IN THE SUPREME COURT OF OHIO

HON. DUSTY RHODES, HAMILTON COUNTY AUDITOR,	:	**CASE NO. 2007-0615**
Appellee	:	
v.	:	
HAMILTON COUNTY BOARD OF REVISION, THE BOARD OF EDUCATION OF THE PRINCETON CITY SCHOOL DISTRICT AND THE TAX COMMISSIONER OF THE STATE OF OHIO,	:	**Appeal from the Ohio Board of Tax Appeals**
Appellees	:	
and	:	
MA RICHTER VILLA LTD. AND VIGRAN, BROTHERS VILLA LTD.,	:	**Board of Tax Appeals Case No. 2005-M-1098**
Appellants	:	

MERIT BRIEF OF APPELLEE HAMILTON COUNTY AUDITOR DUSTY RHODES

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II. INTRODUCTION

The Appellant in his Notice of Appeal listed eighteen assignments of error. In this Merit Brief, eight propositions of law are advanced. All of the propositions are essentially duplicative and raise the same issue, namely that the Court should make an exception to its ruling in *Berea City Schools v. Cuyahoga Board of Revision* (2005), 106 Ohio St.3d 269 2005-Ohio-2176. The Appellant argues the sale of the property should be ignored as well as the testimony and report of the Auditor's expert, Ms. Antoinette Ebert. Instead, Appellant argues the Court should adopt the testimony of its appraiser, Mr. Robin Lorms, who states the subject property, a brand new building, should be valued at approximately half of what it sold for and that the market rent should be half of what the subject and all competitive drugstores pay. His theory is advanced primarily because the property is at 14,000± square foot building that he claims was a "build-to-suit." However, there is no evidence in the record as to how this generic 14,000± square foot box is in any significant way different from any other "box" store.

Despite all the extended reports and testimony, this case is really about a reality check:

- Can a brand new property be worth less than half what it cost to build the day it is finished, particularly when the property is a generic 14,000 ± square foot box?
- Would one of the world's largest drugstores (and its competitors as well) with the best credit rating pay not just more than market rent, but twice what market rent is?
- Can property be worth less than half of what it just sold for?
- Can all similarly situated drug stores, both Walgreens and its competitors, be worth half of what they sell for?

We would respectfully suggest that the answer to all of the above are obvious. The theory the Appellant expounds is more anecdotal than real, and creates a value contrary to what the free

market clearly indicates.

STATEMENT OF FACTS

The tenant (Walgreens) on behalf of the property owner filed a complaint with the Hamilton County Board of Revision (BOR) seeking to decrease the value of the subject property, a newly constructed Walgreens drugstore, from the $4,375,000 value it had recently sold for and the Auditor had appraised it for.

At the BOR hearing the Auditor's staff appraiser, Antoinette (Toni) Ebert was in agreement with the School Board that the value of the property was $4,375,000, the price for which the property sold on April 14, 2003. The owner presented no parties or persons involved in the sale. The owner presented only the testimony of Robin Lorms, an appraiser. Mr. Lorms presented an appraisal report expressing an opinion of value of $1,950,000. (Mr. Lorms at the BTA would prepare a second report dated a week before trial. The second report while reaching the same value conclusion, adds a few comparable sales, but primarily has an extended advocacy of Mr. Lorms' misplaced theory, as well as deleting certain passages in the first report that emphasized the subject's location).

The BOR voted 2-1 (with the Auditor dissenting) to decrease the value of the property to the opinion expressed by Mr. Lorms rejecting the recent arms-length sale of the property. The Auditor appealed the decision of the BOR to the BTA.

The property owner never disputed that the sale was arms-length. They presented no argument to this effect at the BOR. They did not allege it in their opening statement at the BTA. They put on no evidence to the contrary during their case in chief. Their appraiser did not contest it in either of his lengthy reports. Ms. Ebert also presented an appraisal at the BTA. She also did

not dispute the arms-length nature of the sale.

Mr. Lorms admitted he was not privy to the details of the sale. He admitted the sale was not a sales-leaseback, but said it was analogous to it. No one testified for the buyer or seller. Mr. Lorms' testimony is based on how he thinks things are usually done in a build-to-suit transaction. In this case, Mr. Lorms did not have the floor pan, the site plan, or (initially) the costs involved in constructing the store, and no first-hand knowledge or involvement in the sale (Appellant's Supplement p. 45, T.p. 172).

A sale-leaseback occurs where only two parties are usually involved, where the owner of a building sells the building and then leases it back. This transaction, as evidenced by the conveyance fee statement shows a transfer from Neyer Retail, LLC to MA Richter Villa, Ltd. & Vigran Brothers Villa, Ltd. The lease (nowhere introduced into evidence) is with Walgreens, a third party tenant. The same lease was in effect before and after the sale. There is no evidence, other than Mr. Lorms' surmise, that this arms-length sale is anything like a sales-leaseback.

The BTA adopted the sales price as the value and did not give weight to either appraisal report.

III ARGUMENT

APPELLANT'S PROPOSITION OF LAW #1

The holding in *Berea City School District Board of Education v. Cuyahoga County Board of Revision* (2005), 106 Ohio St.3d 269 is not applicable to this case as the *Berea* case addressed the acceptance of a sale price that was indicative of the value of the real estate in-exchange where the property was multi-tenant and not built-to-suit a tenant. In contrast, the instant matter concerns the sale of a single tenant property valued in-use, where the property was built to that tenant's unique needs and the transfer is reflective of the business success and credit-worthiness of the tenant and is unrelated to

the value of the underlying real estate.

In *Berea City Schools v. Cuyahoga Board of Revision* (2005), 106 Ohio St.3d 269, 2005-Ohio-2176 the Court adopted the sales price of a project even though it was encumbered with long term non-market leases. The Court followed *Berea* in *Lakota School District v. Butler County Board of Revision* (2006), 108 Ohio St.3d 310, in that it adopted the sales price as value even though seller-financing may have affected the price.

The Appellant argues that the BTA adopted a value-in-use for the subject property and urges what it calls a narrow exception to the *Berea* rule for build-to-suit, single-tenant buildings, where the tenant has a long term lease and the tenant is creditworthy.

In this case, the Appellant presented no parties or persons involved with or even familiar with the sale. The only witness was an appraiser hired by the tenant with hearsay knowledge about the sale. However, even the appraiser did not dispute that it was arms-length, but sought to recharacterize it as "analogous to a sales-leaseback."

In *New Winchester Gardens, Ltd. v. Franklin City. Bd. of Revision* (1997) 80 Ohio St.3d 36, the Court affirmed the BTA's rejection of an appraiser's testimony about a sale (which he characterized as a "resyndication") as hearsay.

The Court stated that in the absence of an arms-length sale, an appraisal was not appropriate. The Court said:

> "If New Winchester could prove that the sale was not an arm's-length sale, then it would have been appropriate for the BTA to review independent appraisals based upon factors other than the price to show that the 1984 sale price did not reflect true value. *Ratner v. Stark Cty. Bd. of Revision* (1986), 23 Ohio St.3d 59, 23 OBR 192, 491 N.E.2d 680, syllabus.
>
> At the BTA hearing, for tax year 1986, New Winchester introduced the testimony of appraiser John Garvin. In addition to his appraisal testimony, Garvin, over objection,

testified to details concerning the 1984 sales transaction. However, in its final decision, the BTA rejected Garvin's testimony as hearsay because he had no personal knowledge of the sale, and the sale documents were not introduced."

Unless it can be shown that a sale were not arm's-length, the testimony of an appraiser as to his personal opinion of what the property should have sold for is not relevant.

In *Ratner v. Franklin Cty. Bd. of Revision* (1988), 35 Ohio St.3d 26, the Supreme Court held that the relevance of appraisals before the Board of Tax Appeals was not an issue because the sales price was established as arm's-length.

In *Cincinnati Bd. of Edn. v. Hamilton Cty. Bd. of Revision* (1997), 78 Ohio St.3d 325, the Court held those seeking to overcome the presumption of a sale price had to satisfy a two-step process.

> "In *Ranter, supra,* we held in the syllabus: 'A review of independent appraisals based upon factors other than the sale price is appropriate where it is shown that the sale price does not reflect true value.' The burden of persuasion at the BTA was always on the BOE, as appellant, to prove its right to an increase in value. See *R.R.Z. Assoc. v. Cuyahoga Cty. Bd. of Revision* (1988), 38 Ohio St.3d 198, 527 N.E.2d 874, and *Cleveland Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (1994), 68 Ohio St.3d 336, 626 N.E.2d 933. To prove its right to an increase in value the BOE had to prove two points. First, the BOE had to prove that the sale price did not reflect true value. To prove that point the BOE attempted to prove that the sale was not an arm's-length sale. If the BOE had proven the first point, it next had to establish the increased valuation. In this case the BOE never got beyond the first point. Thus, consideration of the auditor's appraisal never became an issue." *Id.* at 328-329 (Emphasis added.)

The Supreme Court has recently reaffirmed its position that a sale in the marketplace constitutes value. See *Berea City School v. Cuyahoga Bd. of Revision* (2005) 106 Ohio St.3d 269 and *Lakota School Bd. v. Butler Cty. Bd. of Revision* (2006) 108 Ohio St.3d 310.

Thus the Appellant's lengthy arguments about why the BTA should have accepted the novel theories of Mr. Lorms are inappropriate. However, notwithstanding the Court's consistent holdings,

most notably in *Berea*, the Appellant's arguments are still without merit.

In this case there is no evidence that the so-called build-to-suit building is anything other than a generic 14,000 ± square foot box. Common experience indicates that all drugstores (with the exception of minor size differences) are virtually identical. In this case, no one from the seller, the buyer, the developer, or Walgreens ever testified. The floor plans were never introduced. No evidence was presented to show anything unique about this property, certainly nothing to justify the almost $2.5 million retrofit that Appellant's appraiser takes as functional obsolesence. The only "evidence" is the anecdotal testimony of the appraiser, Mr. Lorms, that this property is unique. Mr. Lorms further claims that the purchaser paid $4,375,000 for this property was not a knowledgeable real estate investor and only purchased it because of the credit worthiness of the tenant. He supports his theory by analyzing sales of abandoned buildings, or buildings in poor locations with subleases, or leases with non-compete agreements, that prohibit the lease of the property to competitors.

Despite Mr. Lorms' extended advocacy for his position in his two appraisal reports, and his testimony, there is almost no support in the record for his theory, other than a "Letter to the Editor" (disputing the original article) that he relies on heavily (Appellant's Supplement p. 41, 168-170). The Auditor's appraiser, Ms. Ebert, testified there is no significant difference in competing drugstores.

While it is true, the tenant has a high-credit rating, that alone does not exclusively drive the market, as Mr. Lorms suggests.

As Ms. Ebert states, (Appellant's Supplement p.8, T.pp 26-27, Supp p.9, T.p 31):

> **Q:** The mere fact that in this case, Walgreens pays $26 a square foot rent and that investors are interested in that, investors – in fact, investors are interested in not only who the tenant is, but the location of the property?
> **A:** Yes.

Q: So do investors seek out bad locations with bad tenants?
A: No.
Q: What would the ideal investor want to purchase when it's looking for real estate?
A: The highest return.
Q: Where would they find that?
A: With a secure – well, real estate basically comes down to location. A good location is going to – it's going to create a good tenant, which is going to create a good rent.
Q: All right. Is that the point of your last sentence on page 42 where you say, "Clearly, location drives this market"?
A: Yes.
Q: Then you say in the middle paragraph, here the last sentence, that the leased fee and the fee simple are one and the same, correct?
A: Yes.
Q: How do you arrive at that conclusion?
A: In this instance, I believe it does, that it is very similar. The result is involving – evolving in a flourishing market that is locationally driven and revolves around current development costs, current interest rates, current cap rates and expected rates of returns.

These properties are marketed on these various sites, and it's a willing investor purchasing the property.

Does a high quality building with Class A tenants achieve higher rents and higher sales prices because of reduced risk? Of course. But what drives all of this is location. This is not precisely a chicken and the egg question because here we know for certain what came first -- – the location. The major drugstore chains aggressively compete for high profile corner locations, and they all pay similar rents. It is driven by competition and location – – the very reality of the fair market that this Court adopted in *Berea* and *Lakota, supra.*

As Ms. Ebert and Mr. Lorms both say, the national drug store chains create their own market (Appellant's Supplement p. 39, T.p 149). This Court has never said you had to ignore the property's current use. On page 9 of its brief, the Appellant incredibly says that the evidence of value in use "has not been impeached or rebutted in any way." Of course, the record is replete with the testimony and appraisal of Ms. Ebert, as well as the vigorous cross-examination of Mr. Lorms

rebutting and disproving this unsupported theory.

The Court in *State ex. rel. Park Inv. Co. v. Board of Tax Appeals* (1972), 32 Ohio St.2d 28 banned "current use" or "value in use" because it "excludes, among other factors, **location** . ." (emphasis added). Here, location is what drives the value. Appellant's Brief mischaracterizes the Ohio Supreme Court's ruling concerning current use. The *State ex rel. Park* case did not state that current use is irrelevant to valuation. It merely held that assessment laws must not restrict assessment solely to current-use – – it feared that positive valuation factors such as location and speculative uses might not be reflected in such a limiting approach. It did not prohibit the use of a "highest and best use" approach, or in any way infer that appraisers should lower their values to some average value that would occur in a worst-case scenario (which is what Mr. Lorms espouses). The Court was afraid that a lower value would result from a current use straight-jacket approach. Nowhere in the case does the court infer that current use should be prohibited because a higher value might result. That would fly in the face of the highest and best use approach. Nothing in the Court's decision deals with sales based on current use, when the current use is the highest and best use.

The Appellant's manufacturing example is perhaps a good example of current use, but it is completely inappropriate to the case of a generic big box that has nothing in it that would not be used by competitors (Can there be any doubt that CVS, another competitor, would love to have their store in this affluent neighborhood on a high profile corner location? Other than changing the sign, would it require more than $2.5 million dollars to transform this box from a Walgreens to a CVS?).

The difference in size is apparently only important to Mr. Belfrage in this case. A week earlier, he testified at the BTA concerning a Wal-Mart and said free-standing drugstores are comparable in size. The following exchange takes place (Appellants' Supplement p. 43, T.pp 162-

163):

Q: Mr. Lorms, you testified a week or ten days ago on a Wal-Mart property?
A: Yes.
Q: You prepared an appraisal report for that?

• • •

Q: You said recently constructed, free-standing drugstores are all reasonably comparable in size. Did you write that in your report?
A: Yes, they're reasonably comparable in size.

A week earlier the size of drugstores didn't matter. Now apparently it warrants cutting the sales price in more than half.

Mr. Lorms' comparables all suffer for similar failures – – abandoned properties, second tier tenants, subleases, leases restricting the leases to non-competitors. We do not question that these type of properties sell for significantly less than the subject. However, these types of properties are not similar to the subject.

The *Appraisal of Real Estate*(Chicago: The Appraisal Institute, 12th edition, 1994):

Economic Characteristics
Economic characteristics include all the attributes of a property that directly affect its income. This element of comparison is usually applied to income-producing properties. Characteristics that affect a property's income include operating expenses, quality of management, tenant mix, rent concessions, lease terms, lease expiration dates, renewal options, and lease provisions such as expense recovery clauses. Investigation of these characteristics is critical to proper analysis of the comparables and development of a final opinion of value. (p. 436)

Again:

Elements of Comparison
Elements of comparison are the characteristics of properties and transactions that help explain the variance of prices paid for real estate. The appraiser determines the

elements of comparison for a given appraisal through market research and supports those conclusions with market data. When properly identified, the elements of comparison describe the factors that are associated with prices paid for competing properties.

There are 10 basic elements of comparison that should be considered in sales comparison analysis:

1. Real property rights conveyed.
2. Financing terms
3. Conditions of sale
4. Expenditures made immediately after purchase
5. Market conditions (time)
6. Location
7. Physical characteristics - e.g., size, construction quality, condition
8. Economic characteristics - e.g., expense ratios, lease provisions, management, tenant mix
9. Use (zoning)
10. Non-realty components of value

(Emphasis added) (p. 426)

The "market" Mr. Lorms used is not the market for the subject. It is elemental to say that empty buildings in poor locations are not worth what tenanted building in good locations are worth. Mr. Lorms made no study of what the true "market" was. Neither the location nor the economic characteristics are the same.

The following exchange takes place with Mr. Lorms (Appellant's Supplement p. 42, T.p. 159):

Q: If we have 40 CVSs and 60 Walgreens, we have a hundred stores. Of these one hundred operating stores, how many of them do you think pay rent of $26 a square foot?
A: Probably a lot of them do.
Q: Probably all of them, not most?
A: There is a range we see of $18 to $30 in general. So I wouldn't be surprised if all of those you just referenced don't have rents in that range for sure.

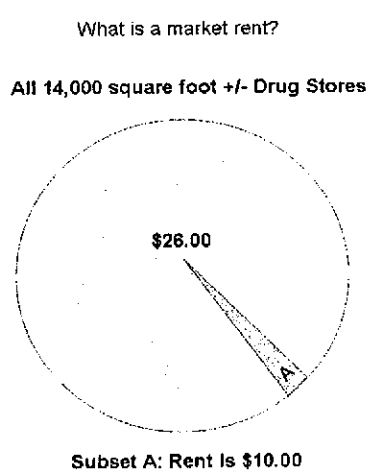
The following exchange takes place with Ms. Ebert (Appellant's Supplement p. 40, T.pp 38-39):

Q: When you look at the pie chart and someone were to ask you what's the market rent for 14,000-square-foot drugstores, is it realistic to say it's $10, or more realistic to say it's $26?
A: $26.
Q: If we did the same thing on the sales instead of the rent, and you found the sales to be how much a square foot, approximately?
A: Let me go back to make sure. They range, but I felt $298 a square foot.
Q: Then Mr. Lorms found them to be something considerably less?
A: Yes.
Q: So when the appraiser is dealing with the market, is the market that which most commonly recurs or most infrequently recurs?
A: Most commonly.

Mr. Lorms' "market rent" reflects what the rent for his property might be in the future if Walgreens abandons it, if the demographics change, and a second tier tenant moves in. Ms. Ebert's market rent reflects the rent in the market set by comparable competitive properties.

Market rent is $26, not $10, as Mr. Lorms suggests.

The BTA's Hearing Examiner, Ms. Luck, essentially captures the problem with Mr. Lorms' theory. This exchange takes place (Appellant Supplement p. 38, T.pp 146-149):



EXAMINATION

By the Examiner:

Q: I have one question before Mr. Scheve starts on your comparable land sales as if vacant or vacant land sales.
A: Yes.
Q: Why didn't you use any drugstore properties?
A: We are instructed typically not to do that. Not by this client, but by most of our bank clients and others because the drugstores have a reputation of paying well above market.
They're paying prices that nobody can. I could tell you a story and probably put it in perspective.
Q: Not really interested in the story, but basically, your entire argument is premised upon the fact that the drugstores are controlling this market to the point that the developer's really just an arm of the real estate arm of the drugstore company, correct?
A: That's correct.
Q: Why wouldn't you use the market in which they've created to value the land for this particular property?
A: We are looking at market value of the land if it were for sale on the open market, not valuing use to a drugstore buyer.
Q: Well, I certainly understand your argument in terms of the market value of a built drugstore, but I guess I don't understand your argument when you've admitted that there (sic) is at least four or five players in the market who would buy drugstore corners –
A: Yes.
Q: – so to speak. So wouldn't there be a competitive market amongst those players?
A: You would think so. But here is actually what's happening: If you go to a landowner, and that landowner says, "I'll sell you my corner. Who is the user?" I said, "I don't want to disclose that it's Walgreens or CVS." I say it's a retail use. They say, "We want to know the use because that will impact some other property we own."
If I say the user is a drugstore, they will price me at $2 million. If the client passes on that and says, "We don't want that location," and no longer have a drugstore opportunity, you come back to them and say, "I have somebody else interested in your site. Who is the user?" I say it's a service station. They might say the price is a million two.
Q: Is it your argument that those are both retail uses, the service station and the drugstore?
A: They are both retail uses.
Q: Okay.

• • •

Q: But I guess I don't understand how this is consistent with the rest of your

argument when, in fact, there are other drugstore users. Let's take the example that Walgreens passes, wouldn't that landowner give the same price to CVS?
A: Yes, they would.
Q: How about Drug Mart?
A: Sure.
Q: Isn't that a market? Isn't that a market that others besides an individual users would use, isn't that a value in exchange?
A: That's a drugstore market.

APPELLANT'S PROPOSITION OF LAW #2

The adoption of the sale price of the subject property would result in an unlawful assessment in use of the subject property.

Appellant's argument is essentially the same argument as advanced in proposition #1. The Appellant again argues the property has a unique physical design. However, other than minor size differences, the record is completely devoid of any information or evidence as to how the floor plan or design of other stores is significantly different (or different at all) from any other competitive drugstore. Mr. Lorms suggests there is more than a $2.5 million difference, without a single detail of what makes up any of that $2.5 million.

He doesn't argue these are "special purpose" buildings, but rather "special use" (Appellant's Supplement p. 42, T.p. 161). In fact, not all drugstores, even within the same chain, are the same size (Appellant's Supplement p. 43, T.p. 165).

When he wrote his report, largely depending on the so-called "uniqueness" of the property, he had neither the site plan, the floor plan, or the actual construction costs (Appellants Supplement p. 44, T.p. 172).

None of his comparable land sales were developed into drugstores (Appellant's Supplement p. 45, T.pp 173-174).

He had numerous errors in his cost approach, but said it didn't make any difference what it cost to build -- it is still worth only $1.6 million (Appellant's Supplement pp. 45-46, T.pp 177-178).

> **Q:** No matter what it costs to build this building, whether it cost $3 million or $8 million or $10 million, under your theory that you want the Board to accept, the cost approach would still be worth $1,600,000?
> **A:** Yes.
> **Q:** Then why even bother with, if you know the answer is $1,600,000, why bother with Marshall & Swift or anything else, just tell us the drugstore get $10, why do a cost approach?
> **A:** We don't do cost approaches very often.

Properties of this type are marketed on the open-market. Ms. Ebert's testimony was the following (Appellant's Supplement p.7, T.pp 24-25):

> I really want to put a strong emphasis on that I really, with all my investigation, the location is the key to these first-tier properties. They are -- These are listed with Loopnet, C.B. Ellis, the Upland Company, the CoStar Company.
>
> They are on their website for sale to investors. Just the same as if the property is going dark, and it is being re-leased or sold to, say, a Family Dollar. First-tier properties, they dominate the location that they're going to be in, so it's creating its own market.

Counsel further argues in its brief (p. 20 et. seq.) that the principle of substitution supports his claim, because the cost to construct the property was less than the sales price. Despite the argument about substitution Mr. Lorms dismisses it and says cost and value are not the same (Appellant's Supplement p 46, T.pp 178-179). As indicated above, the actual costs were not known by Mr. Lorms. In addition, in constructing his cost approach Mr. Lorms made numerous significant mistakes, which he admitted. Not the least of which was that he used as a base cost the cost of a supermarket and not a high quality drugstore, a difference of about $28. After admitting his many mistakes and admitting the base price would have been higher, he states it wouldn't change his

opinion.

He basically admits the cost approach he did was wrong and was not relevant. In addition his cost approach even with the errors is significantly less than his overall value, just as Mr. Ebert's values are. In other words, both appraisers agree the value of the property is significantly more than their cost approach, as cost does not equal value. If, as Appellee's counsel suggests, this proves that Ms. Ebert's value is incorrect (without the numerous errors of Mr. Lorms), does it not even more forcefully prove that Mr. Lorms is wrong and that counsel's argument is misplaced?

APPELLANT'S PROPOSITION OF LAW #3

To adopt the sale price as the value of the subject property would be inconsistent with this Court's holding in *Higbee Co. v. Cuyahoga County Board of Revision* (2006), 107 Ohio St.3d 325, wherein this Court rejected evidence of value inextricably intertwined with the non-real estate business value of the tenant.

The Court's decision in *Higbee Co. v. Cuyahoga County Board of Revision* (2006), 107 Ohio St.3d 325 has nothing to do with this case.

In *Higbee*, the Court dealt with the valuation of a mall and said the value could not be dependent on the business of the tenant. The Court essentially said for example you cannot value a mall based on how many men's suits Macy's may sell in a given year.

In this case, the rent paid and the sales price paid have nothing to do with how many prescriptions are filled or how many magazines are sold by Walgreens.

In every commercial real estate transaction what primarily drives the price is the income generated from the rent. And what drives the rent is the location and the attractiveness of the property.

APPELLANT'S PROPOSITION OF LAW #4

It would be inconsistent with prior decisions of this Court, including most recently *Strongsville Board of Education v. Cuyahoga County Board of Revision* (2007), 112 Ohio St.3d 309 that rejected similar sale and leaseback transactions, to accept the sale price of the subject property.

In *Strongsville supra* the BTA found the sales-leaseback was "marked by the presence of duress." The Court upheld the BTA's determination that the seller "was more than simply motivated to sell; it was instead compelled to enter into the [the sale-leaseback transaction] because it needed to raise capital quickly". (at 5-6) As the Court stated:

> "In reviewing decisions of the BTA, this Court has repeatedly stated that it is not a trier of fact de novo, but that it is confined to the statutorily delineated duties of determining whether the board's decision is "reasonable and lawful" (at p 4, other citations omitted)."

In the instant case the BTA found neither a sales-leaseback or the presence of duress. Both of these are factual determinations that this Court should not disturb. As such, Strongsville is not apposite in the instant case.

Quite simply, this is not a sale-leaseback case. A sale-leaseback occurs when one party in an attempt to raise money "sells" his property to another and executes a new lease to receive financing. In this case Walgreens never owned the property. The same lease was in effect before and after the sale. There is nothing on the record to indicate the original owner had to sell the property. The developer could have elected to continue ownership and collect the rent.

The Court has generally rejected sale-leasebacks because they are financing techniques unrelated to the value of the property. Here, it is clear that the lease (never introduced into evidence) was directly tied to the cost of the building. Even Appellant's counsel concedes this, as he quotes Mr Lorms that the rent "is based on an amortization of the construction costs." (Appellant's brief, p. 27). The rent is typical of what every other competitive drugstore pays. The fact that Walgreens

may use the same developer all the time does not negate the arms-length nature of the deal. (If in fact it did, one would expect that as a regular customer the rent of $28 would be lower than the market, not almost twice as high, as suggested by Appellant.) It is unclear how Appellant's counsel can assert (p. 27 of his brief) that everyone agreed the lease was not arms-length. Again, the entire testimony and report of Ms. Ebert and the Auditor's cross are at odds with this contention.

Appellant concedes this is not a sale-leaseback, but argues that it is analogous to it. However, when three parties are involved, and the same lease is in effect before and after the sale, and the terms of the lease reflect the same terms as terms paid by the competitive market, the transaction is neither a sale-leaseback nor analogous to it. The agreement between Walgreens and the developer is in fact more analogous to the common situation faced by the developer of most office buildings or other commercial buildings that require the pre-leasing of space before the property is developed.

Accordingly, the cited cases by Appellant do not apply.

APPELLANT'S PROPOSITION OF LAW #5

The testimony of the appraisers concerning the facts and circumstances surrounding the transfer of the property, and the characterization of the transfer's unreliability as an indication of value, constitutes admissible, competent, and probative, evidence before the BTA.

The Appellant's argument here is that the BTA erred in not admitting into evidence the testimony of the two opposing appraisers. The Appellant is apparently confused as this argument is wholly without merit. The BTA in fact admitted into evidence the testimony and appraisal reports of both experts. (Appellant's Supplement p. 23, T.pp 85-86; Appellant's Supplement p. 50, T.p. 193) The BTA simply decided the evidence was not probative. We assume the Appellant's argument is meant to imply that the BTA should have given the evidence admitted more

weight than it did. The Appellant primarily makes this argument under proposition of law #7. In any event, this proposition of law is without merit.

APPELLANT'S PROPOSITION OF LAW #6

Adoption of the sale price in this case is inconsistent with Ohio law, succinctly stated by this Court in *Alliance Towers Ltd. v. Stark County Board of Revision* (1988), 37 Ohio St. 3d 16, that it is the encumbered fee simple value of the property which is to be valued for real property tax purposes.

As discussed above, the evidence was conflicting between the experts as to what the fair market rent was. Mr. Lorms for the owner calculated his rent based on subsequent sales to second tier tenants, after the prime tenant had moved to a better location. In addition, the subsequent rents, upon which Mr. Lorms relied, contain non-compete conditions, prohibiting rental of the property to a competitor of the vacated tenant (Appellant's Supplement p. 47, T.p. 183). In addition almost none of his "market rents" were even derived from the Cincinnati market, but instead came from distant parts of the states. What Mr. Lorms relied on as "market rents" were completely different from the real market rent, that by his own admission the vast majority of similarly situated, competitive players pay.

Ms. Ebert, the expert for the County, found the subject's actual rents to indeed be market rents, as evidenced by what similarly situated competitive players pay in the Cincinnati market.

Mr. Lorms' "market rents" are an illusion he creates by comparing significantly non-similar properties to the subject. If the market rent were truly only one-half of what one of the world's biggest and best retailers pay, why would they and their competitors continue to pay double the market rent? If the "comparable" sales and "comparable" rents Mr. Lorms uses were truly market, why wouldn't Walgreens buy his empty stores and pay half of what they do?

The obvious reason they do not buy these second tier locations is because the sales and rents

Mr. Lorms propounds are not comparable – – and they are not market.

The assertion in Appellant's brief that no one challenged this is odd, given the vigorous cross-examination of Mr. Lorms by the Auditor, and the extensive testimony and report of the Auditor's expert, Ms. Ebert.

APPELLANT'S PROPOSITION OF LAW #7

The appraisal of the subject property by the Taxpayers constitutes competent, probative evidence of the value of the subject property.

This duplicative proposition has already been thoroughly discussed above, as to why Mr. Lorms' testimony was not credible or probative evidence.

APPELLANT'S PROPOSITION OF LAW #8

The appraisal of the subject property by the Auditor's witness does not constitute competent, probative evidence of the value of the subject property.

This duplicative proposition has already been thoroughly discussed above as to why Ms. Ebert's testimony was credible and corroborated the BTA's decision that the sales price represented the value of this property.

In addition, the Appellant misstated her experience. She has been an appraiser for 20 years, not three, as claimed on p. 35 (Appellant's Supplement p. 289). We do not question the motivation of Mr. Lorms. We reject Appellant's counsel's argument that Ms. Ebert's testimony is suspect because she works for the Auditor. In fact, Mr. Lorms' testimony would be more susceptible because his livelihood is dependent in part on securing appraisal assignments and writing the value in half for his "big-box" clients. Mr. Lorms makes a good portion of his living testifying that the value of big boxes are half what they sell for. Ms. Ebert testified she has no incentive to come up with a value (Appellant's Supplement p. 5, T.pp. 14-15). She could easily avoid the stress of

testifying an cross examination by simply agreeing with Mr. Lorms (if she thought he was correct) with no adverse consequences to her employment.

While not questioning the motives of any appraiser, would not Mr. Lorms more likely be subject to bias since he makes a significant part of his livelihood from securing appraisal assignment for big boxes in which he attempts to cut the value in half? Ms. Ebert has nothing to gain or lose by her testimony.

IV. CONCLUSION

As stated at the beginning, because there was an arms-length sale of the property as found by the BTA, an appraisal was not appropriate. The novel theories of Mr. Lorms and his hearsay impressions of the sale were properly excluded by the BTA, per *Berea, supra.* However, notwithstanding this, Mr. Lorms' novel theories are misplaced because they do not reflect the market.

The Appellant's theory flunks the reality test:

- Brand new generic drugstores are not worth less than half what it cost to build them the day after they open.
- The world's largest retailers do not pay twice the market value demanded.
- A property is not worth half of what it just sold for.

The following facts are undisputed:

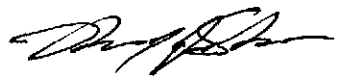
- The property sold for $4,375,000 near the tax lien date.
- The property is a brand-new building in an affluent up-scale community on a high traffic corner lot.
- The lease in effect is typical and market for drugstores.

The BTA correctly decided, that given the undisputed facts above, the Supreme Court's

holding in *Berea, supra* mandated it adopt the sale price as value. The BTA as the trier of fact found that the sale was not a sale-leaseback and found that it was arms-length. This Court should not disturb the factual findings of the BTA, nor reverse its decision when it is reasonable and lawful.

We respectfully urge the Court to affirm the BTA's decision.

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO



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V. CERTIFICATE OF SERVICE

This is to certify that on the 13th day of August, 2007, a copy of the Merit Brief of Appellee was mailed to Nicholas M.J. Ray, Siegel & Siegel, 3001 Bethel Road, Suite 208, Columbus, OH 43220; Jay P. Siegel and Fred Siegel, Siegel, Siegel, Johnson and Jennings Co., LPA, 25700 Science Park Drive, Suite 210, Beachwood, OH 44122; John W. Hust, Schroeder, Maundrell, Barbiere & Powers, Suite 110, Governors Knoll, 11935 Mason Road, Cincinnati, OH 45249; and Marc Dann, Ohio Attorney General, 30 E. Broad Street, 17th Floor, Columbus, OH 43215-3428.

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VI. APPENDIX

elements of comparison: The characteristics or attributes of properties and transactions that help explain the variance of prices paid for real estate; include real property rights conveyed, financing terms, conditions of sale, market conditions, expenditures made immediately after purchase, location, physical characteristics, and other characteristics such as economic characteristics, use, and non-realty components of value.

price is then converted into a unit price and adjusted for other elements of comparison such as location and physical characteristics.

Elements of Comparison

Elements of comparison are the characteristics of properties and transactions that help explain the variance of prices paid for real estate. The appraiser determines the elements of comparison for a given appraisal through market research and supports those conclusions with market data. When properly identified, the elements of comparison describe the factors that are associated with prices paid for competing properties.

There are 10 basic elements of comparison that should be considered in sales comparison analysis:

1. Real property rights conveyed
2. Financing terms
3. Conditions of sale
4. Expenditures made immediately after purchase
5. Market conditions (time)
6. Location
7. Physical characteristics—e.g., size, construction quality, condition
8. Economic characteristics—e.g., expense ratios, lease provisions, management, tenant mix
9. Use (zoning)
10. Non-realty components of value

In most cases these elements of comparison cover all the significant factors to be considered, but on occasion additional elements may be relevant. Other possible elements of comparison include governmental restrictions such as conservation or preservation easements and water and riparian rights, access to the property, and off-site improvements required for the development of a vacant site. Often a basic element of comparison is broken down into subcategories that specifically address the property factor being analyzed. For example, physical characteristics may be broken down into subcategories for age, condition, size, and so on. (Adjustment techniques applicable to each of the 10 standard elements of comparison are discussed in Chapter 18 and illustrated with examples in Chapter 19.)

Sales adjustment processes require a sufficient number of sales from which to extract the adjustments. Often there may not be enough sales to provide a basis for all adjustment calculations. The appraiser should recognize and explain in the appraisal report that a lack of supporting data may either

A property's location is analyzed in relation to the location of other properties. Although no location is inherently desirable or undesirable, an appraiser can conclude that the market recognizes that one location is better than, similar to, or worse than another. To evaluate the desirability of one location relative to other locations, appraisers must analyze sales of physically similar properties situated in different locations. Although the sale prices of properties in two different areas may be similar, properties in one area may be sold more rapidly than properties in the other.

Physical Characteristics

If the physical characteristics of a comparable property and the subject property differ in many ways, each of these differences may require comparison and adjustment. Physical differences include differences in building size, quality of construction, architectural style, building materials, age, condition, functional utility, site size, attractiveness, and amenities. On-site environmental conditions may also be considered.

The value added or lost by the presence or absence of an item in a comparable property may not equal the cost of installing or removing the item. Buyers may be unwilling to pay a higher sale price that includes the extra cost of adding an amenity. Conversely, the addition of an amenity sometimes adds more value to a property than its cost, or there may be no adjustment to value for the existence of or the lack of an item.

Economic Characteristics

Economic characteristics include all the attributes of a property that directly affect its income. This element of comparison is usually applied to income-producing properties. Characteristics that affect a property's income include operating expenses, quality of management, tenant mix, rent concessions, lease terms, lease expiration dates, renewal options, and lease provisions such as expense recovery clauses. Investigation of these characteristics is critical to proper analysis of the comparables and development of a final opinion of value.

Appraisers must take care not to attribute differences in real property rights conveyed or changes in market conditions to different economic characteristics. Caution must also be exercised in regard to units of comparison such as net operating income per unit. *NOI*s per unit reflect a mix of interactive economic attributes, many of which should only be analyzed in the income capitalization approach. Sales comparison analysis must not be presented simply as a variation of the income capitalization approach, applying the same techniques to reach an identical value indication.

Use/Zoning

Any difference in the current use or the highest and best use of a potential comparable sale and the subject property must be addressed. The appraiser must recognize the difference and determine if the sale is an appropriate comparable and, if so, whether an adjustment is required. In most cases the