Reynoldsburg, Ohio. It is a single parcel of land improved by a parking lot, gas station, and a Kroger supermarket. For the tax year 2011, the Licking County Auditor valued the property at \$5,992,800. Appellee Kroger Company (“Kroger”) filed a complaint against valuation with the Licking County Board of Revision (“BOR”) challenging the auditor’s valuation.

{¶3} The BOR held a hearing on Kroger’s complaint on October 24, 2012. Kroger presented the testimony and written report of Curtis Hannah (“Hannah”) of Integra Realty Resources, a state-certified general real estate appraiser. Counsel for appellant, the Board of Education of Reynoldsburg City School District (“BOE”), stipulated to Hannah’s qualifications to the extent listed in the appraisal report. Counsel for Kroger completed a direct examination of Hannah, during which Hannah testified about and reviewed the appraisal report he prepared for the property. Hannah stated he was asked to form an opinion of the value of property at 8460 East Main Street as of January 1, 2011. His opinion as to the valuation is \$3,200,000.

{¶4} On cross-examination, counsel for the BOE questioned Hannah on his use of valuation approaches. Hannah testified he placed primary reliance on the sales comparison approach. However, the income capitalization approach was only \$110,000 different from the sales comparison approach, so there was relative support of the value

indication. As to the sales comparisons Hannah used, he stated that the subject property is inferior to most of the recent leasing activity in Columbus because it is on the fringes of Reynoldsburg in a low-traffic area. The BOE did not present any evidence at the hearing.

{¶5} On December 20, 2012, the BOR issued a notice of resolution decreasing the value of the property to \$4,500,000. Kroger filed a timely appeal to the State of Ohio Board of Tax Appeals (“BTA”). The BTA scheduled a hearing for January 7, 2014. On January 6, 2014, the parties filed a joint waiver of hearing. The joint waiver stated that Kroger and the BOE jointly notified the BTA of their election to waive the hearing scheduled for January 7, 2014. Further, the parties “requested that the matter be submitted upon the record of the proceedings before the BOR and the briefs of the parties.”

{¶6} The BOE filed a brief with the BTA on February 28, 2014. The BOE argued that, as a result of Kroger’s waiver of hearing before the BTA, there is no evidence beyond what was presented at the BOR hearing. Further, that Hannah’s appraisal is unreliable, lacks verifiability, and credibility because Hannah did not testify at the BTA hearing. The BOE cited *Holub v. Lorain County Board of Revision* in support of its position. The BOE challenged Hannah’s valuation as follows: the appraisal failed to account for the full value of the property as it did not consider the fuel station; the appraisal valuation was not credible because numerous valuation factors used in appraisal are not relevant to the subject property; and the appraisal lacks verifiability and credibility to meet Kroger’s burden. Kroger filed its brief on March 7, 2014, and argued it produced probative evidence of value through the appraisal testimony and report, which is before the BTA by

way of the statutory transcript. Further, that the BOE presented no evidence to rebut Hannah's valuation.

{¶7} The BTA issued a Decision and Order on May 5, 2015. The BTA noted the record consists of the notice of appeal, statutory transcript, and the written arguments submitted by the parties. Further, that all parties waived the right to appear at hearing before the BTA. The BTA stated Kroger must prove the adjustment in the value requested and, once competent and probative evidence of the true value has been presented by Kroger, the opposing party has the burden of providing evidence which rebuts Kroger's evidence of value. The BTA noted it must look to all aspects of the record in their independent review of subject property's value.

{¶8} In its decision and order, the BTA detailed the facts and analysis of Hannah's report, including the fact that Hannah employed both the income capitalization and sales comparison approaches to valuation, placing the most weight upon the conclusions reached under the sales comparison approach. The BTA stated that when parties rely on an appraiser's opinion of value, the BTA may accept all, part, or none of the appraiser's opinions and, since an appraisal is not an exact science, the reliability depends on the competence, skill, and ability demonstrated by an appraiser.

{¶9} The BTA found *Holub v. Lorain County Board of Revision* to be distinguishable from the instant case and thus the BOE's *Holub* argument to be without merit. Unlike in *Holub*, in this case, Hannah appeared before the BOR to authenticate his report and was subject to cross-examination. As to the BOE's argument that the BOR found Hannah's appraisal flawed, the BTA found the BOR did not state the appraisal was

flawed and the record is silent as to what the BOR relied upon in rendering its valuation determination.

{¶10} The BTA found that Hannah, on cross-examination and in the supporting information contained in his report, provided sufficient competent and probative responses to the BOE's concerns about the choice of sales and rent comparables and the capitalization rate. The BOE provided no evidence of value. The BTA did agree with one concern of the BOE: that the appraisal improperly failed to attribute value to the fuel center improvements. Thus, the BTA concluded the amount attributable to such improvements (\$42,000) should be added to the appraisal amount to reflect all of the improvements on the property. The BTA concluded that, based upon the preponderance of the evidence currently before them, the value of the property as of January 1, 2011 is \$3,242,000.

{¶11} The BOE appeals the May 5, 2015 Decision and Order of the BTA and assigns the following as error:

{¶12} "I. THE BOARD OF TAX APPEALS' DECISION IS UNREASONABLE AND UNLAWFUL IN THAT THE BTA MISINTERPRETED AND MISAPPLIED THE STANDARD AND BURDEN OF PROOF REQUIRED OF AN APPELLANT SEEKING A REDUCTION IN VALUE FROM AN INDEPENDENT VALUATION OF A BOARD OF REVISION. THE BTA UNLAWFULLY HELD THE KROGER CO. HAD MET ITS BURDEN OF PROOF EVEN THOUGH IT FAILED TO PROVIDE DE NOVO TESTIMONY OR EVIDENCE AT THE BTA LEVEL AND FAILED TO IDENTIFY ANY LEGAL ERROR IN THE BOARD OF REVISION'S DETERMINATION.

{¶13} “II. THE BOARD OF TAX APPEALS’ DECISION IS UNREASONABLE AND UNLAWFUL IN THAT THE BTA ERRED AS A MATTER OF LAW IN ADOPTING THE ROLE OF A REVIEW BOARD EMPOWERED TO RE-FIND FACTS FOUND BY THE BOARD OF REVISION WHEN NO TESTIMONY OR EVIDENCE WAS ADDUCED AT THE BOARD OF TAX APPEALS LEVEL, THEREBY NULLIFYING THE STATUTORY ROLE OF THE BOARD OF REVISION WHICH HAD REACHED AN INDEPENDENT VALUTION OF THE SUBJECT PROPERTY.”

*Standard of Review*

{¶14} The BOE appeals the decision and order of the BTA pursuant to R.C. 5717.04. The statute reads, “[t]he proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides.”

{¶15} The issue before this Court is whether the BTA acted reasonably and lawfully when it valued the property at \$3,242,000. In *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision*, 139 Ohio St.3d 92, 2014-Ohio-1588, 9 N.E.3d 1004, the Ohio Supreme Court recited the standard of review for an appeal of a BTA decision: “[t]he true value of property is a ‘question of fact, the determination of which is primarily within the province of the taxing authorities’ and accordingly we ‘will not disturb a decision of the Board of Tax Appeals with respect to such valuation unless it affirmatively appears from the record that such decision is unreasonable or unlawful.’” *Id.*, quoting *Cuyahoga Cty. Bd. of Revision v. Fodor*, 15 Ohio St.2d 52, 239 N.E.2d 25 (1968).

## I.

{¶16} The BOE first argues the BTA did not correctly apply the burden of proof. The BOE contends that since Hannah did not appear at the BTA hearing and was not subject to cross-examination by the BTA, the weight and reliability of his opinion cannot be assured. Further, that numerous areas of his report could not be assured without his testimony, including the location of sales comparables, types of rent comparables, and the capitalization rate. The BOE argues since the BOR rejected the appraiser's determination, Kroger had to provide new evidence to the BTA to prove a reduced value in order to meet their burden.

{¶17} The party challenging the BOR's decision at the BTA has the burden of proof to establish its proposed value as the value of the property. *Dayton-Montgomery Columbus City School Dist. Bd. Of Edn. v. Franklin Cty. Bd. Of Revision*, 90 Ohio St.3d 564, 740 N.E.2d 276 (2001). The BTA has "wide discretion to accept all, part, or none of the testimony of any appraiser presented to said board \* \* \* [a]bsent an abuse of that discretion, the BTA's determination as to the credibility of witnesses and weight to be given their testimony will not be reversed by this court." *Witt Co. v. Hamilton Cty. Bd. of Revision*, 61 Ohio St.3d 155, 573 N.E.2d 661 (1991). If the only evidence before the BTA is the statutory transcript from the BOR, the "BTA must make its own independent judgment based on its weighing of the evidence contained in the transcript." *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13, 1996-Ohio-432, 665 N.E.2d 1098. The evidence contained in the record to the BTA from the BOR may be used as the sole basis for deciding the appeal. *Edbow, Inc. v. Franklin Co. Bd. of Revision*, 85 Ohio St.3d 656, 1999-Ohio-331, 710 N.E.2d 1112.

{¶18} Upon our review of the record in this case, we find the BTA did not err in reviewing the evidence Kroger presented to the BOR and contained in its transcript certified to the BTA, or in granting credibility to Hannah and weight to his report. As to the BOE's argument that the BTA had to take additional evidence, Ohio Administrative Code 5717-1-15(B) provides that a BTA hearing "may be waived, in writing, with the consent of all parties and the board. If waived, the board may proceed to decide the case upon the record." In this case, the BOE joined in waiving the hearing; after doing so, as the rule states, the BTA could decide the case on the record.

{¶19} The BOE contends the case of *Holub v. Lorain Cty. Bd. of Revision* is instructive in this case as it stands for the broad proposition that appraisal evidence, when unsupported by testimony of the appraiser at the BTA, is unreliable, even if the appraiser testified at the BOR. We disagree.

{¶20} In *Holub*, the BTA held a hearing at which the appellants sought to introduce a written appraisal report authored by a certified appraiser. BTA Nos. 2009-Y-2557, 2010-Y-1539, 2012 WL 2517956 (June 19, 2012). The appellees specifically objected to the report at the BTA hearing on the basis of hearsay. The BTA noted the "fundamental proposition" that "[a]n expert's opinion of value in a tax valuation case is of little help to the trier of fact if the expert does not explain the basis for the opinion." *Id.*, citing *Freshwater v. Belmont Cty. Bd. of Revision*, 80 Ohio St.3d 26, 1997-Ohio-362, 684 N.E.2d 304. The BTA found they could not properly review the method the appraiser used to evaluate the property because the appraiser did not testify at the BOR hearing. *Id.* Accordingly, the BTA found the appraiser's recommendation did not "carry sufficient



indicia of reliability to overcome appellees' hearsay objection" and did not entered the appraiser's report into evidence. *Id.*

{¶21} The instant case is distinguishable from the *Holub* case in multiple respects. First, the BOE in this case made no specific evidentiary objection to Hannah's testimony or report at either the BOR or BTA level. Unlike the report in *Holub* that was neither authenticated by its author before the BOR or the BTA, in this case, Hannah appeared before the BOR to authenticate his report and was subject to cross-examination. Further, in this case, Hannah's testimony explained the basis for his opinion.

{¶22} Rather, we find the instant case to be analogous to *Edbow, Inc. v. Franklin Co. Bd. of Revision*, 85 Ohio St.3d 656, 1999-Ohio-331, 710 N.E.2d 1112, in which the appraiser for the owner testified at the BOR hearing and the parties waived an evidentiary hearing at the BTA. The appellant argued the BTA could not accept the opinion of the appraiser because he did not appear personally before the BTA and thus his appraisal report and testimony was not competent evidence of the true value of the property. In affirming the decision of the BTA, the Ohio Supreme Court found that the BTA has wide discretion to accept all, part, or none of the testimony of any appraiser presented to the board. *Id.* Further, if the only evidence before the BTA is the statutory transcript, the BTA must make its own independent determination based on weighing the evidence in the transcript and the evidence contained in the record to the BTA from the BOR may be used as the sole basis for deciding the appeal. *Id.* Finally, the Court found that the BTA adequately explained why it accepted the appraiser's valuation and that the appellants in the case failed to provide any competing evidence to rebut the appraiser's evidence. *Id.*

{¶23} In this case, Hannah testified at the BOR hearing and the parties waived an evidentiary hearing at the BTA. The BOE had the opportunity to present evidence regarding value and had the opportunity to cross-examine Hannah at the BOR hearing as to his qualifications, methodology, and his overall opinion of value. The full testimony of this cross-examination was before the BTA as it was included in the statutory transcript. The BTA made its own independent determination based on weighing the evidence in the transcript and the evidence contained in the record to the BTA from the BOR, including the property record card, Hannah's appraisal report, and Hannah's testimony. The BTA had wide discretion to determine the weight and credibility of the evidence. The BOE has failed to show that the BTA abused its discretion in granting credibility to witnesses and weight to evidence.

{¶24} The BTA detailed the facts and analysis of Hannah's report, including Hannah's determinations as to the income capitalization and sale comparison approaches to valuation. As to the BOE's concerns regarding the choice of sales and rent comparables and the capitalization rate, the BTA found that in Hannah's cross-examination and in his report, he provided sufficient competent and probative responses to the BOE's concerns about the choice of sales and rent comparables and the capitalization rate. The BTA adequately explained why it accepted Hannah's valuation and why it rejected the BOE's criticisms of the appraisal evidence as to comparables and the capitalization rate. The BTA decides these kinds of factual matters. *Wolf v. Cuyahoga Cty. Bd. of Revision*, 11 Ohio St.3d 205, 465 N.E.2d 50 (1984). Hannah advanced several grounds in support of his methods and the BOE has not negated them.

{¶25} Further evidence of the fact that the BTA's decision was the product of an independent determination based upon the record is that the BTA did agree with one concern of the BOE with regard to Hannah's appraisal and did not simply adopt Hannah's appraisal in its entirety. The BTA found Hannah improperly failed to attribute value to the fuel center improvements. Thus, the BTA concluded the amount attributable to such improvements (\$42,000) should be added to valuation amount advanced by Hannah to properly reflect all of the improvements on the property.

{¶26} We find that sufficient, probative evidence of record supports the BTA's factual findings and the BTA exercised sound discretion in ruling on the credibility of the witnesses and the weight attributed to the evidence. The BOE did not provide any competing evidence to rebut these factual findings. If an appellee before the BTA in a valuation case does not present any evidence to rebut the 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." *Westhaven, Inc. v. Wood Cty. Bd. of Revision*, 81 Ohio St.3d 67, 1998-Ohio-446, 689 N.E.2d 38. Alternatively, "the appellee may present evidence and the BTA may or may not find that evidence to be credible and probative in rebutting the appellant's evidence." *Id.* As noted by the Ohio Supreme Court, "counsel's speculations do not equate to an expert's opinion." *Sears, Roebuck & Co. v. Franklin Cty. Bd. of Revision*, -- N.E.3d --, 2015-Ohio-4522 (Nov. 3, 2015). Accordingly, we find that the BTA's decision is reasonable and lawful. The BTA applied the proper standards and burdens when it independently determined the value of the property. The BTA reviewed the entire record before it and reached an independent determination of value based upon this evidence.

{¶27} We disagree with the BOE's assertion that since the BOR rejected Hannah's appraisal, the BTA must reject his appraisal if no new evidence is presented at the BTA hearing. First, the BOR did not "reject" Hannah's appraisal. As noted by the BTA, the record is silent as to what the BOR relied upon in rendering its valuation determination. Further, the BTA cannot yield its independent role to the BOR. "While a determination of the true value of the real property by a BOR is entitled to consideration by the BTA, such determination is not presumptively valid." *Columbus Bd. of Education v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13, 1996-Ohio-432, 665 N.E.2d 1098. Here, the BTA did consider the BOR's determination, but found the BOR did not provide a record as to what it relied upon in rendering its valuation since it was different from Hannah's testimony and different from the auditor's initial valuation.

{¶28} The BOE's first assignment of error is overruled.

## II.

{¶29} The BOE argues that the BTA cannot change the value from the value determined by the BOR without direct evidence at the BTA level presented at a BTA hearing. The BOE specifically contends that while the BTA can issue rulings on legal issues without further evidence at the BTA level, when value opinions are at issue, these factual issues cannot be resolved without further evidence at the BTA hearing. We disagree.

{¶30} R.C. 5717.01 provides that the county Board of Revision shall certify to the BTA a transcript of the record of proceedings of the county BOR and all evidence offered in connection therewith. After the BTA receives the transcript, it may "order the appeal to be heard on the record and the evidence certified to it by the county board of revision, or

it may order the hearing of additional evidence, and it may make such investigation concerning the appeal as it deems proper.” All parties are afforded an opportunity to offer evidence before the BTA, within the limits of R.C. 5715.19(G). *Bd. of Edn. of Columbus City School Dist. v. Franklin Cty. Bd. of Revision*, 90 Ohio St.3d 564, 2001-Ohio-16, 740 N.E.2d 276.

{¶31} In this case, both parties requested the matter be admitted upon the record of the proceedings before the BOR and waived the evidentiary hearing before the BTA. “By agreeing to waive an evidentiary hearing before the BTA, both parties agreed to have the case decided based on the record as it existed.” *Id.* Thus, when the “BTA reviews the evidence in a case in which the statutory transcript is the only evidence, the BTA must review the transcript and make its own independent judgment based on its weighing of the evidence contained in the transcript.” *Id.* In this case, the BTA’s review of the evidence is thorough and comprehensive. The BTA independently weighed and evaluated the evidence before it and made an independent determination regarding value based upon the record before it.

{¶32} The BOE’s argument that when opinions of value are at issue and the credibility of a witness is critical, further evidence at the BTA hearing level is required before the BTA can change the value determination from the BOR is directly contradicted by case law from the Ohio Supreme Court and the Ohio Revised Code. R.C. 5703.02(A)(2) provides that for appeals from a BOR, the BTA is to “hear and determine all appeals of questions of law and fact.”

{¶33} The Ohio Supreme Court has noted the independent role of the BTA and stated the BTA “should ensure its final determination is more than a mere rubber stamping

of the board of revision's determination.” *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13, 1996-Ohio-432, 665 N.E.2d 1098. If the only evidence before the BTA is the statutory transcript from the BOA, the BTA must make its own independent judgment based on its weighing of the evidence contained in that transcript and cannot yield its independent role to the BOR. *Id.* “While a determination of the true value of the property by a BOR is entitled to consideration by the BTA, such determination is not presumptively valid.” *Id.* Further, evidence contained in the record to the BTA from the BOR may be used as the sole basis for deciding the appeal. *Edbow, Inc. v. Franklin Co. Bd. of Revision*, 85 Ohio St.3d 656, 1999-Ohio-331, 710 N.E.2d 1112.

{¶34} In this case, if the BTA had adopted the value of the BOR without independently weighing the evidence contained in the statutory transcript as the BOE suggests was the only lawful decision, the BTA would not be fulfilling its statutory duty to conduct its own analysis and making an independent determination as to the taxable value of the property. *Dublin City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.2d 222. While the Ohio Revised Code contemplates a *decision* de novo by the BTA based upon its independent review of the evidence from the statutory transcript from the BOR, it does not require or provide for an original action or a trial de novo. *Black v. Bd. of Revision of Cuyahoga Cty.*, 16 Ohio St.3d 11, 475 N.E.2d 1264 (1985); *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13, 1996-Ohio-432, 665 N.E.2d 1098.

{¶35} The BOE’s second assignment of error is overruled.

{¶36} Based upon the foregoing, we overrule the BOE's assignments of error and affirm the May 5, 2015 Decision and Order of the Ohio Board of Tax Appeals setting the value of the property at \$3,242,000.

By Gwin, P.J.,

Delaney, J., and

Baldwin, J., concur