IN THE SUPREME COURT OF OHIO

Cincinnati School District Board of Education,	:	Case No. 2007-1217
Appellee	:	
v.	:	Appeal from the Ohio Board of Tax Appeals
Hamilton County Board of Revision Hamilton County Auditor, and the Tax Commissioner of the State of Ohio,	:	BTA Case No. 2005-M-1069
Appellees	:	
and	:	
Anchor Lyons Limited Partnership,	:	
Appellants	:	

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APPELLEE HAMILTON COUNTY AUDITOR'S BRIEF

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

CASES

TEXT

II. INTRODUCTION

Procedural Note

The present case presents nearly identical issues and arguments to those currently pending before the Court in *Hon. Dusty Rhodes v. Hamilton Cty. Bd. of Revision, et al.* Sp.Ct. 2007-0615. Both cases involve the question of how to properly value a generic "big box" store that has been the subject of a recent sale. In the *Dusty Rhodes* case the tenant was Walgreens. In the instant case, the tenant is WalMart. Other than that, the two cases present identical issues with nearly identical arguments. In both cases the Board of Tax Appeals, following this Court's holding in *Berea City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision* (2005) 106 Ohio St.3d 269, adopted the sales price as the value.

The Appellant in his Notice of Appeal listed twenty-three 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 a "big box" building that he claims was a "build-to-suit." However, there is no evidence in the record as to how this generic "big 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 "big box"?
- Would the world's largest retailer (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 stores, both Walmart 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 Cincinnati School District Board of Education (the School Board) filed a complaint with the Hamilton County Board of Revision (BOR) seeking to increase the value of the subject property, a WalMart store, to the value it sold for in an arms-length sale on October 7, 2004, for \$15,918,900. (The property later resold on September 7, 2005, for \$17,800,000.)

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 \$15,918,000. The owner presented only the testimony of Robin Lorms, an appraiser. However, Mr. Lorms did not do an appraisal, but only a rent comparable study.

The BOR voted 2-1 (with the Auditor dissenting) not to raise the property to its sale price. Instead, they left the value unchanged at \$9,293,400 because "this property is encumbered by a long-term lease which affected the sale price" and therefore, the BOR felt the sale price did not reflect value. (BOR p. 24)

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 Board of Tax Appeals (BTA). They put on no evidence to the contrary during their case in chief. Their appraiser did not contest it in his lengthy report. The only mention that the sale may not have been arms-length was in response to a question on cross examination where Mr. Lorms testified his son told him to be careful of this transaction. The age, occupation, or knowledge of Mr. Lorms' son was not revealed. This testimony was properly rejected as not reliable (p. 9 Decision And Order of Board of Tax Appeals).

At the Board of Tax Appeals, the Auditor presented the appraisal of Ms. Antoinette Ebert. Her opinion of value, utilizing the three commonly accepted methods of appraising was $15,918,900, which also reflected what she considered the arms-length nature of the sale.

Mr. Lorms prepared a full appraisal report at the Board of Tax Appeals with an opinion of value of $6 million, about 37.5% at what it recently sold for.

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 Ferguson Hills Market Inc. to Anchor Lyons Limited Partnership (Appellant's Supplement p.86). The lease is with WalMart, 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 big box. Common experience indicates that all big boxes (with the exception of minor size differences) are virtually identical. In this case, no one from the seller, the buyer, the developer, or WalMart ever testified. The floor plans were never introduced. No evidence was presented to show anything unique about this property, certainly nothing to justify the millions of dollars of 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 $15,918,000 for this property was not a knowledgeable real estate investor and only purchased it because of the credit worthiness of the tenant (Apparently there was another ignorant real estate purchaser who later paid $17,800,000 on September 7, 2001. (Appellant's Supplement p. 86)). 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 appraisal report, 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. 133).

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

As Ms. Ebert states (Appellant's Supplement p. 312):

> The phenomenon of the first tier market has evolved over the past decade or so to become <u>a market unto itself</u>. Prime locations with keen competition among the national competitors drive market values . . . There is no shortage of investors for this type property. The chance to purchase a property of this type, which carries a long-term triple net lease with a credit worthy tenant, creates a high demand with investors.
>
> Sales to investors of new projects are brisk. Re-sales are also taking place in the market with some investors cashing in on the lower cap rates that are driving the sales prices higher, as shown within the sales comparison approach. In addition, the techniques, for these transactions, are now being copied in other retail sectors as well. Moreover, <u>due to location</u>, sales of existing stores for different end users are occurring. This is also evidenced within the sales comparison approach. (Emphasis added.)

Again, (Appellant's Supplement p. 313):

> There has been discussion with regard to second-generation users for build to suit projects not supporting the current values of the first general user. When discussing these issues it should be noted that typically the decision for a first generation user to allow the store to "go dark" is a business related decision. For whatever reason, the location is not allowing the business to perform to expected standards. When this occurs, the owner of the business decides to let the store "go dark" and relocates to a location with hopes to meet the standards of performance. It is interesting to note that when this occurs, the owner of the business will still control the subsequent use of the location by not allowing a competitor the opportunity to occupy the location.
>
> . . .
>
> In summary, <u>the Big Box market is one that is driven by location</u>. The market consists of several national players as first generation users. Developers and sophisticated investors are going to trade and re-trade in this market. The changing landscape of interest rates, cap rates, tenant credit, land, and construction costs set the market price. Locations, when measured to be under-performing, are abandoned by first generation users as a

business decision, but still controlled as a business decision by not allowing competitors the opportunity to occupy the location. These sites are then sold to other end users at market rates or leased to second and third generation users at less than market rates. Clearly, location drives this market. (Emphasis added.)

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 competitors aggressively compete for high profile 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 says, the first tier market creates its own market (Appellant's Supplement p. 49)

The following exchange takes place with Mr. Ebert:

Q: Do these stores, in your mind, create their market?
A: I believe they do create their own market.
Q: And stores that are in good locations, do they have a better market than stores that are in bad locations? Is that an obvious statement?
A: Yes.
Q: And have you found that stores in good locations have higher rents than stores that have bad locations?
A: Yes.
(Appellant Supplement p. 14 , T.p. 47)

The Board of Tax Appeals discussed Mr. Lorms' assertion that the property was encumbered a long term lease to a "market-maker" (BTA Decision and Order, p. 4). The Court has already considered the effect of leases on the property in *Berea, supra* and *Lakota, supra*. 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 <u>lower value</u> 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.

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. <u>Location</u>
7. Physical characteristics - e.g., size, construction quality, condition
8. <u>Economic characteristics - e.g., expense ratios, lease provisions, management, tenant mix</u>
9. Use (zoning)
10. Non-realty components of value

(Emphasis added.) (p. 426)

The following exchange takes place with Ms. Ebert:

Q: Why would you not rely more heavily on vacant stores with no tenants in them to compare to the subject?
A: Because they don't have the same economic value as the subject property. The ten elements of comparison, economic value is one of the comparable components.
Q: So in order for something to be comparable, they have to have similar economic outputs?
A: Correct.
Q: Would this be true in any property, for example, in an office building?
A: Yes.
(Appellant's Supplement p. 13, T.p. 44)

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.

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 big box.

The following exchange takes place with Ms. Ebert:

Q: You have four different categories. Could one say that they are all big boxes, but they're different size boxes?
A: They are different size boxes, but not really actually different size boxes. They are mainly the square shape and rectangular properties. The Costco and the warehouse, they're not as finished as the WalMarts and the Kmarts. They have an open ceiling. The "Category Killers" are usually smaller building, big boxes, but you do have a breakdown of them.
Q: So is there any significant difference in construction or design from one size big box to another big box of the same size?
A: No.
(Appellant's Supplement p. 12, T.pp. 38-39)

Counsel further argues in its brief 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. As indicated above, the actual costs were not known by Mr. Lorms.

His cost approach even with his errors is significantly less than his overall value, just as Ms. 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, 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.

The following exchange takes place with Mr. Lorms:

Q: An then just to get some – a couple of definitions out of the way. In this report you specifically say that this building is not a special purpose building, correct?
A: That's correct.
Q: And this is not a sale leaseback situation on the subject, correct?
A: It's a build-to-suit sale.
Q: Its's not a sale lease-back situation?
A: That's correct.
(Appellant's Supplement p. 66, T.pp. 253-254)

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 WalMart never owned the property. The same lease was in effect before and after the sale. There is nothing in 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 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 first tier "big box" pays. The fact that WalMart 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 would be lower than the market, not almost twice as high, as suggested by Appellant.)

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 WalMart 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. 32, T.p. 117; Appellant's Supplement p. 76, T.p. 294) 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. 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, which 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 created 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 WalMart 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

Mr. Lorms' appraisal of the subject property 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 Auditor's appraisal by Ms. Ebert 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.

The Supreme Court has previously rejected such claims (as the Board of Tax Appeals consistently has) and accepted the valuation conclusions of the Auditor's appraiser. See e.g., *Witt v. Hamilton County BOR* (1991) 61 Ohio St.3d 155; *Loveland Pines v. Hamilton County BOR* (1992) 66 Ohio St.3d 387; and *Cambridge Arms v. Hamilton County BOR* (1998) 81 Ohio St.3d 58.

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. (Appellant's Supplement,p.9, T.p. 28)

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 big boxes 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 $15,918,000 near the tax lien date and again on September 7, 2005, for $17,800,000.

- The property is a brand-new building in a first-tier market..

- The lease in effect is typical and market for competing first tier big box retailers.

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.

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V. CERTIFICATE OF SERVICE

This is to certify that on the 20 day of September, 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; David DiMuzio, 1014 Vine Street, Suite 1900, Cincinnati, OH 45202; 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. *NOIs* 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