THE OHIO BOARD OF REVISION

PRACTICE HANDBOOK

(Third Edition)

By: Jason M. Dolin, Esq.

The Ohio Board of Revision Practice Handbook

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To the Memory

of

David A. Dachner, Esq.

A Lawyer,

A Teacher,

A Fine Man

FAIRFIELD
COUNTY · OHIO

OFFICE OF COUNTY AUDITOR

County Auditor
Carri L. Brown, PhD, MBA, CGFM
carri.brown@fairfieldcountyohio.gov

March 25, 2024

To Ohio County Board of Revision members, practitioners, and residents:

We in Fairfield County are pleased to support the creation of the updated Ohio Board of Revision Practice Handbook. This handbook is widely used as a resource for Ohio County Boards of Revision, practitioners, and residents. It is accompanied by an online resource, the Ohio Board of Revision Resource Center at https://www.co.fairfield.oh.us/OBORRC/. The online tools are additional ways to support the public and those who serve the public, and there is no charge to access the resources.

Having served on the Board of Revision for more than a decade, first as a delegate of the President of the Board of County Commissioners, and for the past three years as the County Auditor, I can attest to the usefulness of these exceptional resources. Also, in multiple conferences and meetings, officials from other counties have reported how important these resources are to them and to real property owners. I am thankful to former County Auditor Jon Slater and to the County Auditors' Association of Ohio who had vision to begin this effort and to encourage its continued improvement.

Thank you to Jason M. Dolin, Esq., for his ongoing leadership and consultation. Jason initiated the work to create these valuable resources, and he continues to be passionate about the effort. He has been a mentor to Fairfield County's Board of Revision Administrator, Linda O'Toole, Esq., who joined our office in 2022. I appreciate Linda and Jason who have collaborated so well to prepare updates to the resources and to provide information to others throughout Ohio. I also appreciate the County Auditor's team members who have provided insight to improve the resources and our Board of Revision processes.

With the handbook and online tools, real property owners and their representatives have more information available to help them navigate processes surrounding the valuation of real property. Professionals in the field also have readily available information to support them in their roles. Indeed, in 2020, the National Association of Counties acknowledged the resources with an Achievement Award in the category of civic education and public information. We in Fairfield County will continue our support of this comprehensive effort to benefit public services in our county and in the state.

Kindest regards,

Carri L. Brown

Carri L. Brown, PhD, MBA, CGFM
Fairfield County Auditor

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ACKNOWLEDGEMENTS

At the outset, I would like to thank former County Auditor Jon Slater and current County Auditor Dr. Carri Brown for their vision, support, and encouragement in the writing and production of this volume. This *Handbook* would not have initially been possible without the leadership and support provided by Jon when *The Handbook* was merely an idea. Carri's enthusiastic and continuing support for *The Handbook*, which started well before she was elected as the Fairfield County Auditor, has ensured that it will continue to be a valuable resource for those who interact with our state's eighty-eight county boards of revision. Their commitment to informing the public and enhancing BOR practice has provided a valuable public service and the users of *The Handbook* owe both Jon and Carri a debt of gratitude for making this available.

I would also like to thank those who kindly gave of their time and knowledge in reviewing portions of this handbook. In particular, I'd like to thank David A. Dachner, Esq., my friend and colleague who has since passed away, Kelley Gorry, Esq. of the Rich & Gillis law firm, and Jonathan Brollier, Esq., then of the Bricker & Eckler law firm, for their thoughtful and insightful comments on several chapters of this handbook. Their review and comments have made this a better volume. I'd also like to thank Linda O'Toole, Esq., the Fairfield County BOR Administrator, and the Fairfield County Auditor's appraisal staff, dedicated professionals who are committed to the high standards of the appraisal profession and who always seek to get it right. They have taught me much and I am very appreciative of their work.

Finally, I'd like to thank all of the Fairfield County officials and employees who serve on our county's Board of Revision for their professionalism, dedication, and their ongoing search for the truth in valuing property.

Jason M. Dolin, Esq.
Lancaster, Ohio
March 2024

FOREWARD TO THIRD EDITION

Since the publication of the last edition of this work, there have been major changes to the manner in which property tax valuation cases may be brought before county boards of revision. In particular, Ohio House Bill 126 ("H.B. 126"), which became effective on July 21, 2022, worked substantial changes to the manner in which "legislative authorities" - primarily boards of education - may bring property valuation complaints at the BOR. The bill added a number of procedural steps that a BOE must undertake before it may file a complaint, and also included a provision prohibiting legislative authorities from appealing BOR decisions to the BTA. Since its enactment, H.B. 126 has been the subject of controversy, has spawned litigation, and appeals regarding certain aspects of H.B. 126 are pending before the Ohio Supreme Court as this *Handbook* is submitted for publication. H.B. 126 is discussed in greater detail below.

A second bill, H.B. 33 ("the Budget Bill") which became effective on October 3, 2023, enacted significant changes to the complex and confusing area of valuing subsidized low income housing. Prior to the bill's enactment, a number of Supreme Court cases had caused confusion among practitioners in this area of valuation law. The bill attempts to clarify and simplify the valuation process for low income housing by, among other things, setting forth some specific parameters for the manner in which such valuations will be conducted, and requiring the Tax Commissioner to enact rules that implement the mandates of those amendments. As this work is submitted for publication, the Tax Commissioner has drafted rules which have not yet been finalized.

Finally, an uncodified section of the Budget Bill created in the General Assembly a Joint Committee on Property Tax Review and Reform. As set forth in the bill, the Joint Committee is required to "review the history and purpose of all aspects of Ohio's property tax law, including the form of levies, exemptions, and local subdivision budgeting." The Joint Committee is required to "produce a report describing the…findings of the Committee and making recommendations on reforms to Ohio's property tax law." The report is required to be submitted to the leadership of

the General Assembly no later than December 31, 2024 at which point the Joint Committee would cease to exist.[1]

As demonstrated by these statutory enactments, property tax law and BOR practice in Ohio remain topics of substantial importance and keen public interest. Given those factors, and the upcoming Joint Committee report, we may reasonably expect still further changes in the not-to-distant future to this challenging area of the law.

Jason M. Dolin, Esq.
Lancaster, Ohio

March 2024

[1] See H.B. 33 at https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_135/bills/hb33/EN/06/hb33_06_EN?format=pdf at 6185. See also See Ohio Legislative Service Commission, *Final Analysis of H.B. 33,* 134[5h] General Assembly at https://www.legislature.ohio.gov/download?key=21327&format=pdf at 598.

INTRODUCTION

This is a practice handbook designed to provide a narrative explaining BOR practice for those who serve on, practice before, or appear at Ohio's boards of revision ("BOR"). Ohio's BORs exert tremendous power. They annually issue decisions determining the valuations for billions of dollars of real property. Those valuation determinations form the basis for tax assessments that fund Ohio's schools and local governments. Those tax dollars provide critical funding to Ohio's schools and support a host of government services at the county and local level. In tax year 2021 alone (payable during 2022), for example, according to the Ohio Department of Taxation:

> During tax year 2021 (bills payable during 2022), the assessed valuation of real property in Ohio was approximately $293.6 billion ($838.7 billion in appraised true value). …[and the] [t]axes charged after the application of reduction factors required by Ohio Revised Code section 319.301 (frequently described as House Bill 920) were approximately $18.5 billion for tax year 2021, an increase of 1.6 percent from tax year 2020.[2]

The BORs themselves operate under, and those who serve on them must be familiar with, an abundance of rules including: (1) statutory provisions of the Ohio Revised Code; (2) administrative rules of the Ohio Administrative Code; (3) decisions of the Ohio Supreme Court and the Courts of Appeals; (4) decisions of the Board of Tax Appeals ("BTA"); (5) their own local rules and regulations; and in a number of circumstances (6) the provisions of the Uniform Standards of Professional Appraisal Practice ("USPAP"). The BTA, alone, issues new decisions almost daily, any one of which can impact how a particular case heard by the BOR should be decided. Given the multiple streams of statutes, rules, and appellate and administrative-body rulings applicable to BOR hearings, the endless variety of factual circumstances that can come before the BOR, and the USPAP rules that apply to appraisers who appear before boards of revision, it is a challenge to keep up with the highly technical and often changing nature of BOR practice. When you couple that with the high volume of BOR hearings held by many counties

[2] See Ohio Department of Taxation Annual Report for Fiscal Year 2022 at page 114. Further, according to the Department of Taxation, "This amount does not include deductions on certain residential and agricultural property (known as the non-business credit), the credit for owner-occupied dwellings, or the homestead exemption for qualifying senior citizens and certain disabled homeowners."

and the limited time that can realistically be devoted to each case, BOR practice can be very demanding. Compounding that challenge is the fact that there is nothing in statute or rule that requires BOR members to have legal or appraisal training. While a number of BOR members have developed a high level of knowledge and expertise in BOR practice through their years of experience, many newcomers to BOR practice – BOR members, attorneys who do not regularly appear before BORs, and members of the public - understandably struggle to understand the labyrinth of statutes, regulations, and decisions applicable to their cases.

This volume is written to make the tangle of statutes, rules, and cases more accessible to both those experienced and not experienced at BOR practice. It should be noted, however, that this volume focuses almost exclusively on BOR practice. It does not discuss in any depth practice before Ohio's Board of Tax Appeals ("BTA"), the administrative appellate body to which appeals from the BOR are most frequently taken.

PART 1

THE BOR AND THE VALUATION OF REAL PROPERTY

CHAPTER 1
OVERVIEW OF THE BOARD OF REVISION

CHAPTER SUMMARY

- Under the Ohio Revised Code ("R.C."), each County Auditor is the assessor of real estate in his/her county.
- The County Auditor is required to perform a full reappraisal of real estate values every six years, with a "triennial update" of values to be performed three years after each full reappraisal.
- County Auditors are required to determine the true value of the fee simple estate of each parcel of real estate in their county as if unencumbered but subject to any effects from the exercise of police powers or from other governmental actions.
- The Revised Code establishes a procedure for citizens to challenge the Auditor's valuation determination at the Board of Revision ("BOR") for that county.
- The BOR is a statutorily created quasi-judicial body that consists of the County Auditor, County Treasurer, and one County Commissioner or their respective designees.

estate in the auditor's county for purposes of taxation."[3] Auditors are required to do a full reappraisal of all real property parcels in their county at least once every six years.[4] That sexennial reappraisal does not require, however, that they view the interior of those properties.[5]

In addition, in the third year after that general reappraisal, the auditor is required to do a "triennial update" of real property values based upon an analysis of "local real estate sales that have occurred in the last three preceding calendar years together with other related information pertaining to real property values in the county."[6]

[3] See R.C. 5713.01(A). See also *OTR Housing Associates, LTD. v. Cincinnati School Dist. Bd. of Edn.*, 1st Dist. Hamilton No. C-200321, 2021-Ohio-3231, ¶ 27 ("The valuation of real property begins with the county auditors, who are required to appraise real property 'at its true value in money.' ").

[4] See R.C. 5713.01(B). See also *Robert Jacops v. Cuyahoga County Board of Revision* (December 31, 2019), BTA No. 2019-325.

[5] See *DCWI Office N., L.L.C. v. Montgomery Cty. Aud.*, 195 Ohio App.3d 235, 2011-Ohio-4011, ⁋⁋ 24 – 31. See also *Al Gammarino v. Hamilton County Board of Revision* (September 5, 2019), BTA No. 2019-278 ("We acknowledge that the auditor is not required to view the interior of properties in conducting a sexennial reappraisal.").

[6] See OAC 5703-25-16(B)(1) ("These studies should be designed to enable the auditor to increase or decrease the taxable valuation of parcels in accordance with actual changes in valuation of real property which occur in different subdivisions, neighborhoods, or

> A triennial appraisal, also referred to as a "statistical update," is conducted three years after the last sexennial appraisal and does not require the auditor to view the property. The triennial appraisal is based on statistical data, such as property sales and construction in the surrounding community. The statistical data is used to generate a "use factor" applied to all properties in a particular area based on an estimation of the average percentage of appreciation or depreciation in value of the properties since the last appraisal. (Tr. 246-248.) By applying the use factor, all parcels within a specific class are reappraised up, down, or without a change, by the same percentage amount.[7]

If as a result of the triennial update the auditor finds that values have either increased or decreased, "the auditor shall adjust the tax records to show the true value in money of each parcel…"[8]

In general, the value determined by the auditor "will carry forward from the first year of each three-year period until the next, unless the auditor's duty to value within the triennial is triggered by some event."[9] If there is such a triggering event, then the auditor may be required to revalue property in addition to the mandated six-year reappraisal and three-year update.

> In addition to the periodically required adjustments, the auditor is under a standing duty to "revalue and assess at any time all or any part of the real estate in such county * * * where the auditor finds that the true or taxable values thereof have changed." R.C. 5713.01(B). This duty might be triggered by an arm's-length sale…[o]r the reporting of an improvement or casualty to the property might lead to a revaluation and reassessment.[10]

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among classes of real property in the county.") See also, *AERC Saw Mill Village v. Franklin County Board of Revision*, 127 Ohio St.3d 44, 2010-Ohio-4468, ¶ 19 ("…the auditor must reappraise property values once every six years and update the values at the interim three-year point."). See also *Bruce S. & Sarah J. Tomcik, Trustees v. Lorain County Board of Revision* (January 7, 2020), BTA No. 2019-664; *Ruth Anna Carlson v. Cuyahoga County Board of Revision* (January 5, 2021), BTA No. 2020-834.

[7] See *Musial Offices, Ltd. v. County of Cuyahoga, et al*., 8th Dist. Cuyahoga No. 108478, 2020-Ohio-5426, ¶ 5.

[8] See OAC 5703-25-06(C). See also *Musial Offices, Ltd. v. County of Cuyahoga*, 8th Dist. No. 108478, 2020-Ohio-3660, ¶ 5 ("The triennial appraisal is based on statistical data, such as property sales and construction in the surrounding community. The statistical data is used to generate a "use factor" applied to all properties in a particular area based on an estimation of the average percentage of appreciation or depreciation in value of the properties since the last appraisal. By applying the use factor, all parcels within a specific class are reappraised up, down, or without a change, by the same percentage amount.").

[9] See also *Robert Jacops v. Cuyahoga County Board of Revision* (December 31, 2019), BTA No. 2019-325. See also *Lake Avenue Christian Church Inc. v. Clark County Board of Revision* (January 29, 2020), BTA No. 2019-1201.

[10] See *AERC Saw Mill Village v. Franklin County Board of Revision*, 127 Ohio St.3d 44, 2010-Ohio-4468, ¶ 19. See also *Robert Jacops v. Cuyahoga County Board of Revision* (December 31, 2019), BTA No. 2019-325 ("…the general rule is that an auditor…is required to perform the countywide reappraisal every six years, an update at the three-year point, and to revalue a property…an time the auditor…finds the value has changed.").

In non-reappraisal and non-update years, however, an auditor "cannot simply change the values arbitrarily for no reason without first making the determination that its value has changed."[11] Conversely, there are reasons to update in non-reappraisal and non-update years and the BTA has found that "boards of revision properly revalue properties when improvements are resketched or updated in county records."[12]

In connection with their assessment duties, R.C. 5713.03 requires auditors to "determine, as nearly as practicable, the true value of the fee simple estate [of parcels in the county], as if unencumbered…"[13] True value is determined as of the tax lien date, January 1, of the applicable year.[14] According to the Ohio Administrative Code ("OAC"):

> (A) "True value in money" or "true value" means one of the following:
>
> (1) The fair market value or current market value of property and is the price at which property should change hands on the open market between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having a knowledge of all the relevant facts.
>
> (2) The price at which property did change hands under the conditions described in section 5713.03 of the Revised Code, within a reasonable length of time either before or after the tax lien date, unless subsequent to the sale the property loses value due to some casualty or an improvement is added to the property.[15]

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[11] See *Robert Jacops v. Cuyahoga County Board of Revision* (December 31, 2019), BTA No. 2019-325. See also *Lake Avenue Christian Church Inc. v. Clark County Board of Revision* (January 29, 2020), BTA No. 2019-1201; *Johnson v. Greene Cty. Bd. of Revision* (Apr. 3, 2018), BTA No. 2017-945.

[12] See *Al Gammarino, Tr. v. Summit County Board of Revision* (June 23, 2020), BTA No. 2019-2068.

[13] See R.C. 5713.03. See also *Amherst Marketplace Station, LLC v. Lorain County Board of Revision*, 9th Dist. Lorain Case No. C.A. No. 20CA011623, 2021-Ohio-3866, ¶ 8 ("R.C. 5713.03 provides that the valuation of property by county auditors must reflect "the true value of the fee simple estate, as if unencumbered * * *." This language contains a "significant change[]" to the language of R.C. 5713.03 as a result of 2012 Am.Sub.H.B. No. 487, effective September 10, 2012, because previous versions of the statute omitted any reference to the unencumbered state of property.").

[14] See R.C. 323.11 ("The lien of the state for taxes levied for all purposes on the real and public utility tax list and duplicate of each year shall attach to all real property subject to such taxes on the first day of January, annually…")

[15] See OAC 5703-25-05(A). See also *Amherst Marketplace Station, LLC v. Lorain County Board of Revision*, 9th Dist. Lorain Case No. C.A. No. 20CA011623, 2021-Ohio-3866, ¶ 8 ("The "true value" of property is "the amount for which that property would sell on the open market by a willing seller to a willing buyer."); *Kristin Duey v Summit County Board of Revision* (May 3, 2022), BTA No. 2021-814 ("Ohio law has long held that county auditors and/or fiscal officers are to appraise real property "at its true value in money." R.C. 5713.01(B). "[T]he value or true value in money of real property" refers to "the amount for which that property would sell on the open market by a willing seller to a willing buyer ***, *i.e.*, the sales price.").

As part of its true value determination the auditor is also required to classify each parcel of real property "according to its principal, current use."[16] Only two classifications are permissible under the Ohio Administrative Code: (1) "Residential and agricultural land and improvements" or (2) "All other taxable land and improvements, including commercial, industrial, mineral and public utility land and improvements."[17]

Where the parcel owner or another statutorily authorized party[18] claims that the valuation, classification of the property,[19] or other decision made by the auditor is incorrect, then that party may bring a complaint before that county's Board of Revision ("BOR") to challenge the auditor's valuation.[20] In that manner, the BOR provides a first level of review, or appeal, of the auditor's valuation determination.[21]

The BOR is a statutorily created[22] quasi-judicial body[23] consisting of the county treasurer, the county auditor, and one member of the board of county commissioners, or their

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[16] See R.C. 5713.041.

[17] See Ohio Administrative Code ("OAC") 5703-25-10(A)(1) and (2). See also *Brett Reid v. Summit County Board of Revision* (March 11, 2019), 2018-1277 ("Pursuant to Ohio Adm. Code 5703-25-10, the county fiscal officer "shall classify each parcel of taxable real property in the county into one of the following classifications, which are: (1) Residential and agricultural land and improvements; (2) All other taxable land and improvements, including commercial, industrial, mineral and public utility land and improvements.").

[18] See R.C. 5715.19(A)(1).

[19] See *Jeffrey Schutte v. Hamilton County Board of Revision* (August 4, 2022(, BTA No. 2020-2175 ("R.C. 5713.041 directs the county auditor to classify each parcel of real property "according to its principal, current use" as residential/agricultural or '[a]ll other taxable land and improvements, including commercial, industrial, mineral and public utility land and improvements.'… The [BTA] has previously noted that there is no statutory definition of "principal use" for purposes of classification and has adopted a primary use test based on the test used to determine whether a property qualifies for exemption from taxation. *Roth v. Erie Cty. Bd. of Revision*, BTA No. 2007-A-1104, 2009 Ohio Tax LEXIS 802 (May 19, 2009). Under this test, "the determination as to taxable status must include an examination of both the quantity and quality of the use for which the property is utilized.""). The reviewing authority of the BTA and BOR does not extend, however, to subclassifications and a party may only challenge whether the parcel was correctly classified by the auditor into the two aforementioned categories. See *Select Medical Property Ventures, LLC v. Franklin County Board of Revision* (November 19, 2019), BTA No. 2018-2103.

[20] See R.C. 5715.19(A)(1).

[21] The county auditor makes other first line decisions, as well, that effect taxpayers including those relating to the Current Agricultural Use Valuation ("CAUV") program and the remission of tax penalties. See, for example, R.C. 5713.31 and R.C. 5715.39.

[22] See R.C. 5715.02.

[23] See *Swetland v. Evatt* (1941), 139 Ohio St.6. See also *MC MSB c/o Nexcore Group v. Delaware County Board of Revision* (July 14, 2016), BTA No. 2015-1580 ("County boards of revision are quasi-judicial bodies created by statute and, as such, only have the limited powers conferred by statute.").

respective designees.[24] Each member of the BOR is authorized to administer oaths to the witnesses who appear before it.[25] The BOR is required to "hear complaints relating to the valuation or assessment of real property as the same appears upon the tax duplicate[26] of the then current year."[27] That duty would encompass, among other things, the obligation to hear complaints relating to the classification of real property's principal current use[28] and whether a parcel qualifies for a tax reduction as real property "not intended primarily for use in a business activity."[29]

As a "deciding tribunal" the BOR has the authority to hear evidence, legal arguments. interpret applicable statutes,[30] and issue decisions. Boards of revision "complete official action when they vote on matters that are properly before them and the vote is noted on the record of the board's proceedings."[31] Thereafter it is required to give notice of its action to concerned parties.[32]

As a creature of statute, the BOR is limited in its powers to those conferred by statute.[33] For instance, in a case involving the valuation of sub-surface minerals, the Court of Appeals

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[24] See R.C. 5715.02.

[25] See R.C. 5715.02.

[26] See R.C. 319.28(A). ("…the county auditor shall compile and make up a general tax list of real and public utility property in the county… Such lists shall be prepared in duplicate…The copies prepared by the auditor shall constitute the auditor's general tax list and treasurer's general duplicate of real and public utility property for the current year.").

[27] See R.C. 5715.11. See also *Cincinnati School Dist. Bd. of Edn v. Hamilton County Board of Revision*, 87 Ohio St.3d 363, 368, 2000-Ohio-452 ("The authority granted to a board of revision by R.C. 5715.01 is to "hear complaints and revise assessments of real property for taxation."); *Hess Ohio Developments, LLC et al v. Belmont County Board of Revision*, 7th Dist. Belmont Nos. 19 BE 0029, 19 BE 0030, 19 BE 0031, 2020-Ohio-4729, ¶ 36 ("R.C. 5715.11 provides that the BOR "shall hear complaints relating to the valuation or assessment of real property as the same appears upon the tax duplicate of the then current year."").

[28] See R.C. 5715.19(A)(1)(a) referencing R.C. 5713.041 ("Each separate parcel of real property shall be classified according to its principal current use… For purposes of this section, lands and improvements thereon used for residential or agricultural purposes shall be classified as residential/agricultural real property, and all other lands and improvements thereon and minerals or rights to minerals shall be classified as nonresidential/agricultural real property. Each year the auditor shall reclassify each parcel of real property whose principal, current use has changed from the preceding year to a use appropriate to classification in the other class.").

[29] See R.C. 5715.19(A)(1)(f) referencing R.C. 319.302(A).

[30] See *Rocky Fork Hunt & Country Club v. Testa*, 120 Ohio App.3d 442 (10th Dist. 1997).

[31] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 121 Ohio St.3d 218, 2009-Ohio-760, ¶ 18.

[32] See R.C. 5715.20.

[33] See *Cincinnati School Dist. Bd. of Edn v. Hamilton County Board of Revision*, 87 Ohio St.3d 363, 368, 2000-Ohio-452 ("A board of revision is a creature of statute and is limited to the powers conferred upon it by statute."). See also *Hess Ohio Developments,*

has ruled that in carrying out its statutory duty to "hear complaints relating to the valuation or assessment of real property" as set forth in R.C. 5715.11, the BOR does not have the authority to determine the ownership of those minerals. That authority, said the Court, is granted to the Common Pleas Court, not the BOR, pursuant to a quiet title action under R.C. 5303.01 and is outside the authority of the BOR.[34]

Further, like the Board of Tax Appeals ("BTA") - the administrative body to which its decisions can be appealed - the BOR has no equitable jurisdiction[35] The Supreme Court has

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LLC et all v. Belmont County Board of Revision, 7th Dist. Belmont Nos. 19 BE 0029, 19 BE 0030, 19 BE 0031, 2020-Ohio-4729, ⁋ 34 ("County boards of revision are creatures of statute and, as a consequence, are limited to the powers conferred upon them by statute."). See also *Morgan County Budget Commission v. Board of Tax Appeals*, 175 Ohio St. 225 (*1963); Ronald J. & Sara L. Siemientkowski v. Lorain County Board of Revision (June 14, 2002), BTA No. 2001-1008; New Albany-Plain Local Schools Board of Education v. Franklin County Board of Revision,* 10th Dist. Franklin Nos. 22AP-732, 733, 737, 738, 743, 744, 746, 757, 748, 749, 750, 751, 2023-Ohio-3806. ⁋ 7 ("The BTA, county boards of revision, and boards of education are all creatures of statute, and as such they have only the jurisdiction, power, and duties the General Assembly has expressly given them.").

[34] See *Hess Ohio Developments, LLC et all v. Belmont County Board of Revision*, 7th Dist. Belmont Nos. 19 BE 0029, 19 BE 0030, 19 BE 0031, 2020-Ohio-4729, ⁋⁋ 43, 44 ("…we disagree that the BOR's determination of the ownership of the other minerals in these administrative appeals falls within its statutory authority to assess property…In Ohio, the resolution of ownership rights in real property is governed by R.C. 5303.01. R.C. 5303.01 reads, in pertinent part, "An action may be brought by a person in possession of real property…against any person who claims an interest therein adverse to him for the purpose of determining such adverse interest.").

[35] See *Cleveland Municipal Schools Board of Education v. Cuyahoga County Board of Revision* (January 4, 2018), BTA No. 2017-369. See also *Dean Casapis v. Lorain County Board of Revision* (December 3, 2019), BTA No. 2019-802 ("We [the BTA] sympathize with the property owner, however this board does not have equitable jurisdiction and, therefore, cannot grant the property owner the relief that he seeks out of a sense of fairness."); *Zaher Helmi v. Montgomery County Board of Revision* (June 29, 2020), BTA No. 2019-1297 ("To the extent that the property owner requests this board [BTA] decrease the subject property's value based upon a sense of fairness, we must also reject that argument. The Ohio Supreme Court has long held this board is a creature of statute and has no power to act unless specifically authorized by statute."); *Stephen Egert v. Cuyahoga County Board of Revision* (May 24, 2021), BTA No. 2020-1909 ("To the extent the property owner requested relief based upon his employment or financial condition, unfortunately, this Board is not allowed to consider these factors. The Ohio Supreme Court has long held that this Board is a creature of statute and has no power to act unless specifically authorized by statute. [citations omitted] As such, we lack equitable jurisdiction and cannot grant the property owner the relief that he seeks out of a sense of "fairness."); *Richard A. Marthaller v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2019-2215 ("…the property owner requests that we reduce the subject property's value out of a sense of fairness…The Ohio Supreme Court has long held this Board is a creature of statute and has no power to act unless specifically authorized by statute. As such, we lack equitable jurisdiction and cannot grant the property owner the relief that he seeks out of a sense of fairness or equitable concepts."); *Isam and Sherri Saleh v. Franklin County Board of Revision* (September 1, 2021), BTA Nos. 2021-177, 2021-190.; *Kent City Schools Board of Education v. Portage County Board of Revision* (March 8, 2022), BTA No. 2020-1310 ("[The owner] argued the value should not be increased because it would cause economic hardship for the property owner. We sympathize, but this Board has no equitable authority to disregard binding law, which says a recent and arm's-length sale creates a rebuttable presumption of value.") Following that reasoning, the BTA has ruled that it has no equitable jurisdiction even in hardship cases caused by the COVID pandemic. See Greenwood v. Franklin Cty. Bd. of Revision (Oct. 12, 2021), BTA No. 2020-2431.; *Struthers City Schools Board of Education v. Mahoning County Board of Revision* (August 15, 2022), BTA No. 2019-2807.; *Gregory R. and Mary L. Thewes v. Summit County Board of Revision* (September 15, 2022), BTA No. 2021-1226.; *Steve and Joy Veris v. Montgomery County Board of Revision* (December 7, 2022), BTA Nos. 2021-1990, 2021-1991.; *Edward Korode v. Portage County Board of Revision* (December 28, 2022), BTA No. 2022-1060; *North East Lawn LLC v. Marion County Board of Revision* (December 30, 2022), BTA No. 2021-1554.; *South-Western City Schools Board of Education v. Franklin County Board of Revision* (January 3, 2023), BTA Nos. 2021-2038, 2021-2039.; *Springfield Local Schools Board of Education v. Lucas County Board of Revision* (May 23, 2023), BTA No. 2021-2265; *Robert Dougherty v. Cuyahoga County Board of Revision* (December 18, 2023), BTA No. 2023-1364.

made clear that "Neither the BOR nor the BTA constitutes a "court", and neither exercises civil jurisdiction at law or in equity."[36] Instead, both the BTA and the BOR are considered administrative agencies.[37] The BOR's subject matter jurisdiction[38] is much narrower than the aforementioned courts, as is the universe of those who are authorized to bring claims before it.[39] In addition, hearings at the BOR are less formal than those in the state courts. For example, unlike state courts the BOR is not bound by the Ohio Rules of Civil Procedure,[40] nor by the Ohio Rules of Evidence.[41] The Rules of Evidence, however, may be used for guidance.[42]

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[36] See *Meadows Development, L.L.C. v. Champaign County Board of Revision*, 124 Ohio St.3d 349, 2010-Ohio-249, ¶ 14.See also *Struthers City Schools Board of Education v. Mahoning County Board of Revision* (August 15, 2022), BTA No. 2019-2807; *Esch Family Limited Partnership v. Montgomery County Board of Revision* (November 30, 2022), BTA No. 2021-2077.

[37] See *Meadows Development, L.L.C. v. Champaign County Board of Revision*, 124 Ohio St.3d 349, 2010-Ohio-249, ¶ 14. See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (October 28, 2019), BTA No. 2018-1604 ("As an *administrative agency* [italics added] this board [the BTA] is not strictly bound by the rules of evidence…"); *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, ¶ 9 ("A county board of revision's jurisdiction to hear and rule on complaints is defined by statute."); *Steward v. Evatt*, 143 Ohio St.547 (1944) (syllabus) ("The Board of Tax Appeals is a creature of statute and is limited to the powers with which it is thereby invested." For example, unlike civil courts in Ohio, both the BOR and the BTA are limited to the jurisdiction granted them by statute and neither has "equitable jurisdiction". See *Harold C. Jr. & Darci Schafer v. Franklin County Board of Revision* (July 25, 2017), BTA No. 2016-1501 ("The appellants also assert that it would be unfair to value the subject property consistent with its recent sale price when other properties were not valued in that manner. This board does not have jurisdiction to reduce the subject property's value based upon "fairness" or equity…as an administrative agency, the BTA "does not have equitable jurisdiction." Thus, this board lacks the requisite authority to provide equitable relief."). Like the BTA, boards of revision are also considered administrative agencies. See *Martha Shelby & Harold Addy Jr. v. Belmont County Board of Revision* (November 26, 2018), BTA No. 2017-1938 ("As an administrative agency, a board of revision may only perform those functions expressly authorized by statute…"); *Worthington City Schools Board of Education v. Franklin County Board of Revision* (July 1, 2022), BTA No. 2022-235.; *Esch Family Limited Partnership v. Montgomery County Board of Revision* (November 30, 2022), BTA No. 2021-2077.

[38] As stated by the Supreme Court, "Subject matter jurisdiction is a court's power to hear and decide a case on the merits." *State ex. Rel. Jones v. Suster*, 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 (1998).

[39] See R.C. 5715.19(A)(1).

[40] See *Zanesville City Schools Board of Education v. Muskingum County Board of Revision* (November 26, 2003), BTA No. 2003-T-51, fn. 1, where the BTA stated that the Ohio Rules of Civil Procedure do not apply to the BTA. If those rules do not apply to the BTA then, logically, they would not apply to the BOR.

[41] See *Dayton Supply & Tool Company v. Montgomery County Board of Revision*, 111 Ohio St. 3d 367, 2006-Ohio-5852, ¶ 24. See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (October 28, 2019), BTA No. 2018-1604 ("As an administrative agency this board [the BTA] is not strictly bound by the rules of evidence and has discretion about the admission of evidence and weight given thereto."). See also *Remington Clean Fill, L.L.C. v. Milford Exempted Schools Village Board of Education*, 12th Dist. Clermont Case No. C.A. 2020-12-074, 2021-Ohio-3779, ¶ 16.

[42] *Columbus City Schools Bd. of Education v. Franklin Cty. Bd. of Revision*, 159 Ohio St.3d 283, 2020-Ohio-353, ¶ 19.

There is another important distinction between hearings in state courts and hearings at the BOR. Unlike in state courts, the BOR is not considered to be "a fully neutral arbiter" and may elicit its own evidence at the hearings it conducts. As stated by the Supreme Court:

> We see no provision of law that prohibits, in connection with ordering a value reduction, a board of revision's consideration of additional evidence beyond that presented by the owner at the board's hearing. Indeed, we have acknowledged that instead of acting as a fully neutral arbiter, a board of revision conducts proceedings that are part of the county's own determination of value for a particular parcel and is therefore an appellee in any appeal from that determination. [citation omitted] ("While the board of revision is a deciding tribunal, it is not a truly impartial tribunal in the sense that a trial court or the BTA is," but rather consists of county officials and "has an interest in the case because the value decision affects the county's tax revenues"). It stands to reason that just as the county auditor consults its experts in originally assessing the property, the board of revision may, when reviewing the decrease complaints that come before it, elicit evidence from consultants and staff appraisers….And although the boards of education have a statutory right to participate in proceedings initiated by decrease complaints, see R.C. 5715.13(A) and 5715.19(B), they do not have the right to limit the scope of evidence that the boards of revision may rely upon in ordering a value reduction..[43]

Indeed, unlike procedures in Ohio's statutory courts, the BTA has ruled that at the BOR, under some circumstances, evidence may be received and properly considered by the BOR *after* the evidentiary portion of the hearing is concluded.[44]

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[43] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 151 Ohio St.3d 458, 2017-Ohio-5823, ¶ 9.

[44] See Dayton Bd. of Edn. v. Montgomery Cty. Bd. of Revision, BTA No. 2004-M-74, 2004 Ohio Tax LEXIS 2018 (Dec. 17, 2004), citing *Park Place Props., L.L.C. v. Miami Cty. Bd. of Revision*, 2d Dist. No. 2001-CA-35, 2002-Ohio-934, ¶ 20. In *Dayton Bd. of Edn*. The BTA stated that "The transcript contains a record of the hearing held before the BOR…However, all the evidence presented to the BOR does not exist within the record. The BOR sought additional information from the property owner, to be submitted *after the close of the hearing*, (emphasis added) and informed Office Town that a representative of the auditor's office would visit the property to determine whether the property was properly valued. We assume the BOR proceeded to gather information concerning the property, because sometime after the hearing was concluded the value of the subject property was reduced. However, only the financial information submitted by Office Town has been included in the record. No further information, e.g., the auditor's conclusions after viewing the property, the evidence of value relied upon by the BOR in reducing value, or the manner by which the financial information presented was applied to conclude to value, is presented through the statutory transcript…. The ability to present evidence and cross examine witnesses before this board [the BTA] also mitigates any constitutional due process arguments concerning the BOR's authority to seek additional information from a property owner or view a property after the close of the BOR's hearing. Pursuant to R. C. 5715.11, the board of revision has a duty to investigate complaints against the valuation of real property filed with that body. In *Park Place Properties LLC v. Miami Cty. Bd. of Revision* (Feb. 15, 2002), Miami App. No. 2001-CA-35, unreported, the appellate court 6 considered a finding of value rendered by a board of revision after considering additional appraisal evidence sought after the close of an evidentiary hearing. In response to the claim that witnesses before a board of revision must be subjected to examination, the court, relying upon R.C. 5715.11, remarked that the statute does not limit the BOR's power of investigation. The court found that the real issue was whether the BOR should have reconvened the hearing so that the appraiser could be cross-examined. The court answered this issue in the negative, finding that the BOR did not abuse its discretion in considering the appraisal, and any due process arguments were counteracted by the statutory

Despite those differences, however, there are some similarities between proceedings at the BOR and those of other courts in Ohio like the Common Pleas, Municipal, and County courts. Like those courts, at BOR hearings (1) testimony is given under oath, (2) a recorded or stenographic record is maintained, (3) rulings are made on evidentiary objections, (4) exhibits are identified and submitted into the record, (5) decisions are issued based on the evidence and the applicable law, and (6) those decisions are subject to appellate review. Further, as with Ohio courts, evidence at the BOR should be reliable.

> Evidence presented at a hearing is accepted only upon conditions designed to insure its reliability. Appellants must first be sworn on oath. Their sworn testimony is then scrutinized and subjected to cross-examination. Documentary evidence is also subjected to the scrutiny of the parties and their counsel."[45]

One common misperception about the BOR should be cleared up at the outset. It is sometimes believed that through the valuation process the Auditor (and through its review of the Auditor's values, the BOR) sets tax *rates*. That belief is incorrect. The auditor sets property *values*, not property tax rates or amounts, and the BOR reviews the auditor's determinations on property *values*. The rates, or the amount of tax to be paid, that are applied to the value of a particular parcel are received from other officials and are not determined by the auditor.[46] It is those *rates*, applied to the value of the parcel, that ultimately determine the amount of property tax paid on a particular parcel. So, for example, an acre of farmland in hypothetical Taxing District 1 where the voters have voted for school levies in high amounts will pay a greater amount of taxes than a virtually identical acre in Taxing District 2, where the voters have voted tax levies in lower amounts.

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scheme of de novo review under R.C. 5717.05." See also *Ray S. Duell v. Stark County Board of Revision* (May 31, 2022), BTA No. 2020-2050.

[45] See *CEM LLC v. Franklin County Board of Revision* (October 4, 2018), BTA No. 2018-358.

[46] See R.C. 319.40(A) ("After receiving from officers and authorities empowered to determine the rates or amounts of taxes to be levied for the various purposes authorized by law…the county auditor shall proceed to determine the sums to be levied upon each tract and lot of real property…").

CHAPTER 2
UNDERSTANDING THE MEANING OF "REAL PROPERTY"

CHAPTER SUMMARY

- Boards of revision may only hear disputes concerning real, as opposed to personal, property and the ability to make that distinction is central to the functioning of the property tax assessment system in Ohio.
- Revised Code Chapter 5701 provides definitions of both "real property" and "personal property."
- A "business fixture" is defined in the Revised Code and is considered personal property (and therefore, not taxed as real property) even though affixed to, or buried under, the ground.
- A "fixture" is defined in the Revised Code and is considered real property (and therefore, taxed as real property).
- In determining whether an item is real or personal property the first step is to determine if it is a "business fixture." If not, the Supreme Court has developed a two-step methodology to make the real vs. personal property determination.

The Assessment of "Real Property"

Revised Code Title 57 - and in particular Chapters 5713,[47] 5715,[48] and 5717[49] - creates an integrated assessment, adjudication, and appeals system for the taxation of real property in Ohio. To that end, R.C. 5715.01(A) requires that Ohio's Tax Commissioner prescribe methods to determine both the true and taxable values of real property.[50] To handle disputes that may arise as to whether a property was accurately assessed for valuation purposes, a board of revision is established in each county to "hear complaints and revise assessments of *real property* for

[47] See R.C. Chapter 5713, Assessing Real Estate.

[48] See R.C. Chapter 5715, Boards of Revision; Equalization of Assessments.

[49] See R.C. Chapter 5717, Appeals.

[50] See R.C. 5715.01(A)(1).

taxation."[51] (emphasis added). That statute makes clear that the BOR's authority is limited to cases involving real, as opposed to personal, property.

Because only real property can be assessed and taxed under Chapters 5713 and 5717, and because the BOR's authority is limited to cases involving real property, determining what constitutes "real property," as opposed to "personal property," is central to Title 57's real property taxation system. If property is categorized as real property, its value is subject to real property taxation and the BOR has authority to adjudicate disputes relating to its valuation. If it is categorized as personal property, its value is not subject to real property taxation and the BOR has no authority to hear those disputes.

"Real Property" and "Personal Property"

In guiding the determination as to whether the subject is (or contains) real or personal property, R.C. 5701.02(A) defines "real property", in applicable part, as follows:

> "Real property," "realty," and "land" include land itself…all growing crops, including deciduous and evergreen trees, plants, and shrubs, with all things contained therein, and, unless otherwise specified in this section or section 5701.03 of the Revised Code, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto.

In defining "real property", R.C. 5701.02(A) references R.C. 5701.03 which defines "personal property." That definition reads, in applicable part:

> "Personal property" includes every tangible thing that is the subject of ownership, … including a business fixture, and that does not constitute real property as defined in section 5701.02 of the Revised Code.[52]

Thus, by statutory definition something cannot be both real and personal property at the same time. It must be one or the other.

[51] See R.C. §5715.01(B) ("There shall also be a board in each county, known as the county board of revision, which shall hear complaints and revise assessments of real property for taxation.").

[52] See R.C. §5701.03(A).

"Business Fixtures" and "Fixtures"

In the overwhelming proportion of cases heard by boards of revision, there is no issue that the subject of the hearing is real property. There are cases, however, where the distinction between real and personal property is not so clear. Those typically involve situations where physical objects are buried under or affixed to the subject real property or to the buildings, improvements, or structures thereon. In those hybrid-type cases the issue is often whether items of personal property have been "transformed" into real property for taxation purposes through their attachment to or burying under the subject parcel. If so, their value is included in the value of the real property and subject to real property taxation. Items affixed to or under the ground are typically categorized as either "business fixtures" or "fixtures." There are important distinctions between the two.

A "business fixture" is personal property[53] and is defined in R.C. 5701.03(B) as follows:

> "Business fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty. "Business fixture" includes, but is not limited to, machinery, equipment, signs, storage bins and tanks, whether above or below ground, and broadcasting, transportation, transmission, and distribution systems, whether above or below ground. "Business fixture" also means those portions of buildings, structures, and improvements that are specially designed, constructed, and used for the business conducted in the building, structure, or improvement, including, but not limited to, foundations and supports for machinery and equipment. "Business fixture" does not include **fixtures** that are common to buildings, including, but not limited to, heating, ventilation, and air conditioning systems primarily used to control the environment for people or animals, tanks, towers, and lines for potable water or water for fire control, electrical and communication lines, and other **fixtures** that primarily benefit the realty and not the business conducted by the occupant on the premises.

The "fixtures" referenced above in R.C. 5701.03(B), above, are defined in R.C. 5701.02(C) as follows:

> "Fixture" means an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the realty and not the business, if any, conducted by the occupant on the premises.

[53] See R.C. §5701.03(A).

Based on the above statutory language, the Ohio Supreme Court has found that "It is apparent that the General Assembly has expressed its intent that fixtures are real property and that business fixtures are personal property…"[54] In brief, then, if something is "real property" it is subject to real property taxation. If it is "personal property" it is not. If it is a "fixture" it is considered part of the land and therefore subject to real property taxation. If it is a "business fixture" it is considered personal property and not subject to real property taxation. In distinguishing a "business fixture" from a "fixture," a business fixture "primarily benefits the business conducted by the occupant on the premises and not the realty,"[55] whereas a fixture "primarily benefits the realty and not the business, if any, conducted by the occupant on the premises."[56]

Determining Whether it is a "Business Fixture"?

To determine whether an item is real or personal property, the first step is to review the very detailed statutory definition of "business fixture" in R.C. 5701.03(B). That definition contains a lengthy list of items considered "business fixtures." If the item under review appears in that list, it is "personal property,"[57] is not taxable real property, and the inquiry should be concluded.[58]

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[54] See *Metamora Elevator Company v. Fulton County Board of Revision*, 143 Ohio St.3d 359, 2015-Ohio-2807, ¶ 23.

[55] See R.C. §5701.03(B).

[56] See R.C. §5701.02(C).

[57] See R.C. §5701.03(A) which states, in applicable part, that personal property "includes every tangible thing that is the subject of ownership… including a business fixture…"

[58] See *Metamora Elevator Company v. Fulton County Board of Revision*, 143 Ohio St.3d 359, 2015-Ohio-2807, ¶ 25, where the Supreme Court stated "In promulgating R.C. 5701.03, the General Assembly has expressly defined the term "business fixture" to include storage bins, and therefore, they are personal property not subject to real property tax. And in clarifying its intent, the General Assembly expressly stated that the term business fixtures includes storage bins. *Therefore, our analysis need go no further than to apply the expressed intent of the General Assembly to the undisputed facts of this case*." (emphasis added). See also, *Hoffman Properties, L.P. v. Testa*, 9th Dist. Medina C.A. No. 14CA0041-M, 2015-Ohio-393, ¶ 11 where the Court of Appeals stated that in the first instance a two step analysis is not required where the subject item is identified in the statute as a business fixture ("…In *Metamora…* the Supreme Court clarified…that the question of whether an item constitutes real property or a business fixture "does not necessarily require a two-step analysis with initial consideration given to the definition of 'real property' in all instances… Thus, the Supreme Court acknowledged in *Metamora* that "in *Funtime* we did not strictly apply the two-step analysis that we announced in paragraph 33" due to the fact that the item in question was "otherwise specified" because it fit the definition of business fixture.").

Where, however, the subject is not found in the business fixture definition, then the Supreme Court has prescribed a two-step process to determine whether the item is real or personal property.

> …first, determine whether the item meets the requirements of one of the definitions of real property set forth in R.C. 5701.02. If the item does not, then it is personal property. If the item fits a definition of real property in R.C. 5701.02, it is real property unless it is "otherwise specified" in R.C. 5701.03. If an item is "otherwise specified" under R.C. 5701.03, it is personal property.[59]

See the chart, below, for a graphic depiction of the method to distinguish real from personal property.

Examples

Unfortunately, other than the items expressly identified as "business fixtures" in R.C. 5701.03(B) there is no definitive, all-encompassing listing of the category or type of personal property that is converted to real property once affixed to or buried under real property. Indeed, such a list would be of limited help because the Supreme Court has long held that the facts and circumstances of each case control the determination of what is real as opposed to personal property.[60]

Despite that lack of statutory specificity, however, decisions of both the Supreme Court and the BTA provide guidance as to the type of facts and circumstances that support a finding that an object is a "business fixture." For example, the Supreme Court has found that:

1. Grain storage bins were business fixtures[61] and therefore, not subject to real property taxation;

2. A "station house," consisting of a platform with no walls and an overhead canvas for protection from the elements, which was affixed to an amusement park ride to help load

[59] See *Funtime, Inc. v. Wilkins*, 105 Ohio St.3d 74, 2004-Ohio-6890, ¶ 33.

[60] See *Masheter v. Boehm*, 37 Ohio St.2d 68 (1974), Syllabus 2 ("The determination of whether an item is a fixture, passing with the real property in an appropriation proceeding, must be made in light of the particular facts of each case, taking into account such facts as the nature of the property; the manner in which it is annexed to the realty; the purpose for which the annexation is made; the intention of the annexing party to make the property a part of the realty; the degree of difficulty and extent of any loss involved in removing the property from the realty; and the damage to the severed property which such removal would cause.")

[61] See *Metamora Elevator Company v. Fulton County Board of Revision*, 143 Ohio St.3d 359, 2015-Ohio-2807.

and unload patrons of the ride, was a business fixture and not subject to real property taxation;[62]

3. Conveyors and material handling equipment installed inside a distribution center to transport merchandise were business fixtures where (1) they were attached to the building's support beams using hangers and headers but did not support the building itself, (2) could be unbolted and removed without damaging the building itself, and (3) could be repaired, replaced, and reconfigured.[63]

Similarly, the BTA found that greenhouses located on the subject parcel were business fixtures and, therefore, not taxable as real property. In discussing the factual basis for its decision, the BTA stated that:

> The greenhouses situated on the subject property are not buildings, structures, or improvements…the greenhouses are designed in such a way that they are able to be constructed, deconstructed, and reconstructed, all while maintaining the integrity of the underlying parts…they are constructed like an erector set, where pieces are connected but not welded. As such, elements of a greenhouse, or the greenhouse as a whole, can be removed and replaced if business needs change, and the portions that were removed remain intact and can be sold or reused elsewhere. This is particularly evident given the second-hand market for greenhouses, which does not exist for buildings. We recognize that many of the greenhouses have been attached to the ground and have remained in place for significant length of time with no immediate plans for relocation. This does not speak to the permanence of their construction, but rather to the permanence of their attachment to the real property, which is a defining characteristic of a fixture.[64]

In another case, the BTA ruled that an underground irrigation system installed at a golf course was a business fixture and, thus, personal property.

> In this instance, we find that the irrigation system…does not constitute real property, but is personal property, i.e., a business fixture…Clearly, such specialized irrigation system was designed and installed to address the unique needs associated with the operation of a golf course and to primarily benefit the ongoing business conducted on the land, i.e., the golf course.[65]

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[62] See *Funtime, Inc. v. Wilkins*, 105 Ohio St.3d 74, 2004-Ohio-6890.

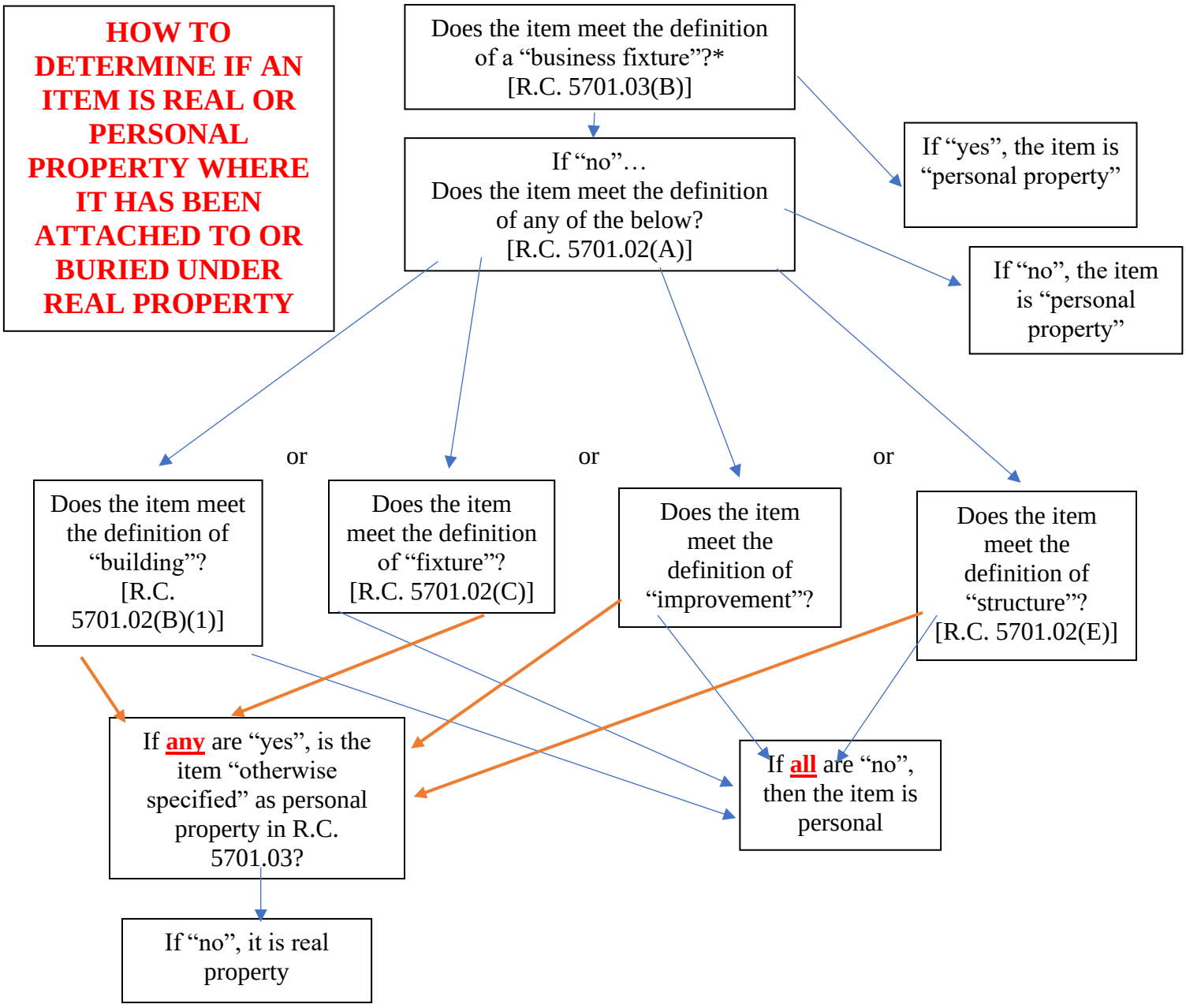
[63] See *Litton Systems, Inc. v. Tracy*, 88 Ohio St.3d 568, 2000-Ohio-427 .

[64] See *Viola Associates, LLC v. Lorain County Board of Revision* (July 11, 2018), BTA Nos. 2016-1273, 2016-1274, 2016-1275, affirmed on appeal at *Viola Assocs., L.L.C. v. Lorain Cty. Bd. of Revision*, 9th Dist. Lorain C.A. No. 18CA011386 18CA011387, 2021-Ohio-991.

[65] See *Hoffman Properties, L.P. v. Testa*, 9th Dist. Medina C.A. No. 14CA0041-M, 2015-Ohio-393, ¶ 12.

These cases make clear that the real versus personal property determination is often driven by the subtle distinctions and granular details of each case. In making the real versus personal property determination, the first step is to determine if the item, once affixed to the real property, has become a business fixture. If not, the next step is to utilize the two-step protocol described above as outlined by the Supreme Court.

CHART



*See *Metamora Elevator Company v. Fulton County Board of Revision*, 143 Ohio St.3d 359, 2015-Ohio-2807 where the Supreme Court stated that "Our decision in *Funtime* does not necessarily require a two-step analysis with initial consideration given to the definition of "real property" in all instances…In promulgating R.C. 5701.03, the General Assembly has expressly defined the term "business fixture"…our analysis need go no further than to apply the expressed intent of the General Assembly…"

CHAPTER 3
THE "FEE SIMPLE" INTEREST

CHAPTER SUMMARY

- The fee simple estate, as if unencumbered but subject to the exercise of police or governmental powers, is the property interest to be valued at a BOR hearing.
- A lease is an encumbrance on the fee simple estate.
- The increase or decrease in value attributable to a lease is to be "stripped out" of the value of the parcel so that its value can be determined "as if unencumbered."
- Police powers include, among other things, zoning and health and safety regulations.
- The price at which a property recently sold creates a rebuttable presumption that the sales price is the value of the property.

R.C. 5713.03

The accurate identification of the property interest to be valued is central to any BOR valuation decision. R.C. 5713.03 identifies that interest as "the fee simple estate, as if unencumbered but subject to any effects from the exercise of police powers or from other governmental actions…" Thus, under R.C. 5713.03 the property interest to be valued contains three elements: it must be (1) a fee simple estate; (2) unencumbered; but (3) subject to the effect of police powers.

Element 1: What is a "Fee Simple Estate"?

As defined by the Ohio Supreme Court, "fee simple is the highest right, title and interest that one can have in land. It is the full and absolute estate in all that can be granted."[66] Not only does fee simple ownership encompass all rights in and to the surface of the land, but it also includes

[66] See *Masheter v. Diver*, et al., 20 Ohio St.2d 74, 78 (1969).

rights to use or convey the gas, oil, coal, stone, water, and any mineral interest found under the land.[67]

Element 2: What is an "Encumbrance"?

R.C. 5713.03 also requires that land be valued "as if unencumbered." It follows that we must determine the meaning of "encumbrance" in order to remove the impact, both negative and positive, that the encumbrance may have on the value of the subject land.

At the outset, it is clear that easements are encumbrances.[68] Covenants and restrictions in favor of the Department of Housing and Urban Development ("HUD"), in the case of subsidized housing valuations, are also considered encumbrances.[69] Finally, leases too are encumbrances.[70] As stated by the Court of Appeals:

> An encumbrance is a right or interest in land which may subsist in third persons to the diminution of the value of the land but which is nonetheless consistent with the passing of the fee by conveyance…That encumbrances include unexpired leases is also well-settled.[71]

Because the tenant has the right under a lease to occupy the property, any sale of the property is subject to the leasehold rights of the tenant unless the tenant has waived those rights. Thus, the lease is considered an encumbrance on the fee simple estate and R.C. 5713.03 makes no distinction between leases that enhance or those that diminish a parcel's value. In both instances the statute

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[67] See *Mid-Ohio Coal Company v. Ralph C. Brown*, 5th Dist. Guernsey No. 17 CA 21, 2018-Ohio-1934, ⁋ 18. Fee simple also encompasses air rights over the land. See *Village of Willoughby Hills v. Corrigan*, 29 Ohio St.2d 39 (1972) ("The landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land.").

[68] See *Johnston v. Waterville Gas & Oil Company*, 6th Dist. Lucas No. L-08-1143, 2009-Ohio-4061, ⁋ 17. See also *Vanderlaan v. Pavlik*, 1st Dist. Hamilton No. C-150060, 2015-Ohio-5349, ⁋ 9 ("Generally, an easement is defined as an interest in the land of another which entitles the owner of the easement to a limited use of the land in which the interest exists."). However, where they are voluntarily undertaken they may *not* be considered in determining a property's value. See *Christopher T. Cline, Margaret Ann Plahuta, Teresa Jo Gubsch v. Hocking County Board of Revision* (August 30, 2021), BTA No. 2020-1498 ("It is well settled that voluntarily undertaken restrictions cannot be considered when valuing real property.")

[69] See separate opinion of Justice DeWine, concurring in part and dissenting in part, in *Columbus City Schools Board of Education v .Franklin County Board of Revision*, 154 Ohio St.3d 146, 2018-Ohio-3254, ⁋ 31 where Justice DeWine, citing *Alliance Towers*, stated that such restrictions "obviously constituted an encumbrance on the property-that is, a 'right to, or interest in, land which may subsist in another to diminution of its value, but consistent with passing of the fee.").

[70] See *Lowe's Home Centers, Inc. v. Washington County Board of Revision*, 154 Ohio St.3d, 2018-Ohio-1974, ⁋ 19 ("…it is plain that a lease is an encumbrance and that R.C. 5713.03's directive to value the realty 'as if unencumbered' means to value the reality as if it were free of encumbrances such as leases.").

[71] See *Tenbusch v. L.K.N. Realty Co.*, 107 Ohio App. 133 (8th Dist. 1958).

requires that the fee simple property is to be valued "as if unencumbered," and any encumbrance – whether it diminishes or enhances the value of the property – may not be considered in the determination of value.[72]

Element 3: What are "Police Powers"?

Additionally, R.C. 5713.03 requires that the fee simple estate must be valued "subject to any effects from the exercise of police powers or from other governmental actions." In other words, the impact of police powers on the value of the property *should* be considered and factored in when making a value determination. Police powers typically include things like zoning and health and safety regulations.[73] Because police powers can place limitations or constraints on the size of a parcel, the location or type of building that may be built on the parcel (i.e.: setback regulations, zoning districts limited to residential, etc.), or the manner in which it can otherwise be used, they are often considered to reduce the value of the property.[74] By the same token, by enhancing the aesthetics or safety of a neighborhood, police powers may in some instances have a generally positive influence on neighborhood property values.

Separating the Value of a Lease from the Fee Simple Estate

The requirement that property be valued "as if unencumbered" becomes particularly

[72] In common understanding, the word "encumbrance" is often seen as meaning "a burden or impediment" (see https://www.google.com/search?source=hp&ei=Lg7FWrXpNOi3jwTmw6W4Bg&q=dictionary&oq=dictionary&gs_l=psy-ab.13..0j0i131k1j0j0i131k1j0l6.934.2030.0.4131.10.10.0.0.0.0.185.1277.2j8.10.0....0...1.1.64.psy-ab..0.10.1271....0.WYdO0ze-wxU#dobs=encumbrance&spf=1522863671628). For example, in the commercial real estate context, a lease can be considered to diminish the value of the parcel where the prospective purchaser intends to construct a new building or enterprise on the land but is prevented from doing so because an existing tenant continues to occupy the property pursuant to a lease; clearly an impediment to new construction. On the other hand, in the context of commercial property a lease can enhance the value of the property even though it is an "encumbrance," by providing a prospective purchaser with a steady income stream of rent-paying tenants. Nonetheless, despite the fact that a lease may benefit the owner, it is considered an "encumbrance" because it is a "right or interest in land which may subsist in third persons [the tenant]."

[73] But they can also include things that are not typically associated with commonplace health and safety regulations. For example, in the context of low-income housing, the Ohio Supreme Court has ruled that the use restrictions imposed under a low income housing subsidy program are restrictions for "the general welfare". As such, they are police power restrictions and must be considered in determining the value of the subject property. See *Woda Ivy Glen Limited Partnership v. Fayette County Board of Revision*, 121 Ohio St.3d 175, 2009-Ohio-762, ¶ 30.

[74] It is important to note, however, that zoning and other police power regulations can also enhance the value of a property by ensuring that the district in which it is located is safe, well-maintained, and physically attractive, thereby arguably raising the value of the property.

important, and at the BOR is most frequently encountered, when a commercial property that is subject to a lease is being valued. In that circumstance the Supreme Court, following the language of R.C. 5713.03, allows those who oppose the sales price (typically the owner seeking a valuation below the sales price) to present evidence of the value of the lease so that such value may be removed or stripped out from the value of the fee simple estate.[75] As discussed in greater detail below, while the Supreme Court has held that the sales price is *presumptively* valid, that presumption may be rebutted;[76] often through the testimony of an appraiser who opines on the value that the lease added to the sales price over the value of the fee simple estate.

The Court has stated, however, that the "mere fact that an expert [appraiser] has opined a different value should not be deemed sufficient to undermine the validity of the sale price as the property value," but went on to say that:

> …specific information bearing on the question of the recency, the arm's-length character, or the voluntariness of the sale may be introduced as part of an appraiser's report and opinion of value and may thereby rebut the presumption and permit the appraiser's opinion of value to be considered.[77]

More recently, the Supreme Court reiterated that in arm's length sales there remains a presumption that the sale is the best evidence of value.[78] But, importantly, it clarified that the amendment to R.C. 5713.03 in 2012 restored the standard that "the sale price is the best evidence but not the only evidence of true value."[79] Accordingly, the Court ruled that under that standard, "appraisal evidence was admissible and competent even when a sale price was proposed as

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[75] See *Terraza 8, L.L.C. v. Franklin County Board of Revision*, 150 Ohio St.3d 527, 2017-Ohio-4415. See also *Zachary A. Zimmer v. Stark County Board of Revision* (November 6, 2017), BTA Nos. 2017-622, 2017-623.

[76] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 146 Ohio St.3d 470, 2016-Ohio-757, ¶ 17.

[77] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 146 Ohio St.3d 470, 2016-Ohio-757, ¶ 20. See also *Hilliard City Schools Board of Education v. Franklin County Board of Revision*, 154 Ohio St.3d 449, 2018-Ohio-2046, ¶ 13.

[78] See *Westerville City Schools Board of Education v. Franklin County Board of Revision*, 154 Ohio St.3d 308, 2018-Ohio-3855, ¶ 10.

[79] See *Westerville City Schools Board of Education v. Franklin County Board of Revision*, 154 Ohio St.3d 308, 2018-Ohio-3855, ¶ 16. ("By overriding *Berea* in enacting H.B. 487's amendments to R.C. 5713.03, the legislature reinstated *Ratner*'s approach, under which appraisal evidence is competent and admissible evidence of value even in cases in which a sale price has been offered as evidence of value.").

establishing the property's value."[80] In so-ruling, the Court rejected the BOE's argument that the appraisal could only be considered where there had first been evidence "to impugn the sale in some way before appraisal evidence becomes relevant and admissible."[81] As such, in light of the 2012 amendments to R.C. 5713.13, appraisal evidence may be considered alongside evidence of an arm's length sale[82] and there is no requirement, prior to considering such appraisal evidence, that the recency or arm's length nature of the sale be impugned.[83]

[80] See *Westerville City Schools Board of Education v. Franklin County Board of Revision*, 154 Ohio St.3d 308, 2018-Ohio-3855, ¶ 16.

[81] See *Westerville City Schools Board of Education v. Franklin County Board of Revision*, 154 Ohio St.3d 308, 2018-Ohio-3855, ¶ 13.

[82] See *GC Net Lease @ 3 (Westerville) Investors, L.L.C. v. Franklin County Board of Revision*, 154 Ohio St.3d 121, 2018-Ohio-3856, ¶ 11. ("…in *Westerville City Schools*…we held that the 2012 Am.Sub.H.B. No. 487 amendments to R.C. 5713.03 made appraisal evidence admissible and competent alongside sale price evidence in determining a property's value. A cursory mention of one aspect of the appraisal does not constitute a full consideration of the evidentiary value of the appraisal.").

[83] See *Menlo Realty Income Properties 28, LLC v. Franklin County Board of Revision*, 10th Dist. Franklin No. 19AP-316, 2019-Ohio-4872, ¶ 24, quoting from *Westerville City Schools Board of Education v. Franklin County Board of Revision*, 154 Ohio St.3d 308, 2018-Ohio-3855, ¶ 13 ("…no threshold showing is required before a tribunal must give full consideration to appraisal evidence.").

CHAPTER 4
DETERMINING IF THE BOR HAS JURISDICTION TO HEAR THE CASE

CHAPTER SUMMARY

- "Jurisdiction" refers to the BOR's authority to hear and adjudicate a case.
- The jurisdictional requirements for the BOR to hear a case are contained in Revised Code sections 5715.13 and 5715.19.
- The complainant in a BOR proceeding has the burden to show that the BOR has the jurisdiction to hear the case.
- The DTE Form 1, the standard BOR complaint form, is typically used by complainants to initiate the complaint process
- Certain information on the DTE 1 is not mandatory in order for the BOR to obtain the jurisdiction to hear a case.
- Information is considered mandatory on the DTE 1 if it runs to "the core of procedural efficiency," which means it is required by statute, imposed on the appellant itself, and relates to the informative content of the complaint.
- Some of the information considered to be mandatory on the DTE 1 includes the requirement that the complaint set forth the amount of the over/under valuation on which the complaint is based.

Overview of Jurisdiction

In general, "jurisdiction" refers to a court's power or authority to entertain and adjudicate a case.[84] Whether a court has the lawful authority to hear a case depends upon the scope of authority granted to the court in its enabling legislation: either Ohio's Constitution or the statute that created the court. Where there is no grant of authority, the court cannot hear the case. For example, a Municipal Court cannot hear a divorce case because its enabling legislation does not grant it that authority.[85]

[84] See *Bank of America, N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, ¶ 19; See also *Elkem Metals Company, Limited Partnership v. Washington County Board of Revision*, 81 Ohio St.3d 683 (1998).

[85] See R.C. 1901.18.

The Filing Deadline

Complaints at the BOR are initiated by the filing of a complaint (the DTE 1 form) with the county auditor for the current (subject) tax year "on or before the 31st day of March of the ensuing tax year…"[86] In general, a complaint may be filed only for the current tax year and not for prior tax years.[87] Similarly, the BOR lacks jurisdiction to reclassify the property from, for example, a commercial classification to a residential classification for the prior years.[88]

In turn, "[t]he county auditor shall present to the county board of revision all complaints filed with the auditor."[89] If the complaint is "filed by mail or certified mail, the date of the United States postmark on the envelope or sender's receipt shall be treated as the day of filing."[90] The Revised Code states, however, that "A private meter postmark on an envelope is not a valid postmark for purposes of establishing the filing date."[91]

Prior to the enactment of H.B. 126, discussed below, the auditor was required to serve notice of the complaint on all non-filing parties. H.B. 126 made changes to that prior law regarding service on BOEs. Those amendments did not change the time frame for filing counter-complaints.[92]

The March 31st filing deadline is jurisdictional and a party's failure to timely file its complaint can result in the case being dismissed for lack of jurisdiction. As stated by the BTA:

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[86] See R.C. 5715.19(A)(1). Regarding the timing of filing a complaint in the ensuing year see *Musial Offices, Ltd. v. County of Cuyahoga*, 8th Dist. No. 108478, 2020-Ohio-3660, ¶ 6 ("Because real property taxes are billed almost one year behind, a taxpayer is billed in December for the first half of a tax year based on the property's value as of January 1st of that same year. A taxpayer challenging the tax value of property for the 2008 tax year would have until March 31, 2009, to file the complaint.") vacated upon reconsideration on other grounds in *Musial Offices, Ltd. v. County of Cuyahoga, et al*., 8th Dist. Cuyahoga No. 108478, 2020-Ohio-5426.

[87] See *Hess Ohio Developments LLC v. Belmont County Board of Revision* (June 6, 2019), BTA No. 2018-2199 – 2673 ("…R.C. 5715.19(A)(1) allows for complaints to be filed against certain determinations "for the current tax year," and generally does not permit a complaint to be filed against determinations made in prior years."). It should be noted, however, that *in* *Sheldon Road Assoc., L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 131 Ohio St.3d 201, 2012-Ohio-581, the Supreme Court held that the filing of a timely complaint for the current tax year may also confer jurisdiction on a board of revision to consider a preceding year's valuation when the county auditor's redetermination of a property's value for a previous tax year constitutes a determination for the current year *and* the auditor changed the value after the statutory deadline for challenging that year's assessment.

[88] *Kelli Dodson v. Allen County Board of Revision* (July 14, 2023), BTA No. 2022-1295.

[89] See R.C. 5715.19(A)(1).

[90] See R.C. 5715.19(A)(1).

[91] See R.C. 5715.19(A)(1).

[92] See R.C. 5715.19(B).

> The Supreme Court has held that full compliance with R.C. 5715.19(A), including the filing deadline, is required "before a county board of revision is empowered to act on the merits of the claim." [citation omitted]. The court has expressly noted that "statutory filing requirements are mandatory, jurisdictional requirements which cannot be waived even by a tax official." [citation omitted]. It is clear from the record that the underlying complaint in this matter was not filed by the statutory deadline. The complaint therefore failed to properly invoke the jurisdiction of the board of revision.[93]

Where a complaint is timely filed and the March 31st deadline has passed, the complaint cannot be amended absent specific statutory authority. "This board [BTA] has repeatedly held that, absent express statutory authority, a complainant cannot amend a complaint after the March 31 statutory filing deadline passes."[94]

Complaints are typically filed on or after January 1 and before March 31 (unless that date falls on a weekend or legal holiday) of the year immediately following the tax year in question. While the complaint *must* be filed before March 31 or be dismissed as jurisdictionally defective, it *may* be filed prior to January 1 so long as it is not filed before the current tax year's duplicate is finalized on October 1.[95] So, for example, a complaint may be filed in December of 2019 for the

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[93] See *Miami Trace Local Schools Board of Education v. Fayette County Board of Revision* (December 11, 2017), BTA No. 2017-1335 See also *Sheldon Road Associates, L.L.C. v. Cuyahoga County Board of Revision*, 131 Ohio St.3d 201, 2012-Ohio-581, ¶ 18; *Barbara E. Eberhart v. Franklin County Board of Revision* (June 13, 2013), BTA No. 2012-5191 ("Ohio courts, as well as this board, have consistently held that the deadline established by the General Assembly in R.C. 5715.19(A)(1) is one with which complainants must strictly comply and that failure to do so is fatal to a complaint."); *Delaware City Schools Board of Education v. Delaware County Board of Revision* (March 1, 2021), BTA No. 2020-2164 ("The Supreme Court has held that full compliance with R.C. 5715.19(A), including the filing deadline, is required "before a county board of revision is empowered to act on the merits of the claim." [citation omitted]. The Court has expressly noted that "statutory filing requirements are mandatory, jurisdictional requirements which cannot be waived even by a tax official."); *Gary P. & Pamela D. Baranek v. Ashtabula County Board of Revision* (October 24, 2022), BTA No. 2022-646.

[94]See *Lorain City Schools Board of Education v. Lorain County Board of Revision* (September 26, 2017), BTA Nos. 2017-1185, 2017-1189. See also *Kettering City Schools Board of Education v. Montgomery County Board of Revision* (May 1, 2017), BTA No. 2016-2510 ("A complaint may only be amended in an effort to correct jurisdictional defects *prior* [italicized in the original] to the statutory filing deadline, i.e., March 31, 2016."); *Mary Jane Wolfe v. Cuyahoga County Board of Revision* (January 28, 2020), BTA No. 2019-898 ("Though the property owner attempted to cure the jurisdictional defect by letter subsequent to the issuance of the BOR's decision, such attempt was jurisdictionally deficient because it occurred well after the deadline for filing complaints for ta year 2018, i.e., April 1, 2019."). Following that law, it would appear that COVID complaints for tax year 2020 filed under Senate Bill 57 could not be amended once the September 2, 2021 filing deadline has passed.

[95] See R.C. 319.28 ("On or before the first Monday of September in each year, the auditor shall correct such lists in accordance with the additions and deductions ordered by the tax commissioner and by the county board of revision, **and shall certify and on the first day of October deliver one copy thereof to the county treasurer.** "). (bolding added). See also *Craig L. Paullin v. Cuyahoga County Board of Revision* (September 1, 2006), BTA No. 2006-819 ("Complaints challenging value for a particular tax year may be filed only after the auditor's tax list and duplicate have been prepared and certified, which, by statute, must be done before the first Monday in October.").

2019 tax year, and the complainant's failure to wait until January 1, 2020 to file is not a jurisdictional defect requiring dismissal. As stated by the Supreme Court:

> The school board additionally argues that consideration of the 2008 tax year was jurisdictionally barred at the BOR because the complaint, filed in December 2008, was premature with respect to the 2008 tax year. The school board concedes, however, that although R.C. 5715.19 establishes March 31 of the ensuing year as the last day for filing, the statute does not specify any start date for filing. Instead, the school board relies on a series of BTA decisions holding that premature filings do not vest jurisdiction in a statutory body…In those decisions, however, the filing of the complaint occurred before October 1 of the current tax year, which is the point at which the current year's assessment against the property has been finalized…
>
> Accordingly, we need not address whether a complaint filed before October 1, 2008, would fail to invoke the BOR's jurisdiction as to tax year 2008. We hold that a complaint filed in December of the current tax year, even if it is premature in light of local rules and practices, is not *jurisdictionally* defective as a challenge to the current tax year's assessment.[96] (italics in original)

Finally, it should be noted that as a result of the pandemic, a temporary exception to the March 31 filing deadline was enacted. Under Senate Bill 57 ("SB 57"), effective August 3, 2021, property owners who claimed that they suffered a reduction in their property's value "due to a circumstance related to the COVID-19 pandemic or a state COVID-19 order" for tax year 2020 were allowed to file a "COVID complaint" with the BOR from August 3 until September 2, 2021.[97] Under SB 57, the assessment of the property's true value for tax year 2020 was to be determined as of October 1, 2020, instead of the normal January 1 tax lien date.[98] For tax years 2021 and 2022 the normal filing date returned and a COVID complaint for those tax years "…must be received by the county auditor before March 31 of the following tax year or the last day to pay first-half taxes without penalty, whichever date is later."[99]

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[96] See *Sheldon Road Associates, L.L.C. v. Cuyahoga County Board of Revision*, 131 Ohio St.3d 201, 2012-Ohio-581, ¶¶ 15, 16.

[97] See https://www.legislature.ohio.gov/download?key=16561&format=pdf, page 3 ("Such a complaint must be filed with the county auditor by September 2, 2021 (30 days after the act's effective date)…)."

[98] But see *Northridge Local Schools Board of Education v. Montgomery County Board of Revision*, 2md Dist. Montgomery No. 29179, 2022-Ohio-495, ¶ 24 where the Second District Court of Appeals, stated that "…we hold that the filing requirement of R.C. 5715.19(A)(1) is a deadline which, due to the governor's deletion of the words 'or deadline' from Section 22(A)(10) was not tolled by H.B. 197." See also *Porat Group 3, LLC v. Cuyahoga County Board of Revision* (January. 19, 2021), BTA No. 2020-1399.

[99] See instructions for DTE Form 1A.

Regarding the degree of factual specificity that was required to be pleaded in the COVID complaint for it to be jurisdictionally sufficient, SB 57 stated that:

> An eligible person that files such a [COVID] valuation complaint shall allege with particularity in the complaint how such a [COVID-related] circumstance or [State COVID] order caused the reduction in true value of the property. The board of revision shall dismiss a valuation complaint that merely alleges a general decline in the economic or market conditions in the area or region in which the property that is the subject of the complaint is located.

The BTA found that where the complainant pleaded on the complaint form "Permitted COVID Complaint. Due to closures and State order – impacted business. Loss of occupancy and revenue – Loss of value due to COVID" that the COVID complaint was jurisdictionally sufficient. Reasoning by analogy, the BTA stated that:

> The phrase "plead with particularity" appears in the Ohio Rules of Civil Procedure. Civ.R. 9(B) states, "[i]n all averments of fraud or mistake, the circumstances constituting such fraud or mistake shall be stated with particularity." The fact that Civ.R. 9(B) deals with fraud is irrelevant for our purposes. The significance of the analogy is that Civ. R. 9(B) informs us as to the degree of factual detail required to satisfy the "particularity" requirement. It is that standard, transferable by analogy to the requirement within S.B. 57, that is instructive for our purposes. "The 'particularity' requirement of Civ. R. 9(B) means that the pleading must contain allegations of fact which tend to show each and every element of a cause of action for fraud." *[citation omitted]* Therefore, we find that a similar "particularity" standard should apply in reviewing a COVID Complaint filed pursuant to S.B. 57. By analogy, a COVID Complaint would be sufficient under S.B. 57 if, like under Civ. R. 9(B), it showed all elements of the COVID Complaint-claims that are required under S.B. 57.[100]

The BTA went on to state that S.B. 57 appeared to require that only two elements be alleged for there to be a facially sufficient claim: "(1) that there was 'a circumstance related to the COVID-19 pandemic or a state COVID-order,' and (2) "that such circumstance or order caused the reduction in true value." The BTA determined that the direct causal link between those two elements must be alleged in the complaint and that on the facts of the complaint "the statute does not require complete evidence or proof of the methodology used to calculate the reduction…" in value set forth on the face of the complaint.[101]

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[100] See *Cobblestone Square Company II, Ltd. v. Lorain County Board of Revision* (November 29, 2020), BTA No. 2022-54.

[101] See *Cobblestone Square Company II, Ltd. v. Lorain County Board of Revision* (November 29, 2020), BTA No. 2022-54. See

Continuing Complaint Jurisdiction

Unrelated to COVID, the Revised Code provides a "continuing complaint" exception to the March 31 filing deadline. As set forth in R.C. 5715.19(D):

> If a complaint filed under this section for the current year is not determined by the board [of revision] within the time prescribed for such determination, the complaint and any proceedings in relation thereto shall be continued by the board as a valid complaint for any ensuing year until such complaint is finally determined by the board or upon any appeal from a decision of the board. In such case, the original complaint shall continue in effect without further filing by the original taxpayer, the original taxpayer's assignee, or any other person or entity authorized to file a complaint under this section.[102]

The time limit for the BOR to render a decision (R.C. 5715.19(D)'s reference to the "time prescribed for such determination") is set forth in R.C. 5715.19(C): "The board of revision shall hear and render its decision on an original complaint within one hundred eighty days after the last day such a complaint may be filed with the board under division (A)(1) of this section or, if a counter-complaint is filed within one hundred eighty days after such filing."[103] It should be noted, however, that H.B. 126 now requires that if the original complaint is filed by a legislative authority, and if the BOR has not issued a decision within one year after the filing of the complaint, "the board is without jurisdiction to hear, and shall dismiss the complaint."[104]

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also *Worthington City Schools Board of Education v. Franklin County Board of Revision* (January 30, 2023), BTA No, 2022-276 where the BTA dismissed a COVID complaint as jurisdictionally insufficient where the complaint pleaded "Due to cancelled flights, travel bans and gathering restrictions imposed by State government. Cancellation of all major citywide events, sports activities. Increased cost of operation due to sanitation requirements, cost of labor and cost of supplies." The BTA further explained that "Here, the appellant's statements on Line 10 was three sentences. *See* S.T.at 3. All three of these sentences are generic assertions devoid of any particularity to the subject property. As such, ADH's statements could apply to any type of property or industry in any market during the COVID pandemic. Therefore, we find this level of pleading is exactly what the General Assembly indicated should be dismissed by a county board of revision."

[102] See R.C. 5715.19(D).

[103] See R.C. 5715.19(C). This section was also amended by H.B. 126. See https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb126/EN/07/hb126_07_EN?format=pdf.

[104] See R.C. 5715.19(C).

According to the Supreme Court, R.C. 5715.19(D) "allows the auditor's valuation for a later year to be challenged before the board of revision without the filing of a new complaint."[105] As stated by the Court:

> Ordinarily, pursuant to R.C. 5715.19(A), a taxpayer protesting the valuation of a property must file a complaint by March 31 of the year succeeding the tax year in question—e.g., a taxpayer disputing a valuation for tax year 2012 would have to file a complaint by March 31, 2013. But R.C. 5715.19(D) provides an exception to that requirement—if a taxpayer already has a complaint in the pipeline regarding that particular parcel and the county board of revision does not determine that complaint within 90 days [since changed to 180 days], the taxpayer does not need to file complaints in succeeding years regarding that same parcel for as long as the original complaint is unresolved. Thus, a county board of revision may exercise "continuing-complaint jurisdiction" over a real-property-valuation dispute for a given tax year even though no formal complaint was filed for that year.[106]

In one case, the Court described how continuing complaint jurisdiction works.

> A March 5, 2012 [BOR] complaint for the 2011 tax year was not resolved by the BOR until May 13, 2013. Because the BOR issued its decision more than 90 days[107] after the complaint was filed, the continuing-complaint provision of R.C. 5715.19(D) was triggered. Pursuant to R.C. 5715.19(D), if a taxpayer already has a complaint under review regarding a particular parcel and a board of revision does not determine that complaint within 90 days [since changed to 180 days], the taxpayer need not file complaints in succeeding years regarding that same parcel as long as the original complaint is unresolved. Thus, a county board of revision retains jurisdiction to determine a real-property-valuation dispute for a given tax year even if the taxpayer has filed no formal complaint for that year…The BOR had jurisdiction to consider MDM's request for tax year 2012.[108]

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[105] See *1495 Jaeger L.L.C. v. Cuyahoga County Board of Revision*, 132 Ohio St.3d 222, 2012-Ohio-2680, ⁋ 18.

[106] See *Life Partners, Ltd. v. Cuyahoga County Board of Revision*, 152 Ohio St.3d 238, 2018-Ohio-230, ⁋ 1. See *also* *Corex Partners LLC, Chou Katrella Partners v. Franklin County Board of Revision*, 10th Dist. Franklin No. 19AP-322, 2020-Ohio-3865, ¶ 8 ("Accordingly, under the statute a county board of revision may exercise "continuing-complaint" jurisdiction over a real-property-valuation dispute under R.C. 5715.19(D) for a given tax year even though no formal complaint was filed for that year, so long as the original complaint has not been "determined by the board within the time prescribed [and] until such complaint is finally determined by the board or upon any appeal from a decision of the board.""). See also *Corex Partners LLC, Chou Kattella Partners v. Franklin County Board of Revision*, 10th Dist. Franklin No. 19-AP-322, 2020-Ohio-3865, ⁋ 2.

[107] This case was decided before the statute was changed requiring a decision within 180 days.

[108] See *MDM Holdings, Inc. v. Cuyahoga County Board of Revision*, 152 Ohio St.3d 555, 2018-Ohio-541, ⁋ 3.

The Supreme Court has held, however, that "the carryover provisions in R.C. 5715.19(D) do not apply for ensuing tax years in which a new complaint has been filed."[109]

But how is continuing complaint jurisdiction invoked? While the Court has stated that R.C. 5715.19(D) is clear about the *availability* of continuing complaint jurisdiction (where the deadline of R.C. 5715.19(C) has not been met) it:

> … is less clear on the mechanics of how to assert continuing-complaint jurisdiction over the value for a tax year that is left unresolved by the final determination of the original complaint.[110]

The Court clarified that lack of specificity in the statute by saying that "…submitting a letter request to the board of revision is enough to invoke the BOR's jurisdiction pursuant to the original complaint."[111] There is no requirement, in other words, that a "proper" or formal complaint be filed and "any form of written submission suffices to invoke a board of revision's continuing complaint jurisdiction…"[112]

But beyond that, the Court has made clear that R.C. 5715.19(D) does not impose a deadline by which continuing complaint jurisdiction must be invoked. As stated by the Court:

> …allowing a taxpayer to invoke a board of revision's continuing complaint jurisdiction beyond March 31 of the year following the year the original complaint is resolved is consistent with our precedent. [In a prior case], this court held that the board of revision had continuing-complaint jurisdiction when the original complaint was resolved in September 2006 and the taxpayer submitted after March 31, 2007, a letter invoking continuing jurisdiction over a 2005 valuation. If the lack of a deadline is a problem, it's up to the General Assembly to make an easy fix…[113]

Revised Code sections 5715.13 and 5715.19 set forth the jurisdictional requirements that must be met before the BOR can hear a complaint[114] and complainants must fully comply with the

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[109] See *Board of Education of the South-Western City Schools v. Franklin County Board of Revision* (September 28, 2007), BTA No. 2005-V-332 quoting *Cincinnati Board of Education v. Hamilton County Board of Revision*, 74 Ohio St.3d 639 (1996)

[110] See *Life Partners, Ltd. v. Cuyahoga County Board of Revision*, 152 Ohio St.3d 238, 2018-Ohio-230, ⁋ 9.

[111] See *Life Partners, Ltd. v. Cuyahoga County Board of Revision*, 152 Ohio St.3d 238, 2018-Ohio-230, ⁋ 9.

[112] See *Novita Industries, L.L.C. v. Lorain County Board of Revision*, 153 Ohio St.3d 57, 2018-Ohio-2023, ⁋ 12.

[113] See *Life Partners, Ltd. v. Cuyahoga County Board of Revision*, 152 Ohio St.3d 238, 2018-Ohio-230, ⁋ 10. See also *Molly Company, LTD. v. Cuyahoga County Board of Revision*, 154 Ohio St.3d 137, 2018-Ohio-4070, ⁋ 2 ("…"nothing in [R.C. 5715.19(D)] authorizes the BOR to dismiss a continuing complaint for lack of timeliness.").

[114] See *Simon DeBartolo Group, L.P. v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No. 85052, 2005-Ohio-2621, ¶ 9.

requirements of those sections before a county board of revision may act on their claims."[115] In applicable part R.C. 5715.13(A) states that:

> …the county board of revision shall not decrease any valuation unless a party affected thereby or who is authorized to file a complaint under section 5715.19 of the Revised Code makes and files with the board a written application therefor, verified by oath and signature, showing the facts upon which it is claimed such decrease should be made.

In addition, R.C. 5715.19 contains a list of those who are authorized to file complaints, requires that each complaint state the amount of the auditor's alleged error in valuation, and contains limitations, subject to exceptions, on the filing of more than one complaint in the same triennial period.

A critical first step in any BOR proceeding is to determine whether the complainant has properly invoked the jurisdiction of the BOR. As stated by the Supreme Court:

> In hearing and ruling on complaints, a board of revision must *first* examine the complaint to determine whether it meets the jurisdictional requirements set forth in R.C. 5715.13 and 5715.19… The board must dismiss any complaint that does not meet those requirements.[116] (italics added)

The party seeking to invoke the jurisdiction of the BOR[117] (the complainant) bears the burden of proving that the BOR has jurisdiction to hear the case.[118] That burden is met where the complainant includes jurisdictional facts in the complaint sufficient to show compliance with the requirements of R.C 5715.13(A) and R.C. 5715.19. As stated by the Court of Appeals:

> A complainant before a board of revision must affirmatively plead the jurisdictional facts in its complaint…The board of revision examines those facts to determine whether the complaint meets the jurisdictional requirements in R.C. 5715.19…If the complaint meets the jurisdictional requirements, then the board of revision may proceed to consider the evidence and determine the true value of the property. If the complaint does not meet the jurisdictional requirements, then the board of

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[115] See *Stanjim Co. v. Mahoning Cty. Bd. of Revision*, 38 Ohio St.2d 233 (1974).

[116] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, ¶ 10.

[117] See below, regarding a party's "standing" to file a BOR complaint and the interrelatedness of jurisdiction and standing.

[118] See *Marysville Exempted Village School District Board of Education v. Union County Board of Revision*, 136 Ohio St. 3d 146, 2013-Ohio-3077, ¶ 11 ("… the proponent of jurisdiction must shoulder the burden of showing that the tribunal—here, the board of revision—may proceed to hear its complaint.").

> revision must dismiss it because it has not invoked the board's power to consider and decide the merits.[119]

It should also be noted that while R.C. 5715.19(A)(1)(d) identifies "the determination of the total valuation or assessment of any parcel that appears on the tax list" as subject to challenge at the BOR, that "The term 'assessment' as used in that statute encompasses more than just a specific dollar valuation."[120] As stated by the Supreme Court: "…assessing real property for taxation includes assigning parcels to taxing districts and recording them on the tax list" and, accordingly, "a school board may appeal the incorrect recording of a property on the tax list since recording is part of the assessment, and the board of revision has the power to correct this."[121]

In almost all cases the subject parcel is in existence on both the tax lien date and on the date the BOR complaint is filed, more than twelve months later. But what if the subject parcel did not exist on the tax lien date (January 1 of the subject year) but *does* exist on the date the complaint for the subject tax year is filed (between January 1 and March 31 of the year immediately following the subject year)?[122] Under those circumstances does the BOR have jurisdiction to hear the complaint? In that situation the critical factor in determining if the BOR has jurisdiction is whether the subject parcel appeared on the Auditor's tax list as of the date that the complaint was filed. As set forth in R.C. 5715.11:

> The county board of revision shall hear complaints relating to the valuation or assessment of real property as the same appears upon the tax duplicate *of the then current year*.[123] (italics added)

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[119] See *OH Retail II LL, LLC v. Franklin County Board of Revision*, 10th Dist. App. No. 13AP-230, 2013-Ohio-5705, ¶ 13.

[120] See *Struthers City Schools Board of Education v. Mahoning County Board of Revision* (August 15, 2022), BTA No. 2019-2807.

[121] See *Struthers City Schools Board of Education v. Mahoning County Board of Revision* (August 15, 2022), BTA No. 2019-2807 citing *State ex rel Rolling Hills Local School Dist. Bd of Educ. V. Brown County*, 63 Ohio St.3d 520 (1992).

[122] See R.C. 5715.19(A)(1) which states, in applicable part, that: "…a complaint against any of the following determinations *for the current tax year shall be filed with the county auditor on or before the thirty-first day of March of the ensuing tax year* or the date of closing of the collection for the first half of real and public utility property taxes for the current tax year, whichever is later…" (italics and underlining added).

[123] See R.C. 5715.11.

The "tax list" [or duplicate][124] is compiled "…on or before the first Monday of August…of real property with the county for the current year."[125] That tax list is required to be certified by the first day of October in the current year.[126] If the parcel exists by the time the tax list is compiled, then the BOR has jurisdiction to hear the complaint. As stated by the BTA:

> Irrespective of whether a parcel existed on the tax lien date in question, provided such parcel "appears on the tax list" on the date the complaint is filed, jurisdiction is properly vested in the board of revision to determine value.[127]

But what about a situation that is almost the reverse: where the parcel is on the tax list as of the date the complaint is filed but - *after* the complaint is filed and *before* the hearing on the complaint is held - has been removed from the tax list because it was granted tax exempt status by the Tax Commissioner? [128] In that situation, too, the BTA has held that the BOR has jurisdiction to hear the case because – even though no longer taxable – if it was on the tax *list on the date the complaint was filed*.[129]

DTE Form 1: Perfection is Not Required

The DTE Form 1, the standard BOR complaint form, is typically used by complainants to initiate the complaint process and provide jurisdictional information sufficient to comply with the

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[124] The duplicate contains the same information as contained in the original tax list. Under R.C. 319.34, the county auditor "…shall compile and make up…a list of the names of several persons…in whose names any taxable property has bee listed and assessed…Such lists shall be prepared in **duplicate**…The copies prepared by the auditor shall constitute the auditor's classified tax list and the **treasurer's tax duplicate** of taxable property for the current year." (bolding added).

[125] See R.C. 319.28(A).

[126] See R.C. 319.28(A).

[127] See *MS MSB LLC v. Nexcore Group v. Delaware County Board of Revision* (July 16, 2016), BTA No 2015-1580. See also *South-Western City Schools Board of Education v. Franklin County Board of Revision* (August 6, 2018), BTA No. 2017-1451 ("In this case, we find the certified copy of the tax list, submitted by the BOE at this board's hearing, sufficiently demonstrated that the subject property was included on the tax list for tax year 2016. In doing so, we conclude that the BOE's increase complaint properly invoked the jurisdiction of the BOR…"); *Kuntz 2016, LLC v. Montgomery County Auditor*, 2nd Dist. Montgomery No. 28038, 2018-Ohio-4635.

[128] See *Kuntz 2016, LLC v. Montgomery County Auditor*, 2nd Dist. Montgomery No. 28038, 2018-Ohio-4635, ¶ 15, 19. Exempted parcels are entered on an exempt list which is separate from the tax list. As stated by the Court of Appeals: "While the auditor is also required to provide a valuation for tax-exempted real property, R.C. 5713.07 and 5713.08 require the auditor to enter the taxable value on a list of all tax-exempt property that is *separate from the tax list*." [italicized in original]…Properties that appear on the tax-exempt list for a particular year do not appear on the auditor's tax list and duplicate for that year."

[129] See *Worthington City Schools Board of Education v. Franklin County Board of Revision* (May 27, 2020), BTA No. 2019-2343.

minimum requirements of R.C. 5715.13 and 5715.19.[130] When the DTE Form 1 is accurately and completely filled out, it fulfills that requirement and provides information sufficient to invoke the BOR's jurisdiction.

Despite the fact that full and accurate completion of the DTE Form 1 is sufficient to establish jurisdiction, perfection in its completion is not required in order to invoke the BOR's jurisdiction.[131] According to the Supreme Court "[t]he board of revision's jurisdiction…does not hinge on complete, technical compliance with the complaint form, and errors in completing the complaint form do not necessarily bar the board of revision from exercising jurisdiction."[132]

Because the Court does not require perfection in completing the DTE Form 1, it follows that some information on the DTE Form 1 is more critical than other information in establishing jurisdiction at the BOR. If jurisdiction-critical information is omitted on the DTE Form 1, then that omission will deprive the BOR of jurisdiction to hear the case.

On the other hand, some of the information sought on the complaint form is not jurisdiction-critical. As the Court explained "…failure to provide information requested by the complaint form [DTE Form 1] is not a jurisdictional defect when the requested information *does not fulfill a specific statutory or constitutional requirement*."[133] [italics added]. This makes clear that some information is "mandatory" in establishing jurisdiction while other information is merely "directory" but not "mandatory."

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[130] See *Simon DeBartolo Group, L.P. v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No. 85052, 2005-Ohio-2621, ¶ 12 ("…the BTA Form 1, the predecessor to DTE Form 1, "represents a lawful interpretation of the minimal, data requirements of R.C. 5715.19 and 5715.13."). See also *Trebmal Construction, Inc. v. Cuyahoga County Board of Revision*, 29 Ohio App.3d 313 (8th Dist. 1986) ("The Tax Commissioner has authority to promulgate rules and forms which implement the statutory requirements. R.C. 5715.29, 5715.30. The complaint form used by this taxpayer (D.T.E. Form No. 1) represents the commissioner's lawful interpretation of the minimal data requirements in R.C. 5715.13 and 5715.19.").

[131] See *Nucorp, Inc. v. Montgomery County Bd. of Revision*, 64 Ohio St.2d 20, 21 (1980) ("While this court has never encouraged or condoned disregard of procedural schemes logically attendant to the pursuit of a substantive legal right, it has also been unwilling to find or enforce *jurisdictional* barriers not clearly statutorily or constitutionally mandated, which tend to deprive a supplicant of a fair review of his complaint on the merits.").

[132] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627,¶ 14. See also *Jeff Wright v. Summit County Board of Revision* (April 4, 2016), BTA No. 2015-971.

[133] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, ¶ 14.

DTE Form 1: Mandatory Requirements vs. Directory Requirements

Where information is omitted from the DTE Form 1 the BOR must distinguish "a mandatory statutory requirement from a directory statutory requirement."[134] Mandatory requirements impact whether the BOR has jurisdiction to hear a case while "directory" ones do not. If a mandatory requirement is omitted from the DTE Form 1, the case must be dismissed. That is not the case with a directory requirement. As stated by the Supreme Court "The difference between a directory requirement and a mandatory one is that a violation of the directory requirement does not constitute a jurisdictional defect."[135] Thus, a complainant can fail to comply with the "directory" requirements of the DTE Form 1 while simultaneously providing sufficient information to satisfy the law's "mandatory" requirements and thereby invoke the jurisdiction of the BOR.

Accordingly, there are a number of circumstances where the omission or incorrect listing of directory requirement information does not result in dismissal for lack of jurisdiction. For example, the rear of the DTE Form 1 contains a plain instruction indicating that the complaint may list only parcels that are in the same taxing district. In addressing a party's failure to follow that instruction, the BTA has ruled that:

> The requirements for a board of revision to exercise jurisdiction over a complaint that lists multiple parcels located in multiple taxing districts on a single complaint form have been considered numerous times. The courts and this board [BTA] have consistently held that this practice does not go to core jurisdiction. This is true even if the parcels are not contiguous or are not part of a single economic unit.[136]

In addition, the Supreme Court has made clear that the failure to comply with certain other instructions on the DTE Form 1 is also not a jurisdictional defect. For example, the Court has ruled that:

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[134] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, ¶ 20 ("We went on to state that *Zier'* s reference to "mandatory requirements" points to the importance of distinguishing a mandatory statutory requirement from a directory statutory requirement.").

[135] See *2200 Carnegie, L.L.C. v. Cuyahoga County Board of Revision*, 135 Ohio St.3d 284, 2012-Ohio-5691, ¶ 26.

[136] See *Charles E. Reynolds v. Hamilton County Board of Revision* (December 28, 2012), BTA No. 2011-3979. See also *Simon DeBartolo Group L.P. v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No. 85052, 2005-Ohio-2621.

1. it is not a jurisdictional defect to fail to accurately identify the legal owner of the subject;[137]

2. it is not a jurisdictional defect to list an incorrect address for the property owner on the DTE Form 1[138] (provided that the owner gets notice of the hearing);

3. it is not a jurisdictional defect to identify the wrong tax year on the DTE Form 1;[139] and

4. and the BTA has ruled that it is not a jurisdictional defect where the owner "listed an opinion of value in column A [of the complaint form], [but] it did not list the corresponding current value for each parcel in column B or the change in value in column C", stating that "The missing information in this case does not run to the core of procedural efficiency because the BOR has direct access to the Auditor's current value. *Id.* at ¶18. Therefore, we find that complaint met the necessary requirements to invoke the BOR's jurisdiction."[140]

The Court and BTA have made clear that the information inaccurately provided or omitted on the DTE Form 1 in the above examples is directory, not mandatory, and if inaccurately included or omitted in the DTE Form 1 will not result in the dismissal of the complaint. Further, the BTA has ruled that the BOR had jurisdiction to hear a complaint where although the complaint listed the wrong parcel numbers, it sufficiently identified those parcels by address, the fact that the parcels had recently transferred, and the value sought such that the BOR could provide notice to all necessary parties.[141]

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[137] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627. See also *Board of ST. Clair Township Trustees – Judy Valerio, Tom Barnes, John Snyder v. Butler County Board of Revision* (June 7, 2019), BTA No. 2018-49; *Henry W. Tuttle v. Lake County Board of Revision* (January 4, 2021), BTA No. 2019-1401 ("The Supreme Court has made it clear that there is no statutory requirement for a complainant to correctly identify the owner of a subject property…There remains, however, a burden to prove that a complainant has standing to file a complaint."). *Diversified Oil & Gas LLC N/K/A Diversified Production LLC v. Coshocton County Board of Revision* (July 12, 2023), BTA Nos. 2020-1202, 2020-1203 ("The fact that the owner was improperly listed on line one of the complaints is not a jurisdictional hurdle, so long as the complainant can prove standing.").

[138] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, ¶ 15 ("R.C. Chapter 5715, however, contains no requirement that a valuation complaint include the property owner's correct address.").

[139] See *Sheldon Road Associates, L.L.C. v. Cuyahoga County Board of Revision*, 131 Ohio St.3d 201, 2021-Ohio-581, ¶ 14 ("Sheldon's complaint identified 2007 as the tax year at issue, but the identification of the year on the complaint form is not required by statute and therefore does not constitute a jurisdictional prerequisite to the BOR's initiating a review of the 2008 tax-year assessment.").

[140] See *Midland Towing and Auto Repair v. Licking County Board of Revision* (November 15, 2023), BTA No. 2023-645.

[141] See *Beavercreek City Schools Board of Education v. Greene County Board of Revision* (July 30, 2018), BTA No. 2017-1090.

DTE Form 1: How to Distinguish Mandatory from Directory Requirements – The "Core of Procedural Efficiency"

When it is faced with a DTE Form 1 that is missing information, the BOR is called upon to determine if the missing information is mandatory or directory. The Supreme Court has provided some guidance on how to distinguish a mandatory requirement from a directory one. As stated by the Court:

> To draw that distinction [the mandatory/directory distinction], courts ask whether the statutory requirement runs to the core of procedural efficiency…If a statutory requirement runs to the core of procedural efficiency, then compliance is mandatory and is a jurisdictional prerequisite to pursuing the administrative case.[142]

The Court went on to say that "The cases in which this court has applied a core-of-procedural-efficiency test to conclude that a requirement is jurisdictional have one factor in common: they involve a failure to comply with a requirement imposed by statute."[143] Further:

> …the case law has usually treated a statutory requirement as mandatory and hence jurisdictional when the requirement is (1) imposed on the appellant itself and (2) relates to the informative content of the document [the BOR complaint] by which the administrative proceeding is instigated.[144]

Thus, in ultimately discerning the meaning of the term "core of procedural efficiency" (and thereby determining what is "mandatory" as opposed to "directory") we must determine the meaning of the two requirements cited above. The first requirement above ("imposed on the appellant itself") ("the First Requirement") is relatively easy to discern. The second requirement ("relates to the informative content of the document by which the administrative proceeding is instigated") ("the Second Requirement") is more difficult to discern but importantly, may represent the essence of the term "core of procedural efficiency".

Unfortunately, there is relatively little case law guidance as to the meaning of the Second Requirement. The guidance that does exist, however, tends to indicate that the Second Requirement is directed towards making sure that all parties entitled to receive notice of the

[142] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, ¶ 20.

[143] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, ¶ 22.

[144] *Shinkle v. Ashtabula County Board of Revision*, 135 Ohio St.3d 27, 2013-Ohio-397, ¶ 19.

complaint receive notice that is sufficiently informative such that they can make an informed decision as to whether to appear and oppose the complaint.[145]

In accordance with the above reasoning, the Court has specifically found that the following items go to the core of procedural efficiency:

1. The notification requirement of R.C. 5715.19(B);[146]

2. The requirement of R.C. 5715.19(D) to state the amount of overvaluation, undervaluation, etc. upon which the complaint is based;[147] and

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[145] As examples of what constitutes mandatory jurisdictional requirements, the Court in *Shinkle, supra,* cited the following: (1) the requirement that the notice of appeal set forth the decision appealed from and (2) the requirement that the notice of appeal contain a copy of the decision appealed from as well as a specification of the errors complained of. In both of those examples the content that the Court found to be "jurisdictional" addressed information generally considered important, even critical, in helping a potential appellee determine the specific decision and issues being challenged on appeal. Without that knowledge a potential appellee cannot make an informed decision as to whether it considers the matters under appeal to be important enough to appear in the appellate proceedings and oppose the legal propositions being put forth by the appellant. Proper notice provides a prospective appellant with those critical bits of information.

[146] See R.C. 5715.19(B) which reads, in applicable part, that "Within thirty days after the last date such complaints may be filed, the auditor shall give notice of each complaint in which the stated amount of overvaluation, undervaluation, discriminatory valuation, illegal valuation, or incorrect determination is at least seventeen thousand five hundred dollars in taxable value to each property owner whose property is the subject of the complaint, if the complaint was not filed by the owner or the owner's spouse." See also *2200 Carnegie, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 135 Ohio St.3d 284, 2012-Ohio-5691, ¶ 24 ("For all these reasons, we hold that the notification requirement of R.C. 5715.19(B) is jurisdictional because it "runs to the core of procedural efficiency" by furnishing the basic notice that is essential to the proper conduct of the administrative proceedings.").

[147]See R.C. 5715.19(D) which reads, in applicable part, that "Each complaint shall state the amount of overvaluation, undervaluation, discriminatory valuation, illegal valuation, or incorrect classification or determination upon which the complaint is based." See also *Shinkle v. Ashtabula County Board of Revision*, 135 Ohio St.3d 27, 2013-Ohio-397, ¶ 18 ("The requirement to state the amount of value on which the complaint is based plainly runs to the core of procedural efficiency under R.C. 5715.19."). *Brian Edgar Garry v. Hamilton County Board of Revision* (April 8, 2019), BTA No. 2018-1212 ("For a complaint to be valid, it must include all information that goes to the core of procedural efficiency [citation omitted]. The Supreme Court has held that 'the requirement to state the amount of value runs to the core of procedural efficiency and is therefore jurisdictional'."). In accordance with that view, in *Marijoy Halitzka v. Lorain County Board of Revision* (November 10, 2020), BTA No. 2020-751 the BTA dismissed a complaint where on Line 9 of the DTE 1 the complainant listed the sales prices of properties other than the subject, but did not assert a value for the subject itself ("Here, it is undisputed that the property owner's complaint failed to provide an opinion of value for the subject property. Though the property owner referenced the sales prices of other properties, ranging from $29,500 to $45,050, there is no way to discern exactly how those properties' sales prices relate to her opinion of value for the subject property."). But see *Storts v. Perry Cty. Bd. of Revision* (April 24, 2012), BTA No. 2009-1687 where on Line 8 the complaint stated "I have about ½ of what colum [sic] B is and I guess a lot of sweat!" Despite the lack of specificity in the precise dollar value being sought, the BTA found the complaint legally sufficient because "While appellant did not indicate a specific number as the value sought, he indicated that the value should be about half of the amount indicated in Column B – the current taxable value…Using only the information on the face of the complaint, a simple mathematical calculation produces a requested taxable value of $34,900…We find that the complaint properly invoked the jurisdiction of the board of revision…" See also *Jackson Local Schools Board of Education v. Stark County Board of Revision* (May 20, 2019), BTA No. 2017-1894 ("While this board [BTA] has recognized the opinion of value can be inferred even when line 8 of a complaint is blank, e.g. when a complainant requests valuation in accordance with a recent sale price and the sale price is on the complaint, [owner in this case] made no such allegation on the face of the complaint."); *Mary Jane Wolfe v. Cuyahoga County Board of Revision* (January 28, 2020), BTA No. 2019-898 ("…this board [the BTA] has recognized the opinion of value can be inferred even when line 8 of a complaint is blank, e.g., when a complainant requests valuation in accordance with a recent sale price and the sale price is on the complaint, in this matter…"); *Worthington City Schools Board of Education v. Franklin County Board of Revision* (July 1, 2022), BTA No. 2022-235.; *Groveport Madison Local School Board of Education v. Franklin County Board of Revision* (August 15, 2022), BTA No. 2022-229.; *Debra Henderson v. Cuyahoga County Board of Revision* (September 12, 2002), BTA. No. 2022-929 ("…a complainant's failure to specify an opinion of value in the complaint means that the complaint fails to invoke the jurisdiction of a board of revision."); *Nicole M. Campbell v. Cuyahoga County Board of Revision* (September 12, 2022), BTA No. 2022-872; *Carmen & Helga Lombardo Trustees*

3. The requirement of R.C. 5717.01 that the notice of appeal from a BOR decision be filed with both the BTA and the BOR.[148]

Further, "…a county board of revision is not required to scour a complaint and any included attachments to discern a complainant's position regarding elements that are of a core jurisdictional nature."[149] Where an item goes to the core of procedural efficiency, the burden remains upon the complainant to prove it. Common amongst the items above is the centrality of the concept that appropriate notice of the proceedings be given to those who are lawfully entitled to it. Items 1 and 3, above, clearly address the importance of appropriate notice. But item 2 does as well because the Court has indicated that unless the amount of reduction being sought is listed on the DTE Form 1, the Auditor cannot determine whether to send notice to an effected landowner or the local school board.[150] If there is non-compliance with any of the three above items, then the case must be dismissed for lack of jurisdiction.

There have been circumstances, however, where mandatory information is missing from the DTE Form 1 but the parties entitled to notice nonetheless received actual notice of the BOR hearing and appeared to defend their interests. That is of no moment and the complaint must still

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v. Cuyahoga County Board of Revision (December 12, 2022), BTA No. 2022-812 ("The Ohio Supreme Court has been clear that a BOR lacks jurisdiction to consider a complaint where the complainant fails to state an opinion of value."); *Laurie Clumpner v. Cuyahoga County Board of Revision* (December 27, 2022), BTA No. 2022-930; *Spitzer Lakes Ltd, Company v. Lorain County Board of Revision* (January 13, 2023), BTA Nos. 2022-1304, 2022-1305.

[148] See R.C. 5717.01 which reads, in applicable part, that "Such appeal shall be taken by the filing of a notice of appeal, in person or by certified mail, express mail, facsimile transmission, electronic transmission, or by authorized delivery service, with the board of tax appeals and with the county board of revision." See also *Austin Co. v. Cuyahoga Cty. Bd. of Revision*, 46 Ohio St.3d 192 (1989); *Petros Investment Co., L.L.C. v. Jackson Local School District*, 5th Dist. Case No. 2014CA00076, 2015-Ohio-24, ¶ 13.

[149] See *Martha Shelby & Harold Addy Jr. & Others v. Belmont County Board of Revision* (November 26, 2018), BTA No. 2017-1938.

[150] R.C. 5715.19(B), as amended by H.B. 126, states that "(B) … the auditor shall give notice of each complaint in which the stated amount of overvaluation, undervaluation, discriminatory valuation, illegal valuation, or incorrect determination is at least seventeen thousand five hundred dollars in taxable value to each property owner whose property is the subject of the complaint, if the complaint was not filed by the owner or the owner's spouse." The BTA has stated that "A complaint must contain the information on line 8 because the General Assembly requires the BOR to give notice to affected parties, but only if the requested change in value is $17,500 or more. See R.C. 5715.19(B). When line 8 is left blank, the auditor/fiscal officer is unable to verify whether the required notices should be sent." *Candy B. Green v. Cuyahoga County Board of Revision* (November 19, 2015), BTA No. 2015-594. Cases decided prior to the enactment of H.B. 126 sometimes refer to notification of BOEs. As discussed herein, H.B. 126's amendments no longer require such a notification.

be dismissed because owing to the omission of the mandatory information, the BOR failed to obtain jurisdiction over the case at its initiation.[151]

It is important to note that in February 2019 changes were made to the DTE Form 1 which changed former "Line 8" to "Line 9". The information sought in current Line 9 is essentially the same as the information sought in then-Line 8. The old "Line 8" form looked like this:

8) The increase or decrease in taxable value sought. Counter-complaints supporting auditor's value may have zero in Column D				
Parcel Number	Complainant's Opinion of Value		Column C Current Taxable Value (From Tax Bill)	Column D Change in Taxable Value (+ or -) (Col. B minus Col. C)
	Column A True Value (Fair Market Value)	Column B Taxable Value (35% of Column A)		

The revised form, which now contains the information formerly listed on "Line 8", is now denominated "Line 9" and looks like this:[152]

9. The increase or decrease in market value sought. Counter-complaints supporting auditor's value may have -0- in Column C.			
Parcel number	Column A Complainant's Opinion of Value (Full Market Value)	Column B Current Value (Full Market Value)	Column C Change in Value

Because many prior BTA cases refer to "Line 8" and the phrase "Line 8" has become shorthand among BOR practitioners for the section where the complainant is required to list the value it seeks, I will refer to former Line 8/current Line 9 as "Line 8/9".

[151] As stated by the Court of Appeals in *The Hilltop Commons, LLC v. Clarence Mingo, II*, 10th Dist. Case No. 11AP-10879, 2012-Ohio-5661, ¶ 41-42 ("Hilltop nonetheless claims the BOR could exercise jurisdiction regardless of the errors in its complaint since the BOE received notice of the complaint, filed a timely counter-complaint, and appeared at the hearing. Even if we assume Hilltop is correct that its mistakes did not prejudice the Columbus City School District BOE, the BOR nonetheless lacked jurisdiction to proceed with a merit hearing since Hilltop's non-responsive answer to 8(D) failed to provide statutorily required overvaluation information regarding the West Broad Street property. Because of this error, the BOR never acquired subject-matter jurisdiction over Hilltop's claim. *IBM Corp. v. Franklin Cty. Bd. of Revision*, 10th Dist. No. 06AP–108, 2006–Ohio–6258 (finding a complaint's compliance with R.C. 5715.19 and 5715.13 is necessary before a county Board of Revision obtains subject-matter jurisdiction). {¶ 42} The issue of subject-matter jurisdiction involves " 'a court's power to hear and decide a case on the merits and does not relate to the rights of the parties…. Although a party's voluntary appearance before the tribunal can waive an irregularity in personal jurisdiction, "the lack of subject matter jurisdiction is not waivable." ... Because Hilltop's complaint failed to invoke the BOR's subject-matter jurisdiction, the BOR did not possess the power to determine the claim on its merits, and any question of prejudice is not dispositive.

[152] The new form can be accessed at https://www.tax.ohio.gov/portals/0/forms/real_property/DTE_DTE1.pdf.

In addition, there have been circumstances where a proposed valuation relating to a property other than the subject property is erroneously included by the complainant on Line 8/9 of the DTE Form 1. In other words, information is included on Line 8/9 but it is non-responsive or not related to the subject property. In such case, the Court of Appeals has ruled that the erroneous information is so non-responsive as to essentially constitute an omission, thereby requiring that the case be dismissed for lack of jurisdiction.[153]

Step by Step Analysis

In sum, then, when faced with a complaint where information is missing, the BOR may wish to go through the following analysis to determine whether a case should be dismissed for lack of jurisdiction:

Step 1: If the information that is missing is the "Complainant's Opinion of Value" on Line 8/9 of the DTE Form 1, then the case should be dismissed for lack of jurisdiction. A sample hearing transcript at the end of this chapter reflects a hearing where a motion to dismiss was granted for failure to complete Line 8/9.

If information other than the Complainant's Opinion of Value is missing in the DTE Form 1, then go to Step 2.

Step 2: If the information that is "missing" on the on DTE Form 1 is (1) an inaccurate identification of the owner; (2) an incorrect address for the property; or (3) listing the wrong tax year then it is not a jurisdictional defect and the BOR should proceed to a hearing on the merits. At that hearing, the BOR should elicit information correcting those errors on the record.

Step 3: If the "missing" information is not addressed in Steps 1 or 2, above, then determine if the missing information is required to be in the complaint by R.C. 5715.13 or R.C. 5715.19. If it is required by statute to be in the complaint, then go to Step 4.

[153] See *The Hilltop Commons, LLC v. Clarence Mingo, II*, 10th Dist. Case No. 11AP-10879, 2012-Ohio-5661 ("All of Hilltop's responses in line 8 refer to a parcel located in the New Albany-Plain Local School District unrelated to the complaint…Hilltop's answers to 8(A) through (D) are non-responsive as to the subject property, so that determining the company's actual valuation claim from the information provided in the complaint is not possible…Since the given information is non-responsive as to the [subject] property, Hilltop's complaint essentially omits the requested line 8 information. Where a complaint omits a response to 8(D), the auditor will be unable to know whether he should inform the school board of a complainant's claim under R.C. 5715.19(B)...the BOR nonetheless lacked jurisdiction to proceed with a merit hearing since Hilltop's non-responsive answer to 8(D) failed to provide statutorily required overvaluation information regarding the [subject] property."). Cases decided prior to the enactment of H.B. 126 sometimes refer to notification of BOEs. As discussed herein, H.B. 126's amendments no longer require such a notification.

If it is not required to be in the complaint, then it is a non-jurisdictional omission and the BOR should move forward with a hearing on the merits.

Step 4: Determine whether the missing information is a requirement imposed on the Appellant itself (as opposed to the Auditor, the BOR, etc.). If it is imposed on the Appellant, then proceed to Step 5.

Step 5: Determine whether the missing information relates to "the informative content of the complaint by which the BOR proceeding was instigated." If it does, then the case should be dismissed for lack of subject matter jurisdiction.

The above steps are graphically depicted on the graph at the end of this chapter.

Signature and Verification

It should be noted that if the signature on the bottom of the form is missing, and if the March 31 filing deadline has passed, then the case should be dismissed.[154] A missing or omitted *verification* (the notarization) of the signature, however, is not jurisdictional and should not result in the case being dismissed.[155]

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[154] See *Joseph Shapiro v. Cuyahoga County Board of Revision* (August 20, 2013), BTA No. 2013-1122 ("… in September 2012, the General Assembly amended the statute to specifically require a signature on the written application**,** which seeks an increase or decrease in the value of real property. Therefore, at the time the complaint was filed in January 2013, the relevant portion of R.C. 5715.13(A) provided that: "the county board of revision shall not decrease any valuation unless a party affected thereby or who is authorized to file a complaint under section 5715.19 of the Revised Code makes and files with the board a written application therefor, *verified by oath and signature*, showing the facts upon which it is claimed such decrease should be made." (Emphasis added). See Legislative Service Commission's Bill Analysis of H.B. 509, 129th General Assembly, at page 26 at http://www.lsc.ohio.gov/analyses129/12-hb509-129.pdf.

[155] See *Simon DeBartolo Group, L.P., v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No. 85052, 2005-Ohio-2621, ¶ 14 (8th Dist. 2005) ("…the lack of a statutorily mandated verified signature did not prevent the attachment of jurisdiction because the complainant had substantially complied with the statutory requirements and the lack of a verified signature did not affect the core of procedural efficiency."). See also *Owens Illinois, Inc. v Lucas County Board of Revision* (November 9, 2006) BTA No. 2005-1101 ("…we have previously held that even if a complaint is not properly notarized, the BOR retains jurisdiction over the complaint, as the verification requirements on the form are procedural rather than jurisdictional and see also *Colonial Storage Mgmt. v. Franklin Cty. Bd. of Revision* (1986), 112 Ohio App.3d 508, wherein the court agreed with the Cuyahoga County Court of Appeals [in *Trebmal Constr. Inc. v. Cuyahoga Cty. Bd. of Revision* (1986), 29 Ohio App.3d 312] and held that the requirement of R.C. 5715.13 that a complaint be "verified by oath" is procedural and not jurisdictional.").

After the enactment of H.B. 126, section 15 was added to the DTE Form 1 stating that if the complainant is a legislative authority, it has complied with the requirements of R.C. 5715.19(A)(6) and (7) regarding the filing of the complaint. As with other complainants, the legislative authority is required to verify the complaint. As of the date this work was submitted for publication, no case had interpreted whether the legislative authority's failure to verify the complaint would deprive it of jurisdiction at the BOR.

Countercomplaints: Is There Jurisdiction Where the Underlying Complaint is Withdrawn/Dismissed?

While R.C. 5715.19(A) addresses the filing of a complaint, R.C. 5715.19(B) addresses the filing of a "countercomplaint" by the school board or other statutorily authorized party. That section was amended by H.B. 126 and now reads, in applicable part, that:

> (B) A board of education, subject to this division,…may file a counter-complaint[156] in support of or objecting to the amount of alleged overvaluation…stated in a previously filed complaint or objecting to the current valuation. Upon the filing of an original[157] complaint under this division, the board of education or the property owner shall be made a party to the action.

The BOR complaint form – the DTE Form 1 - makes reference to a "counter-complaint," but the Supreme Court has noted that "although the official complaint form uses the term "countercomplaint," as does our case law, that word does not appear in the statute itself."[158] That was changed in H.B. 126 where amendments to R.C. 5715.19(B) now include the word "counter-complaint." In the past, however, the Supreme Court has sometimes referred to the original complaint filed under R.C. §5715.19(A) as the "A complaint" and the complaint filed under R.C. §5715.19(B) (referred to on the DTE Form 1 as the "countercomplaint") as the "B complaint."[159]

In cases where the A complaint is dismissed because it is jurisdictionally defective, the Supreme Court has held that the B complaint "must also be dismissed because the counter-complaint [B complaint] does not vest a board of revision with jurisdiction independent of the original complaint."[160] In addition, the Court has ruled that where the A complaint is voluntarily

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[156] The amendments to H.B. 126 changed the word "complaint" to "counter-complaint".

[157] The amendments to H.B. 126 inserted the word "original." Prior to the amendments, the language simply read "complaint."

[158] See *Licking Heights Local Schools Board of Education v. Franklin County Board of Revision*, 154 Ohio St.3d 157, 2018-Ohio-3255, ¶ 9.

[159] See *Licking Heights Local Schools Board of Education v. Franklin County Board of Revision*, 154 Ohio St.3d 157, 2018-Ohio-3255, ¶ 14.

[160] See *C.I.A. Properties v. Cuyahoga County Auditor*, 89 Ohio St.3d 363 (2000). See also *Auburn Parking LLC v. Cuyahoga County Board of Revision* (April 18, 2019), BTA Nos. 2018-349, 2018-364.

dismissed *before* the B complaint is filed, there is no jurisdiction for the filing of the B complaint under R.C. §5715.19(B). As stated by the Court, "…the A complaint's jurisdictional validity and pendency *at the time the B complaint is filed* [italics in original] is a jurisdictional prerequisite to the validity of the B complaint."[161]

Where, however, (1) the B complaint is filed at the time the A complaint is pending and (2) the A complaint is subsequently *voluntarily* dismissed, the Court has ruled that there is jurisdiction for the B complaint to be heard by the BOR. Under that circumstance, the Court stated that the facts to be considered are those that existed "as of the point in time that the [B] complaint was filed."[162] The Court ruled that "…we conclude that the voluntary dismissal of the A complaint long after the B complaint had been filed did not deprive the BOR and the BTA of jurisdiction to consider the BOE's claim, in the B complaint…"[163]

In summary then, in connection with the B complaint (countercomplaint), the following jurisdictional rules pertain:

1. Where the A complaint is jurisdictionally defective,[164] there is no jurisdiction for the BOR to hear the B complaint.

2. Where the A complaint is voluntarily withdrawn before the B complaint is filed, there is no jurisdiction for the BOR to hear the B complaint.

3. Where the B complaint is timely filed after the A complaint and thereafter the A complaint is voluntarily dismissed, there is still jurisdiction for the BOR to hear the B complaint.

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[161] See *Licking Heights Local Schools Board of Education v. Franklin County Board of Revision*, 154 Ohio St.3d 157, 2018-Ohio-3255, ¶ 14.

[162] See *Licking Heights Local Schools Board of Education v. Franklin County Board of Revision*, 154 Ohio St.3d 157, 2018-Ohio-3255, ¶ 16.

[163] See *Licking Heights Local Schools Board of Education v. Franklin County Board of Revision*, 154 Ohio St.3d 157, 2018-Ohio-3255, ¶ 17.

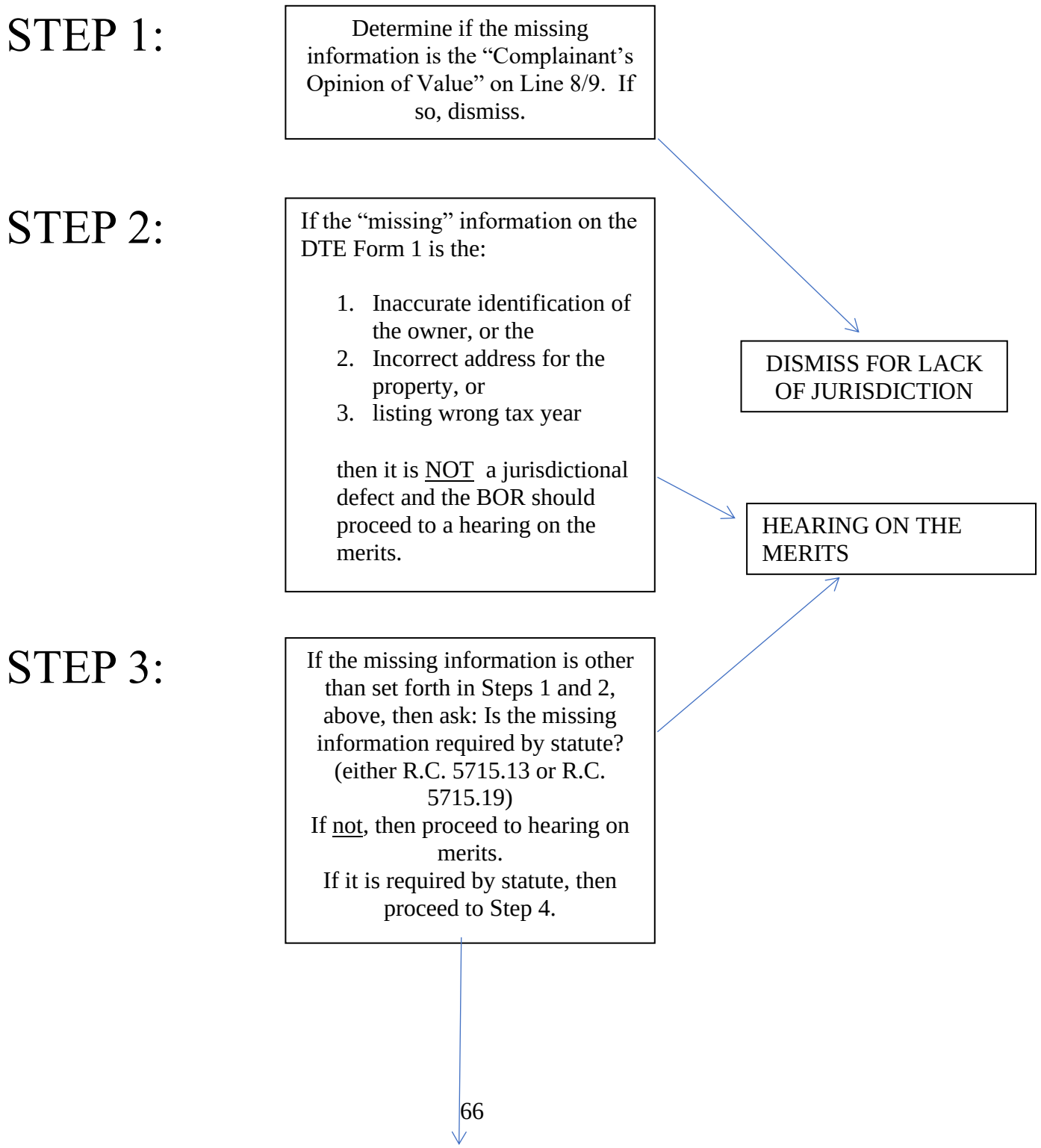
[164] This is usually determined as of the closing of the BOR filing period, typically ending on March 31, because the BTA has ruled that a defective complaint may not be amended after the March 31 filing deadline ("To the extent that the appellant argues that he "cured" the defect by submitting a new, properly completed complaint, this board has previously held that a complainant may not amend its complaint after the March 31 filing deadline so as to cure jurisdictional defects.") See *Saxton v. Franklin County Board of Revision* (July 15, 2013), BTA No. 2013-801.

On Appeal

The Supreme Court has ruled that on appeal, the jurisdictional sufficiency of a complaint is a question of law (as opposed to a question of fact) and, as such, is reviewed *de novo* by the Court.[165]

[165] See *Toledo Public Schools Board of Education v. Lucas County Board of Revision*, 124 Ohio St.3d 490, 2010-Ohio-253, fn. 2.

IF INFORMATION IS MISSING IN THE DTE FORM 1



STEP 4:

Ask: Was the missing information a requirement imposed on the Appellant itself?
(In most cases, it will be)

If so, then proceed to Step 5.

STEP 5:

Ask: Does the missing information relate to "the informative content of the complaint by which the BOR proceeding was instigated"? If so, then the case should be dismissed for lack of subject matter jurisdiction.

DISMISS FOR LACK OF

SAMPLE HEARING TRANSCRIPT DISMISSING COMPLAINT FOR FAILURE TO COMPLETE LINE 8

BOR: 16-038
PARCEL NUMBER: 0460059800
OWNER: Gary Wheeler
ADDRESS: 4023 Northbank Road
CURRENT VALUE: $643,650
ASKING VALUE: $0

- - -

BOARD MEMBERS: Jon Slater, James Bahnsen, Carri Brown

PRESENT: Jonathan Brollier, Esq.

- - -

MR. DOLIN: Back on the record on BOR Case 16-038. This is an original complaint filed by Gary M. Wheeler regarding two parcels, 0460059800 and 0460059910, regarding a property address -- both of which are regarding property address 4023 Northbank Road, Millersport, Ohio.

A countercomplaint has been filed by the School Board of the Walnut Township Local School District Board of Education, whose counsel is here.

Counsel, if you'd put your appearance on, please.

MR. BROLLIER: Sure. Jon Brollier from Bricker & Eckler on behalf of the Walnut Township Schools.

MR. DOLIN: I note that the time is

after 10:00 AM. This matter was noticed for 9:00 AM. Mr. Wheeler is not present. We do have green card receipts that Mr. Wheeler was notified of the time and date of the hearing, and he's not present. We will move forward.

We've marked as Exhibit Number 1 the original complaint, and Exhibit Number 2 the countercomplaint, and we've also marked as Exhibit Number 3 a motion to dismiss filed by the school board. Those three will all be entered into evidence in the record.

Inasmuch as Mr. Wheeler is not here, there will be no further evidence. I should note that on the complaint section eight has not been filled out, and I suspect that Mr. Brollier may have something to add to that.

So, Mr. Brollier, if you wish to make any comments.

MR. BROLLIER: Thank you. And may it please the board. Because the property owner failed to comply with 5715.19's mandatory requirements of listing the amount of overvaluation or undervaluation upon which the complaint is based, the board lacks jurisdiction

to consider the complaint and is required to dismiss it for lack of jurisdiction.

I have submitted to Mr. Dolin, and he has labeled what I believe is Exhibit 3, a motion to dismiss. If the other board members would like to have copies of our motion, it may. And I've summarized our argument, and so I don't think I need to reiterate it other than to say both the statute governing BOR cases requires complainants to state the amount of overvaluation that they're complaining about, and also the case law is very clear that that is a jurisdictional defect. And if you don't fill out question number eight and identify the value that you're seeking, your complaint must be dismissed.

I've attached to the motion and highlighted the relevant passages, but there's decisions from as recently as January of this year from the Board of Tax Appeals reiterating that long-standing rule. So the board need not go further than dismiss the complaint.

Even if the board chooses to hear it, first of all, Mr. Wheeler's not attended to

present any evidence. Second of all, the theme that we're going to see with I think all of our Buckeye Lake cases is simply saying that there's been a change or adverse condition affecting the neighborhood does not prove a particular value of a property. And I think we're going to hear from a lot of owners on Buckeye Lake that the conditions with the dam and the efforts of remediation have affected the property values. And unless they can prove what particular effect that change had on their own property, no reduction should be granted.

I thank the board for its time and that's all I have.

MR. DOLIN: Off the record, please.

(Discussion off the record.)

MR. DOLIN: Back on the record. The hearing in this matter has been concluded and this matter is now on for a decision.

Is there a motion by any member of the board?

MS. BROWN: I moved based on lack of jurisdiction, lack of evidence, and lack of attendance of the complainant that we retain the

county auditor's value as originally presented.

MR. DOLIN: Is there a second?

MR. BAHNSEN: Second.

MR. DOLIN: There's a motion and a second.

Is there any discussion?

MR. SLATER: Not other than I would have liked to have actually heard testimony in this case. I do have questions as to what the impact of the lake actually may have had on the valuation, but as the complainant's not present, we don't have the opportunity to do so.

MR. BAHNSEN: Also as noted, and section eight not having been completed, that there's no basis for us to even review this case.

MR. DOLIN: Seeing no further discussion, all in favor of the motion to dismiss signify by saying aye.

(All say aye.)

MR. DOLIN: Motion carries unanimously. Matter is dismissed for lack of jurisdiction. That concludes this matter.

(Recess taken.)

CHAPTER 5
DETERMINING IF THERE IS STANDING TO FILE A COMPLAINT

CHAPTER SUMMARY

- "Standing" is an element of "jurisdiction" and addresses whether the complainant has the individual capacity under the law to file the complaint.
- The requirements for standing at the BOR are set forth in R.C. 5715.13(A) and 5715.19(A)(1) and only those individuals/entities listed in R.C. 5715.19(A)(1) may file a complaint.
- Standing is determined as of the time the complaint is filed.
- In order to have standing, complainants filing as owners must own the property at the time they file.
- With the exception of certain tenants, in order to have standing complainants must own legal, as opposed to equitable, title to the subject property.
- Other than those non-attorney filers authorized to file complaints under R.C. 5715.10(A)(1), standing is denied to non-attorneys who file complaints on behalf of another because such filing constitutes the unauthorized practice of law.

Previously we discussed the BOR's jurisdiction: its lawful power to hear and adjudicate a case brought before it. In this chapter we address "standing." The two concepts – jurisdiction and standing – are related but different. While "[t]here is a clear distinction between the requirements of subject matter jurisdiction and standing,"[166] there are elements of overlap as well. Put plainly:

> Subject-matter jurisdiction refers to the *statutory or constitutional authority* to adjudicate a case…Lack of standing, on the other hand, challenges *a party's capacity* to bring an action, not the subject-matter jurisdiction of the tribunal.[167] (italics added)

[166] See *Harris v. Harris*, 5th Dist. Stark No. 2014CA00107, 2015-Ohio-1000, ¶ 37.

[167] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, ¶ 25.

"Jurisdiction," then, addresses whether the BOR has the *lawful authority to hear* a case while "standing" addresses *who* is entitled to bring the case (and thereby invoke the power and authority of the BOR).

Despite that difference, however, there is an important relationship between jurisdiction and standing. As explained by the Court:

> …the General Assembly has incorporated the requirement for standing into the jurisdictional requirements for filing a valuation complaint, as set forth in R.C. 5715.13 and 5715.19. "A complaint filed by a person who is not identified by [R.C. 5715.19(A), see below] as one who may file a complaint does not vest jurisdiction in the board of revision to review the auditor's valuation."[168]

"It is well settled that standing to file valuation complaints is jurisdictional."[169] "The valuation complaint is a creature of statute and the statutes that apply thereto must be complied with to properly invoke the jurisdiction of the board of revision."[170] In other words, having standing to bring a case at the BOR is a component - a requisite element – needed in order for the BOR to properly exercise its jurisdiction over a case.

Sequentially, then, before the BOR has the lawful power to hear a case it must first determine whether the complainant has the personal capacity to file the complaint.[171] If the complainant does *not* have standing – the personal capacity to bring the case - then a necessary element of jurisdiction is missing and the BOR would not have the lawful jurisdiction to hear the case. On the other hand, if standing is first established the BOR can then move on to determine

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[168] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, ¶ 25. See also *Toledo Public Schools Board of Education v. Lucas County Board of Revision*, 124 Ohio St.3d 490, 2010-Ohio-253, ¶ 10 ("A complaint filed by a person who is not identified by the statute as one who may file a complaint does not vest jurisdiction in the board of revision to review the auditor's valuation. The classification is important because R.C. 5715.13 directs that a board of revision not "decrease any valuation" unless a party who is authorized by R.C. 5715.19(A) to do so files the complaint."); *South-Western City Schools Board of Education v. Franklin County Board of Revision* (May 23, 2022), BTA No. 2021-1710.; *William M. Puz v. Portage County Board of Revision* (January 11, 2023), BTA No. 2022-1614.

[169] *South-Western City Schools Board of Education v. Franklin County Board of Revision* (May 23, 2022), BTA No. 2021-1710. See also *Vendor: Hallmark Building Co. (FNA Fairfax Apartments, Inc. and Kelly Bauernschmidt-Vendee* (August 29, 2022), BTA No. 2021-1702; *Lake Local Schools Board of Education (Wood) v. Wood County Board of Revision* (November 20, 2023), BTA No. 2020-1639.

[170] See *Vendor: Hallmark Building Co. (FNA Fairfax Apartments, Inc. and Kelly Bauernschmidt-Vendee* (August 29, 2022), BTA No. 2021-1702 citing *Griffith v. Cuyahoga Cty. Bd. of Revision*, 44 Ohio St.2d 225, 339 N.E.2d 817 (1975).

[171] Indeed, as if to accentuate that point, the very first information sought on the complaint form – on its first line - seeks the identity of the owner as opposed to, for instance, the location of the parcel or the amount of the valuation reduction being sought.

whether the other requirements of subject matter jurisdiction have been met so that the case can go forward.

Who is Authorized to File a Complaint at the BOR?

Two sections of the Revised Code - R.C. sections 5715.13(A) and 5715.19(A)(1)[172] - address standing. In applicable part, R.C. 5715.13(A) states that:

> … the county board of revision shall not decrease any valuation *unless a party affected thereby or who is authorized to file a complaint under section 5715.19* …makes and files with the board [BOR] a written application therefor [complaint]…[173] (italics added)

The use of the word "or" in the phrase "a party affected thereby *or* who is authorized to file…under 5715.19" in the above statute would seem to give the separate ability to file to those who are "affected thereby" *or* to those who are "authorized to file…under section 5715.19." According to Ohio's Supreme Court:

> It is now well settled that the language of R.C. 5715.19(A) establishes the jurisdictional gateway to obtaining review by the boards of revision: it authorizes complaints from particular actions of the county auditor, and it then specifies what persons or entities "may file such a complaint."…A complaint filed by a person who is not identified by the statute [R.C. 5715.19(A)] as one who may file a complaint does not vest jurisdiction in the board of revision to review the auditor's valuation.[174]

Sequentially, then, according to the Court:

> … to have standing, a complainant *must first demonstrate* that pursuant to R.C. 5715.19(A)(1), he or she is a "person owning taxable real property in the county…If the complainant satisfies this "threshold standing requirement," a court will then consider whether he or she meets the requirements of R.C. 5715.13, which provides, "The county board of revision shall not decrease any valuation unless a party affected thereby or who is authorized to file a complaint under section

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[172] See *Village Condominiums Owners Assn. v. Montgomery County Board of Revision*, 106 Ohio St.3d 223, 2005-Ohio-4631, ¶ 6 ("…"[t]he two statutes of primary importance when considering the standing of a party to file a complaint for a decrease in valuation with a board of revision are R.C. 5715.19 and 5715.13.").

[173] See R.C. 5715.13(A).

[174] See *Toledo Public Schools Board of Education v. Lucas County Board of Revision*, 124 Ohio St.3d 490, 2010-Ohio-253, ¶ 10.

> 5715.19 of the Revised Code makes and files with the board a written application * * *."[175] (italics added)

Having established that a complainant must first fall within the list of those identified as authorized complainants in R.C. 5715.19, that statute in turn identifies those who are authorized to file a valuation complaint at the BOR.

The H.B. 126 Amendments

Longstanding provisions of RC 5715.19(A) identified the persons and entities authorized to file a complaint, including boards of education. The statute was amended, however, by H.B. 126 effective July 21, 2022.[176]

As discussed below, while many of the changes in the amendment were substantive, significantly affecting the manner in which BOR complaints may be filed, one of H.B. 126's changes was to terminology only. In particular, H.B. 126 substituted the term "legislative authority" to collectively describe several government boards and bodies which, under the pre-amendment language, were specifically identified. Under H.B. 126 the phrase "legislative authority" was defined to mean:

> …a board of county commissioners, a board of township trustees of any township with territory in the county, the board of education of any school district in the county, or the legislative authority of a municipal corporation with territory in the county.[177]

[175] See *Village Condominiums Owners Assn. v. Montgomery County Board of Revision*, 106 Ohio St.3d 223, 2005-Ohio-4631, ¶ 6. See also *Rock 1234, LLC; Corona Verde, LLC; Forselles II Partners, LL Per Auditor* (October 27, 2021), BTA No. 2021-1249 ("To have standing, a complainant must be identified by R.C. 5715.19(A) as one who may file a complaint.").

[176] See *North Ridgeville City Schools Board of Education v. Lorain County Board of Revision* (October 31, 2022), BTA No. 2022-1152, reversed on other grounds *; New Albany-Plain Local Schools Board of Education v. Franklin County Board of Revision*, 10th Dist. Franklin Nos. 22AP-732, 733, 737, 738, 743, 744, 746, 757, 748, 749, 750, 751, 2023-Ohio-3806. ⁋ 7

[177] See R.C. 5715.19(A).

As stated by the Tenth District Court of Appeals, "The H.B. 126 amendments to R.C. 5715.19(A) rephrased but did not substantively alter the list of persons and entities authorized to file complaints against real property valuations."[178]

As such, the list of those authorized to file a complaint under amended, R.C. 5715.19 remained as follows:[179]

> [1] Any person owning taxable real property in the county or in a taxing district with territory in the county;
>
> [2] such a person's spouse;
>
> [3] a tenant of the property, if the property is classified as to use for tax purposes as commercial or industrial, the lease requires the tenant to pay the entire amount of taxes charged against the property, and the lease allows, or the property owner otherwise authorizes, the tenant to file such a complaint with respect to the property;[180]
>
> [4] an individual who is retained by such a person or tenant and who holds a designation from a professional assessment organization, such as the institute for professionals in taxation, the national council of property taxation, or the international association of assessing officers;
>
> [5] a public accountant who holds a permit under section 4701.10 of the Revised Code,
>
> [6] a general or residential real estate appraiser licensed or certified under Chapter 4763. of the Revised Code who is retained by such person or tenant,[181] or

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[178] See *New Albany-Plain Local Schools Board of Education v. Franklin County Board of Revision*, 10th Dist. Franklin Nos. 22AP-732, 22AP-733, 22AP-738, 22AP-743, 22AP-744, 22AP-746, 22AP-747, 22AP-748, 22AP-749,22AP-750, 22AP-751, 2023-Ohio-3806, ¶16.

[179] For ease of review, I have added the bracketed numbers to that section of the Revised Code to make clear who can file.

[180] This provision authorizing tenants to file a complaint was added to R.C. 5715.19(A) by Senate Bill 57 ("S.B. 57"), effective August 3, 2021. See also *City of Cleveland/IX Center Corp. v. Cuyahoga County Board of Revision* (September 28, 2022), BTA No. 2022-186 ("…, a tenant has standing if four elements are met. First, the tenant must be a "tenant of the *property owner*[.]" Emphasis added. Second, the property must be classified as commercial or industrial. *Id*. Third, the lease must require the "tenant to pay the entire amount of taxes charged against the property." *Id*. Fourth, either the lease must allow, or the property owner must permit, the tenant to file the complaint."). It should also be noted that a tenant that qualifies under that provision is also: (1) authorized to have a BOR complaint filed on its behalf by retaining any of the individuals identified in categories 4 through 7, above; (2) authorized, if the tenant is a firm, company, association, partnership, limited liability company, or corporation, to have an officer, a salaried employee, a partner, or a member of that tenant file the complaint; or (3) authorized, if the tenant is a trust, to have a trustee of the trust file the complaint on behalf of the tenant. See text of S.B. 57.

[181] See, for example, *13715 Terrace Builds LLC v. Cuyahoga County Board of Revision* (May 26, 2020), BTA Nos. 2019-2522, 2019-2523 ("R.C. 5715.19(A)(1) permits the filing of a complaint by an appraiser.").

> [7] a real estate broker licensed under Chapter 4735. of the Revised Code, who is retained by such a person or tenant;
>
> [8] if the person or tenant is a firm, company, association, partnership, limited liability company, or corporation, an officer, a salaried employee, a partner, or a member of that person or tenant;[182]
>
> [9] if the person or tenant is a trust, a trustee of the trust;
>
> [10] the prosecuting attorney;
>
> [11] treasurer of the county;

Prior to the amendments of H.B. 126, R.C. 5715.19(A) also included as potential filers "the board of county commissioners…the board of township trustees of any township with territory within the county; the board of education of any school district with any territory in the county, or the mayor or legislative authority of any municipal corporation with any territory in the county." As mentioned above, the terminology for those entities was changed to "legislative authority" so that the amended statute now reads:

> [12] "or the legislative authority of a subdivision[183] or the mayor of a municipal corporation."

But perhaps the most significant changes made by H.B. 126 were its provisions relating to complaints filed by boards of education ("BOE"). Those changes primarily related to three areas: (1) the notice to the BOE when a complaint is filed at the BOR by a property owner or other authorized filer; (2) the process to be utilized and the conditions under which the BOE may file a complaint at the BOR; and (3) the appeals process to be used by the BOE when it appeals a BOR decision. In addition, although not involving practice at the BOR, H.B. 126 included a provision regarding settlement agreements between the BOE and property owners.

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[182] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 152 Ohio St.3d 134, 2017-Ohio-8844, ¶ 11, where the Court stated that: "Here, there is no question that [non-owner complainant] could pursue a challenge to the auditor's valuation - it owns taxable property in Franklin County. The question is whether the individual who filed the complaint on [behalf of the non-owner complainant] fell within the class of individuals authorized by statute to do so. If that statutory authority was lacking, the complaint must be dismissed as jurisdictionally defective."

[183] The word "subdivision" refers to a political subdivision.

H.B. 126: Elimination of Notice to the BOE

Regarding notice, H.B. 126 eliminated the requirement of the pre-amendment statute that the BOE be given notice of the filing of the complaint.[184] Prior to the amendment, R.C. 5715.19(B) required that the county auditor notify the BOE and each property owner (if she did not file the complaint) of each complaint filed at the BOR which alleged a change of at least fifty thousand dollars ($50,000) in fair market value (seventeen thousand five hundred dollars in taxable value). That notice was required to be given within thirty days after the last date that a complaint may be filed, generally March 31 of the following tax year. Under amendments to R.C. 5715.19(B), the county auditor is no longer required to give that notice to the BOE, while still being required to give it to each property owner whose property is the subject of the complaint.[185]

The elimination of the notice requirement may have an impact on the filing of counter-complaints by the BOE. Significantly, after the amendment the BOE must file its counter-complaint within thirty (30) days after the original complaint is *filed*, as opposed to thirty days *after receiving notice* of the complaint as existed prior to the amendment.[186] This change may complicate the BOE's ability to file a timely counter-complaint to the original complaint. In addition, under the amendments counter-complaints by the BOE are only allowed if the original complaint alleges a change in fair market value of at least $50,000 ($17,500 in taxable value).[187] It should be noted that the amendments do not change the notice or filing requirements for property owners, who will still receive notice of the filing of the complaint by any other party and who may

[184] See H.B. 126 as enrolled at https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb126/EN/07/hb126_07_EN?format=pdf. See also https://www.legislature.ohio.gov/download?key=18974&format=pdf ("The act removes a requirement that school boards receive notice when certain property tax complaints are filed.").

[185] See Ohio Legislative Service Commission, *Final Analysis of H.B. 126*, 134th General Assembly at https://www.legislature.ohio.gov/download?key=18963&format=pdf ("The bill…removes a requirement under current law that school districts receive notice of a complaint if the complaint alleges a change in full market value of at least $50,000.").

[186] See Ohio Legislative Service Commission, *Final Analysis of H.B. 126*, 134th General Assembly at https://www.legislature.ohio.gov/download?key=18974&format=pdf. See also Ohio Legislative Service Commission, *Final Fiscal Note & Local Impact Statement of H.B. 126*, 134th General Assembly at https://www.legislature.ohio.gov/download?key=18963&format=pdf.

[187] See amended version of R.C. 5715.19(B) at https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb126/EN/07/hb126_07_EN?format=pdf.

file the counter-complaint within thirty days after they receive notice of the filing of the original complaint.[188]

H.B. 126: Conditions Before the BOE May File a Complaint

The second significant change of H.B. 126 dealt with the process through which a legislative authority, including the BOE, may file a complaint at the BOR. In particular, H.B. 126 added subsections (6), (7), and (8) to R.C. 5715.19(A) which imposed new procedural requirements on legislative authorities as pre-conditions before they may file a BOR complaint.

As amended, new subsection R.C. 5715.19(A)(6)(a) states that neither the legislative authority of a subdivision, nor the mayor of a municipal corporation, nor a third-party complainant may file an original complaint challenging the valuation of property the subdivision or complainant does not own or lease unless (1) the property was sold in an arm's length transaction before, but not after, the tax lien date for the tax year for which the complaint is filed[189] and (2) the sale price exceeds the true value of the property appearing on the tax list for that tax year by both ten percent and five hundred thousand dollars ($500,000) for tax year 2022.[190] Amended subsection (6) further requires that beginning in tax year 2023, the $500,000 threshold amount shall be annually adjusted by the Tax Commissioner to account for changes in the economy.[191] But the amendments

[188] See R.C. 5715.19(B). See also Ohio Legislative Service Commission, *Final Analysis of H.B. 126*, 134th General Assembly at https://www.legislature.ohio.gov/download?key=18974&format=pdf. ("The act does not change the notice or filing requirements for property owners. Owners will still receive notice of an original complaint filed by another party, and may file a countercomplaint within 30 days after the owner receives that notice.")

[189] In *Snider Crossing LLC v. Warren County Board of Revision* (December 18, 2023), BTA No. 2023-1195 the property owner claimed that the BOE's complaint should be dismissed for lack of BOR jurisdiction because the BOE had failed to prove *at the time the complaint was filed* that the property had been sold in an arm's length transaction as required by R.C. 5715.19(A)(6). The BTA's attorney examiner rejected that argument, stating that "At the outset, the Board rejects the property owner's assertion that the BOE was required to establish an arm's length sale at the time of filing its complaint…it is not a novel issue for a complaint to both allege and prove a particular fact in order to invoke the BOR's jurisdiction." The matter was then set down to move forward at the BTA in accordance with its milestone schedule. (BTA's website for this case last viewed on March 8, 2024).

[190] See. R.C. 5715.19(A)(6)(a) and R.C. 5715.19(J) which states, in applicable part, that "the filing threshold for tax year 2022 equals five hundred thousand dollars. For tax year 2023 and each tax year thereafter, the tax commissioner shall adjust the filing threshold used in that division" to index it to account for changes in the economy. The calculation used to adjust the $500,000 amount is set forth in R.C. 5715.19(J) and the Tax Commissioner is required to "certify the amount resulting from the adjustment to each county auditor not later than the first day of October each year."

[191] See Ohio Legislative Service Commission, *Final Analysis of H.B. 126*, 134th General Assembly at https://www.legislature.ohio.gov/download?key=18974&format=pdf.

make clear that while the filing threshold amount may be increased over time, it may not be decreased. According to the amendments, the Tax Commissioner "shall not make the adjustment for any tax year in which the [filing threshold] amount resulting from the adjustment would be less than the filing threshold for the current tax year."[192]

R.C. 5715.19(A)(6)(b) requires that a resolution be passed by the legislative authority as a pre-condition to filing the complaint, stating that an original complaint shall not be filed unless "the legislative authority or, in the case of a mayor, the legislative authority of the municipal corporation, first adopts a resolution authorizing the filing of the original complaint at a public meeting of the legislative authority."

New subsection 5715.19(A)(7) (hereafter "(A)(7)"), in turn, makes reference to subsection (A)(6)(b) discussed above, stating that the resolution that's adopted under (A)(6) shall include all of the below information:

> (a) Identification of the parcel or parcels that are the subject of the original complaint by street address, if available from online records of the county auditor, and by permanent parcel number;
>
> (b) The name of at least one of the record owners of the parcel or parcels;
>
> (c) The basis for the complaint under divisions (A)(1)(a) to (f) of this section relative to each parcel identified in the resolution;
>
> (d) The tax year for which the complaint will be filed, which shall be a year for which a complaint may be timely filed under this section at the time of the resolution's adoption.

Subsection (A)(7) imposes additional requirements on the legislative authority regarding the adoption of the resolution and the manner in which the parcel's owner is notified. In applicable part, it states that the resolution shall not identify more than one parcel "except that a single resolution may identify more than one parcel…if each parcel has the same record owner[s]." However, the legislative authority "may adopt multiple resolutions…by a single vote, provided that the vote is separate from the question of whether to adopt any resolution that is not adopted under division (A)(6)(b)…" In other words, the single-vote provision prohibits the mixing of (A)(6)(b) resolutions with other resolutions that are not related to (A)(6)(b).

[192] See R.C. 5715.19(J).

Before the resolution is adopted, the legislative authority is required to "mail a written notice to at least one of the record owners of the parcel or parcels identified in the resolution stating the intent of the legislative authority in adopting the resolution, the proposed date of adoption, and the basis for the complaint under divisions (A)(1)(a) to (f) of this section relative to each parcel identified in the resolution." The notice is required to be sent by certified mail "to the last known tax-mailing address of at least one of the record owners and, if different from that tax-mailing address, to the street address of the parcel or parcels identified in the resolution." Alternatively, if the legislative authority has an internet identifier of record[193] of at least one of the owners, it may send the notice by regular mail and to the internet identifier of record. The amended statute requires that "The notice shall be postmarked or, if sent by internet identifier of record, sent at least seven calendar days before the legislative authority adopts the resolution."[194] Finally, (A)(7) states that the BOR has jurisdiction to consider a complaint filed pursuant to the resolution "only if the legislative authority notifies the board of revision of the resolution in the manner prescribed in division (A)(8) of this section." (A)(7) concludes by stating that "The failure to accurately identify the street address or the name of the record owners of the parcel…does not invalidate the resolution nor is it a cause for dismissal of the complaint."

New subsection R.C. 5715.19(A)(8) discusses revisions to the BOR complaint form resulting from the statutory amendments, stating that: "A complaint form prescribed by a board of revision or the tax commissioner for the purpose of this section shall include a box that must be checked, when a legislative authority files an original complaint, to indicate [1] that a resolution authorizing the complaint was adopted in accordance with division (A)(7) of this section" and [2] that notice was mailed to or sent before the adoption of the resolution to at least one of the owners of record of the subject property.[195]

[193] Under R.C. 5715.19(A), an "internet identifier" has the same meaning as used in R.C. 9.312 which says " 'internet identifier of record' means an electronic mail address, or any other designation used for self-identification or routing in internet communication or posting, provided for the purpose of receiving communication."

[194] See R.C. 5715.19(A)(7).

[195] See R.C. 5715.19(A)(8).

Once an original complaint is pending at the BOR, amendments to R.C. 5715.19(C) require that it be adjudicated within a specified period of time or, upon failing that, the BOR will lose jurisdiction to consider it.

> If the original complaint is filed by the legislative authority of a subdivision, the mayor of a municipal corporation with territory in the county, or a third party complainant, and if the board of revision has not rendered its decision on the complaint within one year after the date the complaint was filed, the board is without jurisdiction to hear, and shall dismiss, the complaint.[196]

As can be seen, the above amendment deprives the BOR of jurisdiction only in connection with complaints filed by an entity or person other than the owner of the subject property. As such, the BOR's failure to render a decision within a year on an owner initiated original complaint will not deprive the BOR of jurisdiction to consider it and render a decision.

H.B. 126 also addressed "private pay agreements" between BOEs and property owners; a practice that had caused consternation among some county auditors. In these private pay agreements, the property owner "agrees to make one or more payments to the political subdivision [typically the BOE] in exchange for the legislative authority dismissing the complaint or counter-complaint [against the owner], refraining from filing a complaint or counter-complaint, or settling a claim."[197] Under the amendment, a private pay agreement does not include an agreement between the parties "pursuant to which an agreed-upon valuation for the [subject] property…is approved by the county auditor and reflected on the tax list…" so long as that agreement does not require any of the payments described in the amendment. Unlike the other amendments to H.B. 126 which went into effect for complaints and counter-complaints filed for tax year 2022, the private pay agreement amendment went into effect on the bill's effective date, July 21, 2022.[198]

Finally, H.B. 126 made a significant change to the BOE's right to appeal under R.C. 5717.01. Continuing law under R.C. 5715.20, requires that whenever the BOR renders a decision on a complaint it must give notice of its action to both the property owner and the complainant, if the complainant was not the owner. Prior to the amendments, any party could then appeal that

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[196] See R.C. 5715.19(C).

[197] See Ohio Legislative Service Commission, *Final Fiscal Note & Local Impact Supplement*, for H.B. 126, 134th General Assembly at https://www.legislature.ohio.gov/download?key=18974&format=pdf

[198] See Ohio Legislative Service Commission, *Final Analysis of H.B. 126*, 134th General Assembly at https://www.legislature.ohio.gov/download?key=18963&format=pdf

decision to the BTA within thirty days after notice of the decision was mailed.[199] The amendment's to R.C. 5717.01 denied that appeal right to a political subdivision, saying that a "subdivision that files an original complaint or counter-complaint….with respect to property that the subdivision does not own or lease may not appeal the decision of the board of revision with respect to that original complaint or counter-complaint." It should be noted, however, that the amendments do not prohibit "the legislative authority from becoming the opposing party in an appeal filed by a property owner or another party."[200]

Not surprisingly, after H.B. 126 was enacted litigation ensued regarding the BOE's right to appeal. In *North Ridgeville City Schools Board of Education v. Lorain County Board of Revision* (October 31, 2022), BTA No. 2022-1152, the BTA addressed the question of *when* the H.B. 126 amendments to R.C. 5717.01 (which precluded appeals by the BOE to the BTA) took effect. In that case the BTA found that that the amendments regarding the BOE's appeal rights took effect on July 21, 2022 by operation of law, thereby precluding BOE appeals after July 21, 2022 from BOR decisions that were rendered on complaints that had been filed *before* that date.[201] Therefore, the BTA held that "boards of education now have no appeal rights to this Board unless the board of education owns or leases the property," in accordance with the H.B. 126 amendments to R.C. 5717.01.

After the *North Ridgeville* decision, in another case where the BTA dismissed a case based on *North Ridgeville* an appeal was taken to the Third District Court of Appeals in *Marysville Exempted Village Schools Board of Education v. Union County Board of Revision*, 3rd Dist. Union Nos. 14-23-03, 2023-Ohio-2020 ("*Marysville*"). There, the Court of Appeals considered the BTA's *North Ridgeville* decision, specifically whether the amendment is applicable where the original complaint and counter-complaint are filed before July 21, 2022 but the appeal to the BTA was filed after that date. The *Marysville* court examined the language of the amendment and found

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[199] See R.C. 5717.01.

[200] See Ohio Legislative Service Commission, *Final Analysis of H.B. 126*, 134th General Assembly at https://www.legislature.ohio.gov/download?key=18963&format=pdf

[201] See *New Albany-Plain Local Schools Board of Education v. Franklin County Board of Revision*, 10th Dist. Franklin Nos. 22AP-732, 733, 737, 738, 743, 744, 746, 757, 748, 749, 750, 751, 2023-Ohio-3806. ¶ 19 ("The BTA [in *North Ridgeville*] rejected the board of education's argument that applying the amended version of R.C. 5717.01 from BOR decisions rendered on complaints that had been filed prior to July 21, 2022 would constitute an improper, retroactive application of the amended statute.").

that the BTA in *North Ridgeville* had misinterpreted the language of the statutory amendments and that its decision was flawed. Accordingly, the *Marysville* court held that the amendments applied "prospectively to appeals stemming from *complaints* [emphasis in original] filed after the July 21, 2022 effective date…as opposed to prohibiting appeals from complaints that were filed prior to that date."[202] As of this writing, several cases are pending at the Ohio Supreme Court regarding H.B. 126's amendment concerning appeals.[203] Because the H.B. 126 amendments were far-reaching and a significant change from prior practice, it is not unreasonable to expect litigation in the future surrounding its language and interpretation.

The Supreme Court has held that statutory filing requirements are mandatory and jurisdictional and, further, cannot be waived "even by a tax official."[204] Accordingly, those who file complaints at the BOR must meet strict filing requirements and the failure to do so can result in the dismissal of the complaint. Examples of such dismissals include the dismissal of a complaint for lack of jurisdiction where it was filed two days after the filing deadline[205] and dismissal of a complaint, defective at the time of filing, despite the fact that the filing party attempted to cure the defect at the BOR hearing itself.[206]

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[202] See in *Marysville Exempted Village Schools Board of Education v. Union County Board of Revision*, 3rd Dist. Union Nos. 14-23-03, 2023-Ohio-2020, ¶ 36.

[203] Subsequent to the *Marysville* decision, the Tenth District Court of Appeals in *New Albany-Plain Local Schools Board of Education v. Franklin County Board of Revision*, 10th Dist. Franklin Nos. 22AP-732, 22AP-733, 22AP-738, 22AP-743, 22AP-744, 22AP-746, 22AP-747, 22AP-748, 22AP-749,22AP-750, 22AP-751, 2023-Ohio-3806, also found that *North Ridgeville* had been incorrectly decided by the BTA, but on other grounds. The *Marysville* decision was appealed to the Supreme Court by the property owner, where it is pending as of the date of this writing (March 13, 2024). See https://www.supremecourt.ohio.gov/Clerk/ecms/#/caseinfo/2023/0964. In addition, the Fifth District Court of Appeals in *Olentangy Local School Board of Education v. Delaware County Board of Revision*, 5th Dist. Delaware Nos. 23 CAH 01 003, 23 CAH 01 004, 2023-Ohio-3984 and *Lancaster City School District Board of Education v. Fairfield County Board of Revision*, 5th Dist. Fairfield No. 23 CA 02, 2023-Ohio-3985 also found the BTA's decision in *North Ridgeville* to have been unlawful. Both of those cases were appealed to the Supreme Court by the respective property owners and *sua sponte*, the Court determined to hold each of those cases for decision pending its decision in *Marysville*. See https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2024/2024-ohio-763.pdf.

[204] See *Verifone, Inc. v. Limbach*, 69 Ohio St.3d 699 (1994). See also *Henry W. Tuttle v. Lake County Board of Revision* (January 4, 2021), BTA No. 2019-1401 ("…to have standing, a complainant must be identified by R.C. 5715.19(A), as one who may file a complaint.").

[205] See *Sidney City Schools Board of Education v. Shelby County Board of Revision* (January 26, 2016), BTA No. 2015-1650.

[206] See *Kettering City Schools Board of Education v. Montgomery County Board of Revision* (May 1, 2017), BTA No. 2016-2510.

When is Standing Determined?

Standing is determined as of the time the complaint is filed[207] and the burden is on the party that files the complaint to prove that he/she has standing.[208] This becomes important in circumstances, not unusual, where a property is sold after the tax lien date (i.e.: January 1, 2016) but before the BOR filing deadline (March 31, 2017) and the old owner (who owned the property on the tax lien date but not on the filing date), files the complaint at the BOR. If the old owner does not own property *when the complaint is filed*, then the complaint should be dismissed for lack of standing.[209] On the other hand, there *is* standing for a new owner to file a complaint at the BOR where the deed has been signed by the old owner and delivered to the new owner, even though the deed has not been filed with the County Recorder on the date the complaint is filed, According to the BTA:

> The Ohio Supreme Court has been clear that ownership changes when a seller delivers, and a buyer accepts an executed deed. [citation omitted] While the recording of a deed perfects delivery, there is no requirement that the deed be recorded to pass title. [citation omitted] Furthermore, there is no requirement that a complainant legal title holder must also be the recorded title holder.[210]

Legal vs. Equitable Title

Further, the filing party must own legal, as opposed to equitable, title to the property. One who owns equitable title has only the beneficial interest in the property. As stated by the Supreme Court:

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[207] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, ¶ 26 ("Standing is determined as of the commencement of the action."). See also *Loveman Steel Corporation v. Cuyahoga County Board of Revision* (August 22, 2017), BTA No. 2017-405 ("R.C. 5715.19(A)(1), "requires that a complainant must have owned taxable real property in the county at the time the complaint was filed."); *South-Western City Schools Board of Education v. Franklin County Board of Revision* (May 23, 2022), BTA No. 2021-1710 ("…to have standing, one filing a valuation complaint as the owner of real property must own real property in the county when such person files the complaint to invoke the jurisdiction of the board of revision."); *William M. Puz v. Portage County Board of Revision* (January 11, 2023), BTA No. 2022-1614.

[208] See *Society National Bank v. Wood County Board of Revision*, 81 Ohio St.3d 401 (1998).

[209] See *Victoria Plaza Limited Liability Company v. Cuyahoga County Board of Revision*, 86 Ohio St.3d 181 (1999).

[210] See *Rock 1234, LLC; Corona Verde, LLC; Forselles II Partners, LL Per Auditor* (October 27, 2021), BTA No. 2021-1249.

> …a person owning property has legal title to it; a person having the beneficial interest in property has possession of all characteristics of ownership other than legal title. Since R.C. 5715.19 does not contain language allowing someone other than the person holding legal title to file a complaint, we conclude that the owner of an equitable interest in real property does not have standing to file a complaint.[211]

But, as discussed above, Senate Bill 57 carved out an exception to that general rule by allowing certain qualifying tenants (who by virtue of their lease have an equitable, as opposed to legal, interest in the property) to file a complaint at the BOR. Going forward, the enactment of this new tenant provision vitiates the prior law relating to tenants which said that they could not file a BOR complaint,[212] even if they held long term lessees[213] and even if they were contractually obligated to the landowner to pay property taxes.[214] In addition, and unrelated to Senate Bill 57, where ownership is divided between land and improvements – with one party owning the land and another party owning the building(s) - both owners have standing to file a complaint challenging their property value.[215]

Other than the S.B. 57 exception allowing certain tenants to file, the law requiring legal ownership is still applicable. For example, the vendees of a land installment contract have equitable title (typically, the ability to occupy and use the land) upon execution of the contract, but do not obtain legal title – and therefore the ability to file a BOR complaint – until the terms of the contract have been satisfied. As a result, vendees of land installment contracts do not have standing to file complaints at the BOR for the property that they occupy under the land installment

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[211] See *Victoria Plaza Limited Liability Company v. Cuyahoga County Board of Revision*, 86 Ohio St.3d 181, 183 (1999). See also *Brett Greer v. Cuyahoga County Board of Revision* (June 7, 2021), BTA No. 2020-1175 ("A property owner has standing to file a complaint under R.C. 5715.19; however, the owner of an equitable interest does not.").

[212] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision* (August 20, 2017), BTA No. 2016-1624 ("…the Supreme Court has determined that a lessee does not have standing to file a complaint when the lessee does not own the subject property and or other property in the county."). See also *Dublin City Schools Board of Education v. Franklin County Board of Revision* (November 15, 2017), BTA Nos. 2017-1294, 2017-1447 ("R.C. 5715.19(A) sets forth who may file a complaint challenging the valuation of real property for tax purposes; while an owner of real property in the county is specified, tenants are not.").

[213] See *Diley Ridge Medical Center v. Fairfield County Board of Revision*, 141 Ohio St.3d 149, 2014-Ohio-5030, ¶ 13.

[214] See *Name Brand Furniture Warehouse, Inc. v. Cuyahoga County Board of Revision*, 41 Ohio App.3d 47 (8th Dist.1987).

[215] See *Valibar Realty Co. v. Cuyahoga Cty. Bd. of Revision* (Jan. 6, 2006), BTA Nos. 2003-T-633. See also *Edward F. Hoban/National Church Residences of Holy Trinity OH v. Cuyahoga County Board of Revision* (January 25, 2021), BTA Nos. 2019-3006, 2020-144; *Edward f. Hoban/Holy Trinity II Senior Housing Limited Partnership v. Cuyahoga County Board of Revision* (January 27, 2021), BTA Nos. 2019-3007, 2020-145.

contract.[216] The same reasoning should apply to easement holders who do not own the property but have an equitable right to use it for certain purposes. Neither easement holders nor land installment contract vendees are identified in R.C. 5715.19(A) as having standing to file.

The Unauthorized Practice of Law

There is, however, another potential impediment to obtaining "standing" at the BOR: the unauthorized practice of law.[217] The Supreme Court has long held that "[t]he preparation and filing of a complaint with a board of revision [by a non-attorney] on behalf of a taxpayer constitute the practice of law."[218] The corollary to that ruling, of course, is that a non-attorney who prepares and files a complaint at the BOR has engaged in the *un*authorized practice of law.[219] If

[216] See *Chris Haggy v. Clark County Board of Revision* (June 13, 2015), BTA No. 2014-2391. See also *Lodging Industry Inc. v. Lorain County Board of Revision* (December 19, 2016), BTA No. 2016-794 ("A land contract results in a current transfer of equitable ownership and a subsequent transfer of legal title upon satisfaction of the contractual terms…As such, the holder of legal title has standing to file a complaint under R.C. 5715.19, whereas the owner of an equitable interest in real property does not."). See also *Massillon City Schools Board of Education v. Stark County Board of Revision* (April 12, 2021), BTA No. 2020-991; *Robert Otto Carson v. Cuyahoga County Board of Revision* (May 24, 2021), BTA No. 2020-2265 ("A "land contract results in a current transfer of equitable title and a subsequent transfer of legal title upon satisfaction of the contractual terms."); However, see *Vendor: Hallmark Building Co. (FNA Fairfax Apartments, Inc. and Kelly Bauernschmidt-Vendee* (August 29, 2022), BTA No. 2021-1702 regarding standing where the holder of legal title and the holder of equitable title were both named as appellants in the complaint at the time it was filed.

[217] Dismissals based on the unauthorized practice of law do not, at first blush, appear to implicate traditional "standing" issues; involving, instead, the authority of the Supreme Court to control the practice of law and to protect the public by refusing to allow those without the appropriate training and credentials from acting as attorneys. Nonetheless, because R.C. 5715.19(A) grants standing only to those individuals/entities identified in the statute – and because non-attorneys who do not fall into one of the other categories are not granted such standing – issues related to the unauthorized practice of law are appropriately placed in this chapter on "standing". See, for example, *Phyllis Menos, et al. v. Cuyahoga County Board of Revision* (April 11, 2013), BTA No. 2012-5127 where the BTA stated that "While appellants and the BOR describe the jurisdictional issue in this matter as one of standing, we believe it is more properly a question of whether Ms. Federico committed the unauthorized practice of law by filing the complaint on behalf of the property owner."

[218] See *Sharon Village Limited v. Licking County Board of Revision*, 78 Ohio St.3d 479 (1997) (syllabus). See also *Greenway Ohio, Inc. v. Cuyahoga County Board of Revision*, 155 Ohio St.3d 230, 2018-Ohio-4244, ¶ 18.

[219] See *Ohio State Bar Association v. Home Advocate Trustees, L.L.C.,* 152 Ohio St.3d 60, 2017-Ohio-9108, ¶ 16, where, in describing the unauthorized practice of law in general, the Supreme Court stated that "The unauthorized practice of law is the rendering of legal services for another by any person not admitted or otherwise certified to practice law in Ohio…The rendering of legal services includes the 'preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts.'" Regarding the unauthorized practice of law specifically before the BOR see *Cleveland Metropolitan Bar Association v. Wallace*, 147 Ohio St.3d 338, 339, 2016-Ohio-5603 ("…there is clear Ohio Supreme Court authority to the effect that the preparation of complaints as to tax valuation assessments for filing with Ohio boards of revision for others is the unauthorized practice of law…"). As stated by the Supreme Court in *Cincinnati School District Board of Education v. Hamilton County Board of Revision*, 91 Ohio St.3d 308 (2001):

> … the critical inquiry for purposes of determining the vesting of jurisdiction in a board of revision is whether the record demonstrates the initiation of proceedings by the filing of a jurisdictionally valid complaint, *i.e.*, a

unauthorized practice occurs in connection with the preparation and filing of the complaint, then the filer has no standing, the BOR has no jurisdiction to hear the complaint, and the complaint must be dismissed.[220]

Despite that, as identified above, R.C. 5715.19 allows for a limited number of exceptions where a non-attorney is granted standing to file a complaint at the BOR and thereby properly invoke its jurisdiction.[221] One of those exceptions, for example, allows a non-attorney spouse of a property owner to file a complaint on the owner's behalf. But that exception is limited and does not allow any of the owner's other relatives to file.[222] Accordingly, non-attorney family members (i.e., the owner's son or daughter, etc..) who file complaints at the BOR on behalf of non-spouse family members engage in the unauthorized practice of law and do not have standing "which deprives a board of revision of jurisdiction to consider a complaint."[223]

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complaint "prepared and filed" either by the taxpayer acting in a *pro se* capacity or by an attorney authorized to practice law acting in the taxpayer's behalf.

See also *Board of Education of The Whitehall City School District v. Franklin County Board of Revision*, 10th Dist. Franklin Nos. 01AP-878, 01AP-879, 2002-Ohio-1256, ¶ 11 ("Based on *Sharon Village* and its progeny, for a complaint before the FCBOR to be jurisdictionally valid, an attorney that is authorized to practice law must prepare and file the complaint, or an owner-taxpayer acting in a *pro se* capacity must prepare and file the complaint.")

[220] See *Phyllis Menos, et al. v. Cuyahoga County Board of Revision* (April 11, 2013), BTA No. 2012-5127. See also *Fanny Lara Arevalo v. Franklin County Board of Revision* (July 11, 2012), BTA No. 2011-1026 ("…this board has found that, where a fiduciary relationship exists, certain non-attorneys may prepare and file complaints on another's behalf without engaging in the unauthorized practice of law. However, where no evidence of the requisite fiduciary relationship exists, complaints filed by non-attorneys remain jurisdictionally defective. This board has determined that a complaint filed by a non-attorney realtor is insufficient to invoke the jurisdiction of the board of revision…"); *Vandalia-Butler City Schools v. Montgomery County Board of Revision* (October 26, 2015), BTA Nos. 2014-4414; 2014-4415; *Jones Holdings LLC v. Montgomery County Board of Revision* (June 3, 2019), BTA No. 2018-2028 ("Non-attorney agents…are not authorized to file valuation complaints on behalf of another, and engage in the unauthorized practice of law when they do so. [citation omitted]. A complaint filed by a non-attorney agent not authorized by law fails to invoke the board of revision's jurisdiction."); *Dayton City Schools Board of Education v. Montgomery County Board of Revision* (October 15, 2019), BTA No. 2019-45 ("Because [the person who filed the complaint] is not an attorney and is not otherwise authorized to file by R.C. 5715.19(A), we find the underlying complaint failed to properly vest jurisdiction in the board of revision."); *Elias Karsheh, Zacharia Cohen v. Cuyahoga County Board of Revision* (February 17, 2021), BTA No. 2020-2269 ("A complaint filed by a non-attorney agent not authorized by law fails to invoke the board of revision's jurisdiction."); *Lewis D. McClintock v. Cuyahoga County Board of Revision* (June 14, 2023), BTA no. 2022-1434.

[221] See *JPBK Properties #2, L.L.C. v. Cuyahoga County Board of Revision* (March 24, 2017), BTA No. 2016-2527 ("The Supreme Court has held that those specified in the statute [R.C. 5715.19(A)] may file on behalf of another, without the assistance of an attorney, and without such actions constituting the unauthorized practice of law….").

[222] See *JPBK Properties #2, L.L.C. v. Cuyahoga County Board of Revision* (March 24, 2017), BTA No. 2016-2527 ("The only familial relationship listed in the statute is a spouse; siblings are not listed as individuals authorized to file on behalf of another. This board has previously found that non-attorney family members are not authorized to file a complaint with a board of revision on behalf of other family members."). See also *Lavalle Michelle v. Cuyahoga County Board of Revision* (November 20, 2019), BTA No. 2019-1861 (Dismissal where the complaint was filed by the non-attorney brother of the owner); *Nicolae Caraman v. Cuyahoga County Board of Revision* (March 16, 2021), BTA Nos. 2020-2124, 2020-2117.

[223] See *Ramiro Ortega v. Cuyahoga County Board of Revision* (November 21, 2017), BTA No. 2017-1097.

In addition, dismissals for the unauthorized practice of law at the BOR arise in other (non-familial) contexts. For example, the BTA has upheld dismissals of BOR complaints filed by: a non-attorney beneficiary of a trust who was not the titled owner;[224] a non-attorney "Friend/Realtor" who filed on behalf of the owner;[225] a non-attorney who files a complaint for the owner under a power of attorney;[226] a non-attorney "Authorized signer, Property Manager";[227] a non-attorney "property manager";[228] a non-attorney "sister and manager;"[229] a non-attorney "Owner's Realtor";[230] a non-attorney agent to the "holder of a lien encumbering the subject property";[231] a non-attorney "owner's son/power of attorney";[232] and a non-attorney "statutory agent and

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[224] See *Massillon City School District Board of Education v. Stark County Board of Revision* (May 31, 20113), BTA No. 2011-2699.

[225] See *Phyllis Menos, et al. v. Cuyahoga County Board of Revision* (April 11, 2013), BTA No. 2012-5127.

[226] See *Fravel v. Stark Cty. Bd. of Revision* (2000), 88 Ohio St.3d 574.

[227] See *Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision* (March 24, 2017), BTA No. 2016-776.

[228] See *Board of Education of The Groveport Madison Local Schools v. Franklin County Board of Revision* (June 26, 2012), BTA No. 2009-2931. See also *Bental LLC v. Cuyahoga County Board of Revision* (January 12, 2021), BTA No. 2020-620 ("Here, there is no indication that Harris was an owner-member of entity that owned the property, an attorney, or one who was identified by R.C. 5715.19(A) to file complaints on behalf of another. Though he was identified as "manager," such a relationship did not allow him to properly file a complaint on behalf of the property owner."); *Ganor Holdings LLC v. Cuyahoga County Board of Revision* (February 22, 2021), BTA No. 2020-1339; *Dean and Gilli, LLC v. Cuyahoga County Board of Revision* (March 3, 2021), BTA No. 2020-1343 ("Non-owner "managers" are not among the nonlawyers who are explicitly authorized to file complaints under R.C. 5715.19(A)."); *NS Raskin LLC c. Cuyahoga County Board of Revision* (March 3, 2021), BTA No. 2020-1335; *Bental LLC v. Cuyahoga County Board of Revision* (March 16, 2021), BTA No. 2020-1328; *Hofman Y.D. LLC v. Cuyahoga County Board of Revision* (March 29,2021), BTA No. 2020-1326; *Eretz Amin, LLC v. Cuyahoga County Board of Revision* (March 29, 2021), BTA No. 2020-1325; *ZY6 LLC v. Cuyahoga County Board of Revision* (March 29, 2021), BTA No. 2020-1324; *Titan Cleveland 1 LLC v. Cuyahoga County Board of Revision* (June 8, 2021), BTA No. 2020-1922 ("Non-owner "property managers" are not among the nonlawyers who are explicitly authorized to file complaints under R.C. 5715.19(A)."); *CMR Hospitality LLC v. Cuyahoga County Board of Revision* (July 8, 2021), BTA No. 2020-1048.

[229] See *Ulrich and Patricia Neuman v. Franklin County Board of Revision* (September 5, 2014), BTA No. 2013-4140.

[230] See *Daniel Fiske v. Cuyahoga County Board of Revision* (December 9, 2014), BTA No. 2013-2826.

[231] See *Miamisburg City Schools Board of Education v. Montgomery County Board of Revision* (May 2, 2019), BTA No. 2018-1646.

[232] See *Francis J. Owens Sr. M.D. Trustee v. Cuyahoga County Board of Revision* (February 7, 2017), BTA No. 2016-2404. See also *Caraman Nicolae Vasilica v. Cuyahoga County Board of Revision* (February 17, 2021), BTA No. 2020-2118; *Nicolae Caraman v. Cuyahoga County Board of Revision* (March 16, 2021), BTA Nos. 2020-2124, 2020-2117.

manager"[233] to name a few.[234] Because none of those non-attorneys are authorized to file by R.C. 5715.19, any complaints they file will fail to invoke the BOR's jurisdiction.

Similarly, the BTA has also found that a non-attorney who engages in motion practice has engaged in the unauthorized practice of law.[235] Moreover, even when a non-attorney is authorized to file a complaint (i.e.: an owner or other person or entity authorized to file under R.C. 5715.19(A)(1)), the non-attorney is held to the same legal standards as an attorney and her non-attorney status does not give her any procedural or other advantages at the BOR.[236]

It should be noted, however, that even though the BOR has no jurisdiction to hear a case where the person who files the complaint at the BOR engages in the unauthorized practice of law, the BTA has ruled that "Despite that the filing of the notice of appeal constituted the unauthorized practice of law, it does not deprive this Board [BTA] of jurisdiction to consider the merits of the appeal."[237] That is because "R.C. 5717.02 [statute authorizing appeals to the BTA] does not require that the corporation's [the filer's] agent be an attorney for purposes of invoking the BTA's jurisdiction"[238]

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[233] See *MMS Inv, LLC v. Cuyahoga County Board of Revision* (February 17, 2021), BTA No. 2020-811.

[234] It is important to note, however, that R.C. 5715.19(A) now allows "an officer, a salaried employee, a partner, or a member of that person or tenant" to file on the owner's behalf if the owner is "a firm, company, association, partnership, limited liability company, or corporation." In the cases cited above there, the "managers" were apparently not employed by the owner.

[235] See *Patricia Batties v. Summit County Board of Revision* (September 11, 2019), BTA No. 2019-587 ("As an initial matter, there is no indication that Marvin Parms is an attorney licensed to practice law in Ohio. It appears, therefore, that he has engaged in the unauthorized practice of law by attempting to represent the appellant in this matter, i.e., engaging in motion practice."). See also *RCDT LLC v. Cuyahoga County Board of Revision* (February 17, 2021), BTA No. 2020-621.

[236] See *Dean Casapis v. Lorain County Board of Revision* (December 3, 2019), BTA No. 2019-802 ("To the extent that the property owner argued that his status as a non-attorney should weight in favor of not dismissing this appeal, we must reject such argument. By proceeding in a pro-se capacity, the property owner risked the possibility that he may not have had a complete understanding of the appeal process; however, his election to proceed pro se does not relieve him of the responsibilities imposed upon him…a pro se litigant is 'held to the same rules, procedures and standards as those litigants represented by counsel and must accept the results of her own mistakes and errors.'"). See also *Chad C. Welker v. Cuyahoga County Board of Revision* (January 5, 2021), BTA No. 2020-900 ("Unfortunately, by proceeding in a pro se capacity, the appellant risked the possibility that he may not have a complete understanding of the appeal process; however, his election to proceed pro se does not relieve him of the responsibilities imposed upon him."); *Elaine Mocnik v. Cuyahoga County Board of Revision* (April 19, 2021), BTA No. 2020-2024; *Kellie Flonnoy v Cuyahoga County Board of Revision* (July 6, 2021), BA No. 2021-125; *Jess 1 LLC v. Cuyahoga County Board of* Revision (November 27, 2023), BTA No. 2023-1284 (("[T]he fact that appellants were acting pro se * * * does not excuse their failure * * *. 'It is well established that pro se litigants are presumed to have knowledge of the law and legal procedures and that they are held to the same standard as litigants who are represented by counsel'");

[237] See *Ismet Coralic v. Cuyahoga County Board of Revision* (September 14, 2022), BTA No. 2021-2019.

[238] See *Nascar Holdings, Inc. v. Testa*, 152 Ohio St.3d 405, 2017-Ohio-9118, ¶ 13.

Where the Property Manager's Attorney Files the Complaint

There is an exception, however, to the above-cited cases that prohibit a non-attorney property manager from filing a BOR complaint on behalf of the owner. This occurs where (1) the non-owner property manager was given clear authority by the owner to file the complaint and, importantly, (2) the *attorney* for the non-owner property manager agent filed the complaint on behalf of the non-owner property manager. In such a circumstance the Supreme Court has ruled that the complaint was properly filed because the complainant had not him/herself engaged in the unauthorized practice of law. As explained by the Court:

> We turn now to the question whether [the non-owner property manager], *acting through its attorney*, could validly file the valuation complaint as the agent of the property owner. (italics added)
>
> Significantly, one issue that has arisen in many cases is not present here: the issue of the unauthorized practice of law. The complaint in this case on its face indicates that it was prepared and filed by an attorney who acted on behalf of [the non-owner property manager]. Therefore, the issue of the unauthorized practice of law does not arise…In the present case, [the non-owner property manager's] complaint implies its status as agent, and [the non-owner property manager] subsequently proved its authorization [to file on behalf of the owner] when it produced the management agreement. Therefore, its valuation complaint should not be dismissed…

The Court went on to conclude that:

> …when, as in the present case, a lawyer has prepared and filed the complaint, the list of persons who may file on behalf of the owner in R.C. 5715.19(A) is not relevant. It follows that R.C. 5715.19(A) did not preclude [the non-owner property manager] as the management company from filing a valuation complaint on behalf of…the owner.[239]

Thus, a non-attorney manager can act as the "Complainant's agent" under the circumstances cited above with the assistance of the manager's attorney.

Not "Saved" By Owning Property in the County

[239] See *Toledo Public Schools Board of Education v. Lucas County Board of Revision*, 124 Ohio St.3d 490, 2010-Ohio-253, ¶ 28 .

Further, while R.C. 5715.19(A) grants standing to "[a]ny person owning taxable real property in the county" it is important to note that the grant of such standing does not "save" from dismissal the complaint of a non-attorney who owns property in the county but also lists him/herself as "Complainant's agent" on Line 3 of the complaint. In that circumstance the BTA has dismissed the complaint on unauthorized practice grounds. In so doing, the BTA has explained that:

> We find [the non-attorney, non-owner's] ownership of [other] taxable real property in the county to be irrelevant to the jurisdictional issue raised. [The non-attorney, non-owner] clearly filed the underlying complaint as an agent of [the owner of the subject property]. She listed herself as "complainant's agent" on the complaint form, indicated her relationship to the property as "property manager," and signed the complaint as "property manager."[240]

Thus, because she filed as an agent of the owner, but was not a licensed attorney or otherwise authorized under R.C. 5715.19 to file on behalf of the owner, the complaint was dismissed despite the fact that there were other grounds on which she could have obtained proper jurisdiction.[241]

A "Second Chance" Where the Unauthorized Practice of Law Occurs

It should be noted, however, that the Revised Code provides a "second chance" for authorized individuals to refile the complaint even if the original complaint was dismissed because the original filer engaged in the unauthorized practice of law. As stated in R.C. 5715.19(A)(3):

> If a county board of revision, the board of tax appeals, or any court dismisses a complaint filed under this section or section 5715.13 of the Revised Code for the reason that the act of filing the complaint was the unauthorized practice of law or the person filing the complaint was engaged in the unauthorized practice of law, the party affected by a decrease in valuation or the party's agent, or the person owning taxable real property in the county or in a taxing district with territory in the county, may refile the complaint, notwithstanding division (A)(2) [prohibiting

[240] See *Board of Education of The Groveport Madison Local Schools v. Franklin County Board of Revision* (June 26, 2012), BTA No. 2009-2931.

[241] It is likely that had the non-attorney, non-owner complainant filed on Line 2 of the Complaint as "Complainant if not owner" and then left Line 3 (Complainant's agent) blank, that she would have been a proper complainant under the section of R.C. 5715.19(A) that permits filing by "Any person owning taxable real property in the county or in a taxing district with territory in the county". Her filing in an agency capacity on behalf of the owner, however, placed her in the category of unauthorized practice.

> a second filing within the "interim period" with certain exceptions] of this section.[242]

Normally a second filing is barred within the "interim period" – the three year period consisting of (a) the sexennial reappraisal year plus its two following years or (b) a similar three year period following its "update" three years later[243] – unless one of the exceptions listed in R.C. 5715.19(A)(2)(a – d) has been shown.[244] Where, however, the complaint is dismissed because the original filer engaged in the unauthorized practice of law, then a second filing may be made within the interim period by a filer authorized by R.C. 5715.19(A)(1) without that filer having to prove one of the exceptions.

Exceptions to a Second Filing in the Interim Period

As mentioned above, R.C. 5715.19(A)(2) generally prohibits a second BOR filing in the "interim period".[245] In applicable part, that statute reads that:

> No person…shall file a complaint against the valuation or assessment of any parcel that appears on the tax list if it filed a complaint against the valuation or assessment of that parcel for any prior tax year in the same interim period, unless the person…alleges that the valuation or assessment should be changed due to one or more of the following circumstances that occurred after the tax lien date for the tax

[242] See R.C. 5715.19(A)(3).

[243] See *Soyko Kulchystsky, L.L.C. v. Cuyahoga County Board of Revision*, 141 Ohio St.3d 43, 2014-Ohio-4511, ¶ 20 ("R.C. 5715.19(A)(2) generally prohibits a complainant from filing two complaints during a triennial "interim period." The term "interim period" is defined in the statute as "the tax year to which section 5715.24 of the Revised Code applies and each subsequent tax year until the next tax year in which that section applies again." R.C. 5715.24 refers to the schedule in which a reappraisal is conducted by a county every six years, with an update of valuation performed in the third year; the interim period, sometimes referred to as a "triennium" or "triennial period," consists of a reappraisal or an update year plus the two following years."). See also *Vereit Real Estate v. Lorain County Board of Revision* (August 16, 2021), BTA No 2021-933 ("R.C. 5715.19(A)(2) expressly limits the number of times a complaint may be filed within an applicable three-year period but allows multiple filings under certain circumstances. [citation omitted]. A second complaint within an interim period must allege and establish one of the four circumstances set forth in R.C. 5715.19(A)(2)."); *Tessmer Group v. Stark County Board of Revision* (September 21, 2021), BTA No. 2021-1125 ("R.C. 5715.19(A)(2) expressly limits the number of times a complaint may be filed within an applicable three-year period but allows multiple filings under certain circumstances.").

[244] See *Tessmer Group v. Stark County Board of Revision* (September 21, 2021), BTA No. 2021-1125 ("A second complaint within an interim period must allege and establish one of the four circumstances set forth in R.C. 5715.19(A)(2).").

[245] See *Princess Ada Israel v. Cuyahoga County Board of Revision* (November 16, 2023), BTA No. 2023-1439 ("R.C. 5715.19(A)(2) expressly limits the number of times a complainant may file a complaint within an applicable three-year period but allows multiple filings under certain circumstances. If an appellant fails to prove that their complaint meets one of the exceptions, then we must dismiss the appeal for lack of jurisdiction.").

> year for which the prior complaint was filed and that the circumstances were not taken into consideration with respect to the prior complaint…[246]

The apparent purpose of the statute is to "reduce the number of filings, while still allowing new tax valuations in interim years in certain limited circumstances."[247]

There are exceptions, however, which allow the filing of a second complaint within the interim period. As stated by the BTA, "A succeeding complaint within an interim period 'must allege and establish one of the four circumstances set forth in R.C. 5715.19(A)(2).'"[248] Those exceptions are where one or more of the following occurs after the tax lien date for the tax year for which the prior complaint was filed: (1) the property was sold in an arm's length transaction;[249] (2) the property lost value due to some casualty;[250] (3) substantial improvement was added to the property;[251] or (4) an increase or decrease of at least fifteen percent (15%) in the property's

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[246] See R.C. 5715.19(A)(2).

[247] *M&S Real Estate, LLC v. Cuyahoga County Board of Revision* (April 13, 2021), BTA Nos. 2020-2240, 2241, 2244, 2245, 2251; *M&S Real Estate, LLC v. Cuyahoga County Board of Revision* (December 9, 2022), BTA No. 2020-2239.

[248] See *Olentangy Local Schools Board of Education v. Delaware County Board of Revision* (February 21, 2020), BTA No. 2019-1101. See also *Drumme Olena R. Oleksii, Igor v. Cuyahoga County Board of Revision* (March 29, 2021), BTA No. 2020-2150 ("A second complaint within an interim period 'must allege and establish one of the four circumstances set forth in R.C. 5715.19(A)(2).'").

[249] To determine whether the "arm's length sale" exception has been met see *Soyko Kulchystsky, L.L.C. v. Cuyahoga County Board of Revision*, 141 Ohio St.3d 43, 2014-Ohio-4511, ¶¶ 23 – 26. See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (June 12, 2020), BTA No. 2019-2810 ("To meet the exception set forth in R.C. 5715.19(A)(2)(a), i.e., the arm's length transaction claimed by the BOE, the Supreme Court set forth three elements that must be met: (1) the second-filed complaint must allege that the property value should be changed on account of the property's having been sold in an arm's length transaction; (2) The sale must have occurred after the tax-lien date for the tax year for which the prior complaint was filed; and (3) The sale must not have been "taken into consideration with respect to the prior complaint."); *RMH Holdings LLC v. Cuyahoga County Board of Revision* (March 16, 2021), BTA No. 2020-2132;*M&S Real Estate, LLC v. Cuyahoga County Board of Revision* (April 13, 2021), BTA Nos. 2020-2240, 2241, 2244, 2245, 2251.

[250] See *Glyptis v. Cuyahoga County Board of Revision*, 152 Ohio St.3d 597, 2018-Ohio-1437, ¶ 12. ("Three requirements must be satisfied in order for the casualty-loss exception to apply. First, the second-filed complaint must assert that casualty loss justified the filing. Second, the event triggering the exception must have occurred after the tax-lien date of the year for which the earlier complaint was filed. Third, the triggering event must not have been "taken into consideration with respect to the prior complaint,"). See also *M&S Real Estate, LLC v. Cuyahoga County Board of Revision* (April 13, 2021), BTA Nos. 2020-2240, 2241, 2244, 2245, 2251. The casualty alleged as the basis for the second filing must "must include an identifiable event which occurred after the filing of the complaint which was not taken into consideration by the BOR for the earlier tax year." See *Michael Isreal v. Franklin County Board of Revision* (April 8, 2022), BTA No. 2019-2852

[251] See *Lakewood City Schools Board of Education v. Cuyahoga County Board of Revision* (August 24, 2022), BTA No. 2021-2753 ("Appellant relies on the exception set forth in R.C. 5715.19(A)(2)(c): "Substantial improvement was added to the property". To qualify for this exception, the substantial improvement must have occurred "after the tax lien date for the tax year for which the prior complaint was filed," and those circumstances must not have been taken into consideration with respect to the prior complaint.").

occupancy has had a substantial economic impact on the property.[252] The applicability of those exceptions is determined as of the time the second complaint is filed[253] and a complainant seeking to file the second complaint in a three year interim period has the burden to establish one of the four exceptions.[254]

It should also be noted that a second complaint may be filed within the interim period where a first complaint was filed but was withdrawn prior to the BOR hearing. Under R.C. 5715.19(A)(5):

> Notwithstanding division (A)(2) of this section, a person, legislative authority, or officer may file a complaint against the valuation or assessment of any parcel that appears on the tax list if it filed a complaint against the valuation or assessment of that parcel for any prior tax year in the same interim period if the person, legislative authority, or officer withdrew the complaint before the complaint was heard by the board.[255]

Other than those exceptions, a second filing within the interim period is barred.

It is also worth noting, in the context of "continuing complaint" jurisdiction (discussed above in Chapter 4), that the BTA has ruled that where a complaint (1) is filed in one triennium, (2) is not decided timely in accordance with 180 day rule of R.C. 5715.19(C), and (3) thereafter carries over into the following triennium as a "continuing complaint," that the carryover into the new triennium is *not* considered the filing of a complaint for purposes of R.C. 5715.19(A)(2)'s prohibition against filing two complaints in the same triennium.[256] In that context "the invocation of continuing complaint jurisdiction for a subsequent year is not a 'complaint' that would bar the

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[252] See R.C. 5715.19(A)(2). See also *Alfred H. and Marquerita C. Quarles v. Cuyahoga County Board of Revision* (April 27, 2021), BTA No. 2020-1548 ("A second complaint within an interim period must allege and establish one of the four circumstances set forth in R.C. 5715.19(A)(2)."). It should also be noted that "To qualify for [the change in occupancy] exception, the actual change in occupancy must occur before January first of the second tax year in order to have an effect for the current tax year.…An actual change in occupancy that occurs after the [relevant] lien date and that has a substantial impact on the value of the property does not furnish a reason to change the valuation on the lien date itself, because its economic effect had not yet occurred as of that earlier date." See *Michael Isreal v. Franklin County Board of Revision* (April 8, 2022), BTA No. 2019-2852.

[253] See *Soyko Kulchystsky, L.L.C. v. Cuyahoga County Board of Revision*, 141 Ohio St.3d 43, 2014-Ohio-4511, ¶ 30 ("We hold that the applicability of R.C. 5715.19(A)(2)(a) should be determined s of the date the second-filed complaint was filed.").

[254] See *Developers Diversified Ltd. v. Cuyahoga County Board of Revision*, 84 Ohio St.3d 32 (1998) ("Thus, a complainant, to file a second complaint for the same interim period, must allege and establish one of the four circumstances set forth in R.C. 5715.19(A)(2).").

[255] See R.C. 5715.19(A)(5).

[256] See R.C. 5715.19(A)(2) (" No person… shall file a complaint against the valuation…of any parcel…if it filed a complaint against the valuation…of that parcel for any prior tax year in the same interim period…").

filing of a subsequent year within the interim period."[257] and the complainant need not prove one of the four exceptions in order for the case to be heard.

Finally, it should be noted that S.B. 57 allows the filing of a COVID complaint in the interim period even if a prior valuation complaint has been filed during that same interim period. As set forth in that bill:

> Notwithstanding division (A)(2) of section 5715.19 of the Revised Code, an eligible person may file a valuation complaint authorized under division (B) of this section [a COVID complaint], regardless of whether that eligible person filed any complaint under section 5715.19 of the Revised Code relative to that parcel for any preceding tax year in the same interim period.[258]

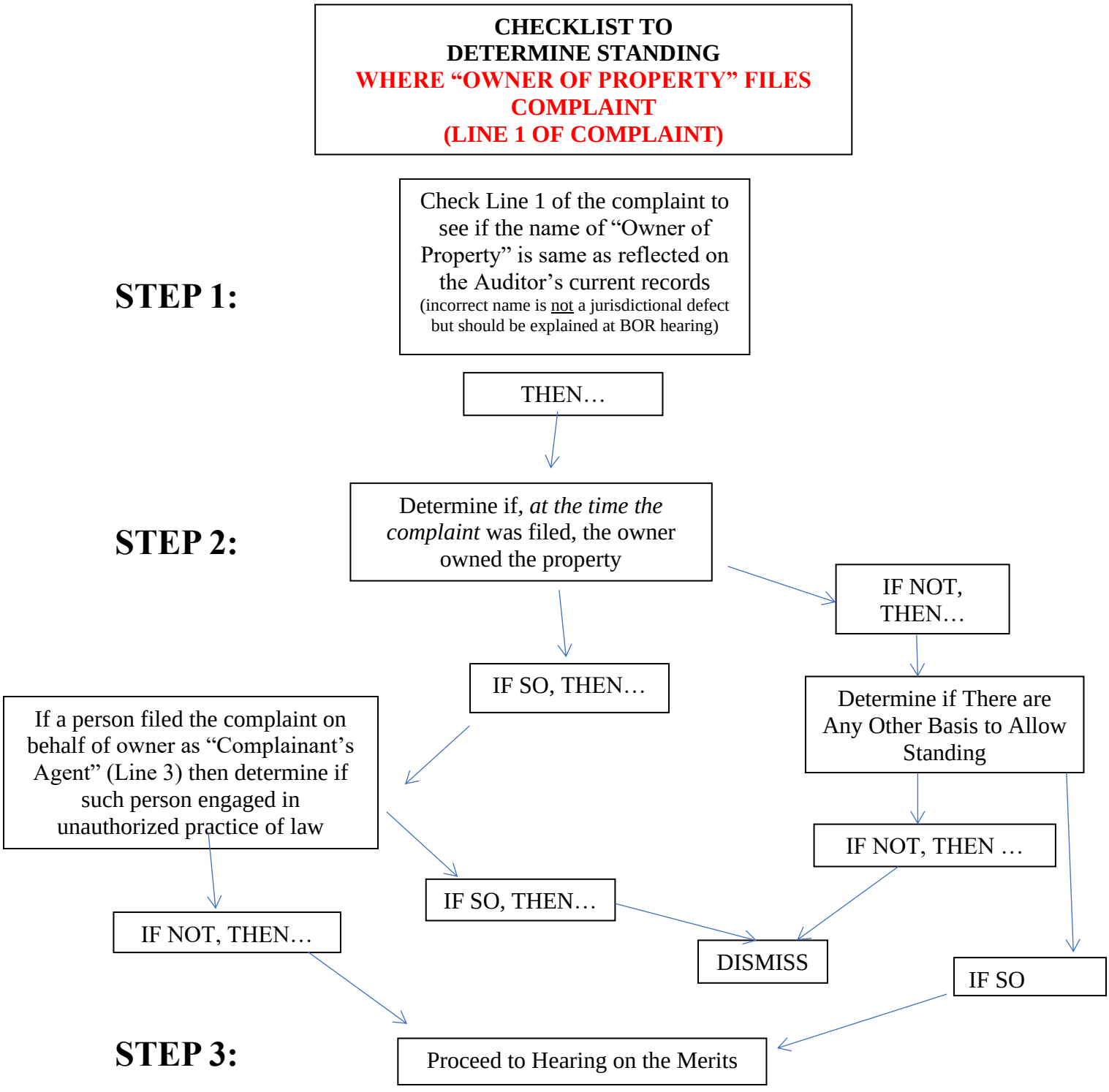
Conclusion

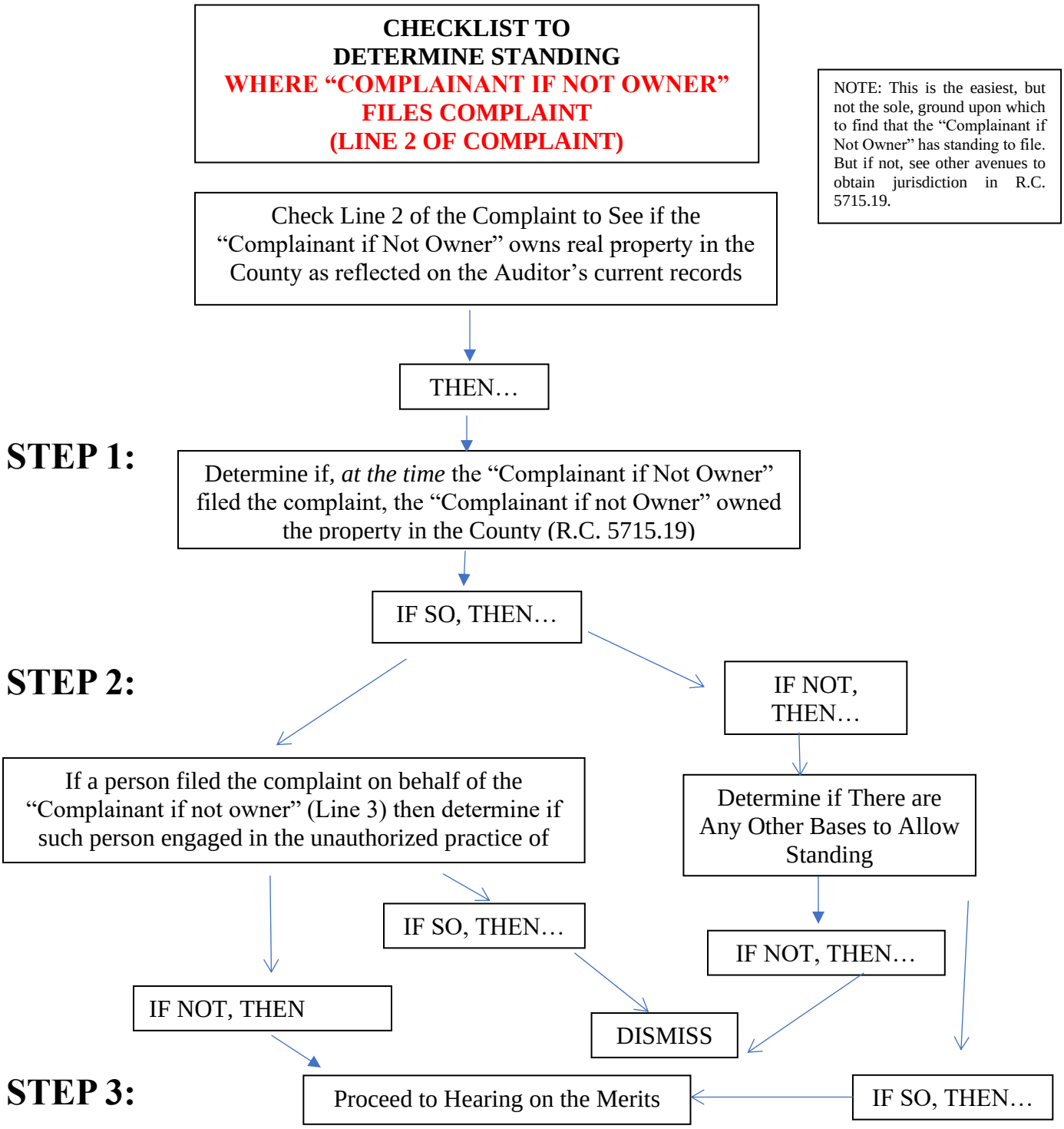
Standing, along with subject matter jurisdiction, are critical "gateway" considerations that must be reviewed prior to each BOR case to ensure that the case has been properly brought and that the BOR has the lawful authority to hear and decide the case. Attached are two diagrams that can act as a guide in addressing whether the complainant has standing to file.

[257] See *Cleveland Municipal Schools Board of Education v. Cuyahoga County Board of Revision* (December 31, 2019), BTA No. 2017-2156.

[258] See text of S.B. 57, Section 3(E).

CHECKLIST TO DETERMINE STANDING
WHERE "OWNER OF PROPERTY" FILES COMPLAINT
(LINE 1 OF COMPLAINT)




CHECKLIST TO
DETERMINE STANDING
WHERE "COMPLAINANT IF NOT OWNER"
FILES COMPLAINT
(LINE 2 OF COMPLAINT)
NOTE: This is the easiest, but not the sole, ground upon which to find that the "Complainant if Not Owner" has standing to file. But if not, see other avenues to obtain jurisdiction in R.C. 5715.19.
Check Line 2 of the Complaint to See if the "Complainant if Not Owner" owns real property in the County as reflected on the Auditor's current records
THEN…
STEP 1:
Determine if, at the time the "Complainant if Not Owner" filed the complaint, the "Complainant if not Owner" owned the property in the County (R.C. 5715.19)
IF SO, THEN…
STEP 2:
IF NOT, THEN…
If a person filed the complaint on behalf of the "Complainant if not owner" (Line 3) then determine if such person engaged in the unauthorized practice of
Determine if There are Any Other Bases to Allow Standing
IF SO, THEN…
IF NOT, THEN…
IF NOT, THEN
DISMISS
STEP 3:
Proceed to Hearing on the Merits
IF SO, THEN…

CHAPTER 6
UNDERSTANDING THE BURDEN OF PROOF

CHAPTER SUMMARY

- The conduct of BOR hearings, and the decision of the Board, are ultimately directed by the "burden of proof" ("BOP").

- The BOP places both the burden of going forward with evidence and the risk of non-persuasion on the party that bears the burden.

- If the party that bears the burden of proof fails to meet its burden (fails to prove its case), then that party loses regardless of whether or not the opponent offered evidence against it.

- The "standard of proof" differs from the "burden of proof" and is concerned with the level of proof required in order for the party bearing the BOP to prove its case.

- The BOR uses the civil "preponderance of the evidence" standard to assess the evidence before it.

- The Auditor's valuation is presumed to be correct, and the complainant bears the burden to prove that the Auditor's valuation is incorrect.

- The two primary avenues to challenge the Auditor's valuation are by showing evidence of a recent arm's length sale or an appraisal as of the tax lien date.

- Once a sale has been proven, the sale price is presumed to be the value of the subject property unless rebutted. The opponent of the evidence may rebut it and then the proponent of the evidence (the party that initially offered it) may provide evidence to "rebut the rebuttal". This is called a "surrebuttal".

What is the "Burden of Proof"?

As discussed in Chapter 1, the BOR is a quasi-judicial body and a deciding tribunal.[259] It is required to hear the complaints that are brought before it,[260] to consider the merits of each of those complaints, and to render decisions thereon.[261] Decisions and proceedings of the BOR, like those of all courts or adjudicative administrative bodies, are ultimately governed by the "burden of proof." In explaining the purpose of the burden of proof in legal proceedings, one legal commentator has observed that:

> Adversary systems of justice typically give the parties (not the judge) the task of adducing evidence on contested issues in litigation. Such a policy immediately raises the problem of dividing that task between the parties. Who, as between plaintiff and defendant, should be given the job of producing evidence on a contested issue? *Burden of proof* rules are the device courts employ to address this problem. By giving a specified party the burden of proof on a given issue, the court tells that party that he must either come up with evidence supporting his position or suffer an adverse judgment on that issue.[262]

The identification of the party that bears the burden of proof in a particular case gives unspoken direction to the order of the BOR hearing and the manner in which the evidence is presented to the board.

Burden of Proof at BOR Hearings

The Ohio Supreme Court has ruled that "A party seeking an increase or decrease in valuation bears the burden of proof before a board of revision"[263] and that "A taxpayer

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[259] *Sharon Village Limited v. Licking County Board of Revision*, 78 Ohio St.3d 479 (1997). See also *R.R.Z. Associates v. Cuyahoga County Board of Revision*, 38 Ohio St.3d 198 (1988).

[260] See R.C. 5715.01 which reads, in applicable part, that "There shall also be a board in each county, known as the county board of revision, which shall hear complaints and revise assessments of real property for taxation." See also R.C. 5715.11 which reads, in applicable part, that "The county board of revision shall hear complaints relating to the valuation or assessment of real property…The board shall investigate all such complaints and may increase or decrease any such valuation or correct any assessment complained of, or it may order a reassessment by the original assessing officer."

[261] See *Dublin Local Schools Bd of Ed v Franklin County Bd of Revision*, BTA 82-C-839 (1983).

[262] See *Burdens of Proof in Civil Litigation: An Economic Perspective*, *Journal of Legal Studies*, Vol. XXVI (June 1997), at 413.

[263] See *Snavely v. Erie County Board of Revision*, 78 Ohio St.3d 500 (1997). See also *Scranton-Averell, Inc. v. Cuyahoga County Fiscal Officer*, 8th Dist. Cuyahoga Nos. 98493 and 98494, 2013-Ohio-697, ¶ 23 (""A taxpayer [seeking a reduction] has the initial burden to establish the right to a reduction when challenging a county auditor's property valuation.""); *Highland Towers Akron, L.L.C. v. Summit County Board of Revision*, 9th Dist. Summit C.A. No. 26338, 2012-Ohio-4386, ¶ 8 ("As the party seeking an increase in the Property's valuation, the School Board initially bore the bure of proof at the Board of Revision."); *Ruth Anna*

[complainant]…has the *duty* to prove his right to reduction in value."[264] (italics added). As stated by the Court of Appeals:

> [I]t is fundamental to administrative law and procedure that the party asserting the affirmative issues also bears the burden of proof."…The term "burden of proof" encompasses both the burden of going forward with evidence (or burden of production) and the burden of persuasion…"The burden of persuasion never leaves the party on whom it is originally cast."…The burden which rests upon the plaintiff, to establish the material averments of his or her cause of action * * * **never shifts**.[265] (bold in original)

Further, "Implicit in that burden [of proof] is a 'risk of non-persuasion,' a likelihood that the claim will be denied if its proponent fails to establish the material averments of his claim."[266]

Because "The burden is on the taxpayer to prove his right to a deduction…" the taxpayer "is not entitled to the deduction claimed merely because no evidence is adduced contra his claim."[267] Thus, even where the opponent presents no evidence or weak and ineffectual evidence in opposition to the complainant's evidence, that doesn't change the fact that ultimately the complainant must still prove its right to an increase or decrease in valuation.[268] It is worth noting, however, that while the opponent of the complainant's claim has no burden to offer evidence in opposition to the complainant's claim, its failure to oppose the complainant's claim with opposing

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Carlson v. Cuyahoga County Board of Revision (January 5, 2021), BTA No. 2020-834 ("When a property owner seeks to challenge the values resulting from the reappraisal process, the owner must present sufficient evidence to establish that an alternative proposed value is the true value of the property and cannot merely challenge the accuracy of the fiscal officer's value."). See also *DIS X Investments, LLC v. Lucas County Board of Revision* (August 30, 2021), BTA No. 2020-372.

[264] See *Renner v. Tuscarawas County Board of Revision*, 59 Ohio St.3d 142 (1991).

[265] See *Zingale v. Ohio Casino Control Commission*, 8th Dist. Cuyahoga No. 101381, 2014-Ohio-4937, ¶ 33 (8th Dist.).

[266] See *State v. Whiting*, 2nd Dist. Miami No. 96-CA-13, 1997 WL 568018 (Sept. 5, 1997).

[267] See *Western Industries, Inc. v. Hamilton County Board of Revision*, 170 Ohio St. 340, (1960). See also *Moskowitz v. Cuyahoga County Board of Revision*, 150 Ohio St.3d69, 2017-Ohio-4002; *Ramy D. Eidi, Trustee v. Lucas County Board of Revision* (October 12, 2021), BTA Case No. 2020-1208 ("An appellant must present competent and probative evidence in support of the requested reduction, and an owner is not entitled to a reduction merely because no evidence is presented against its claim."); *Fred Azar v. Summit County Board of Revision* (September 18, 2023), BTA No. 2021-1319.

[268] See *Smartland4, LLC v. Cuyahoga County Board of Revision* (December 2, 2020), BTA No. 2019-2151 ("It is well settled that the complainant has the burden to prove real property value and that county auditors and/or boards of revision have no duty to disprove initially assessed values. [citation omitted] ("[T]he complainant bears a burden not to merely challenge the auditor's valuation or assessment, but rather to provide competent and probative evidence that an alternative value reflects the true value of the subject property.").

evidence runs the risk that the BOR may find the complainant's unopposed evidence to be competent and probative and, thus, rule in the complainant's favor.[269]

The Burden of Proof Drives the Hearing

The sequence, structure, and the manner of questioning witnesses at BOR hearings will vary depending upon which of the parties bears the burden of proof. For example, where the school board ("BOE") is the complainant it will typically seek an increase in the Auditor's valuation. In that capacity it bears the burden of proof and, as a result, will present its evidence first. Conversely, where the owner is the complainant it bears the burden of proof and will present its testimony or evidence first. Further, the questions asked of the BOE and the evidence it produces when it is the complainant will typically differ from those asked of the owner when it is the complainant.[270] Attached at the end of this chapter are samples of testimony where the BOE and the owner, respectively, are the complainants and have the burden of proof.

But perhaps the greatest impact of the burden of proof is that after the evidentiary portion of the hearing is closed, the BOR's decision in the case will be guided by whether the party who bore the burden of proof met that burden.[271] Given the critical part played by the burden of proof in BOR proceedings, it is not surprising that almost every BTA decision includes a discussion of the burden of proof, and which party bears that burden in the particular case under review.

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[269] For an analogous argument where an appeal is taken to the BTA, See also *Scranton-Averell, Inc. v. Cuyahoga County Fiscal Officer*, 8th Dist. Cuyahoga Nos. 98493 and 98494, 2013-Ohio-697, ¶ 23 ("By not presenting any evidence [at the BTA], the BOR and county auditor do risk that the court will find the appellant's evidence competent and probative, and therefore, determinative of the appeal."); *Restivo v. Board of Revision of Ottawa County*, 6th Dist. Ottawa No. 99-OT-052, 1999 WL 13186517, (Dec. 30, 1999).

[270] As a complainant, the BOE does not typically present live witness testimony for residential real estate transfers and will often enter into evidence only paper exhibits consisting of the deed, the conveyance fee statement, and records from the Auditor's Office evidencing the transfer. Owners, as complainants, may offer those documents as well but also frequently present live witness testimony to attest to the arm's length nature of the sale or to other facts and circumstances that otherwise support the reduction in valuation they seek.

[271] See also *Ohio Jury Instructions*, CV 207.03 Burden of Proof ("The burden of proof is on the plaintiff to prove the facts necessary for his/ her case by a preponderance of the evidence.").

The Standard of Proof at BOR Hearings

While the terms are sometimes (and incorrectly) used interchangeably, there is a difference between the *burden* of proof – which imposes upon one party or the other both the responsibility of going forward with evidence along with the risk of non-persuasion – and the *standard* of proof against which that evidence is judged. Before you can meet your burden of proof, the evidence must first satisfy the standard of proof required to meet that burden. In criminal cases, for example, the *burden* of proof always rests with the state that brings the charges. The *standard* of proof that the state must meet in order to meet its burden of proof, is proof of guilt "beyond a reasonable doubt." In civil cases and at BOR hearings the burden of proof rests with the plaintiff (complainant) who files the complaint, but the *standard* of proof that the plaintiff (complainant) must meet in order to satisfy the burden of proof is the traditional civil standard: proof by "a preponderance of the evidence."

While the *burden* of proof allocates the responsibility of going forward with evidence, the *standard* of proof sets forth the quantum of evidence – the level and extent of the evidence - that the party bearing the burden of proof must demonstrate in order to persuade the trier of fact and meet its burden. It is important to note, however, that the "quantum" of evidence does not refer solely to the volume or amount of evidence, but rather, to its quality. Indeed, juries in civil cases in Ohio are routinely instructed that "You must weigh the *quality* of the evidence. Quality may or may not be identical with (quantity) (the greater number of witnesses)."[272] (italics added).

While that jury instruction is vague as to whether quality "may or may not be identical with quantity…" it makes clear that ultimately it is the quality of the evidence, not its quantity, that should control. A large quantity of inconsequential or unpersuasive evidence does not prove the complainant's case. By the same token, because Ohio's courts understand that there are many ways to prove a case, the above jury instruction recognizes that a large volume of relevant but otherwise weak evidence may prove, through small increments in the aggregate, to be sufficiently persuasive so as to meet or exceed the standard of proof. The bottom line in all instances, however, is that the quality of the evidence at the BOR is more important than its quantity.

[272] See *Ohio Jury Instructions*, CV 303.05 Preponderance.

The "Preponderance of the Evidence" Standard

In deciding its cases the BOR shares certain characteristics with Ohio's civil courts, including the requirement that the complainant (the "plaintiff" in a civil case) prove its case by "the preponderance of the evidence"[273] standard of proof. The BTA has made clear that "a complainant has the burden of proof to establish by a preponderance of the evidence, the value which is asserted in the complaint."[274] In turn, the "preponderance of the evidence" has been defined by Ohio's courts to mean "the greater weight of the evidence."[275] Civil juries in Ohio are instructed that the "preponderance of the evidence" means:

> …the greater weight of the evidence; that is, evidence that you believe because it outweighs in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. You must weigh the quality of the evidence.[276]

What Facts are at Issue at BOR Hearings?

Implicit in the concept of a burden of *proof* is that something is required to be *proven*. But before understanding how the burden of proof directs the conduct of a BOR hearing, we need to understand what it is that the law requires the complainant to prove at that hearing.

The starting point for any BOR hearing is the Auditor's valuation of the subject property. It is, after all, the Auditor's valuation against which the complaint has been filed. R.C. 5713.03 requires that the Auditor determine "the **true value** of the fee simple estate [of the subject property], as if unencumbered…" As stated by the Supreme Court:

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[273] See *Friendly's v. Franklin County Board of Revision* (February 18, 1994), BTA No. 92-K-1399, 1994 WL 62973 ("It is fundamental that a complainant has the burden of proof to establish by a preponderance of the evidence, the value which is asserted in the complaint."). See also *Dolores M. Davis v. Board of Revision of Ashtabula County* (November 5, 1993), BTA No. 91-N-611, 1993 WL 463983 ("In an administrative hearing, such as the one held by the Board of Revision, the property owner need only prove his case by a preponderance of the evidence…").

[274] See *Friendly's v. Franklin County Board of Revision* (February 18, 1994), BTA No. 92-K-1399, 1994 WL 62973. See also *Davis v. Bd. of Revision of Ashtabula Cty.* (Nov. 5, 1993), BTA No. 91-N-611, 1993 WL 463983. See also *SmartlandCL4, LLC v. Cuyahoga County Board of Revision* (December 2, 2020), BTA No. 2019-2151 ("[T]he complainant bears a burden not to merely challenge the auditor's valuation or assessment, but rather to provide competent and probative evidence that an alternative value reflects the true value of the subject property.").

[275] See *Dawson v. Anderson*, 121 Ohio App.3d 9 (10th Dist. 1997).

[276] See *Ohio Jury Instructions*, CV 303.05 Preponderance.

> Value in the context of ad valorem taxation of property is defined in terms of the *exchange* value rather than the current-use value.
>
> > …the value or true value in money of any property is the amount for which that property would sell on the open market by a willing seller to a willing buyer. In essence, the value of property is the amount of money for which it may be exchanged, i.e., the sales price.[277]

Thus, the "true value" of the property is the standard against which the Auditor's valuation is to be measured and, accordingly, when the Auditor's valuation is challenged at the BOR the property's "true value" is the factual issue that must be decided. If everyone agrees with the Auditor's valuation, then there is nothing in dispute and no need for a BOR hearing. By definition, of course, when a party files a complaint at the BOR they are claiming that the Auditor did not correctly determine the true value of the subject property.

Despite a complainant's implicit assertion that the Auditor incorrectly valued the subject property, the law is clear that "when a county auditor acts within the limits of the jurisdiction conferred by law, the auditor's action is presumed, in the absence of proof to the contrary, to be valid and to have been done in good faith and in the exercise of sound judgment."[278] That presumption is maintained even where (1) the Auditor changes its determination of a property's condition (where no physical improvements have been made since the last valuation)[279] or (2) changes a property's valuation at a time other than during the sexennial reappraisal or triennial update years, so long as the Auditor acted within her ordinary duties of office. The burden remains on the party challenging the new valuation to prove otherwise.[280] It follows, then, that when the

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[277] See *Rite Aid of Ohio, Inc. v. Washington County Board of Revision*, 146 Ohio St.3d 173, 2016-Ohio-371, ⁋ 24.

[278] See *Colonial Village, Ltd. v. Washington County Board of Revision*, 123 Ohio St.3d 268, 2009-Ohio-4975, ¶ 31. See also *New Day Realty LLC v. Summit County Board of Revision* (January 2, 2023), BTA No. 2021-1880 ("…there is a general rule that 'in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner. All legal intendments are in favor of the administrative action.'"

[279] See *William S. Johnson v. Greene County Board of Revision* (May 20, 2019), BTA No. 2018-912 ("Appellant essentially argues that once a property's condition is determined by the auditor, it cannot improve unless some change has been made to the property; instead, without outside intervention, over time it will only decrease in value. Such argument fails to account for the relative nature of a property's condition rating in the auditor's records. The International Association of Assessing Officers has explained that, in rating a property's condition for purposes of an assessment system, "[r]ating schemes can be based on an absolute standard, one that applies to all properties in the system, or they can be based on a relative standard, one that changes from neighborhood to neighborhood or from one group of properties to another." [citation omitted] Accordingly, a property's condition could be average for its neighborhood, but fair when compared to properties in another neighborhood. Likewise, as the condition of properties in a county changes from year to year, a property's condition relative to others may change over time.").

[280] See *Jackson Local Schools Board of Education v. Stark County Board of Revision* (January 7, 2020), BTA No. 2018-1106.

auditor "certifies a value on the tax list and duplicate, it is not a high bar to show that he or she properly exercised this authority."[281]

Upon the initiation of the case, then, the Auditor need not prove that he/she was correct in valuing the subject property but rather the complainant must prove that the Auditor was *in*correct.[282] Indeed, the BTA has stated that the Auditor is not required to defend values produced by its mass appraisal system or even to answer a complainant's questions about that system.[283] In essence, our system operates on a tacit assumption that all is in order – that the Auditor's valuation is correct – prior to the filing of the complaint. Once the complaint is filed by the complainant who is challenging that assumption (at least in the case of the subject property), the burden is on the complainant to show that the tacit assumption of a correct valuation for the subject property

[281] See *Hess Ohio Developments LLC v. Belmont County Board of Revision* (June 6, 2019), BTA No. 2018-2199 – 2673. See also *Sue Ellen Timmons v. Harrison County Board of Revision* (July 11, 2019), BTA No. 2018-2121.

[282] *Christopher Hicks v. Clermont County Board of Revision* (January 10, 2022), BTA No. 2021-1112 ("Neither the Auditor nor the BOR bears the 'burden to offer proof of the accuracy of the appraisal on which the county initially relies, with the result that the BTA is justified in retaining the county's valuation of the property when an appellant fails to sustain its burden of proof.'"); *David R. Neubrander v. Summit County Board of Revision* (March 21, 2023), BTA No. 2021-1365; *Alan Schneider v. Cuyahoga County Board of Revision* (September 14, 2023), BTA No. 5022-501.

[283] See *George and Sherry Parker v. Ashtabula County Board of Revision* (May 22, 2012), BTA No. 2009-2162, Fn. 1 ("It also appears that what appellants may have truly sought in filing the underlying complaint was an explanation of how the mass appraisal process's county-wide focus was specifically applied to their individual property in the sexennial reappraisal. However, the auditor is not required to defend the value originally concluded to by the mass appraisal system, either by answering questions asked by an individual property owner or when a property owner files a complaint with a board of revision. The burden is placed upon the complainant to bring forward the evidence that the value is something other than that assessed by the auditor."). See also *Smartland FND1, LLC v. Cuyahoga County Board of Revision* (September 29, 2020), BTA No. 2019-2421 ("Neither the auditor nor the BOR bears the "burden to offer proof of the accuracy of the appraisal on which the county initially relies, with the result that the BTA is justified in retaining the county's valuation of the property when an appellant fails to sustain its burden of proof.""); *5326 Turney Road Investments, LLC v. Cuyahoga County Board of Revision* (September 1, 2021), BTA No. 2020-1028 ("The auditor or fiscal officer is not required to defend the value originally concluded to by the mass appraisal system.").; *Gregory R. and Mary L. Thewes v. Summit County Board of Revision* (September 15, 2022), BTA No. 2021-1226; *Esch Family Limited Partnership v. Montgomery County Board of Revision* (November 30, 2022), BTA No. 2021-2077; *Steve and Joy Veris v. Montgomery County Board of Revision* (December 7, 2022), BTA Nos. 2021-1990, 2021-1991; *PJ Legacy LLC v. Summit County Board of Revision* (December 9, 2022), BTA No. 2021-1945; *Bernard Alderman v. Muskingum County Board of Revision* (December 16, 2022), BTA No. 2020-1264; *Jackie Properties LLC v. Montgomery County Board of Revision* (December 19, 2022), BTA No. 2022-2866; *Mihai Dan Cojocaru v. Cuyahoga County Board of Revision* (December 29, 2022), BTA No. 2020-828; *South-Western City Schools Board of Education v. Franklin County Board of Revision* (January 3, 2023), BTA Nos. 2021-2038, 2021-2039; *Gloria J. Hill v. Hamilton County Board of Revision* (January 30, 2023), BTA No. 2021-670.

was mistaken. As such, the complainant bears the burden of proof and the risk of non-persuasion.[284] If he/she doesn't come forward with sufficient evidence to persuade the BOR that the tacit assumption was incorrect, then the tacit assumption of a correct valuation by the Auditor remains in place.

In sum, at the initiation of a BOR proceeding the Auditor's valuation is presumed to be correct and the Auditor is not, at least in the first instance, required to prove anything. The burden of proof rests on the complainant seeking a change from the Auditor's valuation.

How to Challenge the Auditor's Valuation at BOR Hearings

Having established that the complainant bears the burden of proof at the BOR by a preponderance of the evidence to show that the Auditor's valuation was incorrect, the question next arises as to *how* the complainant can meet that evidentiary burden. The law makes clear that there are two main avenues through which a successful challenge to the Auditor's valuation can be accomplished: (1) through proof of a valid sale or (2) through the submission of a valid appraisal of the property.[285]

R.C. 5713.03, the statute that requires the Auditor to find the true value of real property, sets the framework for what needs to be proven where a sale provides the basis upon which to challenge the Auditor's valuation:

> In determining the true value of any…parcel of real estate under this section, if such … parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor may consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes. (underlining added)

[285] The BTA has repeatedly stated "As the Supreme Court of Ohio has consistently held, "[t]he best method of determining value, when such information is available, is an actual sale of such property between one who is willing to sell but not compelled to do so and one who is willing to buy but not compelled to do so. *** However, such information is not usually available, and thus an appraisal becomes necessary." *State ex rel. Park Invest. Co. v. Bd. of Tax Appeals*, 175 Ohio St. 410 (1964). Such is the case in this appeal, as the record does not indicate that the subject property "recently" transferred through a qualifying sale." See *9410 Denison, LLC v. Cuyahoga County Board of Revision* (May 11, 2017), BTA No. 2016-574.

Thus, where the complainant asserts that the Auditor's valuation is incorrect and attempts to prove that claim with evidence of a sale of the subject property, the complainant has the burden, in the first instance, to prove the following;

1. That there was an arm's length sale;
2. That in that sale, there was a willing seller and a willing buyer; and
3. That the sale occurred a reasonable time either before or after the tax lien date

Where the Sale is Proven, the Sale Price is Deemed the Property's Value Subject to Rebuttal

Once the three elements above have been proven by the proponent, the existence of a sale has been established. Importantly for the party challenging the validity of the sale, once the sale is proven, the sale price is presumed to be the value of the property *unless rebutted*. As often stated by the BTA:

> Once the existence of a sale is established, "a sale price is deemed to be the value of the property, and the only rebuttal lies in challenging whether the elements of recency and arm's-length character between a willing seller and a willing buyer are genuinely present for this particular sale."[286]

Where a recent, arm's length sale has been proven by appropriate documentation the BTA has been critical of boards of revision – and has even admonished them[287] – where they have

[286] *Icon Owner Pool 3 Midwest/Southeast, LLC v. Franklin County Board of Revision* (September 8, 2017), BTA Nos. 2016-1362, 1363, 1364 citing *Cummins Property Servs., L.L.C. v. Franklin Cty. Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473, ¶ 13. But see *Terraza 8, L.L.C. v. Franklin County Board of Revision*, 150 Ohio St.3d 527, 2017-Ohio-4415 where the Supreme Court ruled that a party may rebut a sale price of real property encumbered by a lease, at the time of the sale, with information about market lease rates. See also *Wilmington City Schools Board of Education v. Clinton County Board of Revision* (December 18, 2017), BTA No. 2016-900.

[287] See *Talawanda City Schools Board of Education v. Butler County Board of Revision* (May 25, 2021), BTA No. 2020-1032 ("We have repeatedly held that this particular Board of Revision erroneously shifts the evidentiary burden, for sales, based upon conjecture."). See also *Talawanda City Schools Board of Education v. Butler County Board of Revision* (June 7, 2021), BTA No. 2020-976; *Talawanda City Schools Board of Education v. Butler County Board of Revision* (June7, 2021), BTA No. 2020-957; *Hudson City Schools Board of Education v. Summit County Board of Revision* (July 6, 2022), BTA No. 2020-1783 ("However, rather than follow well-established caselaw and precedent, this particular BOR once again misunderstands, misapplies, or blatantly disregards Ohio law by inferring or shifting the burden upon the sale proponent to present evidence in support of the sale. We find such practice not only in contravention of the law but disingenuous. Previously, we have admonished other county boards of revision who have adopted such practices.").; *Sucula, LLC v. Cuyahoga County Board of Revision* (July 21, 2011), BTA No. 2021-477 *Care for All, LLC v. Cuyahoga County Board of Revision* (August 1, 2022), BTA No. 2020-832; *Union Scioto Local Schools Board of Education v. Ross County Board of Revision* (September 1, 2022), BTA No. 2020-1674; *Akron City Schools Board of Education v. Summit County Board of Revision* (September 15, 2022), BTA No. 2021-2327 ("Based on the repeated decisions of this BOR in similar sale-cases brought by a local school board, such as in the present case, it is clear this BOR misunderstands, misapplies, or blatantly disregards following well-settled law…Consequently, we will continue to author decisions in these sale-cases that rebuke, reprimand, and castigate this BOR and *all* county boards of revision who incessantly misapply, blatantly disregard, or adopt policies/practices in contravention of the law.")..."); *Fairfield City Schools Board of Education v. Butler County Board of Revision* (March 6, 2023), BTA No. 2022-765 ("We have repeatedly held that this particular BOR erroneously shifts the evidentiary burden for sales."): *Fairfield City Schools Board of Education v. Butler County Board of Revision* (March 6, 2023),

nonetheless rejected the sale as evidence of value based upon the BOR's speculation about other factors not in the record. As stated by the BTA:

> In this matter, the conveyance fee statement and property record card confirm the details of the subject sale. Contrary to the BOR's decision, the BOE was not required to prove that the subject sale was anything other than facially valid. [citation omitted] Upon presentation of the sale document, the burden shifted to either the property owner or the BOR to rebut the presumption that the subject sale was the best indication of the subject property's value. Neither the property owner nor the BOR satisfied such burden.[288]

The BTA made clear that boards of revision should avoid speculation and base their decisions on evidence in the record.

> Though the BOR speculated about a number of factors that *could* demonstrate that the subject sale was not indicative of the subject property's value, the record is void of any indication that any of those factors were present. This Board has repeatedly held that "mere speculation is not evidence."[289]

A Light Initial Burden

In the first instance, the evidentiary requirements are minimal to establish the rebuttable presumption of an arm's length sale. As stated by the Supreme Court:

> …if the proponent of a sale demonstrates that the sale occurred, and the sale on its face appears to have been at arm's length, then the opposing party has the burden of going forward with rebuttal evidence. [citation omitted] "To benefit from this presumption, the proponent of a sale must satisfy a relatively light initial burden and need not 'definitive[ly] show* * * that no evidence controvert[s] the * * * arm's-length character of the sale.' " [citations omitted]…we have focused on whether the taxpayer provided 'basic documentation of a sale.' [citations omitted] A deed and conveyance-fee statement [citations omitted] or a deed and purchase agreement [citation omitted] satisfy this requirement.[290]

BTA No. 2022-763; *Talawanda City Schools Board of Education v. Butler County Board of Revision* (March 8, 2023), BTA No. 2022-901; *Fairfield City Schools Board of Education v. Butler County Board of Revision* (March 8, 2023), BTA No. 2022-768; *Princeton City Schools Board of Education v. Butler County Board of Revision* (March 20, 2023), BTA No. 2022-920 ("…this BOR once again erroneously ignored basic Ohio law by rejecting the sale and relying on misinformed conjecture.").

[288] See *Talawanda City Schools Board of Education v. Butler County Board of Revision* (May 25, 2021), BTA No. 2020-1013.

[289] See *Talawanda City Schools Board of Education v. Butler County Board of Revision* (May 25, 2021), BTA No. 2020-1013.

[290] See *Dauch v. Erie County Board of Revision*, 149 Ohio St.3d 691, 2017-Ohio-1412, ⁋ 16 – 17. See also *Tyeisha M. Carruthers v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2021-304 ("A proponent may generally meet their initial burden with sale documents that contain basic details about the sale, e.g., sale price, parties, and sale date. *Lunn*, at ¶15 (no additional testimony is usually necessary)…"); *Nordonia Hills City Schools Board of Education v. Summit County Board of*

But even all of those documents might not be required if the opposing party does not challenge the basic facts of the sale. According to the Court:

> …we have not held that these particular documents are required in every case. Indeed, in *Utt,*[291] we stated that the absence of a deed or purchase agreement was not fatal, "because no party disputed the timing or price of the sale" and the documents that were provided demonstrated a " 'sale [that] on its face appear[ed] to be recent and at arm's length.' " [citations omitted] Thus, a proponent may satisfy his initial burden with less documentary evidence if there is no real dispute about the basic facts of the sale.[292]

In addition, the BTA has held that, if undisputed, "the evidence of a sale contained on a property record card…may serve as a sufficient basis upon which to rely in determining the value of a property."[293]

Beyond that, the Court has stated that it is not even necessary for the complainant to personally appear at the BOR hearing to prove that there was an arm's length sale, so long as sufficient documentation of the sale has been provided.

> …we reject the county's proposition that a taxpayer-complainant must appear at the board-of-revision hearing to satisfy its initial burden. "How a party seeking a

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Revision (November 8, 2021), BTA No. 2020-1410; *Tallmadge City Schools Board of Education v. Summit County Board of Revision* (May 3, 2022), BTA No. 2020-1620 ("The proponent of a sale bears a "relatively light initial burden." *Lunn v. Lorain Cty. Bd. of Revision*, 149 Ohio St.3d 137, 2016-Ohio-8075, ¶ 14. The proponent need only present a facially valid sale, typically with the conveyance fee statement, deed, and purchase agreement. Here, the BOE presented a facially valid sale with the conveyance fee statement and deed."); *Akron City Schools Board of Education v. Summit County Board of Revision* (May 17, 2022), BTA No. 2020-1807; *Allen B Properties LLC v. Summit County Board of Revision* (August 8, 2022), BTA No. 2021-1116. But see *Cleveland Municipal Schools Board of Education v. Cuyahoga County Board of Revision* (May 20, 2019), BTA No. 2018-186 where the BTA, citing *Dauch*, stated that "a proponent can ordinarily meet that initial burden with a conveyance fee statement, deed, purchase agreement, or a combination thereof…" It went on to find however, that where the school board relied upon the deed, a CoStar Report, and a mortgage document, that those documents were insufficient by themselves to show a facially valid sale.

[291] See *Utt v. Lorain County Board of Revision*, 150 Ohio St.3d 119, 2016-Ohio-8402.

[292] See *Dauch v. Erie County Board of Revision*, 149 Ohio St.3d 691, 2017-Ohio-1412, ⁋ 18.

[293] See *Board of Education of Westerville City Schools v. Delaware County Board of Revision* (June 13, 2013), BTA No. 2011-155. See also *Wen Wen LLC v. Cuyahoga County Board of Revision* (September 4, 2019), BTA No. 2019-89 ("…this board has recognized evidence of a sale contained in a record card can be a sufficient basis to determine value…"); *Allen B Properties LLC v. Summit County Board of Revision* (August 8, 2022), BTA No. 2021-1116 ("Here, [Owner] presented its complaint, the property record card, and [Owner's] testimony to establish a valid sale. We find that [Owner] has presented sufficient evidence verifying a recent, arm's-length sale."); *Allen B Properties LLC v. Summit County Board of Revision* (August 8, 202), BTA No. 2021-1107; *Allen B Properties LLC v. Summit County Board of Revision* (August 8, 2022), BTA No. 2021-1050; *Allen B Properties LLC v. Summit County Board of Revision* (August 8, 2022), BTA No. 2021-1049; *Union Scioto Local Schools Board of Education v. Ross County Board of Revision* (September 1, 2022), BTA No. 2020-1674 ("this Board and the Ohio Supreme Court have held that a sale is facially valid when the proponent of the sale provided only a deed and conveyance fee statement reflecting the sale or just a deed and purchase agreement, or even just a conveyance fee statement and property record card.").

> change in valuation attempts to meet its burden of proof before a board of revision is a matter for that party's judgment." [citation omitted] A party may elect not to appear at a board-of-revision hearing and instead rely on other evidence supporting its claim, although doing so risks a finding by the board that its evidence is inadmissible or unpersuasive…That is not the case here, however, because no party challenged the admissibility of the evidence [that the owner] submitted, the BOR accepted it, and it met the minimum evidentiary threshold previously recognized by this court.[294]

In short, from an evidentiary standpoint, meeting the initial burden of showing an arm's length sale is not difficult.[295]

On the other hand, where there is *not* a recent sale a complainant's assertion that the Auditor's valuation is incorrect will need to be supported through the use of an appraisal. The meaning of "arm's length sale" and "reasonable time" (recency) are central to an effective understanding of the BOR and will be treated in greater depth in later chapters.

Carrying the Burden of Proof at the BOR

Using an Appraisal Where the Appraiser Does Not Testify

Like at other quasi-judicial hearings, in carrying the burden of proof the proponent of evidence at the BOR may submit both documentary evidence as well as live testimony. Evidence presented at the BOR often includes testimony of an appraiser explaining the appraiser's written appraisal report. We discuss in greater depth later in this volume appraisals and the manner in

[294] See *Lunn v. Lorain County Board of Revision*, 149 Ohio St.3d 137, 2016-Ohio-8075, ‖ 16. See also *10716 Florian LLC v. Cuyahoga County Board of Revision* (May 28, 2019), BTA No. 2018-964 ("A proponent may generally meet the initial burden with sale documents, the deed, conveyance fee statement or a combination thereof. See Lunn, supra, at ¶15 (no additional testimony is usually necessary).").

[295] In addition, the BTA has ruled that the complainant at the subject hearing may introduce evidence of a sale *to which it was not a party* for purposes of establishing value. See *1356 E.171 LLC v. Cuyahoga County Board of Revision* (May 28, 2019), BTA No. 2018-965 ("The county appellees argue appellant cannot rely on the prior sale because it was not a party to that sale. They claim that "Appellant cannot rely on *Dauch v. Erie Cty Bd of Revision*, 20l7-Ohio-1412 to meet his burden, because the documents relied on, are from a sale from a different entity, and not Appellant's sale." However, the county appellees cite no case requiring a sale proponent to have been a party to the sale. Neither *Dauch*, nor *Lunn*, add that additional hurdle. Instead, those cases are clear the only way to rebut a facially qualifying sale is by showing the sale was either too remote or not arm's-length. Id. Moreover, the record is clear there is a connection between appellant and the October sale because ME INV LLC and appellant are related entities. The county appellees also argue the sale is problematic because no person with knowledge testified about the October sale. Here again, *Lunn* is clear no such corroborating testimony is required.").

which an appraiser reaches a value conclusion. For purposes of this chapter, however, it is important to note a few things about appraiser testimony.

At the outset, it is not uncommon for a complainant-owner to present an appraisal report prepared on behalf of its lender in connection with the lender's consideration of a loan to purchase or refinance the subject property. In those circumstances the complainant-owner will often present the appraisal without having the appraiser personally testifying at the BOR. The absence of the appraiser at the BOR can be problematic. "We [the BTA] generally reject appraisals that are not tax-lien dated and when no appraiser appears to testify."[296] Such appraisals raise a number of potential problems and the Supreme Court has found that "In the absence of supporting testimony, applying a financing appraisal in the tax-valuation setting can be problematic because it may not necessarily represent a "'complete and thorough evaluation of the property.'"[297]

In addition, the absence of the appraiser denies the BOR the opportunity to question her on a number of important matters. In one case the BTA characterized the use of part of an appraisal report in the absence of the appraiser's in-person testimony as "unreliable hearsay."[298] As stated by the BTA:

> … we generally reject an appraiser's opinion of value when the appraiser does not appear before either the BOR or this board…when the appraiser does not appear to testify, he or she cannot speak to the appraiser's credentials, authenticate or identify the report, or describe the efforts undertaken to estimate value. Importantly, the appraiser is not available for cross-examination by the opposing party or to respond to questions posed by this board.[299]

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[296] See *Smartland FND1, LLC v. Cuyahoga County Board of Revision* (September 29, 2020), BTA No. 2019-2421.

[297] See *Jakobolvitch v. Cuyahoga County Board of Revision*, 152 Ohio St.3d 187, 2017-Ohio-8818, ¶ 15. See also *South-Western City Schools Board of Education v. Franklin County Board of Revision* (January 3, 2023), BTA Nos. 2021-2038, 2021-2039.

[298] See *M A Kaplan Living Trust v. Cuyahoga County Board of Revision* (February 12, 2021), BTA No. 2019-1333.

1. [299] See *Dawson, David J. v. Hamilton County Board of Revision* (April 11, 2019), BTA No. 2018-1390. See also *A.D. v. Cuyahoga County Board of Revision* (January 8, 2020), BTA No. 2019-649 ("When a party submits a written appraisal, the presentation of the appraiser as a witness allows the other parties and this board [BTA] the opportunity to evaluate the credibility of the appraiser and the reliability of his or her analysis."); *Alex Schutz v. Cuyahoga County Board of Revision* (January 28, 2020), BTA Nos. 2019-668, 669, 820, 1068 ("…[the BTA] generally rejects an appraiser's opinion of value when the appraiser does not appear before either the BOR or [the BTA]."); *Tito Colon v. Cuyahoga County Board of Revision* (May 4, 2020), BTA No. 2019-1218 ("…we generally reject an appraiser's opinion of value when the appraiser does not appear before either the BOR or this board."); *Lori D. Gogolin v. Lake County Board of Revision* (June 15, 2020), BTA No. 2019-1720; *Linas Macikenas v. Cuyahoga County Board of Revision* (July 13, 2020), BTA Nos. 2020-170, 171, 172, 173; *Sheila Alridge v. Cuyahoga County Board of Revision* (July 20, 2020), BTA No. 2019-1420; *Elaine Mocnik v. Cuyahoga County Board of Revision* (April 19, 2021), BTA No. 2020-2024; *Deborah A. Capretta and Richard A. Capretta v. Cuyahoga County Board of Revision* (July 20, 2021), BTA No. 2019-1291; *New Cleveland Development LLC v. Cuyahoga County Board of Revision* (May 31, 2022), BTA No. 2019-1444; *Newark City Schools Board of*

Indeed, in a case where the appraiser offered an opinion of value as of the tax lien date but did not appear at the hearing, the BTA stated that "because it [the appraisal] was presented without testimony from the appraiser…the value conclusions should not be given any weight in our analysis."[300]

It should be noted, however, that the general rule disallowing an appraisal report as probative evidence where the appraiser does not testify is not absolute. As stated by the BTA, "Even without testimony from the author [appraiser], however, where an appraisal contains sufficient indicia of reliability, the information contained therein may furnish an independent basis for valuing the property."[301] This was made clear in *Copley-Fairlawn School District Board of Education v. Summit County Board of Revision ("Copley-Fairlawn")*,[302] a Supreme Court case where an appraisal which did not render an opinion as of the tax lien was submitted as evidence and where the appraiser did not testify. Despite that lack of in-person testimony and the fact that the appraiser's opinion of value did not speak as of the tax lien date, "the Supreme Court held [that the BTA] should have given weight to a non-tax-lien dated appraisal when the appraisal's proponent testified about why the appraisal was created, and a party relied upon the appraisal in a financial transaction."[303] The Supreme Court found that a number of factual circumstances

Education v. Licking County Board of Revision (December 9, 2022), BTA No. 2019-2723.; *Linas Macikenas v. Cuyahoga County Board of Revision* (August 2, 2023), BTA Nos. 2023-196, 2023-198, 2023-199, 2023-200; *Jennifer Radin and Brandon Glenn v. Cuyahoga County Board of Revision* (August 7, 2023), BTA No. 2022-1588; *Robert Groszewski v. Lucas County Board of Revision* (September 19, 2023), BTA No. 2021-1437.

[300] See *Daniel and Bonnie Kossin v. Cuyahoga County Board of Revision* (June 29, 2020), BTA No. 2019-2390.

[301] See *A.D. v. Cuyahoga County Board of Revision* (January 8, 2020), BTA No. 2019-649. See also *Rita J. Calhoun v. Cuyahoga County Board of Revision* (January 28, 2020), BTA Nos. 2019-968, 969 where the BTA found that the information contained in an appraisal of the subject property used in bankruptcy proceedings contained sufficient indicia of reliability because "the appraisal was relied upon by the lender and the [bankruptcy] judge to establish the value of the property during the bankruptcy…"). See *M A Kaplan Living Trust v. Cuyahoga County Board of Revision* (February 12, 2021), BTA No. 2019-1333.

[302] See *Copley-Fairlawn School District Board of Education v. Summit County Board of Revision*, 147 Ohio St.3d 503, 2016-Ohio-1485; *Mary Bolouri v. Cuyahoga County Board of Revision* (February 7, 2022), BTA no. 2021-325.

[303] See *Dawson, David J. v. Hamilton County Board of Revision* (April 11, 2019), BTA No. 2018-1390. See also *Northland-4, LLC and Knowledge Universe Education LLC* (June 12, 2019), BTA No. 2016-136 ("Even without the testimony from the author…where an appraisal contains sufficient indicia of reliability, the information contained therein may furnish an independent basis for valuing the property.").

showed the appraisal to be reliable even though it wasn't dated as of the tax lien date and the appraiser did not testify.

> The appraisal in this case was offered along with testimony as to its origin and use; specifically, [the buyer] testified that the appraisal was commissioned by the bank he consulted in connection with refinancing the property…The bank's analysis and the appraisal came to the conclusion that the value of the property had decreased…and [T]hat conclusion constricted the amount of equity against which [the buyer] could borrow…The uncontroverted testimony thereby shows the preparation of the appraisal for a business purpose as well as its actual use for that purpose; it also demonstrates the reliance placed by both [the buyer] and the bank on the appraisal's valuation of the property. Moreover…the appraisal report is certified by a state-certified appraiser and member of the Appraisal Institute and his licensed, state-registered appraiser assistant.[304]

But that did not mean that the appraiser's *opinion* of value (as distinct from the data used to reach that opinion), was competent evidence. The Court, citing well-settled law, acknowledged that it was "true that the straightforward reliance on the opinion of value concluded by the appraisal report was unlawful under these circumstances." But having acknowledged that, the Court went on to distinguish the appraiser's *opinion* of value in the appraisal from other *data and information* contained in the appraisal. As stated by the Court:

> But the attempt to use the *opinion of value* (italics added) expressed in the appraisal report … does not render the appraisal incompetent as evidence *for any purpose at all* (italics added). Indeed, in *AP Hotels,*[305] we acknowledged the propriety of the BTA's using the specific components of the appraisal for the later tax year in determining the value for the current year.[306]

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[304] *Copley-Fairlawn School District Board of Education v. Summit County Board of Revision*, 147 Ohio St.3d 503, 2016-Ohio-1485, ¶ 24 – 25. See also *Charles L. Devore v. Ottawa County Board of Revision* (March 17, 2020), BTA No. 2019-1182 where even though the appraiser did not testify and the appraisal was not as of the tax lien date, the BTA found that the appraisal contained "sufficient indicia of reliability" because "…appellant testified about its [the appraisal's] origin and use and indicated that the appraiser viewed both the interior and exterior of the subject property…Importantly, based on appellant's unrefuted testimony, the appraisal was relied upon by at least four separate individuals or institutions: appellant, his ex-wife, the court presiding over their divorce, and his lending institution."; *Douglas Freer v. Cuyahoga County Board of Revision* (May 20, 2019), BTA No. 2018-805; *Alex Schutz v. Cuyahoga County Board of Revision* (January 28, 2020), BTA Nos. 2019-668, 669, 820, 1068 ("…there is no evidence any party relied on the appraisal in a business or financial transaction, so [the BTA] is not required to look to, or rely on, the information contained [in the appraisal]…").

[305] See *AP Hotels of Illinois, Inc. v. Franklin County Board of Revision*, 118 Ohio St.3d 115, 2008-Ohio-2565, ¶ 16 where the Court, in allowing the appraisal's underlying data (as distinct from the appraiser's opinion of value) to be used, stated that "Although the appraiser did not certify his ultimate opinion of value as of the 2002 tax lien date, his certification that the "statements of fact contained in this report are true and accurate" did permit the BTA to use *the factual information* set forth in the report."). (italics added).

[306] See *Copley-Fairlawn School District Board of Education v. Summit County Board of Revision*, 147 Ohio St.3d 503, 2016-Ohio-1485, ¶ 22.

As such, under *Copley-Fairlawn* when the *data* underlying an appraiser's opinion has been determined to be reliable there are circumstances where it can be considered competent by the BOR even though the appraiser's *opinion* of value cannot.[307] Where, however, an appraisal is offered in evidence at the BTA but the appraiser was not present to testify, *and* where "there is no evidence that any individual or entity has relied on the appraisal to establish the subject's value," the BTA has rejected the appraisal and found it unreliable.[308] Further, even where an appraisal has been relied upon in a financial or business transaction it need not be credited by the BOR "in the absence of direct testimony about the preparation and actual use"[309] of the appraisal.

Having discussed the *Copley-Fairlawn* exception, it is important to note that in general appraisals should speak as of the tax lien date; January 1 of the applicable year. As stated by the Supreme Court, "…the first day of January of the tax year in question is the crucial valuation date for tax assessment purposes."[310]

Below, we discuss the "recency" requirement of R.C. 5713.03: that when value is established based upon "an arm's length sale between a willing seller and a willing buyer" such sale must have taken place "within a reasonable length of time, either before or after the tax lien date" In general, of course, this recency requirement recognizes that the more time there is between the "valuation event" (the date of the sale or the date of the appraisal) and the tax lien date, the *less* likely it is that the "valuation event" will accurately reflect the property's true value as of the tax lien date. In setting a value the recency of the sale - or, where an appraisal is used in lieu of a sale,

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[307] See *OM Harikrushn, LLC v. Summit County Board of Revision*, 9th Dist. Summit No. 28234, 2017-Ohio-1028, ¶ 15.

[308] See *Joksim Djuric v. Cuyahoga County Board of Revision* (January 6, 2020), BTA No. 2019-518. See also *Daniel and Bonnie Kossin v. Cuyahoga County Board of Revision* (June 29, 2020), BTA No. 2019-2390;

[309] See *Julia Montgomery v. Allen County Board of Revision* (February 28, 2020), BTA No. 2019-1512 quoting *Musto v. Lorain County Board of Revision*, 148 Ohio St.3d 456, 2016-Ohio-8058, ¶ 42. See also *Smartland FND1, LLC v. Cuyahoga County Board of Revision* (September 29, 2020), BTA No. 2019-2421 ("In *Musto* , the court held this board [the BTA] could disregard an appraisal that had been relied upon in a financial or business transaction "in the absence of direct testimony about the preparation and actual use of" the appraisal."); *McGeorge Properties Ltd. V. Stark County Board of Revision* (May 24, 2022), BTA No. 2021-1134 ("In *Musto*, the court held this Board could disregard an appraisal that had been relied upon in a financial or business transaction "in the absence of direct testimony about the preparation and actual use of" the appraisal."). *Martin Peaspanen v. Ashtabula County Board of Revision* (August 16, 2022), BTA No. 2021-1600.; *William E. Cornell Jr. Trust v. Summit County Board of Revision* (February 7, 2023), BTA No. 2021-1908; *Robert Groszewski v. Lucas County Board of Revision* (September 19, 2023), BTA No. 2021-1437.

[310] See *Freshwater v. Belmont County Board of Revision*, 80 Ohio St.3d, 26, 29 - 30 (1997). See also, *The ARE*, 12th Edition at 602; *836 Real Investment LLC v. Cuyahoga County Board of Revision* (May 24, 2021), BTA No. 2020-28 ("Ohio courts, as well as this Board [the BTA], have been critical of appraisals that fail to derive value as the property existed at the tax lien date.").

the date on which the appraisal is effective - is important because the character of the property might have changed between the date of the sale or appraisal, and the tax lien date.[311]

Where There is Both a Sale and an Appraisal

Revised Code 5713.03 also requires that the Auditor determine "the true value of the fee simple estate [of the subject property], *as if unencumbered*…" As explained by the Court of Appeals:

> The point of Ohio's statutory scheme is to endeavor to separate out, where possible, value attributable to having the lease [an encumbrance] itself (value not subject to the property tax) and value attributable to the "fee simple estate, as if unencumbered" (value that is subject to the property tax).[312]

In establishing that fee simple value, "if such tract, lot, or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor *may* consider the sale price…to be the true value for taxation purposes."[313] (italics added).

But sometimes, where the claimant-owner has purchased a property which has a commercial tenant generating to the owner a stream of rental income, the owner will claim at the BOR that the sales price it paid is not an accurate indicator of the fee simple value; alleging instead that the sales price was artificially high because what the owner was really buying was not so much a fee simple property as the lease-generated income stream. Accordingly, it is not surprising in those circumstances that the claimant-owner opposes the use of the sales price as an indicator of value and instead offers an appraisal to rebut the sales price.[314] But which one controls the value determination? Is it the sale price or the appraisal?

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[311] See *Worthington City Schools Board of Education v. Franklin County Board of Revision*, 124 Ohio St.3d 27, 2009-Ohio-5932.

[312] See *Menlo Realty Income Properties 28, LLC v. Franklin County Board of Revision*, 10th Dist. Franklin No. 19AP-316, 2019-Ohio-4872, ¶ 16. See also *MDC Coast I, LLC v. Union County Board of Revision*, 10th Dist. Franklin No. 18AP-721, 2020-Ohio-683, ¶ 11.

[313] See R.C. 5713.03.

[314] It should be noted, however, that the BTA has ruled that "We agree…that the appraiser is not required to utilize the sale of the subject property to perform a reliable appraisal. Nevertheless, we find that this appraisal should not be given more weight than the sale price in our determination of value." See *Kaushik Sarkar v. Cuyahoga County Board of Revision* (March 15, 2022), BTA No. 2019-2077.

Unfortunately, there is no rule as to which of those must control in *all* circumstances. What *is* clear, however, is (1) that the appraisal must at least be *considered* by the BOR in reaching its value determination where the subject parcel is under lease and the party opposing the use of the sales price offers an appraisal to show that the unencumbered value of the parcel differs from its sales price[315] and (2) that "the proponent of appraisal evidence [usually the owner] need not make any threshold showing before a taxing authority [or the BOR] must fully consider that evidence."[316]

This was made clear in a series of cases starting in 2017 with *Terraza 8, L.L.C. v. Franklin County Board of Revision*[317] ("*Terraza*") where the Supreme Court stated that the price at which the property sold remains the *best* evidence of value subject's value but that it is subject to rebuttal.[318] "The February 2013 sale price… is the *best evidence* [sic] of the property's true value, subject to rebuttal."[319] Thus, the price at which the subject property recently sold in an arm's length sale is the "presumptive, but not conclusive, evidence of the value of the unencumbered fee simple estate."[320]

But the Supreme Court has also acknowledged that "a property owner may be able to realize the value of its property by encumbering it with a lease" and that, accordingly "an appraiser may take that possibility into account when valuing it…so long as the appraisal assumes a lease that reflects the relevant real-estate market."[321] The BTA has stated that:

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[315] See *Menlo Realty Income Properties 28, LLC v. Franklin County Board of Revision*, 10th Dist. Franklin No. 19AP-316, 2019-Ohio-4872, ¶ 3. See also *North Ridge Shopping Center LLC and Rossell-North Joint Venture L.L.C.* (December 31, 2019), BTA Nos. 2018-1140-1141 ("We recognize, as a result of a legislative change to R.C. 5713.03 and the Ohio Supreme Court's *Terraza 8* decision, [that[this board [BTA] must consider appraisal or other evidence of value in addition to any qualifying sales.").

[316] See *MDC Coast I, LLC v. Union County Board of Revision*, 10th Dist. Franklin No. 18AP-721, 2020-Ohio-683, ¶ 10.

[317] See *Terraza 8, L.L.C. v. Franklin County Board of Revision*, 150 Ohio St.3d 527, 2017-Ohio-4415.

[318] See *Terraza 8, L.L.C. v. Franklin County Board of Revision*, 150 Ohio St.3d 527, 2017-Ohio-4415, ¶ 33. See also *Menlo Realty Income Properties 28, LLC v. Franklin County Board of Revision*, 10th Dist. Franklin No. 19AP-316, 2019-Ohio-4872, ¶ 3.

[319] See *Terraza 8, L.L.C. v. Franklin County Board of Revision*, 150 Ohio St.3d 527, 2017-Ohio-4415, ¶ 34.

[320] See *Notestine Manor, Inc. v. Logan County Board of Revision*, 152 Ohio St.3d 439, 2018-Ohio-2, ¶ 26. See also *Store Master Funding VI, LLC v. Franklin County Board of Revision* (December 2, 2020), BTA Nos. 2015-1492, 2015-1493 ("The Ohio Supreme Court has clarified that a recent, arm's-length sale remains the best evidence of value and creates a presumption of value. [citation omitted] However, that presumption is rebuttable, and a party may rebut a sale with appraisal evidence. [citation omitted].").

[321] See *Harrah's Ohio Acquisition Co., L.L.C. v. Cuyahoga County Board of Revision*, 154 Ohio St.3d 340, 2018-Ohio-4370, ¶ 27. See also *Amherst Marketplace Stations, LLC v. Lorain County Board of Revision* (January 29, 2020), BTA No. 2018-930;

> We find that consideration of the income stream derived from leasing real property is not an impermissible motivation. Nothing in the record indicates that consideration of the income stream was atypical of market participants interested in purchasing real property subject to triple net leases. Furthermore, Ohio Adm. Code 5703-25-07(D)(2) specifically authorizes consideration of market rent, i.e., income stream, to determine real property value.[322]

In other words, where a property is sold subject to a lease that provides rent to the owner that is generally in accordance with the applicable real estate market, such market-based rent may be considered in determining the value of the subject property. Where, on the other hand, a property is sold subject to a lease that provides rent to the owner that is well above the rents generally applicable to that real estate market, such atypical over-market rent should not be considered in reaching a property value, as it would artificially inflate the value of the fee simple estate over what the market will bear. According to the BTA however, citing *Terraza*, "the terms of the lease become relevant 'only if an opponent [of the sales price] presents [the lease] as evidence in an attempt to rebut the sale price.' [citations omitted]. Thus, a sale of leased property continues to enjoy the presumption that it is the best evidence of value unless the opponent of the sale presents evidence to establish otherwise."[323]

Because in that circumstance the sale price is not conclusive of value, the Supreme Court has stated that:

> Accordingly, when property was the subject of a recent arm's-length sale, the General Assembly has directed taxing authorities to consider not just the sale price but also any other evidence the parties present that is relevant to the value of the unencumbered fee-simple estate.[324]

Lowe's Home Centers, LLC, v. Wood County Board of Revision (August 18, 2020), BTA Nos. 2017-1429, 2018-1580; *South-Western City Schools Board of Education v. Franklin County Board of Revision* (July 11, 2022), BTA No. 2018-1610.

[322] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (March 11, 2019), BTA Nos. 2017-278, 2017-279, 2017-280, 2017-293, 2017-295, 2017-296, 2017-297, 2017-298.

[323] See *Amherst Marketplace Stations, LLC v. Lorain County Board of Revision* (January 29, 2020), BTA No. 2018-930. See also *Barberton City Schools Board of Education v. Summit County Board of Revision* (April 6, 2020), BTA No. 2019-1074 ("A leased fee sale still creates a presumption of value unless, and until, an opponent shows the lease's terms or the creditworthiness of the tenant pushed the sale above (or below) what the market would otherwise pay for a property.").; *Columbus City Schools Board of Education v. Franklin County Board of Revision* (March 29, 2021), BTA Case Nos. 2017-278, 279, 280, 293, 205, 295 – 298 ("…a party may rebut a sale with appraisal evidence. For example, a party may show an appraisal is a better indication of value because property sold subject to an above-market lease…").

[324] See *Bronx Park III Lancaster, L.L.C. v. Fairfield County Board of Revision*, 153 Ohio St.3d 4550, 2018-Ohio-1589, ¶ 12. See also *Spirit Master Funding IX, L.L.C. v. Cuyahoga County Board of Revision*, 155 Ohio St.3d 254, 2018-Ohio-4302, ¶ 6; *Menlo Realty Income Properties 28, LLC v. Franklin County Board of Revision*, 10th Dist. Franklin No. 19AP-316, 2019-Ohio-4872, ¶ 5;

Amongst such evidence, in determining whether the existing lease-in-place had an impact on the sales price, the Supreme Court has directed that:

> …the amount of rent charged under a lease has to be considered in the context of at least two other factors: the creditworthiness of the tenant and whether the lease at issue is a net lease, under which the tenant defrays the expenses relating to the real estate.[325]

Regarding the impact of an existing tenant's creditworthiness on the sale price of the property, however, the BTA has made clear that a tenant's creditworthiness *alone* is not enough to show that the sale was above-market. In other words, merely because an existing tenant is highly creditworthy does not, by itself, automatically mean that the sale was above market. Instead, according to the BTA "The question…is whether creditworthiness pushed the sale price above market."[326] To answer that question, the BTA has required evidence of market rents. "We cannot determine what is above-market if we do not know what the market is, either based on terms of a lease or lease rate."[327]

Where There is a Sale of Both Real and Personal Property

There are occasions more common in the sale of a business or commercial property than in the sale of a single-family residence, where the sale includes both real and personal property. In those circumstances the value of the personal property is not counted as part of the value of the real estate. According to the Supreme Court:

> …if the record clearly establishes that a portion of a sale price pertains to personal property, the BTA should subtract that portion from the stated sale price to arrive

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Balco Realty L.L.C., Successor to Spirit Master Funding IX, L.L.C., 8th Dist. Cuyahoga No. 110207, 2021-Ohio-3349, ¶ 6.; *Sheffield Crossing Station, LLC v. Lorain County Board of Revision* (August 4, 2023), BTA No. 2018-926.

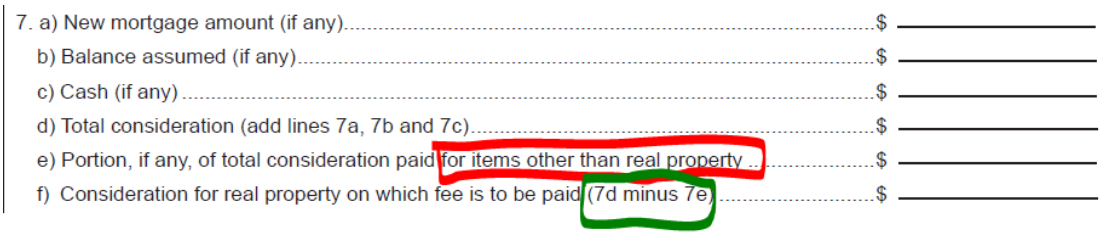
[325] See *GC Net Lease @ 3 (Westerville) Investors, L.L.C. v. Franklin County Board of Revision*, 154 Ohio St.3d 121, 2018-Ohio-3856, ¶10. See *also* *Columbus City Schools Bd. of Edn. v. Franklin County Board of Revision*, 2020-Ohio-200; *Amherst Marketplace Stations, LLC v. Lorain County Board of Revision* (January 29, 2020), BTA No. 2018-930.

[326] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (March 29, 2021), BTA Case Nos. 2017-278, 279, 280, 293, 205, 295 – 298.

[327] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (March 29, 2021), BTA Case Nos. 2017-278, 279, 280, 293, 205, 295 – 298.

> at the amount of consideration paid for the realty. The latter figure will then constitute the true value of the realty.[328]

Following that reasoning, Item 7 of Ohio's standard Real Property Conveyance Fee Statement of Value and Receipt (known as form DTE 100 and shown below) deducts the value of personal property from the total consideration paid for both the real and personal property.


7. a) New mortgage amount (if any) ..... $ _____
b) Balance assumed (if any) ..... $ _____
c) Cash (if any) ..... $ _____
d) Total consideration (add lines 7a, 7b and 7c) ..... $ _____
e) Portion, if any, of total consideration paid for items other than real property ..... $ _____
f) Consideration for real property on which fee is to be paid (7d minus 7e) ..... $ _____

[329]

For purposes of real property valuation, then, the critical question is how to determine what portion of the total purchase price is devoted to real, as opposed to personal, property. The party seeking to show how the purchase price should be allocated bears the burden of proof on that point.[330] As stated by the BTA "Absent unusual complexities of a sale, when a property owner fails to establish a proper allocation among real and personal property, the full sale price constitutes

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[328] See *Olentangy Local Schools Board of Education v. Delaware County Board of Revision*, 125 Ohio St.3d 103, 2010-Ohio-1040, ¶ 22.

[329] See DTE Form 100 at https://www.tax.ohio.gov/portals/0/forms/real_property/DTE_DTE100.pdf.

[330] See *Cincinnati School District Board of Education v. Hamilton County Board of Revision*, 151 Ohio St.3d 109, 2017-Ohio-7650, ¶ 10 ("…our case law has settled the principle that "[a]n owner who favors the use of an allocated bulk-sale price to reduce the value assigned to real property must bear the burden of proving the propriety of the allocation.."). See also *Akron City Schools Board of Education v. Summit County Board of Revision* (January 2, 2019), BTA No. 2017-1714 ("Where an owner disputes the allocation of a bulk sale price to a particular property, the burden is on the owner to demonstrate why the allocation does not reflect the parcel's true value."); *Akeel Investment Limited v. Franklin County Board of Revision* (March 2, 2020), BTA No. 2018-2004 ("The party advocating for a reduction below the full sale price due to an allocation of other assets bears the burden of showing the propriety of such action and must provide 'corroborating indicia' of the appropriate allocation."); *Jackson Local Schools Board of Education v. Stark County Board of Revision* (June 28, 2021), BTA No. 2018-2287 ("An owner who seeks to reduce the valuation of real property below the full sale price bears the burden of showing the propriety of allocating some portion of that reported price to other assets. [citations omitted]."); *Remington Clean Fill, L.L.C. v. Milford Exempted Schools Village Board of Education*, 12th Dist. Clermont Case No. C.A. 2020-12-074, 2021-Ohio-3779, ¶ 21. ("… when the taxpayer/property owner 'opposes the use of the allocated value it reported on [the] conveyance-fee statement, it bears the burden of demonstrating that the reported value does not properly reflect the true value of the parcel.' "); *Tallmadge City Schools Board of Education v. Summit County Board of Revision* (May 3, 2022), BTA No. 2020-1620. *Shree Ganesh Wash, Inc. v. Licking County Board of Revision* (May 25, 2022), BTA No. 2020-1167.

the value of the real property."[331] "If the owner fails to prove the allocation with sufficient evidence, the 'full sale price constitutes the property['s] value.'"[332]

The real/personal property allocation is typically achieved through an agreement between the buyer and seller. Depending upon the evidentiary support for that privately agreed upon allocation it may be given some weight,[333] but it is not necessarily conclusive.[334] The Supreme Court has ruled, however, that even if the parties do not negotiate an allocation of the real/personal property sale, "an after-the-fact appraisal may be used to show the property reduction of the overall sale price to account for those non-realty items."[335]

An after-the-fact appraisal, however, is distinct from an after-the-fact *allocation* by a non-appraiser, which the BTA has looked upon with disfavor. According to the BTA:

> …we have previously rejected the reliance upon an allocation to real property when such allocation was documented after a sale in an attempt to provide "corroborating indicia."[336]

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[331] See *Jackson Local Schools Board of Education v. Stark County Board of Revision* (June 28, 2021), BTA No. 2018-2287. See also *Shree Ganesh Wash, Inc. v. Licking County Board of Revision* (May 25, 2022), BTA No. 2020-1167; *Akron City Schools Board of Education v. Summit County Board of Revision* (November 20, 2023), BTA Nos. 2020-1803, 2021-1969, 2021-1981.

[332] See *Select Medical Property Ventures, LLC v. Cuyahoga County Board of Revision* (August 23, 2019), BTA Nos. 2018-172, 2018-228l; *LE 37, LLC v. Cuyahoga County Board of Revision* (March 6, 2023), BTA No. 2020-1532.

[333] See *Cleveland Municipal Schools Board of Education v. Cuyahoga County Board of Revision* (July 11, 2019), BTA No. 2018-184 ("We find it inappropriate to completely disregard the parties' allocation of the sale price…the data within [the appraiser's] report supports the allocation based on allocations to real estate made by other parties in other arm's-length nursing home sales. We find the data in [the appraiser's report] constitutes corroborating indicia of the reliability of the parties' allocation of the sale price to the subject real property.").

[334] See *Cincinnati School District Board of Education v. Hamilton County Board of Revision*, 151 Ohio St.3d 109, 2017-Ohio-7650, ¶ 10 ("…the allocation agreed to by the parties to the asset purchase agreement is "relevant" in allocating for tax purposes, but it "is not sufficient by itself, because the motivations behind the allocation are crucial to a determination of its propriety for tax-valuation purposes." [citation omitted] In other words, the mere fact that the parties to a bulk sale of assets have agreed to allocate a particular amount to real estate does not by itself establish the propriety of the allocation."). See also *JTB La Bella Vita LLC v. Montgomery County Board of Revision* (July 5, 2019), BTA No. 2018-2059; *Remington Clean Fill, L.L.C. v. Milford Exempted Schools Village Board of Education*, 12th Dist. Clermont Case No. C.A. 2020-12-074, 2021-Ohio-3779, ¶ 28; *Akron City Schools Board of Education v. Summit County Board of Revision* (November 20, 2023), BTA Nos. 2020-1803, 2021-1969, 2021-1981.

[335] See *Akeel Investment Limited v. Franklin County Board of Revision* (March 2, 2020), BTA No. 2018-2004.

[336] See *Soehnke Hasselhof v. Summit County Board of Revision* (March 19, 2020), BTA No. 2019-1710. See also *Makars LLC v. Cuyahoga County Board of Revision* (October 4, 2022), BTA No. 2021-315 ("The Ohio Supreme Court has been clear that "the party advocating for a reduction below the full sale price due to an allocation to other assets bears the burden of showing the propriety of such action and must provide 'corroborating indicia' of the appropriate allocation."); *Ohdee Dohdee, LLC v. Franklin County Board of Revision* (January 30, 2023), BTA No. 2020-216.

As it further explained:

> We recognize that the list contains several items that would be considered equipment and properly valued separate from the realty. Exhibit 1, however, does not meet the standard of 'corroborating indicia' of Giant Oil's allocation. Instead, Exhibit 1 is merely a written statement meant to supplement Mr. Ali's testimony and not a contemporaneous document from the time of the sale.[337]

Indeed, "It is generally insufficient to show the sale price included *some* non-realty; a party [opposing the use of the full purchase price] must show the value of that non-realty to prevail."[338] Further, the Supreme Court has found that real property value allocations have on occasion been an "arbitrary apportionment of the whole [purchase price] for federal tax purposes."[339] Allocations by a party may not be arbitrary and must reflect the true value of the real property.[340] They must be supported by "tangible, credible evidence of value."[341] According to the Court:

> "[t]he crucial issue that arises in proposing the use of an *allocated* sale price is the propriety of the allocation for tax-valuation purposes." (Emphasis in original) [citation omitted] Accordingly, a proposed allocation of purchase price must typically be supported by " 'corroborating indicia' " that establish the propriety of the allocation.[342]

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[337] See *Soehnke Hasselhof v. Summit County Board of Revision* (March 19, 2020), BTA No. 2019-1710.

[338] See *Sub Zero Hamilton Properties v. Lake County Board of Revision* (April 6, 2020), BTA No. 2019-1011.

[339] See *Heimerl v. Lindley*, 63 Ohio St.2d 309, 313 (1980).

[340] See *St. Bernard Self-Storage, L.L.C. v. Hamilton County Board of Revision*, 115 Ohio St.3d 365, 2007-Ohio-5249, ¶¶ 14, 17. See also *Bedford Board of Education v. Cuyahoga County Board of Revision*, 132 Ohio St.3d 371, 2012-Ohio-2844, ¶ 19 where the Court stated that "the validity of using the allocated sale price depends upon the propriety of the allocation; if the BTA finds that an allocation is not proper, or that a proper allocation is not possible based upon the evidence before it, then the sale price is not determinative"; *Columbus City Schools Board of Education v. Franklin County Board of Revision* (November 19, 2019), BTA Nos. 2017-1325, 1326, 1328, 1329, 1330, 1331, 1332, 1333, 1336, 1337, 1338, citing *Bedford Board of Education*, *supra.*

[341] See *JTB La Bella Vita LLC v. Montgomery County Board of Revision* (July 5, 2019), BTA No. 2018-2059.

[342] See *Sapina v. Cuyahoga County Board of Revision*, 136 Ohio St.3d 188, 2013-Ohio-3028, ¶ 21. See also *Akron City Schools Board of Education v. Summit County Board of Revision* (June 19, 2019), BTA No. 2018-1088 ("The party advocating for a reduction below the full sale price due to an allocation of other assets bears the burden of showing the propriety of such action and must provide 'corroborating indicia' of the appropriate allocation."); *Wilsher Management, Ltd. v. Cuyahoga County Board of Revision* (December 27, 2022), BTA No. 2020-1884.; *Aircraft Welding, Inc. v. Cuyahoga County Board of Revision* (January 10, 2023), BTA No. 2021-1900.; *Rhonda Ghiassi v. Licking County Board of Revision* (March 6, 2023), BTA No. 2022-1368; *Robert Groszewski v. Lucas County Board of Revision* (September 19, 2023), BTA No. 2021-1437;l *Akron City Schools Board of Education v. Summit County Board of Revision* (November 20, 2023), BTA Nos. 2020-1803, 2021-1969, 2021-1981.

Further:

> …in the context of valuing property for tax purposes, such an allocation is not to be taken as indicative of the value of the real property at issue unless other indicia on the face of the contract, the circumstances attending the allocation or some other independent evidence establishes the propriety of the allocation.[343]

But factually, what are the "corroborating indicia" sufficient to support the agreed upon allocation? Because the "corroborating indicia" requirement is a judicially created rule, there is no definitive or singular list as to what facts or factors constitute "corroborating indicia," and "corroborating indicia" can vary from case-to-case depending upon the particular factual context and circumstances. As such, discerning what constitutes "corroborating indicia" is a largely fact-driven endeavor where fine factual distinctions can be critical in determining whether the proffered evidence is sufficiently corroborative to constitute "corroborating indicia." Listing examples of "corroborating indicia," then, may be of limited utility. Nonetheless, and with those caveats, "corroborating indicia" supporting an allocation of the sales price have been found to include: (1) an unattested appraisal report,[344] (2) "the loan amount secured by a mortgage on the real property,"[345] (3) "selected portions of the purchase agreement,"[346] (4) "the recorded conveyance fee statement and related attachments,"[347] and a (5) "basis allocation summary that was prepared as part of its due diligence in preparing for the purchase and includes the 'value, as is' for

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[343] See *St. Bernard Self-Storage, L.L.C. v. Hamilton County Board of Revision*, 115 Ohio St.3d 365, 2007-Ohio-5249, ¶ 18.

[344] See *Kevin G. & Patty Killeen v. Lorain County Board of Revision* (May 11, 2017), BTA No 2016-613 ("In *Hilliard City Schs. Bd. of Edn. v. Franklin County Bd. of Revision*, 128 Ohio St. 3d 565, 2011-Ohio-2258, the court utilized an unattested appraisal report, as corroborating indicia, to determine an appropriate personal property allocation in relation to a sale. Therein, despite the owner's assertions that the appraisal "was not probative because the appraiser did not testify[,]" the court nevertheless concluded that the unattested appraisal report provided the ""best available evidence" from which an amount may be derived because it "presents an estimation of value apparently relied upon" and "was within the contemplation of the parties at the time of the sale.").

[345] See *Worthington City Schools Board of Education v. Franklin County Board of Revision* (January 30, 2017), BTA No. 2016-151 citing *Sapina v. Cuyahoga County Board of Revision*, 136 Ohio St.3d 188, 2013-Ohio-3028.

[346] See *Larry Snodgrass v. Franklin County Board of Revision* (July 26, 2016), BTA No. 2015-1924.

[347] See *Sirous Karimi, President Alliance Re Holdings LLC v. Summit County Board of Revision* (March 2, 2015), BTA Nos. 2014-2442, 2753, 2755, 2837.

appliances, furnishings, and equipment"[348] to name just a few.[349] In addition, the Supreme Court has found that an after-the-fact appraisal may be considered in some situations to show that the total sales price listed on the conveyance fee statement did not accurately reflect the subject property's value.[350]

Conversely, the BTA has found that the testimony of a witness with no first-hand knowledge of the subject sale "is not sufficient to establish which assets transferred [i.e..: personal property or real property] without other corroborating indicia to support these conclusions."[351] In another case, the BTA also found a lack of corroborating indicia where a realtor, with no "special skill, training, or experience in the valuation of personal property" testified about the allocated value of that personal property.[352] Finally, the BTA found a lack of corroborating indicia for the allocation where the purchase agreement for the sale of a hotel listed a dollar amount for the allocation between real and personal property but did not include any other supporting evidence like, for example, a business valuation, a personal property valuation, or a real property appraisal. The BTA found that the mere allocation in the purchase agreement, without further support, was "conclusory and unsupported by any tangible evidence" and therefore rejected it.[353]

Where There is a "Bulk Sale" of Multiple Real Estate Parcels

Similar allocation concerns also arise where multiple real estate parcels (that do not include personal property) are sold in a single transaction, sometimes referred to as a "bulk sale". In those

[348]See *WOP Mallard Lakes LLC v. Hamilton County Board of Revision* (September 5, 2014), BTA No. 2013-4519.

[349] But for a circumstance where corroborating indicia were not found in an appraisal see *Brightstone Muirwood, LLC v. Franklin County Board of Revision* (June 3, 2019), BTA No. 2017-1878 ("Because [the appraiser] had no firsthand knowledge of the sale, his appraisal report and testimony were not "corroborating indicia" of the value of the FF&E claimed to be part of the subject sale.").

[350] See *Arbors East RE, L.L.C. v. Franklin County Board of Revision*, 15 Ohio St.3d 41, 2018-Ohio-1611, ¶ 23. See also *Select Medical Property Ventures, LLC v. Cuyahoga County Board of Revision* (August 23, 2019), BTA Nos. 2018-172, 2018-228 ("The Supreme Court has also held in some instances an appraisal can be used to show the value attributable to realty versus non-realty.").

[351] See *Arbors East RE, LLC v. Franklin County Board of Revision* (June 10, 2019), BTA Nos. 2014-4527, 2014-4607.

[352] See *JTB La Bella Vita LLC v. Montgomery County Board of Revision* (July 5, 2019), BTA No. 2018-2059.

[353] See *Talawanda City Schools Board of Education v. Butler County Board of Revision* (August 15, 2019), BTA No. 2018-1274.

cases the allocation of the overall purchase price is not between real and personal property but, rather, amongst various parcels of real property.

At the BOR, "bulk sale" cases often involve a challenge to the sale amount listed on the subject's conveyance fee statement where the challenging party claims that the amount was not based on the parcel's true value, but instead, upon a monetary allocation of the overall purchase price unrelated to the subject's true value. As stated by the Supreme Court:

> We have acknowledged the complications and difficulties that arise when valuing property that has been transferred as part of a bulk sale. A bulk sale differs from a single-parcel sale "because the issue of *proper allocation* stands between the stated sale price and its character as reflecting the value of any one particular parcel." (Emphasis added) [citations omitted]. With a bulk sale, the best evidence of true value " 'is the proper allocation of the lump-sum purchase price' " to individual parcels. [citation omitted] As opposed to a single-parcel sale, a bulk sale raises the additional question "whether the proffered allocation of bulk sale price to the particular parcel of real property is 'proper,' which is the same as asking whether the amount allocated reflects the true value of the parcel for tax purposes."[354]

The Court has explained that bulk sale cases "implicate[s] the principles used to determine how real estate is valued when it is transferred in a single transaction together with other property."[355] Such a bulk transfer has an impact on the method used to value an individual parcel that was part of the bulk sale.

> When applied to such "bulk sales," the familiar precept that "[t]he best evidence of the 'true value in money' of real property is an actual, recent sale of the property in an arm's-length transaction" has a corollary: the principle that the law favors a "proper allocation of [a] lump-sum purchase price" over "an appraisal ignoring the contemporaneous sale."[356]

The Court has held that the party proposing the new allocation has the burden "to show that its allocation of the purchase price between the two parcels represented the true value of each parcel."[357] In other words, that party's burden is not simply to show that it made a mistake on the

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[354] See *Buckeye Terminals, L.L.C. v. Franklin County Board of Revision*, 152 Ohio St.3d 86, 2017-Ohio-7664, ¶ 18. See also *Wells Building LLC v. Ross County Board of Revision* (August 29, 2019), BTA No. 2018-1635.

[355] See *Arbors East RE, L.L.C. v. Franklin County Board of Revision*, 15 Ohio St.3d 41, 2018-Ohio-1611, ¶ 17.

[356] See *Arbors East RE, L.L.C. v. Franklin County Board of Revision*, 15 Ohio St.3d 41, 2018-Ohio-1611, ¶ 17.

[357] See *Buckeye Terminals, L.L.C. v. Franklin County Board of Revision*, 152 Ohio St.3d 86, 2017-Ohio-7664, ¶ 18. See also *Corporate Exchange Bldgs. IV & V, L.P. v. Franklin County Board of Revision*, 82 Ohio St.3d 297, 299, 1998-Ohio-382.

conveyance fee statement. Rather, it must show "that the amount reported on the initial conveyance-fee statement does not reflect the true value of the property."[358] That may seem like a fine distinction, but it is an important one because the parcel's true value - not the fact that a mistake was made - is the essential question. When a party claims that the conveyance fee statement is mistaken the Supreme Court has allowed valuation evidence (evidence that goes beyond the mere proof that a mistake was made) to be considered. As stated by the Court:

> When the allocated amount [on the conveyance fee statement] is improper, i.e., does not accurately reflect the true value of the property, the BTA must review and weigh *all competent evidence* in the record in order to determine the property's true value. [italics added] [citation omitted].[359]

In other words, the BTA (as well as the BOR) is not limited to evidence showing only that a mistake was made. The Court went on to say that:

> When confronted with clear evidence that negates the auditor's valuation, it is unreasonable and unlawful for the BTA[360] to adopt the auditor's valuation rather than to determine the property's value based on the record evidence. [citation omitted] The same rationale applies when clear evidence negates an allocation reported on a conveyance-fee statement.
>
> [The owner's] burden of demonstrating that the allocated amount reported on the …, conveyance-fee statement does not reflect the real property's true value is independent of its burden of submitting corroborating evidence to support the allocation reported on the amended conveyance-fee statement. [citation omitted] The latter burden, which consists of showing " 'corroborating indicia to ensure that the allocation reflects the true value of the property,' [citation omitted], arises only if [the owner] first demonstrates that the originally reported value does not reflect the property's true value.[361]

This makes clear that a two-step process is required where the complainant claims that the sales amount listed on the conveyance fee statement is inaccurate. First, the complainant must prove that the sales amount listed on the originally filed conveyance fee statement "does not reflect the property's true value." If that initial showing is made, then the complainant must show with

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[358] See *Buckeye Terminals, L.L.C. v. Franklin County Board of Revision*, 152 Ohio St.3d 86, 2017-Ohio-7664, ¶ 22.

[359] See *Buckeye Terminals, L.L.C. v. Franklin County Board of Revision*, 152 Ohio St.3d 86, 2017-Ohio-7664, ¶ 22.

[360] While this case specifically mentions the BTA, it is equally applicable to hearings at the BOR.

[361] See *Buckeye Terminals, L.L.C. v. Franklin County Board of Revision*, 152 Ohio St.3d 86, 2017-Ohio-7664, ¶¶ 22 – 24.

"corroborating indicia" that the amount listed on the amended conveyance fee statement accurately reflects the property's true value.

Owner's Opinion of Value

In most judicial or quasi-judicial proceedings, only expert witnesses are authorized to express an opinion of a property's value. There is an exception to that rule, however, which permits a non-expert property owner to give her opinion of the property's value.

> Ordinarily, testimony as to property value is not competent and admissible unless it is the professional opinion of an expert…But equally well recognized is the exception allowing an owner "to testify concerning the value of his property without being qualified as an expert, because he is presumed to be familiar with it from having purchased or dealt with it."…Grounds for this "owner-opinion rule" lie in the assumption that the owner " 'possess[es] sufficient acquaintanceship with [the property] to estimate the value of the property, and [the owner's] estimate is therefore received…The court has recognized the validity of the owner-opinion rule in the context of valuing realty for tax purposes…Important in the owner-opinion rule, however, is that the owner qualifies primarily as a fact witness giving information about his or her own property; usually the owner may not testify about comparable properties, because that testimony would be hearsay…[362]

Nothing in that exception, however, requires that the BOR or the BTA *adopt* that owner's opinion. As stated by the Court:

> The BTA [and the BOR, as well], as the finder of fact, "is vested with wide discretion in determining the weight to be given to evidence and the credibility of witnesses which come before [it]."…And "there is no requirement that the finder of fact accept [the owner's value] as the true value of the property."…Under the owner-opinion rule, [the owner's] opinion of the subject property's market value is competent evidence, but that opinion is not controlling because the BTA determines the credibility of witnesses who come before it…[363]

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[362] See *Worthington City Schools Board of Education v. Franklin County Board of Revision*, 140 Ohio St.3d 248, 2014-Ohio-3620, ¶¶ 18 – 19. See also *Edwin L.Hoseus Jr. & Qunita M. Albonetti v. Hamilton County Board of Revision* (July 25, 2022), BTA No. 2021-1172.

[363] See *Johnson v. Clark County Board of Revision*, 155 Ohio St.3d 264, 2018-Ohio-4390, ¶¶ 22 – 23. *Martin Peaspanen v. Ashtabula County Board of Revision* (August 16, 2022), BTA No. 2021-1600 ("The weight to be accorded an owner's evidence is left to the sound discretion of this Board [citation omitted] and "there is no requirement that the finder of fact accept [the owner's value] as the true value of the property."");*Akron City Schools Board of Education v. Summit County Board of Revision* (September 15, 2022), BTA No. 2021-2327; *Aircraft Welding, Inc. v. Cuyahoga County Board of Revision* (January 10, 2023), BTA No. 2021-1900; *Rhonda Ghiassi v. Licking County Board of Revision* (March 6, 2023), BTA No. 2022-1368; *Linas Macikenas v. Cuyahoga County Board of Revision* (August 2, 2023), BTA Nos. 2023-196, 2023-198, 2023-199, 2023-200.

In that regard, the BTA has ruled that for an owner's opinion:

> …to be considered probative, it must be supported by tangible evidence of a property's value…That value is the true value in money as valued by the market. While an owner might be an expert in the subject property, an owner is generally not an expert in valuation or the market. The weight to be accorded an owner's opinion is left to the sound discretion of [the BTA].[364]

In short, the owner can offer her opinion but if it is not supported by credible and probative evidence, the BOR does not have to believe it.[365]

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[364] See *Michael James Weir v. Wayne County Board of Revision* (April 17, 2019), BTA No. 2018-1409. See also *Gary L. Pence v. Greene County Board of Revision* (April 29, 2019), BTA Nos. 2018-980, 2018-981 ("…the property owner primarily relied upon unadjusted sales data. We have repeatedly held that information of this type is an insufficient basis to determine real property value because it fails to adequately consider and account for unique aspects and differences of the property under consideration and those properties to which comparison is made."); *Kristin Duey v Summit County Board of Revision* (May 3, 2022), BTA No. 2021-814 ("We agree that an owner is entitled to provide an opinion of the subject property's worth, [citation omitted] but in order for such opinion to be considered probative, it must be supported with tangible evidence of a property's value. [citations omitted]. The weight to be accorded an owner's evidence is left to the sound discretion of this Board, [citations omitted] ... and "there is no requirement that the finder of fact accept [the owner's value] as the true value of the property."); *Rex F. Hunn v. Montgomery County Board of Revision* (May 17, 2022), BTA No. 2021-1166; *Eric Bucholtz v. Summit County Board of Revision* (May 17, 2022), BTA No. 2021-1003; *Robert Property Group LLC v. Summit County Board of Revision* (May 24, 2022), BTA No. 2021-929; *James Koons v. Summit County Board of Revision* (July 6, 2022), BTA No. 2021-1755.; *Donald A. and Elainer R. Cable v. Montgomery County Board of Revision* (July 28, 2022), BTA No. 2021-1914; *Brian J. Farmer v. Knox County Board of Revision* (August 2, 2022), BTA No. 2021-1176.; *Susan M. Graves v. Cuyahoga County Board of Revision* (November 21, 2022), BTA No. 2022-511, November 21, 2022; *Esch Family Limited Partnership v. Montgomery County Board of Revision* (November 30, 2022), BTA No. 2021-2077.; *Steve and Joy Veris v. Montgomery County Board of Revision* (December 7, 2022), BTA Nos. 2021-1990, 2021-1991; *PJ Legacy LLC v. Summit County Board of Revision* (December 9, 2022), BTA No. 2021-1945.; *Brian & Rebecca Bivens v. Licking County Board of Revision* (December 16, 2022), BTA No. 2021-1713.; *Artab, LLC v. Belmont County Board of Revision* (December 20, 2022), BTA No. 2021-1019.; *Wilsher Management, Ltd. v. Cuyahoga County Board of Revision* (December 27, 2022), BTA No. 2020-1884.; *Edward Korode v. Portage County Board of Revision* (December 28, 2022), BTA No. 2022-1060; *North East Lawn LLC v. Marion County Board of Revision* (December 30, 2022), BTA No. 2021-1554; *South-Western City Schools Board of Education v. Franklin County Board of Revision* (January 3, 2023), BTA Nos. 2021-2038, 2021-2039; *Brian D. & Joyce M. Foutz v. Cuyahoga County Board of Revision* (January 10, 2023]), BTA No. 2022-1298; *Stella Parkin v. Cuyahoga County Board of Revision* (February 6, 2023), BTA No. 2022-1234; *Michaels Inc. v. Lake County Board of Revision* (March 20, 2023), BTA No. 2022-14; *David R. Neubrander v. Summit County Board of Revision* (March 21, 2023), BTA No. 2021-1365; *SRE ESA Popco Brooklyn LLC v. Cuyahoga County Board of Revision* (May 5, 2023), BTA Nos. 2020-253, 2020-293; *Linas Macikenas v. Cuyahoga County Board of Revision* (August 2, 2023), BTA Nos. 2023-196, 2023-198, 2023-199, 2023-200; *Frank) Xin Rao v. Franklin County Board of Revision* (October 31, 2023), BTA No. 2023-1076.

[365] See *Ruth Anna Carlson v. Cuyahoga County Board of Revision* (January 5, 2021), BTA No. 2020-834 ("As the owner of the subject property, appellant is competent to testify about the subject's value, but this Board [BTA] must determine the appropriate weight to accord his testimony."). See also *Richard Plant Jr. & Denise Plant v. Cuyahoga County Board of Revision* (October 12, 2021), BTA No. 2020-2047 ("..though an owner is free to express an opinion of value, this Board may 'properly reject that opinion when the evidence that forms the basis for the owner's opinion fails to demonstrate the value requested.'"); *Village of Hunting Valley v. Cuyahoga County Board of Revision* (September 13, 2023), BTA No. 2023-128.

Owner's Opinion of Value – Evidence Frequently Found to be Insufficient

In attempting to lower their valuations, owners sometimes offer certain types of evidence that both the BTA and Ohio's courts have routinely rejected as insufficient. Some of the more common forms of that owner-generated evidence are discussed below.

Evidence of the Subject Property's Listing Price

Evidence of the price at which the subject property was listed but did not sell is typically considered an insufficient basis upon which to challenge the auditor's valuation. As stated by the Supreme Court "…while this court has recognized that an arm's-length sale of property raises the rebuttable presumption that the sale price reflects the true value of the property [citations omitted], unaccepted offers to purchase do not constitute a sale price and so raise no such presumption…" and that there was no requirement that the BTA give any weight to testimony about unaccepted offers.[366] As stated by the BTA, "We have repeatedly held that unsuccessful attempts to sell a property are not good indicators of value."[367] Following that reasoning, the BTA has rejected the argument that "the unsuccessful listing price for the property … constitutes the upper limit of its value."[368]

Evidence of Damage to, or Defects in, the Subject Property

Where the owner claims that the subject property's condition has declined since the last reappraisal or triennial update, it is not unusual for the owner to seek a reduction in the subject's value through the submission of photographs of the property, a list of needed repairs, and/or invoices for repairs that have already been made to the subject property. While the BOR should

[366] See *Gupta v. Cuyahoga County Board of Revision*, 79 Ohio St.3d 397, 400 (1997). See also *Howard Sullivan v. Hamilton County Board of Revision* (May 1, 2019), BTA No. 2018-947 ("…we have repeatedly held that unsuccessful attempts to sell a property are not god indicators of value."); *William R. Jenkins v. Montgomery County Board of Revision* (September 30, 2019), BTA No.2018-2045 ("…the Ohio Supreme Court held 'unaccepted offers to purchase do not constitute a sale price and so raise n such presumption' like the rebuttable presumption raised by an actual recent arm's-length sale. The Ohio Supreme Court has said this board [BTA] is not required to 'assign any weight' to unsuccessful attempts to sell property."

[367] See *Zaher Helmi v. Montgomery County Board of Revision* (June 29, 2020), BTA No. 2019-1297. See also *John Wadsworth v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2019-2248 ("This Board has repeatedly held that unsuccessful attempts to sell a property are not good indicators of value.").

[368] See *Stacey and Michael C. Mollinet v. Cuyahoga County Board of Revision* (June 11, 2018), BTA No. 2017-1098.

certainly consider such information, the mere assertion of diminished value due to damage is generally an insufficient basis upon which to reduce the subject's valuation. "A party must do more than submit a 'list of defects'."[369] Rather, what is needed is evidence showing the specific dollar impact that the damage to the subject's condition caused to its value.[370] As stated by the Supreme Court:

> Evidence of needed repairs, or the cost of needed repairs, while a factor in arriving at true value, will not alone prove true value. It is the decrease in true value that may result from the need for the repairs that is the important factor to be determined by the BTA.[371]

The same reasoning applies to property that is "stigmatized" and difficult to resell. For example, in a case where the current owner purchased a home and subsequently learned that the former owner's son had committed suicide in the backyard and that the house may have been used

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[369] See *J&K American Enterprises, Inc. v. Cuyahoga County Board of Revision* (April 20, 2020), BTA No. 2019-1162. See also *Ronald Marthaller v. Cuyahoga County Board of Revision* (July 13, 2020), BTA No. 2019-2220.

[370] *Helen D. Linter, Tr v. Franklin County Board of Revision* (January 5, 2020), BTA No. 2019-328 ("In this case, appellant relied on testimony of negative conditions, specifically purported issues with its shape and topography. While we acknowledge the existence of these conditions, it is unclear whether and to what extent they affect the subject's value. "Without affirmative evidence of the property's value or specific analysis of how the property's condition affected its value, any evidence of defects in the property is inconsequential."). See also *M A Kaplan Living Trust v. Cuyahoga County Board of Revision* (February 12, 2021), BTA No. 2019-1333; *Canton City Schools Board of Education v. Stark County Board of Revision* (April 12, 2021), BTA No. 2020-993; *John Wadsworth v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2019-2248 ("…we find the property owner's citation to defects of the subject properties to be equally unavailing. The property owner failed to provide evidence to quantify the specific diminution in value that resulted from the cited defects."). In the context of COVID complaints filed under S.B. 57, the BTA has stated that a mere compilation of income vs. expense financial data is insufficient to prevail in a COVID complaint. See *SBW Development LLC v. Belmont County Board of Revision* (May 25, 2022), BTA No. 2021-2566 ("But merely filing a list of financial statements that show actual income versus expenses does not necessarily reflect the market. Moreover, doing so is similar to parties that file a list of defects about a subject property. In *Gides v. Cuyahoga Cty. Bd. of Revision*, 8th Dis. No. 102649, 2015-Ohio-4385, the appellate court held that a party must go further to establish "how those defects [or financials] might have impacted the property value;" otherwise, the "defects [or financials] are simply variables in search of an equation." *Id*. at ¶ 7; *see also Throckmorton*. Here, the impact of COVID on the property's value, if any, is not self-evident.."; *Al Gammarino, Tr. v. Hamilton County Board of Revision* (July 6, 2022), BTA No. 2021-1221; *Brian J. Farmer v. Knox County Board of Revision* (August 2, 2022), BTA No. 2021-1176; *Martin Peaspanen v. Ashtabula County Board of Revision* (August 16, 2022), BTA No. 2021-1600; *Christopher Sitko v. Summit County Board of Revision* (August 19, 2022), BTA No. 2021-1043; *Wilsher Management, Ltd. v. Cuyahoga County Board of Revision* (December 27, 2022), BTA No. 2020-1884; *Chicagoland Oil Company, LLC v. Cuyahoga County Board of Revision* (January 5, 2023), BTA No. 2021-1170; *Linas Macikenas v. Cuyahoga County Board of Revision* (August 2, 2023), BTA Nos. 2023-196, 2023-198, 2023-199, 2023-200.; *Fred Azar v. Summit County Board of Revision* (September 18, 2023), BTA No. 2021-1319.; *Orchard Hospitality Corp. v. Montgomery County Board of Revision* (December 6, 2023), BTA No. 2021-2723 ("Both Weiler and Patel testified generally that COVID hurt the hotel's business. Since neither witness's assertions were supported with an appraisal or any other evidence, we do not find this testimony to be credible evidence of the property's value. Further, testimony on loss of revenue does not necessarily mean the value of the real property decreased.").

[371] See *Throckmorton v. Hamilton County Board of Revision*, 75 Ohio St.3d 227 (1996). See also *Cleveland Homes LLC v. Cuyahoga County Board of Revision* (August 20, 2023), BTA No. 2023-492.

in the distribution and possibly the production of pornography, the BTA ruled that the current owner was required to quantify the impact of the "stigma" on the value of the property. In so ruling, the BTA said it sympathized with the owner and understood his frustration, but that "…the Ohio Supreme Court…has been very clear that a litigant must do more than prove property suffers from negative characteristics."[372] Even where, for example, a property was located in a flood plain, the BTA has rejected a claim of diminished value without evidence tying the property's location to a diminution in value.[373] Using similar reasoning, where the owner claimed that a reduction in value was warranted because the property shared a driveway with an adjacent property, the BTA stated that "… while a shared drive could, in theory, reduce the value of the property, [the owner] needed to bring probative evidence to quantify the impact of the shared driveway."[374] In addition, the owner's "… discussion [at the hearing] about negative conditions in the area is not sufficient to support a reduction in value. In order to support this type of claim, [the owner] must have demonstrated not only that such factors are present, but also the impact on the value of the subject property.[375]

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[372] See *Dimitrios E. Boulas v. Cuyahoga County Board of Revision* (March 16, 2021), BTA No. 2020-759. See also *Donald A. and Elainer R. Cable v. Montgomery County Board of Revision* (July 28, 2022), BTA No. 2021-1914; *Jennifer Radin and Brandon Glenn v. Cuyahoga County Board of Revision* (August 7, 2023), BTA No. 2022-1588.

[373] See *Village of Hunting Valley v. Cuyahoga County Board of Revision* (September 13, 2023), BTA No. 2023-128 (" Just because the subject suffers from being within a flood plain does not constitute evidence of any particular value.").

[374] See *Roy E. Phillips v. Licking County Board of Revision* (January 3, 2022), BTA No. 2020-1655.

[375] See *Ruth Anna Carlson v. Cuyahoga County Board of Revision* (January 5, 2021), BTA No. 2020-834. See also *Cleveland Property Development Group LLC v. Cuyahoga County Board of Revision* (October 20, 2021), BTA No. 2020-2119. See also *Kristin Duey v Summit County Board of Revision* (May 3, 2022), BTA No. 2021-814 ("It is generally insufficient to prove property suffers from negative characteristics or defects. Instead, a party must come forward with probative evidence quantifying the effect of those characteristics or defects on value."); *Sandra Lewis v. Summit County Board of Revision* (May 16, 2022), BTA No. 2021-1446; *Rex F. Hunn v. Montgomery County Board of Revision* (May 17, 2022), BTA No. 2021-1166.; *Ray S. Duell v. Stark County Board of Revision* (May 31, 2022), BTA No. 2020-2050; *Carmen Figueroa, Trustee v. Ottawa County Board of Revision* (June 27, 2022), BTA No. 2020-1469; *20 West Grace, LLC v. Cuyahoga County Board of Revision* (July 8, 2022), BTA No. 2021-320; *Matthew Watts v. Cuyahoga County Board of Revision* (July 27, 2022), BTA No. 2021-1982; *Martin Peaspanen v. Ashtabula County Board of Revision* (August 16, 2022), BTA No. 2021-1600.; *Gregory R. and Mary L. Thewes v. Summit County Board of Revision* (September 15, 2022), BTA No. 2021-1226. *Akron City Schools Board of Education v. Summit County Board of Revision* (September 19, 2022), BTA No. 2021-2324; *Allen B. Properties v. Summit County Board of Revision* (September 26, 2022), BTA No. 2021-1055; *David Polsky v. Cuyahoga County Board of Revision* (September 27, 2022), BTA No. 2022-555; *Judi Peaspanen v. Ashtabula County Board of Revision* (October 4, 2022), BTA Nos. 2021-1596, 2021-1597, 2021-1598; *Carmencita Richardson v. Cuyahoga County Board of Revision* (November 7, 2022), BTA No. 2022-473; *Engelbert Gal v. Summit County Board of Revision* (November 21, 2022), BTA No. 2021-1724; *Susan M. Graves v. Cuyahoga County Board of Revision* (November 21, 2022), BTA No. 2022-511, November 21, 2022; *Esch Family Limited Partnership v. Montgomery County Board of Revision* (November 30, 2022), BTA No. 2021-2077; *Schultz Properties, Ltd. v. Cuyahoga County Board of Revision* (December 1, 2022), BTA Nos. 2020-858, 2020-1002; *PJ Legacy LLC v. Summit County Board of Revision* (December 9, 2022), BTA No. 2021-1945; *Brian & Rebecca Bivens v. Licking County Board of Revision* (December 16, 2022), BTA No. 2021-1713; *Bernard Alderman v. Muskingum County Board of Revision* (December 16, 2022), BTA No. 2020-1264; *Edward Korode v. Portage County Board of Revision* (December 28, 2022), BTA No. 2022-1060; *North East Lawn LLC v. Marion County Board of Revision* (December 30,

Further, the Court has found that "Without affirmative evidence of the property's value or specific analysis of how the property's condition affected its value, any evidence of defects in the property is inconsequential."[376] Even where the owner provides evidence of the dollar amount of repairs made to the property, "the Supreme Court has repeatedly rejected the notion that dollar-for-dollar [repair] costs correlate to value."[377] As stated by the BTA, quoting from *The Appraisal*

2022), BTA No. 2021-1554; *Brian D. & Joyce M. Foutz v. Cuyahoga County Board of Revision* (January 10, 2023]), BTA No. 2022-1298; *Brett Greer v. Cuyahoga County Board of Revision* (January 10, 2023), BTA No. 2021-2856 ; *Kenneth and Debra Sharkey v. Ottawa County Board of Revision* (January 30, 2023), BTA No. 2021-1042; *Stella Parkin v. Cuyahoga County Board of Revision* (February 6, 2023), BTA No. 2022-1234; *Barbara & Scott Sees v. Cuyahoga County Board of Revision* (February 6,2023), BTA No. 2022-745; *William E. Cornell Jr. Trust v. Summit County Board of Revision* (February 7, 2023), BTA No. 2021-1908; *Pietro D'Amico v. Cuyahoga County Board of Revision* (March 6, 2023), BTA Nos. 2022-1346, 2022-1348; *Pietro D'Amico v. Cuyahoga County Board of Revision* (March 6, 2023), BTA Nos. 2022-1345, 2022-1350; *Richard Duncan v. Portage County Board of Revision* (March 6, 2023), BTA No. 2022-1120; *David R. Neubrander v. Summit County Board of Revision* (March 21, 2023), BTA No. 2021-1365; *Gerard J. Volk v. Cuyahoga County Board of Revision* (May 3, 2023), BTA No. 2023-30; *First Interstate Avon, Ltd. v. Lorain County Board of Revision* (August 10, 2023), BTA No. 2019-2127; *Stepanie English and Michael English v. Cuyahoga County Board of Revision* (August 10, 2023), BTA No. 2023-495; *Charles Wayne Slivka v. Cuyahoga County Board of Revision* (September 5, 2023), BTA No. 2023-534; *Joseph Matthew Hittner v. Hamilton County Board of Revision* (September 18, 2023), BTA No. 2021-1811; *Bob & Dionne MacDonald v. Cuyahoga County Board of Revision* (September 20, 2023), BTA No. 2022-602; *Frank) Xin Rao v. Franklin County Board of Revision* (October 31, 2023), BTA No. 2023-1076.

[376] See *Schutz v. Cuyahoga County Board of Revision*, 153 Ohio St.3d 23, 2018-Ohio-1588, ⁋ 17. See also *Michael Isreal v. Franklin County Board of Revision* (May 20, 2019), BTA No. 2018-480; *Al Gammarino v. Hamilton County Board of Revision* (August 6, 2019), BTA Nos. 2018-1687, 2018-1688; *Maria N. Caras v. Montgomery County Board of Revision* (February 12, 2020), BTA No. 2019-1289.; *South-Western City Schools Board of Education v. Franklin County Board of Revision* (April 3, 2020), BTA No. 2018-2034 ("A party must do more than demonstrate the existence of negative factors; a party must also quantitatively show the impact such factors have on the property's value."); *Germano v. Cuyahoga Cty. Bd. of Revision* (June 19, 2018), BTA No. 2017-1468, unreported; *South-Western City Schools Board of Education v. Franklin County Board of Revision* (April 3, 2020), BTA No. 2018-2034 ("In the absence of an appraisal quantifying the effect of any adverse factors on the value of the property, we find the evidence insufficient to justify the requested reduction."); *Lori D. Gogolin v. Lake County Board of Revision* (June 15, 2020), BTA No. 2019-1720 ("The property owner asserted that the condition of the subject property…necessitated a reduction to the subject property's value. We must also reject that argument. She failed to provide evidence to quantify the specific diminution in value that resulted from the defect."); *Sheila Alridge v. Cuyahoga County Board of Revision* (July 20, 2020), BTA No. 2019-1420; *Shpend Brahaxhia v. Cuyahoga County Board of Revision* (September 15, 2020), BTA Nos. 2019-2413, 2414, 2950.; *Stevens Preservations LLC v. Lake County Board of Revision* (February 17, 2021), BTA Nos. 2019-2429, 2430, 2431, 2432.; *David C. Henkel & Lisa C. Henkel v. Cuyahoga County Board of Revision* (May 24, 2021), BTA No. 2020-2231 ("This Board [the BTA] has repeatedly rejected the argument that defects, not quantified by a proper appraisal, are sufficient evidence to reduce real property value."); *Stephen Egert v. Cuyahoga County Board of Revision* (May 24, 2021), BTA No. 2020-1909; *Pietro Damico v. Cuyahoga County Board of Revision* (July 12, 2021), BTA Nos. 2020-2200, 2020-2201 ("The Supreme Court has been clear that, while negative characteristics can impact value, the party must present "adequate evidence of the specific impact that [] negative factors have on the" property."); *Martin Peaspanen v. Ashtabula County Board of Revision* (July 12, 2021), BTA No. 2020-1563; *Christopher T. Cline, Margaret Ann Plahuta, Teresa Jo Gubsch v. Hocking County Board of Revision* (August 30, 2021), BTA No. 2020-1498; *Kevin & Maureen Gazdag v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2020-510; *Richard A. Marthaller v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2019-2215; *Elly Maranos v. Cuyahoga County Board of Revision* (September 29, 2021), BTA No. 2020-1419; *Roy E. Phillips v. Licking County Board of Revision* (January 3, 2022), BTA No. 2020-1655; *Michael J. Holowaty v. Geauga County Board of Revision* (April 8, 2022), BTA No. 2021-640 ("It is generally insufficient to prove property suffers from negative characteristics or defects. A party must come forward with probative evidence quantifying the effect of those characteristics or defects on value."); *Steve and Joy Veris v. Montgomery County Board of Revision* (December 7, 2022), BTA Nos. 2021-1990, 2021-1991; *Gloria J. Hill v. Hamilton County Board of Revision* (January 30, 2023), BTA No. 2021-670.

[377] See *Cuyahoga Falls City Schools Board of Education v. Summit County Board of Revision* (July 26, 2019), BTA No. 2018-1320. See also *SHFLW Properties 4, LLC v. Cuyahoga County Board of Revision* (August 14, 2019), BTA Nos. 2018-1382-2018-1497; *Mark Wright v. Clermont County Board of Revision* (January 28, 2020), BTA No. 2019-902.; *Mollie Alban v. Franklin County Board of Revision* (June 1, 2020), BTA No. 2019-1633; *Charles Shalkhauser v. Cuyahoga County Board of Revision* (June 23,

of Real Estate [13th Ed. 2008], "cost [of repairs] and value [of those repairs to the property] are not necessarily synonymous...the value of a particular component is measured in terms of its contribution to the value of the whole property…[t]he cost of an item does not necessarily equal its value."[378] In other words, fifty thousand dollars in repairs does not necessarily mean that those repairs caused a corresponding fifty thousand dollar increase in value or that the property had suffered a fifty thousand dollar decrease in value prior to the repairs. There must be evidence as to how the defects in the property impacted its value.[379] Typically, an appraisal will be required to provide that evidence.

Owner-Generated List of Comparable Sales

It is common for owners to offer evidence of purportedly "comparable sales" in the subject property's neighborhood in an attempt to show how their property has been incorrectly assessed at a higher value than other homes in the neighborhood. Information about these "comparable sales" is often compiled by the owner from government websites or real estate sources that track local sales. Such owner-selected "comparable sales" compilations have routinely been rejected by

2020), BTA No. 2019-2174; *Ronald Marthaller v. Cuyahoga County Board of Revision* (July 13, 2020), BTA No. 2019-2220; *Thunder Holdings, LLC v. Stark County Board of Revision* (October 13, 2020), BTA Nos. 2019-2405, 2406, 2407, 2408, 2409; *Pietro Damico v. Cuyahoga County Board of Revision* (July 12, 2021), BTA Nos. 2020-2200, 2020-2201; *John Wadsworth v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2019-2248; *Richard A. Marthaller v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2019-2215; *Elly Maranos v. Cuyahoga County Board of Revision* (September 29, 2021), BTA No. 2020-1419; *Chichak LLC v. Montgomery County Board of Revision* (October 20, 2021), BTA No. 2021-126.; *Mary Bolouri v. Cuyahoga County Board of Revision* (February 7, 2022), BTA no. 2021-325; *Tallmadge City Schools Board of Education v. Summit County Board of Revision* (May 3, 2022), BTA No. 2020-1620.; *Makars LLC v. Cuyahoga County Board of Revision* (October 4, 2022), BTA No. 2021-315; *Brandon King, Trustee v. Cuyahoga County Board of Revision* (April 27, 2023), BTA No. 2021-311; *William Doss v. Cuyahoga County Board of Revision* (June 6, 2023), BTA No. 2021-1734; *Catherine L. Flaughers v. Summit County Board of Revision* (August 15, 2023), BTA No. 2021-1984.

[378] *Rasem Al-Saleh v. Hamilton County Board of Revision* (January 29, 2020), BTA No. 2019-1069. See also *William J. Navratil v. Cuyahoga County Board of Revision* (June 22, 2020), BTA No. 2019-2650; *Garrison Southfield Park LLC v. Franklin County Board of Revision* (February 25, 2022), BTA No. 2019-2479.

[379] See *Gides v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No. 102649, 2015-Ohio-4385, ¶ 7 ("[t]here was no evidence or testimony submitted that established how those defects might have impacted the property value such that it warranted a***reduction. Without such evidence, the list of defects are simply variables in search of an equation."). See also *Nagler Lawrence H Trs & Jilian R Nagler Trs v. Hamilton County Board of Revision* (March 24, 2020), BTA No. 2018-1158; *Todd S. and Phyliss S. Stone v. Hamilton County Board of Revision* (May 3, 2022), BTA No. 2021-862.; *Alice M. Brown v. Cuyahoga County Board of Revision* (October 24, 2022), BTA No. 2022-701.; *Stacie J. Miller v. Hamilton County Board of Revision* (November 27, 2023), BTA No. 2022-453.

the courts and the BTA. In particular, the BTA has made clear that comparable sales must be adjusted[380] to account for differences between the subject and the comp.

> …the property owner primarily relied upon unadjusted comparable sales data. We have repeatedly held that information of this type is an insufficient basis to determine real property value because it fails to adequately consider and account for unique aspects and differences of the property under consideration and those properties to which comparison is made. [citation omitted].[381]

In other words, without adjusting the property that the owner selected as comparable to account for its differences with the subject, it is impossible to determine if the "comparable" property is, in fact, truly comparable to the subject. Those adjustments can only be made by a qualified appraiser and the failure to make them is frequently a critical defect in owner-generated "comparable" sales.

> …we do not, and have not, found unadjusted comparable sales data to be particularly helpful in our independent review. [citation omitted] With nothing more than a list of raw sales data, a trier of fact is left to speculate as to how common differences, e.g., location, size, quality of construction of improvements, nature of amenities, date of sale as opposed to tax lien date, etc., may affect a valuation determination. For example, [the owner's list of] unadjusted properties vary in size, number of bedrooms, number of bathrooms, age, condition, and location. An expert's appraisal is needed to distill these variables and apply the data to the subject.[382]

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[380] The manner in which an appraiser makes adjustments to comparable sales properties is discussed in more depth in a later chapter.

[381] See *Westerville City Schools Board of Education v. Franklin County Board of Revision* (February 5, 2019), BTA Nos. 2018-248, 2018-249. See also *Tyeisha M. Carruthers v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2021-304; *Lillie M. Kelley v. Cuyahoga County Board of Revision* (January 4, 2022), BTA No. 2020-506.

[382] See *Gloria J. Hill v. Hamilton County Board of Revision* (April 3, 2019), BTA No. 2018-1392. See also *Tammy Freer v. Cuyahoga County Board of Revision* (May 20, 2019), BTA No. 2018-804; *Virani Nazimuddin and Diane v. Lucas County Board of Revision* (December 23, 2019), BTA No. 2019-357 ("We [BTA] have repeatedly held that [raw sales data] is an insufficient basis to determine real property value because it fails to adequately to consider and to account for unique aspects and differences of the property under consideration and those properties to which comparison is made.") and *Richard W. Mann, Jr. Sole Member of Freedom Ventures III LLC v. Franklin County Board of Revision* (December 31, 2019), BTA No. 2018-1811; *Victoria Loewengart v. Delaware County Board of Revision* (August 31, 2020), BTA No. 2019-1312 ("This board has repeatedly held that unadjusted comparable sales data are insufficient basis [sic] to determine real property value."; *M A Kaplan Living Trust v. Cuyahoga County Board of Revision* (February 12, 2021), BTA No. 2019-1333; *Todd S. and Phyliss S. Stone v. Hamilton County Board of Revision* (May 3, 2022), BTA No. 2021-862.; *Carmen Figueroa, Trustee v. Ottawa County Board of Revision* (June 27, 2022), BTA No. 2020-1469; *Michael J. & Bobbie K. Sauer v. Hamilton County Board of Revision* (August 18, 2022), BTA No. 2021-1214.; *Mihai Dan Cojocaru v. Cuyahoga County Board of Revision* (December 29, 2022), BTA No. 2020-828.; *Kenneth Miliner v. Montgomery County Board of Revision* (February 7, 2023), BTA No. 2021-2835.; *Thomas Terwilliger v. Hamilton County Board of Revision* (June 29, 2023), BTA No. 2021-917; (*Frank) Xin Rao v. Franklin County Board of Revision* (October 31, 2023), BTA No. 2023-1076.

As stated by the BTA, "Raw sales data alone is not generally a substitute for a qualifying appraisal."[383] Further, the BTA has rejected an owner's argument "that one comparable sale should establish value for the subject property."[384]

Along with this, owners sometimes present evidence that homes in the same residential subdivision or in proximity to the subject property, with similar floor plans and features, have lower assessed values and pay lower taxes than the subject property. In essence, in these types of cases the owner argues that she was the victim of a type of discriminatory assessment; that because a similar neighborhood home is assessed at a lower value and paying lower property taxes, that the owner's property value should be reduced. That argument, however, has been rejected by the Ohio Supreme Court.

> A particular parcel, because of its location and the improvements thereon, may properly be given a higher value than other parcels in the same neighborhood, without discrimination resulting. After all, true value of the particular property is the controlling consideration, and this is a question of fact primarily within the province of the taxing authorities.[385]

The BTA has also routinely found that argument to be unpersuasive.

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[383] See *341 Castlewood LLC v. Montgomery County Board of Revision* (October 18, 2019), BTA Nos. 2018-987, et seq.

[384] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (June 22, 2020), BTA No. 2019-501.

[385] See *Benedict v. Hamilton County Board of Revision*, 170 Ohio St. 62 (1959). In addition, the Supreme Court has conceded that a system of perfect taxation equality is simply not humanly possible. See also *Meyer v. Board of Revision*, 58 Ohio St. 2d 328 (1979) ("The system of taxation unfortunately will always have some inequality and nonuniformity attendant with such governmental function. It seems that perfect equality in taxation would be utopian, but yet, as a practicality, unattainable. We must satisfy ourselves with a principle of reason that practical equality is the standard to be applied in these matters, and this standard is satisfied when the tax system is free of systematic and intentional departures from this principle.")); *WJJK Investments, Inc. v. Licking Cty. Bd. of Revision*, 76 Ohio St.3d 29 (1996) ("Merely showing that two parcels of property have different values without more does not establish that the tax authorities valued the properties in a different manner. ");*Nathaniel D. Osicki v. Lake County Board of Revision* (December 7, 2020), BTA No. 2020-750; *Ruth Anna Carlson v. Cuyahoga County Board of Revision* (January 5, 2021), BTA No. 2020-834 ("Additionally, the values of other properties are not reliable evidence of value for the subject."); *Ralph Cooper v. Clark County Board of Revision* (January 5, 2021), BTA No. 2020-825 ("In this matter, the property owner primarily argued that the assessed values of other properties necessitates a reduction to the subject property's value. The Supreme Court has considered, and rejected, the utility of comparing assessed values amongst parcels to determine value."); *Martin Peaspanen v. Ashtabula County Board of Revision* (July 12, 2021), BTA No. 2020-1563 ("The Supreme Court has considered, and rejected, the utility of comparing assessed values amongst parcels to determine value."); *Isam and Sherri Saleh v. Franklin County Board of Revision* (September 1, 2021), BTA Nos. 2021-177, 2021-190; *5326 Turney Road Investments, LLC v. Cuyahoga County Board of Revision* (September 1, 2021), BTA No. 2020-1028.; *Butchko, David & Yuki v. Union County Board of Revision* (November 16, 2021), BTA No. 2020-1891.; *PJ Legacy LLC v. Summit County Board of Revision* (December 9, 2022), BTA No. 2021-1945; *Brian & Rebecca Bivens v. Licking County Board of Revision* (December 16, 2022), BTA No. 2021-1713.; *Bernard Alderman v. Muskingum County Board of Revision* (December 16, 2022), BTA No. 2020-1264.; *Artab, LLC v. Belmont County Board of Revision* (December 20, 2022), BTA No. 2021-1019.; *Kenneth and Debra Sharkey v. Ottawa County Board of Revision* (January 30, 2023), BTA No. 2021-1042. *Rhonda Ghiassi v. Licking County Board of Revision* (March 6, 2023), BTA No. 2022-1368; *Robert Dougherty v. Cuyahoga County Board of Revision* (December 18, 2023), BTA No. 2023-1364.

> …the property owner presented [at the BOR] a comparison of the subject's market value with the values of other, similar homes in the neighborhood. This board [BTA] has previously rejected the utility of assessed values in establishing the fair market value of a given [the subject] property [citations omitted]. "Merely showing that two parcels of property have different values without more does not establish that the tax authorities valued the properties in a different manner."[386]

The reasoning behind that view is that tax valuations are not sales and, therefore, not determinative of fair market value. As stated by the BTA:

> The appellant [owner] has submitted a comparative analysis of the tax valuation of certain neighboring land. However, we have often stated that such information is

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[386] See *Kenneth E. Miliner, Sr. v. Montgomery County Board of Revision* (May 1, 2012), BTA Nos. 2010-Q-2712 and 2010-Q-2713. See also *WJJK Investments, Inc. v. Licking Cty. Bd. of Revision*, 76 Ohio St.3d 29, 31 (1996);*John Stehli v. Cuyahoga County Board of Revision* (May 20, 2019), BTA No. 2018-396.("Appellant also argued the fiscal officer valued surrounding properties differently [than the subject]. However, that conclusory statement is insufficient to prove the subject is overvalued. As the Ohio Supreme Court has held, "[m]erely showing that two parcels of property have different values without more does not establish that the tax authorities valued the properties in a different manner." [citation omitted]. It is possible the surrounding properties were undervalued by the fiscal officer. It is equally possible the subject is simply more valuable than other nearby properties."); *Lake Avenue Christian Church Inc. v. Clark County Board of Revision* (January 29, 2020), BTA No. 2019-1201 ("…the values of other properties are not reliable evidence of value for the subject, and a property's valuation from one tax year is not competent and probative evidence of value for another tax year."); *Kevin and Nancy Posey v. Cuyahoga County Board of Revision* (March 2, 2020), BTA No. 2019-2620 ("It is well established that the assessed values of other properties do not establish a new value for a subject property or even that the subject property was valued improperly.").; *Jeff Jones v. Allen County Board of Revision* (April 6, 2020), BTA No. 2019-1202 (The mere fact the auditor valued the subject property at one value another properties at different values does not mean the auditor valued them differently."); *Sutak William A & Joyce A Trustees v. Belmont County Board of Revision* (June 23, 2020), BTA No. 2019-1852; *Medina City Schools Board of Education v. Medina County Board of Revision* (August 31, 2020), BTA No. 2018-665; *M A Kaplan Living Trust v. Cuyahoga County Board of Revision* (February 12, 2021), BTA No. 2019-1333 ("The Supreme Court has considered, and rejected, the utility of comparing assessed values amongst parcels to determine value."); *Christopher T. Cline, Margaret Ann Plahuta, Teresa Jo Gubsch v. Hocking County Board of Revision* (August 30, 2021), BTA No. 2020-1498; *Kevin & Maureen Gazdag v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2020-510. *DIS X Investments, LLC v. Lucas County Board of Revision* (August 30, 2021), BTA No. 2020-372; *John Wadsworth v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2019-2248.; *Richard Plant Jr. & Denise Plant v. Cuyahoga County Board of Revision* (October 12, 2021), BTA No. 2020-2047.; *Mark A. Wise, Trustee and David S. Wise, Trustee v. Cuyahoga County Board of Revision* (November 8, 2021), BTA No. 2020-478.; *Butchko, David & Yuki v. Union County Board of Revision* (November 16, 2021), BTA No. 2020-1891. *David and Roxann Delaet v. Montgomery County Board of Revision* (March 3, 2022), BTA No. 2020-691; *Todd S. and Phyliss S. Stone v. Hamilton County Board of Revision* (May 3, 2022), BTA No. 2021-862; *Al Gammarino, Tr. v. Hamilton County Board of Revision* (July 6, 2022), BTA No. 2021-1221; *Roger M. McMahan v. Miami County Board of Revision* (July 7, 2022), BTA No. 2021-1458; *Phil Efler v. Summit County Board of Revision* (July 21, 2022), BTA No. 2021-1414; *Edwin L.Hoseus Jr. & Qunita M. Albonetti v. Hamilton County Board of Revision* (July 25, 2022), BTA No. 2021-1172; *Michael J. & Bobbie K. Sauer v. Hamilton County Board of Revision* (August 18, 2022), BTA No. 2021-1214; *Akron City Schools Board of Education v. Summit County Board of Revision* (September 15, 2022), BTA No. 2021-2327; *Gregory R. and Mary L. Thewes v. Summit County Board of Revision* (September 15, 2022), BTA No. 2021-1226; *Michael J. Thom v. Summit County Board of Revision* (October 11, 2022), BTA No. 2021-1324; *Esch Family Limited Partnership v. Montgomery County Board of Revision* (November 30, 2022), BTA No. 2021-2077; *South-Western City Schools Board of Education v. Franklin County Board of Revision* (January 3, 2023), BTA Nos. 2021-2038, 2021-2039; *Middletown City Schools Board of Education v. Butler County Board of Revision* (January 30, 2023), BTA No. 2021-1931; *Gloria J. Hill v. Hamilton County Board of Revision* (January 30, 2023), BTA No. 2021-670; *David R. Neubrander v. Summit County Board of Revision* (March 21, 2023), BTA No. 2021-1365; *Platinum Group Investments LLC v. Delaware County Board of Revision* (August 15, 2023), BTA No. 2021-1566; *Schall, Stewart A & Yvonne M, v. Lucas County Board of Revision* (September 7, 2023), BTA No. 2023-427.; *Alan J. and Mary E. Brailer v. Lorain County Board of Revision* (November 7, 2023), BTA No. 2023-973; *Daniel Galmarini v. Franklin County Board of Revision* (November 15, 2023), BTA No. 2023-1070; *Midland Towing and Auto Repair v. Licking County Board of Revision* (November 15, 2023), BTA No. 2023-645; *Janet Quarterman v. Cuyahoga County Board of Revision* (November 17, 2023), BTA No. 2023-1109; *Vincent Pona v. Lake County Board of Revision* (December 7, 2023), BTA No. 2022-584.

not particularly helpful. 'Tax valuations are not sales, and a comparative analysis thereof is always subject to the objection that the tax valuations of the compared properties are not themselves market value.'[387]

Further, owners sometimes argue that the property's value for the tax year in question is too high relative to the subject's value in prior tax years. This argument, too, has consistently been rejected. For example, in a case involving the subject's value for the 2018 tax year, the BTA stated:

> …we do not find the subject property's prior years' valuations to be probative evidence of the value for tax year 2018. The Supreme Court has previously held that each tax year stands alone, and the fact that value may have been different or lower in another year is not competent, credible, and probative evidence that a different year's value should be changed.[388]

It should be noted, however, that while each tax year stands alone:

The Ohio Supreme Court has explained that "[f]or purposes of collateral estoppel,

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[387] See *Benit v. Delaware County Board of Revision* (March 18, 1994), BTA No. 1993-B-722. See also *Haydu v. Portage Cty. Bd. of Revision* (June 18, 1993), BTA No. 1992-H-576 ("Tax valuations are not sales, and a comparative analysis thereof is always subject to the objection that the tax valuations of the compared properties are not themselves market value."); *Victoria Loewengart v. Delaware County Board of Revision* (August 31, 2020), BTA No. 2019-1312; *Martin Peaspanen v. Ashtabula County Board of Revision* (August 16, 2022), BTA No. 2021-1600.; *Judi Peaspanen v. Ashtabula County Board of Revision* (October 4, 2022), BTA Nos. 2021-1596, 2021-1597, 2021-1598.; *Frank) Xin Rao v. Franklin County Board of Revision* (October 31, 2023), BTA No. 2023-1076.

[388] See *Mel & Janet Hanacek v. Lorain County Board of Revision* (January 29, 2020), BTA No. 2019-1040. See also *Thaker Holdings, LLC v. Cuyahoga County Board of Revision* (April 6, 2020), BTA No. 2019-2578 ("…the prior year's valuation for one tax year is not competent and probative evidence for another tax year."); *Richard E. Jenkins v. Cuyahoga County Board of Revision* (May 27, 2020), BTA No. 2019-2791 ("A property's valuation from one tax year is not competent and probative evidence of value for another tax year."); *Ruth Anna Carlson v. Cuyahoga County Board of Revision* (January 5, 2021), BTA No. 2020-834 ("A property's valuation from one tax year is not competent and probative evidence of value for another tax year."); *Helen D. Linter, Tr v. Franklin County Board of Revision* (January 5, 2020), BTA No. 2019-328; *M A Kaplan Living Trust v. Cuyahoga County Board of Revision* (February 12, 2021), BTA No. 2019-1333; *Sutton Builders, LLC v. Cuyahoga County Board of Revision* (March 16, 2021), BTA No. 2019-1987; *22301 Rockside Road, LLC v. Cuyahoga County Board of Revision* (May 25, 2021), BTA No. 2020-1154 ("The Ohio Supreme Court has consistently rejected the argument that a property's valuation from one tax year, resulting from either an agreement among the affected parties or a finding by a tribunal, is competent and probative evidence of value for another tax year.")'; *Martin Peaspanen v. Ashtabula County Board of Revision* (July 12, 2021), BTA No. 2020-1563; *Deborah A. Capretta and Richard A. Capretta v. Cuyahoga County Board of Revision* (July 20, 2021), BTA No. 2019-1291; *Kevin & Maureen Gazdag v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2020-510; *5326 Turney Road Investments, LLC v. Cuyahoga County Board of Revision* (September 1, 2021), BTA No. 2020-1028.; *Richard Plant Jr. & Denise Plant v. Cuyahoga County Board of Revision* (October 12, 2021), BTA No. 2020-2047; *Sandra Lewis v. Summit County Board of Revision* (May 16, 2022), BTA No. 2021-1446; *Carmen Figueroa, Trustee v. Ottawa County Board of Revision* (June 27, 2022), BTA No. 2020-1469. *Phil Efler v. Summit County Board of Revision* (July 21, 2022), BTA No. 2021-1414; *PJ Legacy LLC v. Summit County Board of Revision* (December 9, 2022), BTA No. 2021-1945; *Mihai Dan Cojocaru v. Cuyahoga County Board of Revision* (December 29, 2022), BTA No. 2020-828; *Victoria Wainwright v. Cuyahoga County Board of Revision* (February 6, 2023), BTA No. 2022-132; *David R. Neubrander v. Summit County Board of Revision* (March 21, 2023), BTA No. 2021-1365; *Jennifer Radin and Brandon Glenn v. Cuyahoga County Board of Revision* (August 7, 2023), BTA No. 2022-1588.; *Fred Azar v. Summit County Board of Revision* (September 18, 2023), BTA No. 2021-1319.; *Vincent Pona v. Lake County Board of Revision* (December 7, 2023), BTA No. 2022-584; *Herbert F. Renau v. Cuyahoga County Board of Revision* (December 8, 2023), BTA No. 2022-504.

> the ultimate issue of tax value in one tax years does not constitute the 'same issue' as the ultimate issue of tax value in a different year * * * But the determination in an earlier year of a discrete factual/legal issue that is common to successive tax years may bar relitigation of that discrete issue in the later years."[389]

The BTA has also rejected valuations based upon historical trends or the general rate of inflation. "…this board has consistently rejected the notion that real property values must necessarily rise or fall commensurate with some preconceived notion of "historical trending" or inflationary/deflationary rates."[390]

Evidence from Online Appraisal Sites

In support of lowering their valuations, property owners sometimes use online sites like "Zillow" - which lists pricing information and estimates of value of properties– to show how the subject property has been overvalued by the auditor. The BTA has made clear that estimates of value taken from such online sites are considered unreliable.

> This board has previously found the use of "eppraisals" from "Zillow.com," or other similar sites, to be unreliable, and therefore, such a report is not a relevant consideration in establishing the true value of subject as of the tax lien date at issue.[391]

The BTA has found that information from those sites is unreliable because it does not have a sufficient evidentiary foundation.[392] In particular, the BTA has criticized the use of information from online sites due to its uncertain sources and appraisal methodologies.

> Not only must we [the BTA] speculate as to the data which appellant input into the website to derive an estimate, but we have no information as to the date for which the estimate is offered, the methodologies which may have been employed in developing the estimate, what steps, if any, were taken to ensure the accuracy of

[389] See *Care for All, LLC v. Cuyahoga County Board of Revision* (August 1, 2022), BTA No. 2020-832.

[390] See *Mr. Stephen Bartolo v. Highland County Board of Revision* (June 29, 2020), BTA Nos. 2019-1226, 2019-1228. See also *Dora Burnett v. Cuyahoga County Board of Revision* (July 6, 2021), BTA No. 2019-2477; *Kevin & Maureen Gazdag v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2020-510; .; *Butchko, David & Yuki v. Union County Board of Revision* (November 16, 2021), BTA No. 2020-1891.; *Jaytree LLC v. Clermont County Board of Revision* (October 11, 2022), BTA No. 2022-23.

[391] See *James A. Gambert v. Fairfield County Board of Revision* (October 2, 2013), BTA No. 2012-2185.

[392] See *Roger D. Steed v. Clark County Board of Revision* (December 20, 2011), BTA No. 2009-972 ("… appellant relies upon a single-page printout from 'Zillow.com,' apparently an Internet web site intended to assist individuals in estimating the value of their property. However, we find this information to be comparable to an appraisal for which insufficient foundation has been laid.").

> market data relied upon, or the education, experience, and qualifications of the person(s) developing this appraisal tool. Accordingly, we accord this information, inadmissible hearsay pursuant to Evid.R. 802, no weight.[393]

Realtor-Generated Comparable Sales

In seeking a reduction in a property's valuation, owners sometimes present the testimony of a real estate broker at the BOR either through live testimony, a broker's written opinion of value, a broker-researched list of comparable sales, or a combination of the above. This broker-based opinion evidence has also been found insufficient by the BTA.

> At the outset, we note that this board does not accord the weight to a realtor's opinion of value as we would a qualifying appraisal of the subject property. This board has rejected opinions from other realtors because while they may have extensive training in their field and develop some appraisal expertise, as a group, real estate sales people "typically do not consider all the factors that professional appraisers do."[394]

Further, the BTA has rejected broker-generated opinion evidence even where the broker owns the subject property and is qualified, *as an owner*, to offer an owner's opinion of value.

> …we acknowledge the owner's status as a licensed real estate broker; however, we are also mindful that [the owner] is not a licensed real estate appraiser, trained to opine real property values…Therefore, even though there is no doubt that [the broker], as an owner, is competent to give an opinion of value, we do not recognize her as an expert appraisal witness. Moreover, while we acknowledge her many years of experience in the real estate industry (as testified to before the BOR), we nevertheless find that an insufficient foundation was laid with regard to [the owner's] knowledge and experience in appraisal methods and the derivation of true value for a particular piece of real property; consequently, we assign no probative weight to her opinion of value.[395]

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[393] See *John T. Cors v. Montgomery County Board of Revision* (January 25, 2008), BTA No. 2006-K-2295.

[394] See *Gregory P. Dingess v. Licking County Board of Revision* (April 2, 2019), BTA No. 2018-1149. See also *Richard W. Mann, Jr. Sole Member of Freedom Ventures III LLC v. Franklin County Board of Revision* (December 31, 2019), BTA No. 2018-1811; *Christopher Broyles v. Medina County Board of Revision* (January 7, 2020), BTA No. 2019-763; *Nagler Lawrence H Trs & Jilian R Nagler Trs v. Hamilton County Board of Revision* (March 24, 2020), BTA No. 2018-1158; *Lori D. Gogolin v. Lake County Board of Revision* (June 15, 2020), BTA No. 2019-1720.

[395] See *Friedman v. Cuyahoga County BOR* (January 19, 2017), BTA No. 2016-483.

Given their lack of training and licensing in appraisal techniques, a real estate broker's value opinion is typically rejected by the BTA.[396]

Shifting Burdens of Proof at BOR Hearings

Earlier in this chapter we discussed that the complainant bears the burden of proof during the course of a BOR hearing. That remains true. The opponent of the complainant's claim is under no duty at the BOR to oppose that claim and bears no burden to disprove that claim or to prove anything. The opponent may elect not to appear at the BOR or, once there, may choose to figuratively sit on its hands and hope that the complainant is unable to present a *prima facie* (facially sufficient) case. That is the opponent's right. Indeed, the Supreme Court has made clear that "The burden is on the taxpayer to prove his right to a deduction [reduction in value]. He is not entitled to the deduction claimed merely because no evidence is adduced contra his claim."[397]

[396] See *341 Castlewood LLC v. Montgomery County Board of Revision* (October 18, 2019), BTA Nos. 2018-987, 1339, 1341, 1343, 1344, 1345, 1351, 1352, 1353, 1355, 1356, 1357, 1359, 1362, 1445, 1446, 9898, 990 ("As we have noted before, "real estate salespeople are licensed to sell real estate. They have training in their field but may or may not have extensive appraisal experience." Id. (quoting The Appraisal of Real Estate (13th Ed.2008)). We have also said, "salespeople evaluate specific properties, but they do not typically consider all the factors that professional appraisers do."). See also, *Virani Nazimuddin and Diane v. Lucas County Board of Revision* (December 23, 2019), BTA No. 2019-357 ("…this board [BTA] typically has rejected opinions from realtors because, while they may have extensive training in their field and develop some appraisal expertise, as a group, real estate sales people 'typically do not consider all the factors that professional appraisers do.'");*Zaher Helmi v. Montgomery County Board of Revision* (June 29, 2020), BTA No. 2019-1297; *Victoria Loewengart v. Delaware County Board of Revision* (August 31, 2020), BTA No. 2019-1312 ("…we find Ms. Heatherington's testimony about comparable sales or the real-estate market to be equally unpersuasive…she was a real estate agent, not an appraiser, an individual with the education, experience, and expertise to express an opinion regarding the value of real property….We acknowledge that Ms. Heatherington may be a qualified real estate agent, but we do not find her testimony, based upon such experience, qualified her to offer a competent, credible, and probative opinion on the subject property's value for tax valuation purposes."); *Zeus Shopping Center v/ Champaign County Board of Revision* (May 24, 2021), BTA No. 2020-963 ("…, this Board has long held that salespersons are not appraisers meaning they "may or may not have extensive appraisal experience."); *John Wadsworth v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2019-2248.; *Roy E. Phillips v. Licking County Board of Revision* (January 3, 2022), BTA No. 2020-1655; *Carmen Figueroa, Trustee v. Ottawa County Board of Revision* (June 27, 2022), BTA No. 2020-1469; *Bernard Alderman v. Muskingum County Board of Revision* (December 16, 2022), BTA No. 2020-1264; *Dalton G. Bixler 2016 Trust v. Tuscarawas County Board of Revision* (January 4, 2023), BTA Nos. 2020-1612, 2019-1553, 2020-1613; *Gloria J. Hill v. Hamilton County Board of Revision* (January 30, 2023), BTA No. 2021-670; *KO Properties and Investments Inc. v. Stark County Board of Revision* (March 20, 2023), BTA No. 2022-1005; *Linas Macikenas v. Cuyahoga County Board of Revision* (August 2, 2023), BTA Nos. 2023-196, 2023-198, 2023-199, 2023-200;; *Stepanie English and Michael English v. Cuyahoga County Board of Revision* (August 10, 2023), BTA No. 2023-495.

[397] See *Western Industries, Inc. v. Hamilton County Board of Revision*, 170 Ohio St. 340 (1960). See also *Vernon Ridge 2 Limited Part. And Board of Education of the Mt. Vernon City Schools v. Knox County Board of Revision* (January 29, 2013), BTA Nos. 2009-Y-2789 and 2009-Y-2869 ("We acknowledge a party is not entitled to the value it proposes merely because it is the only one to present evidence [citation omitted]. Indeed, an opposing party need not present any evidence in order to be successful on appeal.").

However, as discussed above, "Once the existence of a sale is established, a 'sale price is deemed to be the value of the property.'"[398] Accordingly, *if* the complainant presents a facially sufficient case at the BOR *and if* the opponent seeks to challenge the value sought by the complainant – both of which are frequently the case - *then* the opponent takes on a burden of its own and must present evidence to rebut the *prima facie* case established by the complainant. In that sense, *and under those circumstances*, the burden then shifts to the opponent. If the opponent rebuts the complainant's *prima facie* case, then the burden shifts back to the complainant to rebut the opponent's rebuttal. Through all of this, however, the complainant retains the ultimate burden of proving the increase or decrease it originally sought in the complaint. If the complainant fails to do that, it loses its case.

As stated by the Supreme Court:

> Ordinarily… "[t]he initial burden on a party presenting evidence of a sale is not a heavy one, where the sale on its face appears to be recent and at arm's length." ... Once evidence of a sale has been presented, the burden then falls on a party opposing the sale price to rebut the sale's recency or its arm's-length character…. In short, a sale price is accepted as a property's value unless the opponent of the price can establish that there is "reason to disregard the sale price as an indicator of value."[399]

The BTA has explained these shifting burdens of proof as follows:

> Once an owner triggers this rebuttable presumption that a sale met all the requirements that characterize true value by presenting unchallenged evidence of sale, however, an opposing party may[400] rebut the utility of the sale by showing that it was not an arm's-length transaction…Once this is done, the burden again shifts to the owner to satisfy a 'heavier burden' to show that 'the sale was nevertheless an arm's-length transaction between typically motivated parties and should therefore be regarded as the best evidence of the property's value.'[401]

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[398] See *Icon Owner Pool 3 Midwest/Southeast, LLC v. Franklin County Board of Revision (September 8,* 2017), BTA Nos. 2016-1362 1363, 1364.

[399] See *Olentangy Local Schools Board of Education v. Delaware County Board of Revision*, 141 Ohio St.3d 243, 2014-Ohio-4723, ¶ 42.

[400] It is important to note here that the BTA used the word "may" instead of "must" or "shall". This makes clear that while the complainant has a mandatory duty to present evidence, the opponent has the option ("may") but not the duty ("must") to "rebut the utility of the sale."

[401] See *Gahanna-Jefferson City Schools Board of Education v. Franklin County Board of Revision* (September 1, 2017), BTA No. 2016-2206.

Thus, where the opponent seeks to challenge the complainant's claim, the burden "shifts" to the opponent to rebut the complainant's evidence. In all contexts, however, in order to prevail at the BOR the complainant must ultimately prove its right to a new valuation[402]. This will be demonstrated by the complainant either in its initial presentation of evidence (its "case-in-chief") or, if the opponent rebuts that initial evidence, on the complainant's sur-rebuttal case (the complainant's rebuttal to the opponent's rebuttal).

Where the Sale, on its Face, Appears to Be Voluntary and at Arm's Length

In practice, then, in those cases where there does not appear to be a facially forced or involuntary sale, the shifting burdens play out as follows:

STEP 1: PROPONENT'S INITIAL BURDEN – The complainant has the initial burden to show a sale that is both arm's length and recent.
PRESUMPTION: Once the sale is established, the sale price is then presumed to be the value of the property, subject to rebuttal.[403]

STEP 2: OPPONENT'S BURDEN - *If* the complainant has made the above showing, and *if* the opponent wishes to contest the validity of the sale as evidence of value, *then* the opponent has the burden to show that the sale was either not recent or not arm's length. If the opponent fails to do this, then the complainant will likely prevail.

STEP 3: PROPONENT'S SECOND BURDEN – If, however, the opponent rebuts the complainant's evidence then the burden shifts back to the complainant who then has a heavier burden to overcome the opponent's rebuttal evidence which showed the sale was either (1) not arm's length, (2) not made between a willing buyer and seller, or (3) not made within a reasonable time of the tax lien date. If the complainant can overcome the opponent's rebuttal evidence, then the complainant will likely prevail. If the complainant is unable to overcome the opponent's rebuttal evidence, then the opponent will likely prevail.

[402] See *William S. Johnson v. Clark County Board of Revision*, 2nd Dist. Clark C.A. Case No. 2016-CA-13, 2016-Ohio-7518, ¶ 13 ("When a party seeks an increase or decrease in valuation of property, that party bears the burden of proving that proposed value to the board of revision...").

[403] *Icon Owner Pool 3 Midwest/Southeast, LLC v. Franklin County Board of Revision* (September 8, 2017), BTA Nos. 2016-1362, 1363, 1364.

This back and forth of shifting burdens has sometimes been analogized to a game of tennis. As one court put it in the context of a government-initiated case, "Conceptually, this shifting of the burdens…conjures up images of a tennis match, where the government serves up its *prima facie* case, the defendant returns with evidence undermining the government's case, and then the government must respond to win the point."[404] Diagrammatically, the shifting burdens of proof look something like this:

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[404] See *F.T.C. v. University Health, Inc.*, 938 F.2d 1206 (5th Cir. 1991), n. 25.

WHERE THERE IS NO EVIDENCE OF INVOLUNTARINESS

BURDEN OF PROOF ON COMPLAINANT	BURDEN OF PROOF ON OPPONENT (ASSUMING IT WISHES TO OPPOSE)
STEP 1 Has initial light burden[405] to show that sale (1) is arm's length, (2) between a willing buyer and seller neither of whom are under duress, and (3) was made within a reasonable period of time to the tax lien date. ("Three Elements")	
	STEP 2 (Rebuttal) Once the complainant's initial burden was met, the opponent must negate one or more of the Three Elements that the proponent has shown.
STEP 3 (Surrebuttal) If the opponent negates one or more of the Three Elements, then the complainant has a heavier burden to overcome the opponent's evidence which showed the sale was either (1) not arm's length, (2) not made between a willing buyer and seller, or (3) not made within a reasonable time of the tax lien date. If the complainant does that, then it is likely to prevail.	

[405] See *Lunn v. Lorain County Board of Revision*, 149 Ohio St.3d 137, 2016-Ohio-8075, ¶¶ 15 - 16 where the Supreme Court elaborated on the complainant's light *initial* burden where the complainant asserts that a sale price should be used instead of the Auditor's valuation and where, on its face, there is no evidence of duress or involuntariness of the sale. As explained by the Court, in those circumstances the burden on the complainant is so light that the complainant can establish a facially sufficient case by submitting to the BOR only "…a parcel report from the auditor's website, a conveyance-fee statement, a partial settlement statement, a partial limited warranty deed, a partial purchase agreement, and documents relating to the listing of the property…" and is not even required to personally appear.

SAMPLE HEARING TRANSCRIPT WHERE BOARD OF EDUCATION IS COMPLAINANT AND BEARS INITIAL BURDEN OF PROOF

BOR: 16-176
PARCEL NUMBER: 0450379320
OWNER: Realty Income Properties, LLC
ADDRESS: 2644 Taylor Road
CURRENT VALUE: $2,280,630
ASKING VALUE: $4,328,320

- - -

BOARD MEMBERS: Jon Slater, Ann Hammond, Sharlene Bails

- - -

PRESENT: Tess Tannehill, Esq.

- - -

MR. DOLIN: We're back on the record on BOR Case 16-176. This is an original complaint filed by the Pickerington Local School District Board of Education. The property owner is listed as Realty Income Properties, LLC. This complaint concerns parcel 0450379320 with a property address of 2644 Taylor Road.

No countercomplaint has been filed in this case. Counsel for the school board is here, if you'd put your appearance on, please.

MS. TANNEHILL: Tess Tannehill from the law firm of Bricker & Eckler here today on behalf of the Pickerington Local School District.

MR. DOLIN: Our records indicate that service was made on the property owner.

Is that correct, Mr. Harper?

MR. HARPER: Yes.

MR. DOLIN: So with that said, we have marked as Exhibit Number 1 and we'll introduce as Exhibit Number 1 the complaint and the attachments thereto that was filed by the board of ed in this case.

Ms. Tannehill, you're not a witness, obviously, but if you have a statement you wish to make, go ahead.

MS. TANNEHILL: Thank you. The Pickerington Local School District filed an original complaint in this case seeking an increase in value based on a June 2014 sale. Attached to the board of ed's original complaint is the property record card for the parcel that was subject to that sale. That property record card evidences a transfer in June of 2014 from KJMB Group, LLC to Realty Income Properties, LLC for $4,328,319.

Also I have here today, and I will provide a copy, a certified copy for purposes of the record, the conveyance fee statement relating to that transfer. On line two of that

conveyance fee statement it shows that the property was transferred to Realty Income Properties 9, LLC. The conveyance fee statement was signed at the bottom by the grantee or its representative under penalties of perjury, indicating that the property was sold in June 2014. The conveyance fee was paid to the county on the full purchase price.

I should also note that the conveyance fee statement allows the property owner the opportunity to allocate some portion of the total purchase price to items other than real estate. On line 7E no portion of the $4,328,319 purchase price was allocated to items other than real estate.

So I'd like to go ahead and enter this into evidence.

MR. DOLIN: That will be entered, as Exhibit Number 2, in evidence.

MS. TANNEHILL: And as this board is well aware, once a party comes before the board with basic evidence of a recent arm's length sale, that sale price is deemed to be the best evidence of the property's value. It's the

burden upon the opponent of any such sale to come before the board with competent and probative evidence that would either negate the recency or the arm's length character of the sale.

In this case the property owner received notice, as I understand it, of the original complaint that was filed. The property owner also received notice that the hearing was taking place today and neither filed a countercomplaint nor elected to attend this hearing today, and so there's absolutely no evidence in the record that could rebut the recency or the arm's length character of this sale.

As a result of that I would ask that the board issue a decision granting the increase to the parcel subject to this complaint to the full purchase price of $4,328 -- and we rounded up here one dollar -- $320 there.

MR. DOLIN: Unless the board has any questions for Ms. Tannehill?

Off the record for a moment.

(Discussion off the record.)

MR. DOLIN: We will go straight to a

decision in this matter.

Is there a motion by any member of the board?

MR. SLATER: I'll make a motion that we grant the complaint and set the auditor's value in this case to the sale price of $4,328,320.

MR. DOLIN: Is there a second?

MS. HAMMOND: Second.

MR. DOLIN: There's a motion and a second.

Is there any discussion?

Seeing no discussion, all in favor of the motion to change the -- to grant the complaint signify by saying aye.

(All say aye.)

MR. DOLIN: Motion carries unanimously. Value to be reset at $4,328,320. That concludes this matter.

(Recess taken.)

SAMPLE HEARING TRANSCRIPT WHERE OWNER IS COMPLAINANT AND BEARS INITIAL BURDEN OF PROOF

BOR: 16-134
PARCEL NUMBER: 0460132500
OWNER: Jonathan M. OWNER
ADDRESS: 3132 Maple Avenue NE
CURRENT VALUE: $429,310
COMPLAINANT VALUE: $350,000

BOARD MEMBERS: Jon Slater, Michael Kaper, Christine Foster

PRESENT: Tess Tannehill, Esq., John Mashburn, Esq.
OWNER

MR. DOLIN: Back on the record on BOR Case 16-134. This is an original complaint filed by property owner Jonathan M. OWNER concerning parcel 0460132500 with a property address of 3132 Maple Avenue, Millersport, Ohio.

A countercomplaint has been filed by the Walnut Township Local District Board of Education. The school district's counsel is here, if you'd put your appearance on.

MS. TANNEHILL: Tess Tannehill for the Walnut Township Schools from the law firm of Bricker & Eckler.

MR. DOLIN: And counsel for the owner.

MR. MASHBURN: John Mashburn, Supreme Court Number 0020560, 518 Main Street,

Groveport, Ohio 43125.

MR. DOLIN: We've marked as Exhibit Number 1 the complaint and the attachments thereto. And we've marked as Exhibit Number 2 the countercomplaint. Unless there's any objection, we'll put both of those into evidence.

Without objection, both will be received in evidence.

At this time let's swear the witness in.

OWNER

duly sworn by the court reporter/notary public.

MR. DOLIN: Sir, if you'd state your name and your address, please.

MR. OWNER: OWNER,

[ADDRESS IDENTIFIED]

MR. DOLIN: You're the owner of that parcel?

MR. OWNER: That's correct.

MR. DOLIN: Do you know it by yourself or with somebody?

MR. OWNER: By myself.

MR. DOLIN: Am I correct, Mr. OWNER, that you seek to reduce the auditor's valuation

in this case down to $350,000?

MR. OWNER: That is correct.

MR. DOLIN: And is that based upon the sale of the home?

MR. OWNER: The purchase price, yes.

MR. DOLIN: And when did you buy the property? Was it on or about December 21 of 2015?

MR. OWNER: 2015. That is correct.

MR. DOLIN: Am I correct that you purchased the property from a woman named [SELLER'S NAME]?

MR. OWNER: Yes.

MR. DOLIN: Did you have any prior connection with her in any manner?

MR. OWNER: No. This was an arm's length transaction.

MR. DOLIN: How did you hear that this parcel was available for sale?

MR. OWNER: It was listed through -- it was on the market for close to 350 days, and I had -- I had viewed the property

several times, and we had several correspondence, but then ultimately we agreed on the purchase price of it.

MR. DOLIN: When you say you viewed the property, you physically entered the property, went into it?

MR. OWNER: Yes.

MR. DOLIN: Was it listed on the MLS?

MR. OWNER: It was.

MR. DOLIN: Was it also on the Internet? Is that where you saw it?

MR. OWNER: Yes.

MR. DOLIN: Okay. Did you have a broker?

MR. OWNER: No. I worked with her real estate agent, but I did not have a broker.

MR. DOLIN: And you ultimately wound up buying it for $350,000. Do you recall what your first offer was? Do you recall what it was listed for?

MR. OWNER: She originally had it listed at 450, and it was based on, I believe, a previous sale and this was during the

time -- well, after the lake announcement, and then during that course, I think she pulled it off the market, then relisted it for 430, and it -- there were no offers during that time as well.

MR. DOLIN: Okay. Do you recall about how much time elapsed from the time that you first contacted her to the time that you -- that she accepted your offer?

MR. OWNER: Three and a half months.

MR. DOLIN: Three and a half months?

MR. OWNER: Yes.

MR. DOLIN: Do you recall what your first offer was?

MR. OWNER: I think 320 was my first -- was the original offer.

MR. DOLIN: Okay. Do you recall if there were any other bidders?

MR. OWNER: No, there was not.

MR. DOLIN: There were no other bidders?

MR. OWNER: No other bidders, no.

MR. DOLIN: So basically a negotiation

between you and her?

MR. OWNER: Yes.

MR. DOLIN: Since you purchased it -- I'm just looking at the photograph. The house appears to be in good condition. Have you made any changes or upgrades to the home?

MR. OWNER: Exterior, just minor. We had to change -- there was a front door we had to do seawall repair. The front was -- the front was just actually a front door, and then we added sliding glass doors in the front upstairs, downstairs. And inside not -- not -- there was some mechanical issues that we had to address, but nothing major or structural.

MR. DOLIN: Okay. So this house is on [LOCATION IDENTIFIED], correct?

MR. OWNER: Yes, it's [LOCATION].

MR. DOLIN: When you say the front of the house, are you talking about the side of the house that faces the [LOCATION]?

MR. OWNER: That's correct. That's what you're seeing there.

MR. DOLIN: What we're looking at in the

photograph is the front of the house, correct?

MR. OWNER: That's correct.

MR. DOLIN: Looking at it from the [LOCATION], correct?

MR. OWNER: Yes.

MR. DOLIN: So this was taken from the []?

MR. OWNER: Yes.

MR. DOLIN: Ms. Tannehill.

MS. TANNEHILL: You mentioned just a few repairs that you made after you bought the property. About when would you say you made those repairs?

MR. OWNER: They were done in March of '16 because she -- part of the agreement was she requested 90 days of occupancy.

MS. TANNEHILL: So when you moved in in March 2016, you started addressing these issues on the property?

MR. OWNER: Yes, I did.

MS. TANNEHILL: So around March '16 is when you would have done the [REPAIR DESCRIPTION]?

MR. OWNER: Yes.

MS. TANNEHILL: And when you would have added the sliding glass doors on two floors?

MR. OWNER: Yes. That would have come later in the summer.

MS. TANNEHILL: Okay. And then the mechanical issues, would those have also been addressed in March of 2016?

MR. OWNER: Yes.

MS. TANNEHILL: And what would you say your estimate of the cost of those improvements were to the property?

MR. OWNER: Probably around 12,000.

MS. TANNEHILL: And at the time that you bought the property in December 2015 any indication that the seller was selling the property because she was in bankruptcy at the time of the sale?

MR. OWNER: No.

MS. TANNEHILL: Any indication that this was sold or court ordered receivership?

MR. OWNER: No.

MS. TANNEHILL: Or any kind of foreclosure by the lender for the prior owner?

MR. OWNER: No.

MS. TANNEHILL: I don't have any additional questions for Mr. OWNER, but I just ask the board to consider that within a couple of months after the tax lien date there appeared to be about $12,000 in terms of cost of improvements made to the property, and to the extent that the board wishes to consider that in determining the value today, I would encourage the board to do that. Thanks.

MR. DOLIN: Any questions from the board?

MR. KAPER: Did I see somewhere where you said the purchase price included some personal property?

MR. OWNER: That's correct.

MR. KAPER: What was that?

MR. OWNER: They had a boat lift that was there that she was going to move so that was part of the -- there was some furniture inside that she came up with a value on and the -- the home had a generator which was another -- which I said that, you know, since it already existed, it should stay with the

property.

MR. KAPER: Okay.

MR. OWNER: So items along that line, they were factored into this price as well.

MR. KAPER: Gotcha. All right. That's all I have.

MR. DOLIN: Okay. Thank you. That will conclude the evidence in this matter. You'll be notified within 30 days and after that have the right to appeal to the Common Pleas Court or the Board of Tax Appeals. Thanks very much.

MR. OWNER: Thank you.

(Discussion off the record.)

MR. DOLIN: Back on the record on BOR Case 16-134. This matter's on for decision concerning parcel 0460132500. The property owner's name is listed as OWNER concerning [LOCATION].

Is there a motion by any member of the board?

MR. KAPER: I'll make a motion that the value of the property be reduced to $350,000 based on the arm's length transaction.

MS. FOSTER: I second that.

MR. DOLIN: There's a motion and a second.

Any discussion?

MR. SLATER: Testimony from the owner that it was a negotiated sale, there was an open market exposure, and no relationship between the parties. I think it met the arm's length test and as such best indicator of value for ad valorem taxation.

MR. DOLIN: Seeing no further discussion, all in favor of the motion signify by saying eye.

(All say aye.)

MR. DOLIN: Motion carries unanimously. Value to be reset at $350,000. That concludes this matter.

(Recess taken.)

CHAPTER 7
UNDERSTANDING WHAT CONSTITUTES AN "ARM'S LENGTH SALE"

CHAPTER SUMMARY

- In establishing the true value of a parcel, R.C. 5713.03 states that the sales price for the parcel may be considered as evidence of value if it was an arm's length transaction that occurred within a reasonable period of time either before or after the tax lien date.

- R.C. 5713.04 states that auctions and forced sales are presumptively invalid as evidence of a voluntary sale.

- An arm's length sale is one that is voluntary (i.e., without compulsion or duress) and generally takes place in an open market between typically motivated parties who act in their own self-interest.

- The particular facts and circumstances of each sale will ultimately control the determination as to whether the sale is arm's length.

- In determining whether a sale is arm's length, the BOR should look at the totality of the evidence for proof of voluntariness and should avoid focusing on any singular aspect of the transaction.

- The presumption of invalidity that attaches to auctions or forced sales can be rebutted by evidence that shows that a particular sale was, in fact, voluntary and occurred at arm's length between typically motivated participants.

- Several types of sales are presumed to be involuntary, and therefore, not arm's length. Those include foreclosure sales, bank sales, sheriff's sales, "short" sales, receivership sales, bankruptcy sales, HUD sales, and VA sales. With the possible exception of sheriff's sales, the presumption of invalidity can be rebutted in each of those cases with evidence of voluntariness.

The determination of whether a sale is arm's length is a critical component in establishing, or challenging, a property's valuation. Two statutes – R.C 5713.03 and 5713.04 – establish the framework and the primary criteria through which the Auditor establishes a property's true value. R.C. 5713.03 reads, in applicable part, that:

> In determining the true value of any tract, lot, or parcel of real estate … if such … has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor may consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes…

On the other hand, R.C. 5713.04 makes clear that there are certain types of sales that presumptively *cannot* be used to determine a property's true value. Under that statute, "The price for which such real property would sell at **auction** or **forced sale** shall not be taken as the criterion of its value" and auction sales are presumptively invalid.[406] As stated by the Supreme Court:

> A "forced sale" is a "hurried sale by a debtor because of financial hardship or a creditor's action."…We have indicated that a sale does not establish a property's value when it "occurs under the compulsion that the property be liquidated for the benefit of creditors," … and "[a] sale conducted under duress is characterized by 'compelling business circumstances * * * clearly sufficient to establish that a recent sale of property was neither arm's-length in nature nor representative of true value,'[407]

According to the Court "The reference to 'forced sale' in [R.C. 5713.04] codifies the basic proposition that a sale must be voluntary from the standpoint of both seller and buyer in order to qualify as an arm's-length transaction."[408] These two statutes, then, work in tandem and make clear that in order to properly decide valuation complaints the BOR must have a clear understanding both of what it *can* consider (an arm's length sale under R.C. 5713.03) and what it *cannot* consider (an auction or forced sale under R.C. 5713.04 - unless rebutted with evidence of voluntariness).[409]

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[406] See *PVT Investments LLC v. Montgomery County Board of Revision* (October 28, 2022), BTA No. 2021-181.

[407] See *Warrensville Hts. City School Dist. Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 145 Ohio St.3d 115, 2016-Ohio-78, ¶ 22.

[408] See *Cincinnati School District Board of Education v. Hamilton County Board of Revision*, 127 Ohio St.3d 63, 67, 2010-Ohio-4907, ¶ 19.

[409] In appropriate cases, of course, and in particular when there is the absence of a sale, the BOR may also consider proper appraisal testimony.

What is an Arm's Length Sale?

While R.C. 5713.03 itself does not provide any guidance as to the meaning of "arm's length sale," Ohio's courts and the BTA have. "It is well established that an arm's-length sale is one that is voluntary, that is, 'without compulsion or duress.'"[410] The Supreme Court has clarified that:

> An arm's-length sale is characterized by these elements: it is voluntary, *i.e.*, without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest.[411]

As further explained by the Court of Appeals:

> A sale is considered at arm's length if buyer and seller are typically motivated market participants."… A "typically motivated" transaction is one in which the buyer and seller are "pursuing their own financial interests."[412]

In determining whether a sale is arm's length, the elements of an arm's length sale – sold and bought without compulsion or duress in an open market, and in each party's self-interest - are not applied in a mechanical manner. Rather, the Court has declared that the particular facts and circumstances of each sale will ultimately control the determination as to whether a sale is arm's length. According to the Court, "…the ultimate character of a sale as voluntary or involuntary is a factual matter to be resolved by the finder of fact based on the entire record before it."[413]

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[410] See *Columbus City School District Board of Education v. Franklin County Board of Revision*, 134 Ohio St.3d 529, 2012-Ohio-5680, ¶ 28.

[411] See *Walters v. Knox Cty. Bd. of Revision*, 47 Ohio St.3d 23 (1989), syllabus. See also *Victoria Loewengart v. Delaware County Board of Revision* (August 31, 2020), BTA No. 2019-1312; *Windsor Tower LLC v. Montgomery County Board of Revision* (August 31, 2021), BTA No. 2019-2166.; *Davenport 2138 LLC v. Cuyahoga County Board of Revision* (December 30, 2022), BTA No. 2020-2133.; North Royalton City School District Board of Education v. Cuyahoga County Board of Revision, 129 Ohio St.3d 172, 2011-Ohio-3092, N.E.2d 955, quoting *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 112 Ohio St.3d 309, 2007 Ohio 6, 859 N.E.2d 540, ¶ 13; *Rightway Real Estate, LLC v. Cuyahoga County Board of Revision* (September 19, 2023), BTA No. 2021-679.

[412] See *NDHMD, Inc. v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga Nos. 101207 and 101300, 2015-Ohio-174, ¶ 25.

[413] See *Columbus City School District Board of Education v. Franklin County Board of Revision*, 134 Ohio St.3d 529, 536, 2012-Ohio-5680, ¶ 31. See, for example, *Plain Local Schools Board of Education v. Stark County Board of Revision* (August 30, 2021), BTA No. 2020-1888, where the BTA found that although there was testimony that there were bidders at the auction other than the winning bidder, there was insufficient probative and credible evidence of value because the sale was through an absolute auction and "…the record is void of any information about the bidding process…[or] any information about the marketing and minimum bid at the absolute auction, as well as any information that would establish that the sale price reflected the subject properties' values despite resulting from an absolute auction.").

Thus, despite the language of R.C. 5713.04 which prohibits the use of real estate prices obtained through auction or forced sale to establish a property's value:

> The [Supreme] court has held that R.C. 5713.04, which provides that "[t]he price for which such real property would sell at auction or forced sale shall not be taken as the criterion of its value," is not an absolute bar, but rather the codification of a rebuttable presumption that forced sales and auctions are not at arm's length.[414]

Consequently, there have been a number of cases where the property has been auctioned or sold at a "forced" sale but where the sales prices obtained from those transactions have, nonetheless, been found to be arm's length and have served to establish the property's true value.

What is "Duress"?

At the BOR, owners sometimes claim they overpaid for a property because the sale was made under duress and, therefore, the sales price should not be considered the property's true value. By definition, a duress sale is not arm's length and in its valuation determinations it is critically important that the BOR understand what does and does not constitute "duress." Unfortunately for those who seek the comfort of general rules, real property is sold under a virtually limitless variety of factual circumstances. That breadth of factual variety makes it next to impossible to establish a universally applicable "test" that identifies specific facts that must be present in order to show duress.

Nonetheless, while a universal duress test may not be possible, the BTA has described the general circumstances that support a finding of duress.

> It is only when it is proven that one party is vested with such disparate bargaining power as to essentially hold the other party "hostage" to a particular price that a sale may be deemed to be made under economic duress or compulsion.[415]

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[414] See *Worthington City Schools Board of Education v. Franklin County Board of Revision* (January 30, 2017), BTA No. 2016-151; *KO Properties and Investments Inc. v. Stark County Board of Revision* (March 20, 2023), BTA No. 2022-1005.

[415] See *Heath City Schools Board of Education v. Licking County Board of Revision* (September 1, 2017), BTA No. 2016-1575. See also *Akron City Schools Board of Education v. Summit County Board of Revision* (October 25, 2023), BTA No. 2022-1033 ("This Board has repeatedly held it will not disregard a recent and arm's-length sale based on the unsupported allegation that a buyer overpaid.").

Further, the BTA has stated that "economic duress is present when a party must purchase the property or suffer 'sure corporate death' or where 'no alternative' exists."[416] The Supreme Court has elaborated on the degree of the disparity in bargaining power that must be evident before the buyer's purchase of the property is considered made under duress.

> The choice between [the business's] survival on the one hand and swift and sure corporate death (bankruptcy) on the other hand presented [the owner] with no true alternative but to pay the price demanded by the seller. Accordingly, we hold that the…sale of the subject property was not an arm's-length sale due to the compulsive business circumstances fueling [the buyer's] decision to acquire the property in question.[417]

In addition, and potentially problematic for those buyers hoping to claim that a purchase was made under duress, the buyer's:

> …subjective belief, at the time of the purchase, regarding the pressure to make the purchase…is simply inconsequential to [the court's] analysis. Rather, [the court] must determine whether the evidence regarding the circumstances surrounding this particular purchase is sufficient to rebut the presumption that the sale price reflected true value.[418]

This establishes that an objective, evidence-based standard is applied when examining the circumstances of the sale before it can be considered made under duress.

The above rulings set a high bar before a BOR may find that a sale has been made under duress and, therefore, invalid for valuation purposes. It is not surprising, then, that claims that a sale was made under duress are frequently rejected. For example, duress was *not* found:

1. where a business claimed it overpaid for property on which a billboard was located in order to maintain its ability to use that billboard;[419]

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[416] See *Beavercreek City Schools Board of Education v. Greene County Board of Revision* (August 19, 2019), BTA No. 2018-1314. *Columbus City Schools Board of Education v. Franklin County Board of Revision* (February 7, 2022), BTA No. 2021-428; *20 West Grace, LLC v. Cuyahoga County Board of Revision* (July 8, 2022), BTA No. 2021-320.; *Middletown City Schools Board of Education v. Butler County Board of Revision* (December 14, 2022), BTA No. 2022-895.

[417] See *Lakeside Avenue Limited Partnership v. Cuyahoga County Board of Revision*, 75 Ohio St.3d 540 (1996). See also *Akron City Schools Board of Education v. Summit County Board of Revision* (September 4, 2018), BTA No. 2017-1562; *Kroger Limited Partnership I v. Hamilton County Board of Revision* (September 13, 2018), BTA No. 2016-2353.

[418] See *Board of Education of the Columbus City Schools v. Franklin County Board of Revision*, 10th Dist. Franklin No. 03AP-106, 2004-Ohio-586, ¶ 15.

[419] See *Heath City Schools Board of Education v. Licking County Board of Revision* (September 1, 2017), BTA No. 2016-1575.

2. where an unsophisticated buyer, who was time-pressed to complete a 1031 exchange in order to obtain its financial benefits, claimed he overpaid for the property;[420]

3. where Ronald McDonald House located near a children's hospital claimed it overpaid for real property because it needed the additional space for expansion;[421]

4. where a business owner claimed, *without further evidence*, that it had to purchase the property because otherwise it would have no place to run its business;[422]

5. where a property owner chose to purchase the subject property to maximize the return on its advertising dollars; [423]

6. where the buyers purchased an agricultural parcel located next to their home to protect against future development on that agricultural parcel;[424]

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[420] See *Tria Adelphia, Inc. v. Summit County Board of Revision* (September 5, 2017), BTA Nos.2016-1846, 2016-1921 ("Rather, it appears that [buyer] was forced only to make an investment decision whether it would be more favorable to complete the December 2015 purchase of the subject property or pay the taxes resulting from the failed §1031 exchange."). See also *McGeorge Properties Ltd. V. Stark County Board of Revision* (May 24, 2022), BTA No. 2021-1134. ("Previously, we found that the transfer of real property as part of a § 1031 exchange does not negate the arm's-length nature of a sale."). *MREV Archwood, LLC v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No 110618, 2022-Ohio-2356, ¶ 21 ("The motivation to engage in a "like-kind exchange," also known as a "1031 exchange," does not impact the arm's-length nature of a sale…In such a transaction, there is no compulsion on the part of the buyer to purchase a specific property, but only to purchase a property, generally, within a certain period").

[421] See *Ronald McDonald House Charities of Central Ohio, Inc. v. Franklin County Board of Revision* (October 9, 2014), BTA No. 2014-116 ("We acknowledge that there exist situations in which a purchaser's assemblage of several properties can provide the basis for inequality in bargaining…However, the mere allegation of a purchaser's desire to accumulate property in a particular area, however, is not itself tantamount to economic duress…While the purchase of the subject parcel may have been necessary for the expansion as planned, it was a business decision made by appellant and the failure to secure the subject parcel would not have resulted in its "swift and sure corporate death."). See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (October 12, 2021), BTA No. 2019-71.

[422] See *Cleveland Municipal Schools Board of Education v. Cuyahoga County Board of Revision* (July 11, 2018), BTA No. 2017-1256 ("Here, there is no evidence that any of the parties to the underlying transaction were faced with "survival on one hand and swift and sure corporate death on the other hand…Though [owner] testified that he needed a place to continue his business, the record is devoid of any evidence to demonstrate whether any effort was made to determine if other suitable locations existed. The record is equally devoid of competent and probative evidence to demonstrate that failure to purchase the subject property would have resulted in the property owner's bankruptcy…We therefore find insufficient evidence of duress such that the sale must be disregarded."): *Columbus City Schools Board of Education v. Franklin County Board of Revision* (January 3, 2022), BTA No. 2019-2327 ("…[the owner] was concerned about its ability to remain on the property if the property was sold to another owner. While it is true that duress is a proper consideration in a sale case, motivation is not duress. All willing buyers have a motive to acquire property, but a motive does not amount to economic duress absent specific and "compelling business circumstances.").

[423] See *Akron City Schools Board of Education v. Summit County Board of Revision* (September 4, 2018), BTA No. 2017-1562.

[424] See *Marysville Exempted Village Schools Board of Education v. Union County Board of Revision* (July 28, 2017), BTA No. 2016-1403 ("Although the property owners asserted that they were not offered an opportunity to negotiate the "take it or leave it" $120,000 selling price, the property owners have not demonstrated that they were compelled to purchase the subject property. They had the option to walk away from the offer and to allow the sellers to find other prospective buyers…All buyers and sellers have subjective motives in any transaction, and, in this instance, there is no evidence that the property owners were held "hostage" to the of first refusal to purchase the subject property."). See also *Victoria Loewengart v. Delaware County Board of Revision* (August 31, 2020), BTA No. 2019-1312 ("[The BTA] has repeatedly held that all buyers and sellers have subjective motives in any transaction, and [the BTA] will not disregard a sale simply because a party may have gotten a bad deal and potentially overpaid for a property."); *Tyeisha M. Carruthers v. Cuyahoga County Board of Revision* (August 30, 2021), BTA No. 2021-304.; *Richard*

7. where a current tenant claimed it purchased the property under economic coercion because the landlord threatened to increase the rent if it did not purchase the property and if it moved to another location much of the equipment it had installed at the property would have to be left behind;[425]

8. where the taxpayer argued that he had "pressing family obligations and difficulties with the builder of the home sitused on the subject property," that he desired "to move into a permanent home for his family before the school year began", and that "the $35,000 non-refundable deposit that he gave the builder made it impossible for him to walk away from the purchase agreement given the problems encountered during the construction process;"[426]

9. where the taxpayer claimed that he overpaid for the property because he "needed space to expand its business, which was located adjacent to the subject property, and, over the years, had unsuccessfully attempted to purchase the subject property."[427]

10. where the taxpayer "felt he was being compelled to leave his existing property because the city kept inspecting it. He claimed it was clear he needed to move after there were

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Plant Jr. & Denise Plant v. Cuyahoga County Board of Revision (October 12, 2021), BTA No. 2020-2047.; *Akron City Schools Board of Education v. Summit County Board of Revision* (September 15, 2022), BTA No. 2021-2327; *Hilliard City Schools Board of Education v. Franklin County Board of Revision* (October 11, 2022), BTA No. 2021-158; *Rightway Real Estate, LLC v. Cuyahoga County Board of Revision* (September 19, 2023), BTA No. 2021-679.

[425] See *Board of Education of the Cleveland Municipal School District v. Cuyahoga County Board of Revision*, 107 Ohio St.3d 250, 2005-Ohio-6434,¶ 16 ("[Owner] contends that its purchase was made under economic coercion because the landlord threatened to increase the rent if it did not purchase the property, and if it moved to another location, much of the restaurant equipment that was installed on the property would have to be left behind…Here, [owner] testified that he negotiated the [purchase] price down…there was nothing in the record to indicate that the owners had made any efforts to determine whether the business could have been relocated and the cost of such relocation…While the owners…would have lost much of their investment in fixtures if they had to move, there was no evidence that the restaurant could not be relocated or that losing this location would cause the owners to file bankruptcy."). See also *Westerville City Schools Board of Education v. Franklin County Board of Revision* (June 15, 2023), BTA No. 2021-393 ("[The owner] indicated that he could not extend his lease or find comparable space nearby, so he purchased the building to maintain the location of his business… All willing buyers and sellers have subjective motives to buy or sell property, but motive does not become duress absent specific and compelling business circumstances, e.g., sure corporate death…Here, we find no such duress.").

[426] See *Umeshkumar Gupta v. Lucas County Board of Revision* (May 28, 2020), BTA No. 2019-905, affirmed on appeal *Umeshkumar Gupta v. Lucas County Board of Revision*, 6th Dist. Lucas No. L-20-1106, 2021-Ohio-332, ¶ 31 ("While appellant's stress level was obviously high during the negotiations that led to his purchase of the subject property, most of that stress was brought on by his own circumstances, not by pressure from the seller. Moreover, appellant was in no way compelled to agree to the terms proposed by the seller.").

[427] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (November 10, 2020), BTA No. 2019-1352. See also *Gahanna-Jefferson City Schools Board of Education v. Franklin County Board of Revision* (March 16, 2021), BTA No. 2019-2660 ("the BOR rejected the sale because the buyers were under duress. Motivation is not duress. All willing buyers have a motive to acquire property, but a motive does not amount to economic duress absent specific and 'compelling business circumstances.'"); *Hilliard City Schools Board of Education v. Franklin County Board of Revision* (October 11, 2022), BTA No. 2021-158.; *Ohdee Dohdee, LLC v. Franklin County Board of Revision* (January 30, 2023), BTA No. 2020-216.; *Green Local Schools Board of Education (Summit) v. Summit County Board of Revision* (November 15, 2023), BTA No. 2021-2044.

three fire inspections in one month. He argued he had to stay in the area because most of his business came from local customers, and he asserted he would have lost 70% of his business if he moved out of the area."[428]

11. where the owner of an automobile dealership claimed it overpaid for a property in order to prevent is competitors from purchasing it.[429]

On the other hand, duress *has* been found, thereby invalidating the use of the sale for valuation purposes:

1. where the seller offered the property for a non-negotiable price and the buyer's failure to purchase the property would have resulted in the loss of a significant portion of its business, resulting in bankruptcy;[430] and

2. where in a sale-leaseback transaction, the seller claimed that the sale was made under duress (and therefore should be disregarded in favor of the appraisal produced by the seller's appraiser) due to the seller's need to raise money for an upcoming balloon payment on a mortgage and the need to raise cash was so urgent that the seller rejected a higher offer because it would have taken too long to complete.[431]

As with many areas of BOR practice, the determination as to whether duress exists can turn on subtle factual distinctions. Caution, then, should be exercised in coming to general conclusions or formulations about what facts will or will not produce a finding of duress. With that said, however, the above cases show that where duress is claimed it is typically *not* enough for an owner to assert that she was compelled to purchase the inflated-priced property because her failure to do so would have resulted in mere economic loss, business disadvantage, or loss of business opportunity. Instead, to prove duress the circumstances must typically be so severe that

[428] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (July 5, 2022), BTA No. 2019-1537.

[429] See *Rightway Real Estate, LLC v. Cuyahoga County Board of Revision* (September 19, 2023), BTA No. 2021-679.

[430] See *Lakeside Avenue Limited Partnership v. Cuyahoga County Board of Revision*, 75 Ohio St.3d 540 (1996) ("…[the seller] offered to sell the subject property to Triton for a stated price. The price was non-negotiable. The property was not offered for sale on the open market…Failure [by the buyer] to purchase the property would have resulted in the loss of a significant portion of [its] business, which, in turn, would have resulted in [its] bankruptcy. [The buyer] attempted to secure financing for the transaction, but even Triton's primary asset-based lender would not finance the acquisition of the property, apparently due to the excessive asking price. …… in light of the undisputed evidence in this case, we find that [buyer's] purchase of the subject property was not "voluntary, *i.e.,* without compulsion or duress," …The record clearly establishes that [buyer] never had any real choice but to purchase the property in question. The choice between [buyer's] survival on the one hand and swift and sure corporate death (bankruptcy) on the other hand presented [buyer] with no true alternative but to pay the price demanded by the seller."); *Ohdee Dohdee, LLC v. Franklin County Board of Revision* (January 30, 2023), BTA No. 2020-216.

[431] See *Strongsville Board of Education v. Cuyahoga County Board of Revision*, 112 Ohio St.3d 309, 2007-Ohio-6, ¶ 17.

the purchase is the result of "economic coercion"[432] or the failure to purchase at the allegedly inflated price would have resulted in the "death" of the business through bankruptcy or some other business-terminating mechanism.[433]

Arm's Length Sales Arise Under a Wide Variety of Circumstances

Because arm's length sales occur under a wide variety of factual circumstances, decisions of both the Supreme Court and the BTA do not limit the finding of an arm's length sale to one specific, or required, factual template. Indeed, sales have been found to be arm's length even when they lacked elements commonly seen in other arm's length sales. While characteristics typically found in voluntary sales – like open market advertising – are certainly considered in determining whether a sale is arm's length, they are not necessarily *required* for there to be an arm's length sale. The Supreme Court has made this clear.

> …we have held that an arm's-length transaction is one that '*generally* [italics in the original] takes place in an open market.'…The case law does not condition character of a sale as an arm's-length transaction on whether the property was advertised for sale or was exposed to a broad range of potential buyers…. Although the presence of open-market elements definitely militates in favor of finding a transaction to have been at arm's length, the BTA decisions establish that their absence does not necessarily negate the arm's length character of the transaction.[434]

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[432] See *Board of Education of the Cleveland Municipal School District v. Cuyahoga County Board of Revision*, 107 Ohio St.3d 250, 2005-Ohio-6434, ¶ 17.

[433] See *Lakeside Avenue Limited Partnership v. Cuyahoga County Board of Revision*, 75 Ohio St.3d 540 (1996). But see, seemingly to the contrary, *Board of Education of the Gahanna Jefferson Public Schools v. Franklin County Board of Revision*, *Gahanna Jefferson Pub. Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 10th Dist. Franklin No. 98AP–460, 1999 WL 1161, *5 (Dec. 31, 1998), where the Court of Appeals held that a purchase was made under duress where the purchasing real estate developer purchased a parcel at an "excessive price in order to complete the planned development of the shopping center. The [purchased] property intruded three hundred twenty-nine feet into [the purchaser's] site development plan. [The purchaser] had already expended vast sums to acquire the other seventeen acres for the shopping center" and "The project could not go forward as planned without acquisition of the subject property."

[434] See *North Royalton City School District Board of Education v. Cuyahoga County Board of Revision*, 129 Ohio St.3d 172, 2011-Ohio-3092, ¶ 29. See also *MNC Asset Holdings OH LLC v. Montgomery County Board of Revision* (July 6, 2021), BTA No. 2019-2583.=; *Cleveland Property Development Group LLC v. Cuyahoga County Board of Revision* (October 20, 2021), BTA No. 2020-2119; *Columbus City Schools Board of Education v. Franklin County Board of Revision* (January 3, 2022), BTA No. 2020-1504; *Columbus City Schools Board of Education v. Franklin County Board of Revision* (February 7, 2022), BTA No. 2021-428; *Columbus City Schools Board of Education v. Franklin County Board of Revision* (February 7, 2022), BTA No. 2019-2814; *William T. Smith v. Cuyahoga County Board of Revision* (May 2, 2022), BTA No. 2020-2212; *Wilsher Management, Ltd. v. Cuyahoga County Board of Revision* (December 27, 2022), BTA No. 2020-1884; *Columbus City Schools Board of Education v. Franklin County Board of Revision* (September 21, 2023), BTA No. 2021-2852; *Lake Local Schools Board of Education (Wood) v. Wood County Board of Revision* (November 20, 2023), BTA No. 2020-1639.

On that reasoning the Supreme Court found that there was an arm's length sale where the buyer bought the property from his brother – normally not considered an arm's length sale due to the familial relationship - who was acting as trustee for the pension-fund-property-owner, because they had obtained an appraisal of the property from a state certified appraiser which showed that the buyer paid more than the appraised value. Under those circumstances, the Court stated that:

> The county…argues that the sale involving the Emerson brothers cannot be an arm's-length transaction because it was between "related parties." "The allegation that the parties to a sale are related bears on whether they are self-interested for purposes of R.C. 5713.03. That is so because related parties may be pursuing the identical interest of common owners rather than acting as separately interested, typically motivated actors in the marketplace."…A transaction involving related parties ordinarily will not qualify as an arm's-length sale, but such a sale can qualify if the proponent "affirmative[ly] demonstrat[es] that the price actually reflects fair market value in spite of the relationship of the parties."
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> We hold that a certified appraisal…can be used to show that the purchase price in a sale between related parties reflected fair market value. We have long recognized that appraisals of market value are, generally speaking, reliable and probative evidence of the true value of real property…It follows that when a party to a sale solicits a certified appraisal to help determine the sale price that fact tends to prove that the sale reflected fair market value.[435]

Similarly, in another case the BTA found that there *was* an arm's length sale even though the subject property was not advertised, was not listed with a broker, and where no "for sale" sign was posted, because there was other evidence showing it to be a voluntary transaction. In so finding, the BTA stated that "...while the lack of advertisement on the open market may have influenced the price paid for the subject property, it does not necessitate a finding that the subject sale was not arm's length in nature."[436]

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[435] See *Emerson v. Erie County Board of Revision*, 149 Ohio St.3d 148, 2017-Ohio-865, ¶¶ 10, 14. See also *Marysville Exempted Village Schools Board of Education v. Union County Board of Revision* (April 20, 2020), BTA No. 2019-1100 ("…a sale between personal friends can still be arm's-length."); *South-Western City Schools Board of Education v. Franklin County Board of Revision* (January 3, 2023), BTA Nos. 2021-2038, 2021-2039.; *Columbus City Schools Board of Education v. Franklin County Board of Revision* (September 21, 2023), BTA No. 2021-2852 ("This Board has repeatedly held it will not disregard a sale simply because of a preexisting relationship when the record shows parties acted in their own self-interest.").

[436] See *Board of Education of the Columbus City Schools v. Franklin County Board of Revision* (October 13, 2009), BTA Nos. 2007-501, 502, and 503. See also *341 Castlewood LLC v. Montgomery County Board of Revision* (October 18, 2019), BTA Nos. 2018-987, 1339, 1341, 1343, 1344, 1345, 1351, 1352, 1353, 1355, 1356, 1357, 1359, 1362, 1445, 1446, 9898, 990 ("A broker's commission is not an essential element of an arm's-length transaction."); *Adler B. Thomas v. Montgomery County Board of Revision* (April 1, 2020), BTA No. 2019-713 ("As justification for its rejection of the sale, the BOR emphasized that the property had not

Seller financing of the real estate sale also sometimes raises suspicions that the parties were not dealing at arm's length. But "The presence of seller financing alone does not negate the arm's length nature of a sale."[437] Further, even if there is favorable seller financing the BTA has found that "[f]avorable financing is generally 'insufficient to show that a sale price does not reflect a property's value.'"[438] Instead, the BTA looks "to whether the sale opponent proved the financing agreement was out of step with market rates and terms", whether "the parties acted in their own self-interest" and "whether the [financing] arrangement led to an atypical reciprocal interaction."[439]

Other BTA cases show that the absence of elements commonly found in arm's length sales does not necessarily mean that the sale is not arm's length and that "merely because a property is not listed on the open market, or is offered at a 'take it or leave it' selling price…does not, per se, mandate the rejection of the sale [as a measure of value]."[440] The BTA has found that "case law does not condition character of a sale as an arm's-length transaction on whether the property was advertised for sale or was exposed to a broad range of potential buyers[441] and that "… a sale should

been listed on the market at the time of the transaction. Though there is no evidence of this in the record, the mere fact that it was not listed on the open market 'does not, per se, mandate the rejection of the sale.' [citations omitted] 'The case law does not condition character of a sale as an arm's-length' transaction on whether the property was advertised for sale or was exposed to a broad range of potential buyers." [citation omitted]. There is nothing about the circumstances of this sale that demonstrates the parties were related in a sense that they did not both act in their own best interest."); *Gahanna-Jefferson City Schools Board of Education v. Franklin County Board of Revision* (March 16, 2021), BTA No. 2019-2660 ("…simply because a property was not listed on the MLS does not mean it was not arm's-length nor does it mean it ceases to be the best evidence of value."); *Columbus City Schools Board of Education v. Franklin County Board of Revision* (January 3, 2022), BTA No. 2019-2327 [("The case law does not condition character of a sale as an arm's-length transaction on whether the property was advertised for sale or was exposed to a broad range of potential buyers."). This Board [the BTA] regularly finds such sales to be arm's-length without evidence to the contrary.")]; *Davenport 2138 LLC v. Cuyahoga County Board of Revision* (December 30, 2022), BTA No. 2020-2133.

[437] See *Plain Local Schools Board of Education v. Stark County Board of Revision* (October 28, 2019), BTA No. 2017-1887. . See also *Cuyahoga Falls City Schools Board of Education v. Summit County Board of Revision* (September 29, 2020), BTA No. 2019-1980 ("A lack of exposure to the market or seller financing are not sufficient to disqualify a sale for purposes of tax valuation."); *Cleveland Property Development Group LLC v. Cuyahoga County Board of Revision* (October 20, 2021), BTA No. 2020-2119; *Airport Hospitality, LLC v. Franklin County Board of Revision* (January 20, 2022), BTA No. 2019-605 ("This Board and the Ohio Supreme Court have long held favorable seller financing does not render the sale price unrepresentative of true value [citations omitted]. That is especially true when the record is clear the parties negotiated a price and acted in their own interests.").

[438] See *Cuyahoga Falls City Schools Board of Education v. Summit County Board of Revision* (June 23, 2020), BTA No. 2019-1981.

[439] See *Plain Local Schools Board of Education v. Stark County Board of Revision* (October 28, 2019), BTA No. 2017-1887. See also *GST Property Management, LLC v. Cuyahoga County Board of Revision* (December 31, 2019), BTA No. 2019-172.

[440] See *Muddy River Homes LLC v. Hamilton County Board of Revision* (September 26, 2017), BTA No. 2016-2150.

[441] See *Muddy River Homes LLC v. Hamilton County Board of Revision* (September 26, 2017), BTA No. 2016-2150.

not be disregarded simply because the buyer was a tenant."[442] In addition the BTA has also addressed real property sold from a decedent's estate - a circumstance sometimes thought to raise issues regarding the arm's length nature of the sale – and found that "without some evidence to the contrary, we have found that transfers of real property via estate sales to be sufficient evidence of value."[443] Finally, the mere fact that the purchaser of the real property was a tenant prior to the purchase is not, alone, a sufficient basis on which to find that the same should be disregarded. As stated by the BTA "…, as both this Board and Supreme Court have done in the past, we reject any contention that by merely having a landlord-tenant relationship is a sufficient reason to disregard a sale as the best evidence of value."[444]

The gist of these cases is that in determining whether a sale is arm's length, the BOR should look at the totality of the evidence for proof of voluntariness and should avoid focusing on singular aspects of the transaction. In general, according to the BTA:

> …the Supreme Court has provided several factors for us to consider in determining whether an auction sale is arm's length: 1) whether, and how long, the property was on the market prior to the auction; 2) whether and how the auction was advertised; 3) the number of willing and able buyers who attended the auction; 4) whether multiple bids were placed. *Those factors are not exhaustive*, but they are factors the Supreme Court has found probative…[445](italics added)

The cases make clear that context is important in determining whether a transaction is arm's length and that the context is found in the totality of the evidence.

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[442] See *Talawanda City Schools Board of Education v. Butler County Board of Revision* (November 30, 2020), BTA No. 2019-2061.

[443] See *New Day Realty LLC v. Summit County Board of Revision* (March 16, 2021), BTA No. 2020-1577. See also *Zimmer v. Stark County Board of Revision* (Nov. 6, 2017), BTA Nos. 2017-622 ("With regard to estate sales, '[w]hile we can conceive of certain circumstances that, if present, might operate to render a sale of real property from a decedent's estate to a private purchase as non-voluntary or not at arm's-length, we are not persuaded that such a sale, without any specific evidence to the contrary, is automatically not an arm's-length transaction.'").

[444] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (September 12, 2022), BTA No. 2020-1830.

[445] See *Timothy Devaughn v. Montgomery County Board of Revision* (September 30, 2019), BTA No. 2019-342. See also *Cleveland Avenue Valley Equity Group LLC v. Delaware County Board of Revision* (March 9, 2020), BTA Nos. 2018-1896, 2018-1993; *Mary Bolouri v. Cuyahoga County Board of Revision* (February 7, 2022), BTA no. 2021-325.

Overcoming the Rebuttable Presumption of Invalidity with Auction Sales

While R.C. 5713.03 addresses the type of evidence that can be used in determining value (an arm's length sale), R.C. 5713.04 addresses the type of evidence that *cannot* be used (auctions and forced sales) in that valuation. Under R.C. 5713.04 there is a *rebuttable* presumption of *in*voluntariness where property is sold through auction or forced sale.

Despite that presumption, however, the Ohio Supreme Court has addressed whether an auction sale price can *ever* be used as evidence of true value and ruled that under certain circumstances it could. As stated by the Court:

> We must now determine whether an auction sale price can ever be regarded as evidence of a property's value and, if so, under what circumstances…we hold that R.C. 5713.04, read in conjunction with former R.C. 5713.03, requires the taxing authorities to presume that an auction sale price is not a voluntary, arm's-length transaction. *That presumption may be rebutted, however, by evidence that a particular sale was in fact voluntary and did occur at arm's length*.[446] (italics added)

Voluntariness can be shown by "evidence showing that [despite the fact it was sold at auction or was a forced sale] the sale occurred at arm's length between typically motivated parties."[447] As stated by the Court of Appeals:

> R.C. 5713.04 requires the taxing authorities to presume that an auction sale price is not a voluntary, arm's-length transaction. The presumption, however, may be rebutted by evidence that a particular sale was in fact voluntary and did occur at arm's length.[448]

In considering whether an auction represented a voluntary sale, the BTA has stated that:

> …the Supreme Court has provided at least four factors for our consideration when determining whether an auction sale is arm's-length: 1) whether and for how long the property was on the market; 2) whether and how the auction was advertised; 3) the number of willing and able buyers who attended the auction; 4) whether

[446] See *Olentangy Local Schools Board of Education v. Delaware County Board of Revision*, 141 Ohio St.3d 243, 2014-Ohio-4723, ¶ 2.

[447] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (September 1, 2017), BTA No. 2016-2177.

[448] See *NDHMD, Inc. v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga Nos. 101207 and 101300, 2015-Ohio-174, ¶ 27.

> multiple bids were placed. Those factors are to be considered alongside the standard factors for an arm's-length transaction that apply to every sale.[449]

The key in all cases is that the sale was voluntary based "on the entire record,"[450] and no single aspect or element of voluntariness controls the ultimate determination as to whether an arm's length sale occurred. According to the BTA:

> … the Supreme Court has provided at least four factors for us to consider in determining whether an auction sale is arm's-length: 1) whether, and how long, the property was on the market prior to auction; 2) whether and how the auction was advertised; 3) the number of willing and able buyers who attended the auction; 4) whether multiple bids were placed. Those factors are not exhaustive, but they are factors the Ohio Supreme Court found probative…Those factors, of course, are to be considered alongside the standard arm's-length transaction factors applicable to every sale. Namely, a sale is arm's-length when "it is voluntary, i.e., without compulsion or duress; it generally takes place in an open market; and the parties act in their own self-interest." [citation omitted][451]

Accordingly, despite the prohibitory language of R.C. 5713.04, under certain circumstances the Court has found the sale of property at auction to be arm's length because on the entire record the facts and circumstances of the particular sale showed that it was a voluntary, open market sale where the parties pursued their respective self-interests. For example, the Court has found an auction sale to be arm's length where the property was listed and marketed for nine months, the auction was publicized and well attended including multiple bidders, the auction sales price was over ninety percent of the list price, and the bank (which owned the property) accepted the bid even though it had the right to reject it.[452] In another case, where the property was sold at auction, the BTA found that it was an arm's length sale because the auction was advertised, the buyer did not have a relationship with the seller, and no special financing was involved with the

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[449] See *Artab, LLC v. Belmont County Board of Revision* (December 20, 2022), BTA No. 2021-1019; *Cleveland Metropolitan Schools Board of Education v. Cuyahoga County Board of Revision* (December 27, 2022), BTA No. 2020-1682.; *KO Properties and Investments Inc. v. Stark County Board of Revision* (March 20, 2023), BTA No. 2022-1005.

[450] See *Columbus City School District Board of Education v. Franklin County Board of Revision*, 134 Ohio St.3d 529, 536, 2012-Ohio-5680, ¶ 31.

[451] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (May 21, 2019), BTA No. 2017-1184. See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (June 27, 2022), BTA No. 2021-426.

[452] See *Olentangy Local Schools Board of Education v. Delaware County Board of Revision*, 141 Ohio St.3d 243, 2014-Ohio-4723.

purchase.[453] In a third auction case, the BTA found an arm's length sale where minimum bids were required, there were other bidders, and there was testimony regarding the length of time the properties were available to any party before the auction closed.[454]

In each of the above cases, the BTA found there to be arms' length sales despite the fact that certain common aspects of voluntariness were *missing*. In the reverse of that situation, the BTA has also found *in*voluntariness even though certain aspects of voluntariness were *present*, because the totality of the facts and circumstances showed that the sale was, in fact, not voluntary. For example, where a property sold by HUD (typically considered a forced sale) was listed on the MLS prior to sale but there was no further evidence of voluntariness, the BTA found that *of and by itself* the mere listing of the property on the MLS – often used as evidence of an open market sale – was not sufficient to show a voluntary sale.[455] As stated by the BTA:

> We recognize that the BOR included the MLS listing as support for the finding the sale was indeed arm's-length. We find, however, that *this listing alone without accompanying testimony or information regarding the circumstances of the sale*, is not enough to rebut the presumption that the sale is not evidence of the subject's value. (italics added).

That BTA ruling underscores that no single element controls the determination of what constitutes an arm's length sale. The ultimate determination as to whether a sale is arm's length depends upon whether voluntariness is shown on the entire record.

Overcoming the Rebuttable Presumption with Forced Sales

As discussed above, in addition to auction sales, R.C. 5713.04 prohibits the sale price derived from a "forced sale" to be used as the criterion of that property's value. There are several

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[453] See *Mt. Vernon City School District Board of Education v. Knox County Board of Revision* (June 16, 2009), BTA No. 2007-476. But see *Green Local Schools Board of Education v. Summit County Board of Revision*, 9th Dist. Summit No. 29196, 2019-Ohio-3250, ¶¶ 14, 25, where the Court of Appeals found that an online auction sale was *not* arm's length where (1) a marketing sign was placed in the front yard about of the subject property about a week before the auction, (2) the property was listed on an online auction website, (3) where potential buyers at the online auction were required to submit a single "final and best offer", and where (4) there was testimony that the seller was not required to accept the offer (although it was unclear whether there was a minimum bid required).

[454] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (September 1, 2017), BTA No. 2016-2177.

[455] See *Gahanna-Jefferson City Schools Board of Education v. Franklin County Board of Revision* (September 1, 2017), BTA No. 2016-2206.

types of sales, discussed below, that are generally considered to be "forced." And just as there was a *rebuttable* presumption of invalidity with auction sales, there is similarly a *rebuttable* presumption of invalidity with most forced sales. As stated by the BTA:

> …unlike a typical sale of the property which enjoys a rebuttable presumption of validity…forced sales, such as transfers of property through bankruptcy proceedings, sheriff's sales, and sales by the Secretary of Housing and Urban Development ("HUD") are not considered reliable value indicators and a rebuttable presumption of *invalidity* arises.[456]

Accordingly, forced sales do not enjoy the presumption of validity that attaches to arm's length sales.[457] As with auctions, however, the Supreme Court has made clear that the presumption of invalidity that attaches to forced sales can be overcome, rebutted, with evidence that the sale in question was, in fact, a voluntary sale between typically motivated parties. As stated by the Court:

> …when the underlying transaction is…a forced sale, the proponent of the sale price bears a heavier burden…R.C. 5713.04 reverses the typical presumption that a sale price is the best evidence of a property's value when the underlying transaction was…a forced sale. Accordingly, we likewise adjust the typical burdens of proof with regard to sale prices. Namely, the opponent of a sale price has a very light burden to establish that a transaction was on its face an auction or a forced sale. Once that threshold is crossed, then the proponent of the sale price bears the burden to prove that the sale was nevertheless an arm's-length transaction between typically motivated parties and should therefore be regarded as the best evidence of the property's value.[458]

Further, it should also be noted that a forced sale is not transformed into a voluntary sale merely because the sale has been approved by a court in a judicial proceeding. As stated by the BTA:

> We acknowledge appellant's argument that the court order said the sale was arm's-length. However, forced sales do not become arm's-length sales for tax purposes simply because they are approved by court order.[459]

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[456] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (September 21, 2017), BTA No. 2016-1356. See also *Lori A. Boyd v. Cuyahoga County Board of Revision* (May 13, 2020), BTA No. 2019-2751.

[457] See *Michael Morton v. Lorain County Board of Revision* (October 20, 2017), BTA No. 2016-1630.

[458] See *Olentangy Local Schools Board of Education v. Delaware County Board of Revision*, 141 Ohio St.3d 243, 2014-Ohio-4723, ¶ 11.

[459] See *Canton City Schools Board of Education v. Stark County Board of Revision* (July 8, 2020), BTA No. 2020-1454.

Foreclosure Sales in General

The Ohio Supreme Court has described a foreclosure as "a forced sale that takes place without the time or opportunity to find a buyer willing to pay an amount that approaches the reasonable worth of the property."[460] Because foreclosure sales in general are considered forced sales, they are not valid indicators of value. According to the Court:

> …the circumstances of a foreclosure sale deprive the sale of its arm's-length character for purposes of R.C. 5713.03 because the motivations of the parties to the sale, particularly the seller, do not qualify as typical of the motivations of other persons in the marketplace.[461]

In further explanation, the Court of Appeals stated that "An example of a seller who is not 'typically motivated' is one in a foreclosure sale that usually 'occurs under the compulsion that the property be liquidated for the benefit of creditors.'"[462]

Despite the Supreme Court's seemingly absolute language barring the use of foreclosure sales in valuation, it has not completely shut the door to foreclosure sales being considered arm's length, where the evidence points to a voluntary sale. As stated by the Court of Appeals:

> The Supreme Court of Ohio explained that even in the cases of a foreclosure sale, which is, by definition, involuntary, it is possible to introduce rebutting evidence to show that a particular foreclosure sale is voluntary.[463]

Below we discuss several types of "forced sales" – sheriff's sales, bank sales, "short" sales, receivership sales, bankruptcy sales, HUD (Housing and Urban Development) sales, and VA (Veterans Administration) sales - and the manner in which the presumption of invalidity that attaches to them can be rebutted with other evidence. (A Forced Sales graph appears at the end of this chapter).

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[460] See *Chicago Title Ins. v. Huntington Natl. Bank*, 87 Ohio St.3d 270, 274 (1999).

[461] See *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 127 Ohio St.3d 63 2010-Ohio-4907, ¶ 22.

[462] See *NDHMD, Inc. v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga Nos. 101207 and 101300, 2015-Ohio-174, ¶ 25. See also *New Day Realty LLC v. Summit County Board of Revision* (February 13, 2020), BTA Nos. 2019-1237, 1241, 1242, 1261, 1262, 1264 ("…the sale documents and/or property record cards [at the BOR hearing] demonstrate that these parcels transferred from Secretary of Housing and Urban Development ("HUD"), Secretary of Veterans Affairs ("VA"), or county sheriff. Unlike the sales noted above, sales of these types are presumptively considered to be "forced" and are invalid absent a showing that the parties were typically motivated.").

[463] See *NDHMD, Inc. v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga Nos. 101207 and 101300, 2015-Ohio-174, ¶ 28.

Sheriff's Sales

Perhaps the archetypical example of a foreclosure sale is a sheriff's sale. "A sale via sheriff's auction following the sheriff's foreclosure…is considered a forced sale and generally does not provide a reliable basis to value a property."[464] The Supreme Court has stated that "…the price that [the owner] paid at the sheriff's sale is not a relevant consideration in establishing true value."[465] More recently, following that Supreme Court ruling, the BTA ruled that:

> The Supreme Court has held that "the price *** paid at the sheriff's sale is not a relevant consideration in establishing true value. R.C. 5713.04 prevents the price paid at the sheriffs sale from establishing the best evidence of true value, stating that 'the price for which such real property would sell at auction or forced sale shall not be taken as a criterion of its value.'[466]

Further, the Court has rejected the use of a sheriff's sale appraisal where that appraisal, as is common, "contains no factual information that could furnish a basis for valuing the subject property as of the tax-lien date – it simply opines a value without any supporting facts or analysis."[467] Following that reasoning, the BTA has also rejected sheriff's sale appraisals where "there is no indication that the appraiser(s) made adjustments to the comparable sales, nor is there any information about the properties to allow the BOR, or this board [BTA], to determine whether adjustments are necessary."[468]

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[464] See *David J. Bailey and Mary B. Vidourek v. Hamilton County Board of Revision* (March 17, 2020), BTA No. 2019-1217. See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (October 4, 2021), BTA No. 2018-1630.

[465] See *Dublin Senior Community Limited Partnership v. Franklin County Board of Revision*, 80 Ohio St.3d 455, 458 (1997).

[466] See *John Bodnar v. Cuyahoga County Board of Revision* (August 24, 2017), BTA No. 2016-1705. See also *Smartland FND1, LLC v. Cuyahoga County Board of Revision* (September 29, 2020), BTA No. 2019-2421 ("…the Ohio Supreme Court has told us to presume a sheriff's sale is not a voluntary, arm's-length transaction… a sheriff's sale is presumed to be a forced sale, which does not create a presumption of value.."); *Archon Capital, LP v. Cuyahoga County Board of Revision* (March 16, 2021), BTA No. 2019-2141 ("Though the sale of a property is generally considered the best evidence of its value [citation omitted], sheriff sales are presumptively invalid…"); *Richard Duncan v. Portage County Board of Revision* (March 6, 2023), BTA No. 2022-1120; *Leonard Troka v. Cuyahoga County Board of Revision* (June 13, 2023), BTA No. 2022-454 ("It is well established a sheriff's sale is a forced sale, which generally does not provide a reliable basis to value a property.").

[467] See *South-Western City Schools Board of Education v. Franklin County Board of Revision*, 152 Ohio St.3d 548, 2018-Ohio-919, ¶ 18. See *Mechal & Schlomi, LLC v. Cuyahoga County Board of Revision* (January 8, 2020), BTA No. 2018-1305 ("We have repeatedly held that sheriff's-sale appraisal reports are not particularly helpful in our quest to determine real property value"). See also *Smartland4, LLC v. Cuyahoga County Board of Revision* (December 2, 2020), BTA No. 2019-2151 ("the court determined that it was legal error to rely upon an appraisal report performed for purposes of a sheriff's sale and concluding that "the sheriff's-sale appraisal credited by the [board of revision] contains no factual information that could furnish a basis for valuing the subject property as of the tax-lien date--it simply opines a value without any supporting facts or analysis.").

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[468]See *CSHFLW Properties 4, LLC v. Cuyahoga County Board of Revision* (August 14, 2019), BTA Nos. 2018-1382-2018-1497. See also *Smartlanders19, LLC v. Cuyahoga County Board of Revision* (September 15, 2020), BTA No. 2019-2420 ("Nor did the

It should be noted, however, that while the Supreme Court has not *specifically* ruled that the presumption of invalidity can be rebutted in a sheriff's sale as it can in other forced sales (see below), language in BTA decisions indicates that the BTA is at least willing to entertain the idea that the presumption of invalidity in a sheriff's sale may be rebutted with evidence of voluntariness. As stated by the BTA:

> …when, as here, a property is transferred through a sheriff sale auction, a rebuttable presumption of *invalidity* attaches to the transaction and the proponent of utilizing such a sale bears the burden of rebutting such presumption by proving that the sale, although "forced," was nevertheless an arm's-length transaction between typically motivated parties and should therefore be regarded as the best indication of value.[469]

Bank Sales

A "bank sale" is different from a "sheriff's sale." The bank sale is a second sale,[470] typically occurring months or even years after the sheriff's sale. Bank sales often arise after the borrower defaults on the loan secured by the subject property and the lender (typically a bank) obtains a judgment against the borrower for the amount outstanding on the loan. To recoup the

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appraisal contain adjustments to the comparable properties and the appraiser did not appear to testify to explain the appraisal and its conclusions.").

[469] See *James Helfrich v. Licking County Board of Revision* (November 3, 2017), BTA No. 2016-1079. See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (September 21, 2017), BTA No. 2016-1356; *C & R Property Management, LLC v. Cuyahoga County Board of Revision* (September 12, 2018), BTA Nos. 2017-1127, 2017-1128 ("This characterization [of the sheriff's sale] as a forced sale is not an absolute bar, but rather creates a rebuttable presumption that the transaction was not arm's length.");*Moira Properties LLC v. Cuyahoga County Board of Revision* (April 2, 2019), BTA No. 2018-1159 (""…[the owner] purchased the subject property…at a sheriff's auction after the property was foreclosed. This type of sale is considered a forced sale, and generally does not provide a reliable basis to value a property…This characterization as a forced sale is not an absolute bar, but rather creates a rebuttable presumption that the transaction was not arm's-length…In this case, however, appellant did not present sufficient evidence regarding the circumstances of the sale that would allow this board to find that it "was nevertheless an arm's-length transaction…For instance, although Lobo testified regarding the number of participants, appellant did not include any information regarding marketing information, any attempts to sell the property prior to the sheriff's auction, or other data to show that the sale was consistent with the market in which the subject is located. Accordingly, we cannot rely on the sale as competent evidence of value.");*Mechal & Schlomi, LLC v. Cuyahoga County Board of Revision* (January 8, 2020), BTA No. 2018-1305; *Taylor Robert Elton Fultz v. Montgomery County Board of Revision* (April 1, 2020), BTA No. 2019-712; *Archon Capital, LP v. Cuyahoga County Board of Revision* (March 16, 2021), BTA No. 2019-2141; *Archon Capital, LP v. Cuyahoga County Board of Revision* (March 16, 2021), BTA Nos. 2019-2076, 2078, 2080, 2082; *KO Properties and Investments Inc. v. Stark County Board of Revision* (March 20, 2023), BTA No. 2022-1005.

[470] See *Zachary A. Zimmer v. Stark County Board of Revision* (November 6, 2017), BTA Nos. 2017-622, 2017-623 ("Turning to bank sales, typically, this type of transfer originates with a financial institution, after that financial institution previously acquired such property from a foreclosure sale. To be sure, "[a] foreclosure sale usually does not qualify as an arm's-length transaction because the sale occurs under the compulsion that the property be liquidated for the benefit of creditors…however, the *subsequent* sale of the property by a lending institution that acquired it, commonly referred to as a "bank sale," may provide a reliable indication of value."). See also *Nationwide Community Revitalization LLC v. Allen County Board of Revision* (October 20, 2021), BTA No. 2020-1270.

funds it is owed, the lender seeks to liquidate (sell) at a sheriff's sale the subject property that secured the loan. Sometimes, however, there are no bids for the subject property or the bids at the sheriff's sale are insufficient to satisfy the amount still owed on the bank loan. In that case the bank may sometimes purchase the subject property with a view to later selling it at a second sale – the "bank sale" – where it hopes to realize a price higher than the amount it would have recouped at the sheriff's sale. (A Bank Sale Process graph appears at the end of this chapter).

Both Ohio's courts and the BTA have made clear that this second "bank sale" may be considered an arm's length sale despite the fact that the bank (the seller of the property in the second sale) acquired the property through a forced sheriff's sale. As explained by the Supreme Court:

> As we have previously acknowledged, sellers in foreclosure sales are usually not typically motivated or acting voluntarily…However, we have also recognized that "a more remote connection between the foreclosure and the sale" may exist in some cases. As a result, "[u]nder some circumstances where a bank acquires distressed property, the bank's subsequent sale of the property may be considered an arm's-length transaction."[471]

Similarly, in discussing the second sale by the bank, the BTA has stated:

> …the subject property was not sold through a sheriff's foreclosure sale; it was purchased from a bank following a prior foreclosure. This board [the BTA] has previously found value in accordance with sales transferred from a bank after foreclosure.[472]

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[471] See *Olentangy Local Schools Board of Education v. Delaware County Board of Revision*, 141 Ohio St.3d 243, 252 – 253, 2014-Ohio-4723, ¶ 49. See also *Columbus City School District Board of Education v. Franklin County Board of Revision*, 134 Ohio St.3d 529, 2012-Ohio-5680; *Nationwide Community Revitalization LLC v. Wood County Board of Revision* (December 19, 2022), BTA Nos. 2020-1449, 2021-1428.

[472] See *Board of Education, Reynoldsburg City School District v. Franklin County Board of Revision* (January 29, 2013), BTA No. 2011-1481. See also *Burns v. Summit County Board of Revision* (December 10, 2010), BTA No. 2009-2135; *Foster v. Montgomery County Board of Revision* (March 16, 2010), BTA No. 2008-937. See also *Zachary Zimmer v. Stark County Board of Revision* (November 6, 2017) BTA No. 2017-622; 623 ("……the sale occurs under the compulsion that the property be liquidated for the benefit of creditors…the *subsequent* sale of the property by a lending institution that acquired it, commonly referred to as a "bank sale", may provide a reliable indication of value."); *Bohn John F & Belle J Trustees v. Montgomery County Board of Revision* (April 2, 2020), BTA No. 2019-710 ("A sale price from an auction or forced sale is presumed to be unreliable evidence of value, albeit subject to rebuttal. *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision*, 141 Ohio St.3d 243, 2014-Ohio-4723. However, the *subsequent* sale of the property by the lending institution which acquired it may provide a reliable indication of value."); *New Day Realty LLC v. Summit County Board of Revision* (September 15, 2020), BTA No. 2019-1263 ("The fiscal officer valued parcel 67-61922 at $45,550 for tax year 2018. [The owner] filed a complaint requesting a value of $31,000. In support, [the owner] supplied the settlement statement showing the property transferred from U.S. Bank to [the buyer] in April 2017 for $31,000. Because the sale is facially qualifying, the sale creates a rebuttable presumption of value in favor of the sale price…"To the extent the BOR rejected the sale because it was from a bank, we find no reason to disregard the sale on that ground". However, no party has submitted evidence to rebut the sale. Therefore, we find the sale is the best, most persuasive evidence of value.").

In finding that a lender's second sale was a valid representation of the property's value, the BTA explained its reasoning:

> …the manner in which the seller may have obtained title is irrelevant to fair market value unless it somehow has an effect on a subsequent [the second] sale…Standing alone, the circumstances under which the seller originally came to own the property are simply not important. Unless it can be shown that a prior foreclosure influenced the terms of a subsequent and unrelated sale, the best evidence of value remains a recent, arm's length, marketplace sale.[473]

In short, where the seller-bank acts as a typically motivated seller, the facts may support the finding that the sale was arm's length. At the BOR hearing then, like in cases of other "forced" sales, the proponent of the sales price derived from the bank sale will need to show that the sale was voluntary, with the bank-seller acting like a typically motivated, open market seller.

"Land Bank" Sales

In addition to sales by financial banks, property is sometimes also sold by "land banks," known in Ohio as "county land reutilization corporations."[474] Very different from financial banks:

> County land banks are nonprofit organizations whose mission is to strategically acquire properties, and return them to productive use, reducing blight, increasing property values, supporting community goals, and improving the quality of life for county residents.[475]

In other words, land banks have community improvement, as opposed to profit, as their primary purpose. In that regard, they are very different from for-profit financial banks. Under Ohio law a land bank:

> …may generally, under R.C. Chapter 5722, acquire property with respect to which a tax foreclosure proceeding has been instituted, and hold, maintain, use, and/or sell such property. R.C. 5722.07 explains that such an entity may sell property acquired by it with or without competitive bidding for "not less than its fair market value," defined generally as the appraised value.[476]

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[473] See *Richard Bockmore v. Lorain County Board of Revision* (January 7, 2005), BTA No. 2004-397 quoting *from Mills v. Lucas County Board of Revision* (April 29, 1994), BTA No. 1992-Z-553.

[474] See R.C. 5722.01.

[475] See http://ohiolandbanks.org/about/.

[476] See *REO Investments LLC v. Cuyahoga County Board of Revision* (March 6, 2014), BTA Nos. 2013-4641, et seq.

Despite their non-profit purposes and the fact that land banks typically acquire only distressed properties, the BTA has ruled that sales of properties held by land banks are "akin to sales from financial banks, which this board [BTA] has repeatedly found to be arm's-length in nature."[477] In that regard, then, sales from land banks are viewed under the same law, described above, applicable to the "second sale" of a foreclosed property from a financial bank to a private citizen or entity and under the appropriate factual circumstances can be considered arm's length sales.[478]

Fannie Mae Sales

The Federal National Mortgage Association (FNMA or "Fannie Mae") is "a federally chartered private corporation created by the United States Congress to 'provide stability in the secondary market for residential mortgages' and to 'promote access to mortgage credit' by 'increasing the liquidity of mortgage investments and improving the distribution of investment capital available for residential mortgage financing.'"[479] Amongst other things, Fannie Mae purchases "residential mortgages from banks, repackage[s] them for sale as mortgage-backed securities, and guarantee[s] these securities by promising to make investors whole if borrowers default."[480] As such, its motivations appear somewhat different from a "typically motivated seller." Nonetheless, presumably because a sale from Fannie Mae is more akin to a bank sale than a sheriff's sale, the BTA has found that:

> Although a transfer of real property from HUD is presumptively invalid…a transfer of real property from Fannie Mae is presumptively valid unless the opponent of such sale comes forward with evidence to demonstrate that the parties acted atypically…Absent an affirmative demonstration that the subject sale was not a recent, arm's-length transaction, we find that the…sale is the best indication of the subject property's value.[481]

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[477] See *REO Investments LLC v. Cuyahoga County Board of Revision* (March 6, 2014), BTA Nos. 2013-4641, et seq.

[478] See *Joseph Cashiotta v. Cuyahoga County Board of Revision* (July 8, 2021), BTA No. 2020-1938) ("Furthermore, we [the BTA] have found land bank sales "to be akin to sales from financial banks, which this Board has repeatedly found to be arm's-length.").

[479] See *Raditz v. Federal National Mortgage Association*, 145 Ohio St.3d 475, 2016-Ohio-1137, ¶ 2.

[480] See *Raditz v. Federal National Mortgage Association*, 145 Ohio St.3d 475, 2016-Ohio-1137, ¶ 2.

[481] See *Jeffrey J. Lott v. Summit County Board of Revision* (April 3, 2018), BTA No. 2017-604.

Thus, once the sale is established it is presumed to be valid unless the opponent of the sale provides evidence to show that "the parties acted atypically."

Short Sales

According to the Supreme Court "a short sale is a transaction in which the sale generates less than the amount owed on the mortgage note."[482] Further,

> A sale price from a short sale raises suspicion about the voluntary character of the sale because a short sale is a transaction in which the sale generates less than the amount owed on the mortgage note…A short sale often occurs in the context of a mortgage-loan default, which is a distressed situation.[483]

Like other forced sales, however, the Supreme Court has made clear that there is not an absolute prohibition on a short sale being considered arm's length if other evidence shows that under the facts and circumstances of the sale it was voluntary.

> Although a short sale naturally raises the inference of distress and duress, the ultimate character of a sale as voluntary or involuntary is a factual matter to be resolved by the finder of fact based on the entire record before it…The standard for duress is whether compelling circumstances lead to the parties consummating a transaction whose terms would likely be unacceptable to a typically motivated seller or buyer.[484]

Thus, as with bank sales and other forced sales, the proponent of the sales price will need to show that the short sale was voluntary, with the bank-seller acting like a typically motivated seller.

Receivership Sales

Under the Revised Code, courts have the authority to appoint receivers under a variety of enumerated circumstances.[485] One of those circumstances, encountered in connection with the sale of real estate, allows the appointment of a receiver:

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[482] See *Columbus City School District Board of Education v. Franklin County Board of Revision*, 134 Ohio St.3d 529, 2012-Ohio-5680, ¶ 29.

[483] See *Columbus City School District Board of Education v. Franklin County Board of Revision*, 134 Ohio St.3d 529, 2012-Ohio-5680, ¶ 29. See also *Windsor Tower LLC v. Montgomery County Board of Revision* (August 31, 2021), BTA No. 2019-2166.

[484] See *Columbus City School District Board of Education v. Franklin County Board of Revision*, 134 Ohio St.3d 529, 2012-Ohio-5680, ¶ 31.

[485] See R.C. 2735.01.

> In an action by a mortgagee, for the foreclosure of the mortgagee's mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, materially injured, diminished in value, or squandered, or that the condition of the mortgage has not been performed, and either of the following applies: (a) The property is probably insufficient to discharge the mortgage debt. (b) The mortgagor has consented in writing to the appointment of a receiver.[486]

In addition, amongst other circumstances, a court can appoint receivers to carry a court's judgment into effect, to dispose of property according to a court judgment, and where a corporation, limited liability company, or other business entity has been dissolved, become insolvent, or is in imminent danger of insolvency.[487] Often the receiver's sale is under court supervision after the prior owner defaulted on the loan.[488]

The appointment of a receiver, then, generally arises in circumstances that would commonly be described as encompassing legal or business distress, demise, or decline; circumstances that do not typically foster a sales environment free of duress or compulsion (at least on behalf of the seller). As stated by the BTA, "…since the only sale document is a deed of receiver, we must presume this was a forced sale, which is not arm's-length."[489] But like other forced sales, sales from a receiver can be considered arm's length under appropriate circumstances. For example, in one case where it found that the presumption of invalidity had been overcome with evidence of voluntariness, the BTA stated that:

> This board has previously found that a sale conducted through a receiver presumably proceeds at the direction and under the supervision of a court order, bringing such transaction within the scope of a forced sale which is not indicative of true value…The [Supreme] court has held that R.C. 5713.04, which provides that "[t]he price for which such real property would sell at auction or forced sale shall not be taken as the criterion of its value," is not an absolute bar…Thus, a party relying on the sale may show that it "was nevertheless an arm's-length transaction between typically motivated parties and should therefore be regarded as the best

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[486] See R.C. 2735.01(A)(2).

[487] See R.C. 2735.01(A)(4), (5), and (6) http://codes.ohio.gov/orc/2735http://codes.ohio.gov/orc/2735http://codes.ohio.gov/orc/2735.

[488] See *Hull Organization, LLC v. Clermont County Board of Revision* (March 31, 2016), BTA No. 2015-888.

[489] See *Cleveland Metropolitan Schools Board of Education v. Cuyahoga County Board of Revision* (December 27, 2022), BTA No. 2020-1682.

> evidence of the property's value."… In the present appeal, although the June 2015 receiver sale clearly falls within the category of a "forced sale" …we find that…[the owner] has rebutted the associated presumption and has proven that the sale was an arm's-length transaction.[490]

As with other forced sales, the particular facts of a receiver's sale will control the determination as to whether the sale can be considered arm's length.

Bankruptcy Sales

While there are various scenarios under which real estate can be sold out of a bankruptcy estate, the one most frequently encountered by the BOR is a real estate sale from a Chapter 7 liquidation of the owner's assets. In general, where the owner files a Chapter 7 bankruptcy, the U.S. Bankruptcy Court appoints a trustee to oversee, and ultimately sell, the debtor's assets including its real estate. The proceeds of those sales are then distributed by the bankruptcy trustee to the creditors of the debtor.

Like other sales that take place under circumstances of financial distress, sales that occur under a Chapter 7 liquidation proceeding, are considered forced sales. As stated by the Court of Appeals:

> …the actual transfer of title of each of the subject properties did not occur as a result of an arm's-length transaction between a willing buyer and a willing seller. The transfer of title of the properties occurred within the context of bankruptcy proceedings. Immediately prior to the scheduled sheriff's foreclosure sale, [the former owner] filed for bankruptcy protection…Thereafter, [the new owner] purchased and acquired title to the properties. In effect, [the new owner] acquired title through a forced sale that was disqualified by R.C. 5713.04 as criterion of value for establishing value.[491]

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[490] See *Princeton City Schools Board of Education v. Hamilton County Board of Revision* (August 24, 2017), BTA No. 2016-1515. See also *ARDC LLC v. Cuyahoga County Board of Revision* (July 15, 2022), BTA No. 2020-1604 ("R.C. 5713.04 establishes a presumption that a sale price from an auction [or forced sale] is not evidence of a property's value. However, that presumption may be rebutted by evidence showing that the sale occurred at arm's length between typically motivated parties."); *Revere Local Schools Board of Education v. Summit County Board of Revision* (August 28, 2023), BTA No. 2021-1894.

[491] See *R.L.G. Properties, L.L.C. v. Franklin County Board of Revision*, 10th Dist. Franklin No. 06AP-132, 2006-Ohio-5096, ¶12. See also *Akron City Schools Board of Education v. Summit County Board of Revision* (February 6, 2023), BTA No. 2020-1589 ("The sale documents show the sale was related to a bankruptcy. The grantor listed on the conveyance fee statement is a court appointed third party. The fiduciary deed identifies the court appointed third party and refers to the related US Bankruptcy Court case. We find that this sale, which was related to bankruptcy, was forced and was not a reliable indication of value. …It is possible to rebut a presumption that a sale related to a bankruptcy is not a good sale. However, in this case, the BOE did not provide any evidence to show that the sale, while related to a bankruptcy, was an arm's length sale.").

And like other sales that are considered forced, under the appropriate factual circumstances sales from a bankruptcy estate can be considered arm's length. As stated by the BTA:

> …forced sales, such as transfers of property through bankruptcy proceedings…are not considered reliable value indicators and a rebuttable presumption of *invalidity* arises…The Supreme Court, however, has determined that R.C. 5713.04 is not an absolute bar to the utilization of a forced sale, but rather, constitutes a codification of a rebuttal presumption of invalidity…Further, the court has indicated, the proponent of utilizing such a sale "bears the burden to prove that[, although forced,] the sale was nevertheless an arm's-length transaction between typically motivated parties and should therefore be regarded as the best evidence of the property's value."[492]

If the proponent of using the sale meets that burden, then the bankruptcy sale may be considered an arm's length sale and can be used to set a property's valuation.

HUD Sales

The Ohio Supreme Court has held that sales of property from the U.S. Department of Housing and Urban Development (HUD) are considered foreclosure sales and therefore are presumptively not arm's length.[493] The reason they are considered forced, according to the Court, is that HUD:

> …serves as a "guarantor of loans which are made by a mortgage lending institution to a mortgagor property owner," so that when the lending institution forecloses on the defaulting owner, the lender "obtains title to the property, often as a result of judicial sale," after which the lender transfers title to HUD "for the amount of the Guarantee."…HUD thus "obtains the property 'under duress, and obviously seeks to divest itself of the property for at least the amount of its guarantee.'...In short, a sale of foreclosed property by HUD is generally regarded as a transaction that is not a voluntary sale between typically motivated market participants.[494]

Following that reasoning, the BTA has stated:

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[492] See *Parkplace on Grand Condominium v. Montgomery County Board of Revision* (August 10, 2017), BTA No. 2016-910. *Jess 1 LLC v. Cuyahoga County Board of* Revision (November 27, 2023), BTA No. 2023-1284 ("…foreclosure sales and forced sales are presumptively invalid.").

[493] See *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 127 Ohio St.3d 63, 2010-Ohio-4907. See also *Nicole & Hyunoo Yim v. Cuyahoga County Board of Revision (*January 8, 2020), BTA No. 2018-2166 ("A HUD sale is presumed not to be a valid sale for purposes of establishing the value of property."); *New Day Realty LLC v. Summit County Board of Revision* (May 4, 2020), BTA No. 2019-1260 ("HUD sales are presumed forced sales, which do not create a presumption of value."), affirmed on appeal *Yim v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No. 109470, 2020-Ohio-6742; *Wonder Homes, LLC v. Cuyahoga County Board of Revision* (July 5, 2022), BTA No. 2021-366.

[494] See *Schwartz v. Cuyahoga County Board of Revision*, 143 Ohio St.3d 496, 2015-Ohio-3431, ¶28.

> When property transfers from HUD, it is considered a forced, involuntary transfer, and, pursuant to R.C. 5713.04, "forced" sales are not representative of market value…

and further, that

> when…a property is transferred from HUD, a rebuttable presumption of *invalidity* attaches to the transaction…In such instances, once the opponent of such a transfer has established that the transfer, on its face, was a forced sale, the proponent of such sale…may rebut the resulting presumption of invalidity by proving that the sale, although "forced", was nevertheless an arm's-length transaction between typically motivated parties and should therefore be regarded as the best evidence of value.[495]

Similar to other "forced" sales, however, the presumption of invalidity for a HUD sale is not absolute[496] and has been overcome in several cases. For example, the BTA found that the presumption of invalidity was successfully rebutted where the subject property was in poor condition, was marketed on the MLS, prior offers for the property fell through, and the property ultimately sold to the highest bidder who had no relationship with HUD.[497] But evidence of a HUD property being listed on the Multiple Listing Service ("MLS"), alone without more, has been found by the BTA to provide an insufficient basis to overcome a HUD sale's presumption of invalidity. This was found in a case where there was evidence that a HUD property was listed in the MLS but there was no testimony by anyone with firsthand knowledge about the facts and circumstances of the sale. In that circumstance the BTA found that "The MLS listing was no substitute for testimony from someone with firsthand knowledge of the HUD sale and does not rebut the presumptions accorded to such sale."[498]

In still another case, the Supreme Court found that the presumption of invalidity of a HUD sale was also successfully rebutted where, amongst other things, the property had been on the

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[495] See *Michael Morton v. Lorain County Board of Revision* (October 20, 2017), BTA No. 2016-1630.

[496] See *Olentangy Local Schools Board of Education v. Delaware County Board of Revision*, 141 Ohio St.3d 243, 2014-Ohio-4723, ⁋ 37 ("…it might be possible to introduce evidence showing that that [sic] a particular foreclosure sale is voluntary…R.C. 5713.04 does not categorically prohibit reliance on the price from a foreclosure sale as evidence of value.").

[497] See *Michael Morton v. Lorain County Board of Revision* (October 20, 2017), BTA No. 2016-1630.

[498] See *Nicole & Hyunjoo Yim v. Cuyahoga County Board of Revision (*January 8, 2020), BTA No. 2018-2166, affirmed on appeal, *Yim v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No. 109470, 2020-Ohio-6742. See also *Hersh v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No. 109035, 2020-Ohio-3596, ⁋ 15.

market for three years, a for-sale sign had been posted at the property, and several offers had been made to buy it.[499] In addition, the presumption of invalidity was overcome in a case where HUD properties were listed with a realtor, they were on the market for 15 and 31 days, respectively, before contracts were entered, and the new owner placed his bid after the period expired when only owner-occupants could make offers.[500]

Finally, just as with auction sales, there are circumstances where a HUD sale contains elements that are typically found in an arm's length sale but, despite the presence of these open-market elements, on the totality of the evidence those open-market elements were not sufficient to overcome the HUD sale's presumption of involuntariness. For example, where a HUD property was listed on the MLS but there was no other evidence of voluntariness, the BTA found that the rebuttable presumption of invalidity had *not* been overcome. As stated by the BTA:

> We recognize that the BOR included the MLS listing as support for the finding the sale was arm's length. We find, however, that this listing alone without accompanying testimony or information regarding the circumstances of the sale, is not enough to rebut the presumption that the [HUD] sale is not evidence of the subject's value. Accordingly, we find that transfer does not furnish a reliable basis to reduce the subject's value.[501]

As with other forced sales, the rebuttable presumption of invalidity in HUD sales can be overcome with evidence of voluntariness.

VA Sales

Like sales from HUD, sales from the Veterans' Administration (VA) are presumed to be involuntary. As stated by the BTA "…this board has previously found that a sale from the Veterans Administration is akin to a purchase from HUD and does not constitute an arm's-length sale."[502]

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[499] See *Schwartz v. Cuyahoga County Board of Revision*, 143 Ohio St.3d 496, 2015-Ohio-3431, ¶28.

[500] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (August 6, 2019), BTA Nos. 2018-1262, 2018-1265. See also *Italian Greek Investments, LLC v. Montgomery County Board of Revision* (December 31, 2019), BTA Nos. 2018-1948, 2018-1949. But see *Shelby Hersh v. Cuyahoga County Board of Revision* (August 27, 2019), BTA No. 2018-1129, where the BTA found that the presumption of invalidity was *not* overcome in a HUD sale where (1) the owner did not show that the property was marketed for any significant period of time, (2) even though salespeople were involved in the sale, the owner failed to show that the property was openly and systematically marketed, and (3) the owner failed to provide market data to show that no higher price could have been obtained.

[501] See *Gahanna-Jefferson City Schools v. Franklin County Board of Revision* (September 1, 2017), BTA No. 2016-2206.

[502] See *Debra A. Atkins v. Cuyahoga County Board of Revision* (February 2, 2015), BTA No. 2014-2362. See also *Allen B Properties v. Summit County Board of Revision* (September 26, 2022), BTA No. 2021-1054 ("…, this Board has repeatedly held

Further, the BTA has ruled that "… transfers of real property from the VA are 'forced' sales within the meaning of R.C. 5713.04." and that "The Veteran's Administration as guarantor of the loan received the property under duress upon foreclosure and sought only to recover the amount of its loan."[503]

But as with HUD sales, the presumption of invalidity in VA sales can be rebutted by evidence showing that the sale was, in fact, voluntary. In a case involving a VA sale, the Supreme Court has explained that:

> … when the underlying transaction is…a forced sale, the proponent of the sale price bears a heavier burden…R.C. 5713.04 reverses the typical presumption that a sale price is the best evidence of a property's value when the underlying transaction was…a forced sale. Accordingly, we likewise adjust the typical burdens of proof with regard to sale prices. Namely, the opponent of a sale price has a very light burden to establish that a transaction was on its face an auction or a forced sale. Once that threshold is crossed, then the proponent of the sale price bears the burden to prove that the sale was nevertheless an arm's-length transaction between typically motivated parties and should therefore be regarded as the best evidence of the property's value.[504]

To overcome the presumption of invalidity of a VA sale, the BTA has stated that "In the absence of a qualifying sale, [the owner] was required…to provide a competent appraisal of the subject property, attested to by a qualified expert, for the tax lien date in issue."[505]

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that a sale from the U.S. Department of Veterans Affairs, as in this circumstance, is considered a forced sale, and thus, the sale is not presumed to be arm's-length.").

[503] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (April 21, 2016), BTA No. 2015-1199. See also *New Day Realty LLC v. Summit County Board of Revision* (September 15, 2020), BTA No. 2019-1263 ("[The owner] filed a complaint seeking a value of $27,333 based on a transfer from the Secretary of Veterans Affairs to [the buyer] for that price. No other evidence was submitted in support of the sale. We find that sale is not indicative of value since it was a transfer from the Secretary of Veterans Affairs, meaning we are to presume the sale was not arm's-length.… [The owner] has presented no evidence that the sale was arm's-length to rebut the presumption. Therefore, we find the fiscal officer's value as retained by the BOR the appropriate value for this parcel.").

[504] See *Olentangy Local Schools Board of Education v. Delaware County Board of Revision*, 141 Ohio St.3d 243, 2014-Ohio-4723, ¶ 43. See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (April 21, 2016), BTA No. 2015-1199.

[505] See *William Tomlinson v. Cuyahoga County Board of Revision* (May 3, 2017), BTA No. 2016-1248.

"Other" Sales

There are certain types of "other" sales which are not considered forced sales, but neither are they considered arm's length for purposes of setting the value of the property. These types of sales typically – but not always - involve transfers that are *ineligible* to be considered as arm's length and include (1) transfers of real property pursuant to a "sale-leaseback" transaction and (2) the sale of a personal property ownership interest (i.e., stock in a corporation, membership interest in an LLC, etc.) in an entity that owns real property. Those types of transfer have inherent characteristics that remove them from consideration as arm's length sales, even though real estate interests may have transferred as part of the transaction.

Sale-Leaseback Sales

Although not considered forced sales, sale-leaseback transactions are not considered arm's length. As stated by the Supreme Court:

> A sale/leaseback inherently involves an overall contractual relationship between the parties that differs from the model of an unrelated seller negotiating with an unrelated buyer. … [in a sale-leaseback] the contemporaneous negotiation of the sale price and the lease terms, especially the rent payments, sets up a reciprocal relationship between these elements of the overall transaction…This reciprocal interaction is in itself atypical of the kind of seller-to-buyer transaction that is understood to fix market value for tax purposes, and because of that atypicality, the ordinary presumption in favor of using the sale price…does not apply…we conclude that the sale aspect of a sale/leaseback does not qualify as an arm's-length transaction under R.C. 5713.03.[506]

[506] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 151 Ohio St.3d 100, 2017–Ohio-7578, ¶ 20. See also *Orange City School District Board of Education v. Cuyahoga County Board of Revision*, 152 Ohio St.3d 25, 2017-Ohio-8817, ¶ 16; *Columbus City Schools Board of Education v. Franklin County Board of Revision* (September 25, 2018), BTA No. 2017-1550; *Shwetal Desai DBA Gericare Associates Inc. v. Butler County Board of Revision* (December 18, 2017), BTA No. 2017-1188 ("Sale-leaseback sales are also presumptively invalid."); *Cole Cab Portfolio LLC v. Lorain County Board of Revision* (July 7, 2022), BTA No. 2020-901 ("Since it was part of a sale-leaseback, it does not qualify as an arm's length transaction. The Ohio Supreme Court has held that the sale price in a sale-leaseback transaction is not indicative of a property's value."); *Rossford Exempted Village Schools Board of Education v. Wood County Board of Revision* (September 27, 2022), BTA No. 2021-1224; *Akron City Schools Board of Education v. Summit County Board of Revision* (January 17, 2023), BTA No. 2020-1622.; *Rossford Exempted Village Schools Board of Education v. Wood County Board of Revision (*July 24, 2023), BTA Nos. 2020-1464, 2021-1486.; *Lake Local Schools Board of Education (Wood) v. Wood County Board of Revision* (November 20, 2023), BTA No. 2020-1639.

Thus, unlike the forced sale cases, there is no rebuttable presumption of invalidity in using the sale portion of a sale-leaseback as evidence of value. Instead, as reasoned by the Court, the overall contractual relationship between the parties removes this type of transaction from the arm's length category altogether.

Sale of Ownership Interest in Corporation or Limited Liability Company

When real property is held in the name of a corporation or limited liability company there are occasions where the *stock* (in the case of a corporation) or *membership interest* (in the case of an LLC) is transferred to the new owner through a purchase agreement. The question in those circumstances is whether there has been a transfer of real property (the land and improvements) or personal property (the stock or membership interest, hereafter collectively referred to as "ownership interest"). If the subject of the transfer is considered personal property, then the BOR has no jurisdiction to render a value determination.[507]

The value of a corporation or limited liability company represents the value of both the real and personal property owned by the entity and without more detailed evidence the mere price at which the entity sells its ownership interest cannot, by itself, be used to establish the value of the real estate owned by that entity. According to the Supreme Court:

> Stock value represents the *company's* value. The many variables associated with a going concern combine to make up a company's value. The sale price of all of the shares of stock of a company, therefore, does not establish the value of that company's real property. Other evidence, such as appraisal or expert accounting testimony, would be necessary to prove the value of the real property separate from the value of the company itself. Because [the owner] did not establish a value for the property, it did not prove that it was entitled to a reduction in value.[508]

In other words, the sale of the entire ownership interest in a corporation or LLC may include value that should be attributed to personal property including, intellectual property, accounts receivable, physical equipment, and goodwill, to name a few. As such, it could be inaccurate to attribute the

[507] See R.C. §5715.01(B) ("There shall also be a board in each county, known as the county board of revision, which shall hear complaints and revise assessments of *real property* for taxation." (italics added).

[508] See *Salem Medical Arts and Development Corporation v. Columbiana County Board of Revision*, 82 Ohio St.3d 193, 1998-Ohio-248.

entire purchase price for the ownership interest only to the real property owned by the entity. That would likely improperly overvalue the real property.

In assessing whether the transfer price of the ownership interest in an entity should be considered the value of the subject real estate, the BTA has made it clear that it will look to the purchase documents for evidence of the nature of the transfer.

> In cases where this board [BTA] has found a transfer of interest in the ownership entity was actually a sale of real property, this board has relied on purchase agreements and other contracts of the parties. If those documents make clear no other going concern value or assets were owned by the newly-formed entity, this board has been willing to recognize that transfer as a sale for real property valuation purposes.[509]

Further elaborating on the type of evidence it will require, the BTA stated that:

> …this board has not considered the sale of membership interest to be a real property sale when the record lacks specific evidence of the transaction, which makes clear the newly formed entity's sole purpose was to facilitate the transfer of real property only. [Citation omitted]. Importantly, a party must present evidence that the entity transfer was not a transfer of non-realty.[510]

As such, where the entity whose ownership interests were being transferred owned personal property in addition to real property, the BTA has been reluctant to attribute to the real property the entire amount of the purchase price that was paid for the ownership interest.

There are, however, circumstances - where the price at which the ownership interest has transferred *is* considered to be the price of the real estate. According to the BTA:

> …this board has found the sale of all the interests in an ownership entity is indicative of real property value where the ownership entity was formed for the sole

[509] See *Cleveland Municipal Schools Board of Education v. Cuyahoga County Board of Revision* (August 20, 2019), BTA No. 2017-2157, affirmed on appeal in *Cleveland Municipal School Board of Education v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No. 109028, 2020-Ohio-5427, ¶ 23; *Lake Cove Apartments, LLC v. Cuyahoga County Board of Revision* (March 6, 2023), BTA Nos. 2020-849, 2020-850 ("In cases where this Board has found a transfer of interest in the ownership entity to be a sale of real property, this Board has relied on purchase agreements and other contracts of the parties. If those documents make clear no other going concern value or assets were owned by the entity, this Board has been willing to recognize that transfer as a sale for real property valuation purposes."); *Cuyahoga Heights Local Schools Board of Education v. Cuyahoga County Board of Revision* (June 7, 2023), BTA No. 2020-2104. ("In reviewing the transfer in June 2018, the purchase and sale agreement makes clear that the subject property is the sole object being transferred to a new entity – the taxpayer. H.R. Exhibit 1 at 1-5. The sale contains little to no personal property.").

[510] See *Cleveland Municipal Schools Board of Education v. Cuyahoga County Board of Revision* (August 20, 2019), BTA No. 2017-2157. See also *Cleveland Metropolitan Schools Board of Education v. Cuyahoga County Board of Revision* (January 8, 2020), BTA No. 2018-2225.

purpose of effectuating the transfer of title to the property and the entity holds no other assets.[511]

For example, in a case where the transfer was of an interest "in an entity that holds *only* the subject real property" (italics added) and no other assets or going concern value, the BTA found that "the transfer is a sale for purposes of real property valuation." In that case the BOE presented evidence of a purchase and sale agreement, a recorded deed showing the transfer from the seller to the purchasing entity, and evidence that the entity was created to hold title to the property, which was the selling entity's only asset. As always, however, the quality of the evidence counts and decisions on whether the subject matter of the transfer is real or personal property will often turn on the specific facts of the case. [512]

More recently, however, the Supreme Court indicated that under certain circumstances it would consider the sale of the entire membership interest in an LLC to constitute the sale of real estate (as opposed to personal property) *even if* the LLC owned some personal property. In that case ("*Palmer House*"), the purchase agreement set forth a list of real, personal, and intangible property that was being transferred as part of the transaction.[513] Based on that, the owner argued that the presence of these non-realty assets "means the transaction involved the transfer of an ongoing business with multiple assets, not just real estate,"[514] and that, therefore, the sales price should not be used as the equivalent value for the real property. Under previously decided law, that would have been correct and meant that the purchase of the membership interest was of a business, and not a real estate sale.

But under the circumstances *of Palmer House*, the Supreme Court disagreed with the owner's argument. In ruling that the transfer of the LLC's membership interest was, in fact, the

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[511] See *Cleveland Municipal Schools Board of Education v. Cuyahoga County Board of Revision* (May 31, 2019), BTA No. 2017-2277.

[512] See *Orange City Schools Board of Education v. Cuyahoga County Board of Revision*, 160 Ohio St.3d 21, 2020-Ohio-710, where the Ohio Supreme Court affirmed, without issuing an opinion, the judgment of the Eight District Court of Appeals in Cuyahoga County Case No. 107199, 2019-Ohio-634, ("Although Appellant maintains other items were transferred as part of the transaction, the evidence shows that the [real] property was the only thing transferred to Appellant for the purchase price…The evidence shows that the transfer of membership interested…was done solely for the purpose of transferring title to the [real] property.").

[513] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 159 Ohio St.3d 283, 2020-Ohio-353, ¶ 40.

[514] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 159 Ohio St.3d 283, 2020-Ohio-353, ¶ 41.

transfer of real estate (as opposed to personal property) the Court looked to the purchase agreement which – despite the fact that the transfer was of membership interests (personal property) – "identifie[d] itself as a purchase agreement for the real estate at issue."[515] But in addition, the Court stated that:

> On the record before us, the real estate at issue generates rent income, which is integral to the value of the real estate. No other income is derived from the use of the property that would relate to any business value other than the value of the real estate itself…That fact places this case in the category of those sales of income-producing properties in which the total contract price constitutes a presumptive starting point for valuing the real estate, subject to reduction if the owner demonstrates the propriety of allocating some of the contract price to assets other than real property.[516]

Thus, the facts of *Palmer House* made clear to the Court that "the parties' transfer of corporate ownership constituted a contrivance for accomplishing the sale of commercial real estate."[517] In other words, the transaction was the sale of real estate that the parties tried to masquerade as the sale of a business. *Palmer House* indicated that the Court will find a transfer to be one of real estate, as opposed to personal property, *even where the transaction also includes the sale of personal property* where: (1) the purchase documents indicate that the sale is for real estate; (2) the subject real estate generates rental income; (3) such income is integral to the value of the real estate; and (4) no other income is derived from the use of the property that would relate

[515] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 159 Ohio St.3d 283, 2020-Ohio-353, ¶ 38.

[516] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 159 Ohio St.3d 283, 2020-Ohio-353, ¶ 42. See also *Gahanna-Jefferson City Schools Board of Education v. Franklin County Board of Revision* (May 27, 2020), BTA No. 2019-73 ("…, in this matter, the purchase agreement explicitly refers "to an intent to sell and buy the real estate itself." Id. Indeed, the purchase agreement is entitled "Real Estate Purchase Contract" and references that "[s]eller will create a new entity for the property and buyer will purchase new entity. Buyer will pay for costs associated with this."…Thus, on this record, we find that the BOE has successfully demonstrated that the parties to the entity transfer effectuated the sale of real property, which we find to be indicative of the subject property's value. Upon careful review of the record, we discern no evidence to rebut the presumption that the subject sale was recent, arm's-length, and voluntary."); *Steubenville Elderly LP v. Jefferson County Board of Revision* (February 6, 2023), BTA No. 2020-1878 ("Like in *Palmer House*, the real estate at issue generates rental income, and "[n]o other income is derived from the use of the property that would relate to any business value other than the value of the real estate itself." *Palmer House* at ¶ 42. The documents submitted by the property owner show that the entity transfer involved the sale of real property, and not the transfer of anything else.").; *Brooklyn City Schools Board of Education v. Cuyahoga County Board of Revision* (August 21, 2023), BTA No. 2021-834.

[517] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 159 Ohio St.3d 283, 2020-Ohio-353, ¶ 39.

to any business value other than the value of the real estate.[518] Subsequent to the Court's decision in *Palmer House*, the BTA explained further that it "does not consider the sale of only a membership interest as a real property sale when the record lacks specific evidence that the entity's sole purpose was to facilitate the transfer of real property [citation omitted]. A party must present evidence that the entity transfer was not a transfer of non-realty, except the personal property that typically transfers with real property."[519]

In addition, there have been other cases where the BTA rejected the sale of an ownership interest as the price of the real property. For example, in a case where the BOE sought to have the price at which ownership interests sold serve as the value of the parcel, the BTA found that the sale of ownership interests in entities was not valid for determining the value of the subject real property because:

> The BOE has not presented a purchase agreement, nor has it submitted the testimony of any individual involved in the transfer. In the absence of such information, we are unable to conclude that the September 2015 transfer of title to the subject property was a sale for purposes of real property valuation purposes.[520]

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[518] See *Columbus Board of Education v. Franklin County Board of Revision* (February 17, 2021), BTA Nos. 2019-393) ("In [*Palmer House*], the Court affirmed this Board's decision, which determined that the transfer of real property via a "Drop Down LLC," by which the seller would place the property in a limited-liability company and then transfer the limited-liability company to the buyer, reflected real property value. Indeed, in cases where this Board has found a transfer of interest in the ownership entity was actually a sale of real property, this Board has relied on purchase agreements and other contracts of the parties. If those documents make clear no other going concern value or assets were owned by the newly formed entity, this Board has been willing to recognize that transfer as a sale for real property valuation purposes. [citations omitted]. However, this Board has not considered the sale of membership interest to be a real property sale when the record lacks specific evidence of the transaction, which makes clear the newly formed entity's sole purpose was to facilitate the transfer of real property only. [citation omitted]. Importantly, a party must present evidence that the entity transfer was not a transfer of non-realty…Here, the record is void of any evidence to demonstrate that the subject sale was solely the sale of real property and, therefore, we cannot conclude that such sale reflects the subject property's value."). See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (February 1, 2021), BTA Nos. 2019-394, 2019-461; *Lake Cove Apartments, LLC v. Cuyahoga County Board of Revision* (March 6, 2023), BTA Nos. 2020-849, 2020-850, ("The documents submitted by the property owners establish that the entity transfer was a sale of real property. Like in *Palmer House*, the real estate at issue generates rental income, and "[n]o other income is derived from the use of the property that would relate to any business value other than the value of the real estate itself.").

[519] See *Cleveland Metropolitan Schools Board of Education v. Cuyahoga County Board of Revision* (May 18, 2023), BTA No. 2021-118. See also *South-Western City Schools Board of Education v. Franklin County Board of Revision* (October 2, 2023), BTA No. 2019-1534 ("In cases when this Board has found a transfer of an interest in the ownership entity to be a sale of real property, this Board has relied on the parties' purchase agreements and other contracts. If those documents make clear the entity owned no other going concern value or assets, this Board has been willing to recognize that transfer as a sale for real property valuation purposes.")

[520] See *Beachwood City Schools Board of Education v. Cuyahoga County Board of Revision* (October 15, 2018), BTA No. 2017-871. See also *Stevens Preservations LLC v. Lake County Board of Revision* (February 17, 2021), BTA Nos. 2019-2429, 2430, 2431, 2432 ("…in cases where this Board has found a transfer of interest in the ownership entity was actually a sale of real property, this Board has relied on purchase agreements and other contracts of the parties.").*Lake Cove Apartments, LLC v. Cuyahoga County Board of Revision* (March 6, 2023), BTA Nos. 2020-849, 2020-850 ("…this Board has not considered the sale of a membership interest to be a real property sale when the record lacks specific evidence of the transaction which makes clear the entity's sole purpose was to facilitate the transfer of real property.").

In a second case, the BTA similarly rejected the sale price of the ownership interest as the value of the property. In that case an appraiser testified but was not personally familiar with the facts and circumstances surrounding the sale. The BTA found his testimony on those critical facts to be hearsay.

> We find the evidence upon which the BOE relied to assert that the subject property transferred, to be problematic as the BOE's case relies upon mounds of hearsay. [Citations Omitted]. For example, instead of presenting the testimony of someone with firsthand knowledge of the alleged sale of February 2013, the BOE presented the testimony of Huber, who lacked such knowledge…Here, it is clear that Huber acted "merely as a conduit of information" about the facts and circumstances of the alleged sale. As a result, we must find that Huber's testimony about the facts and circumstances of the alleged February 2013 sale to be hearsay and, therefore, not competent, credible, and probative, for purposes of this appeal.[521]

Finally, even after the *Palmer House* decision, the BTA "…has not considered the sale of a membership interest to be a real property sale when the record lacks specific evidence of the transaction, which makes clear the newly formed entity's sole purpose was to facilitate the transfer of real property only."[522] According to the BTA, if the purchase agreements and other contracts of the parties "...make clear no other going concern value or assets [other than the real property] were owned by the newly formed entity, this Board has been willing to recognize that transfer as a sale for real property valuation purposes."[523] Again, these cases make clear the importance of the quality and specificity of the evidence.

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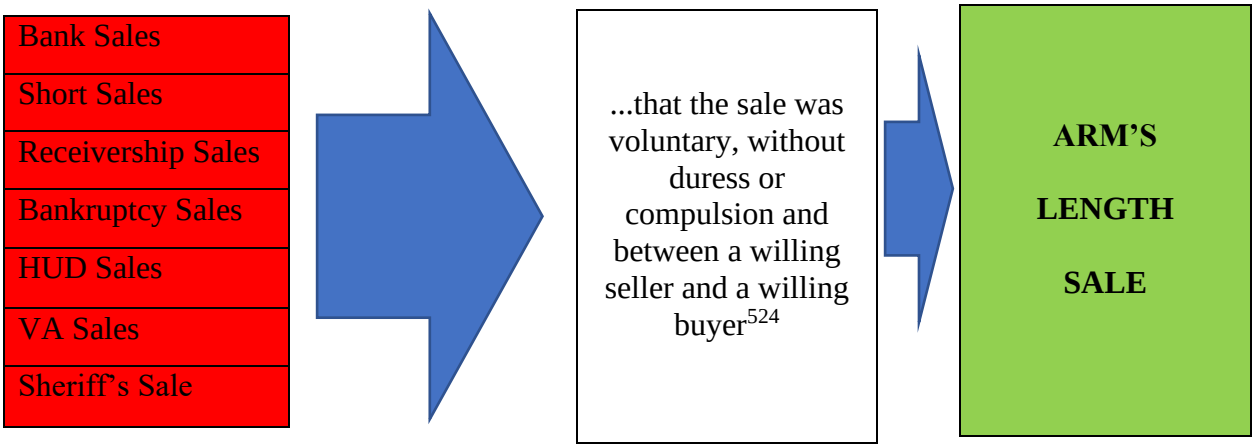
[521] See *Beachwood City Schools Board of Education v. Cuyahoga County Board of Revision* (May 28, 2019), BTA No. 2017-663. See also *Cleveland Municipal Schools Board of Education v. Cuyahoga County Board of Revision* (May 20, 2019), BTA No. 2018-186 where the BTA rejected the entity sale price as the value of the real property ("At the BOR, the school board relied on three documents, i.e., the deed, CoStar report, and mortgage document. The deed is not dispositive because it does not contain any information about the actual details of the membership transfer…We have likewise held to "the extent the BOE relies on the CoStar report as evidence of the sale price, such report is hearsay."…We are likewise unable to determine the membership sale price or other details from the mortgage document…No appraiser appeared to testify to the documents, and no other witnesses were called to authenticate the purchase agreement or to discuss the transaction.").

[522] See *Columbus Board of Education v. Franklin County Board of Revision* (February 1, 2021), BTA Nos. 2019-394, 2019-461. See also *Stevens Preservations LLC v. Lake County Board of Revision* (February 17, 2021), BTA Nos. 2019-2429, 2430, 2431, 2432 ("…this Board has not considered the sale of membership interest to be a real property sale when the record lacks specific evidence of the transaction, which makes clear the newly formed entity's sole purpose was to facilitate the transfer of real property only.").

[523] *Stevens Preservations LLC v. Lake County Board of Revision* (February 17, 2021), BTA Nos. 2019-2429, 2430, 2431, 2432. See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (November 27, 2023), BTA No. 2022-333 ("In cases when this Board has found a transfer of an interest in the ownership entity to be a sale of real property, this Board has relied on the parties' purchase agreements and other contracts. If those documents make clear the entity owned no other going concern value or assets, this Board has been willing to recognize that transfer as a sale for real property valuation purposes.").

FORCED SALES

PROPONENT ARGUES THAT VALUE SHOULD BE DERIVED FROM ONE OF THE BELOW FORCED SALES (PRESUMPTION OF *IN*VALIDITY ATTACHES)	PROPONENT OF SALE HAS BURDEN TO REBUT THE PRESUMPTION OF *IN*VALIDITY AND MUST PROVE…	IF THAT BURDEN IS MET, THEN IT'S AN…

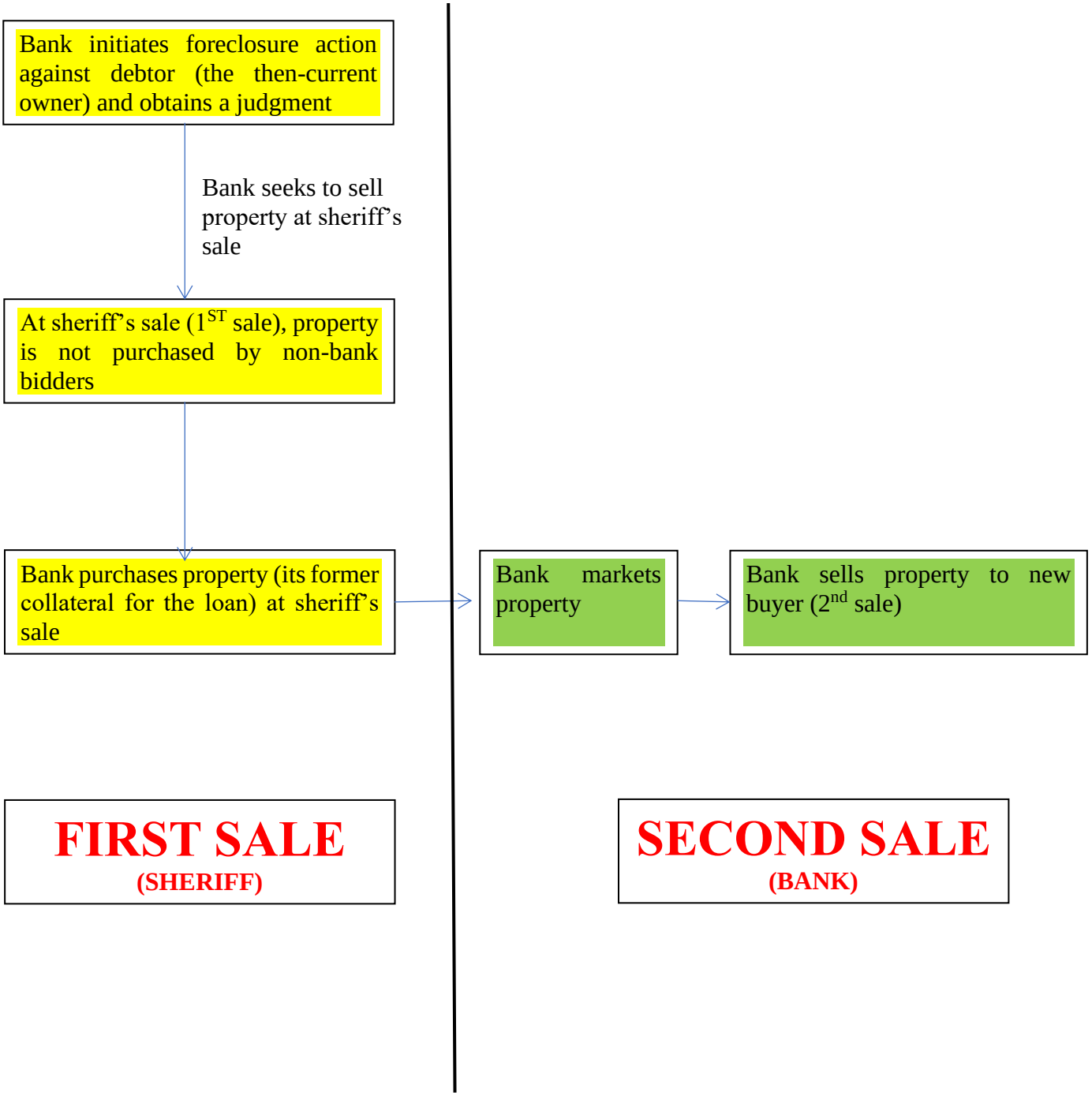


IF BOR IS GOING TO FIND THAT A FORCED SALE IS, IN FACT, ARM'S LENGTH, THEN IT MAY WANT TO CONSIDER USING THE FOLLOWING LANGUAGE IN ITS DECISION:

> We recognize that a [TYPE OF] sale is generally considered a forced sale under R.C. 5713.04. The Supreme Court has made clear, however, that the fact that a sale is a [TYPE OF] sale does not automatically prohibit it from being considered an arm's length sale if the other facts and circumstances of the case show that it was, in fact, a voluntary sale and without duress or compulsion. Here, the facts and circumstances presented by _____ show the following that indicate the sale was voluntary:
>
> 1. _____
> 2. _____
> 3. _____
>
> Accordingly, based on the totality of the evidence here, it is clear that this sale was, in fact, voluntary and accordingly I move that……

[524] See *Columbus City School District Board of Education v. Franklin County Board of Revision*, 134 Ohio St.3d 529, 2012-Ohio-5680.

BANK SALE PROCESS



CHAPTER 8
UNDERSTANDING THE MEANING OF "WITHIN A REASONABLE LENGTH OF TIME"

CHAPTER SUMMARY

- For a sale to be considered valid for valuation purposes, R.C. 5713.03 states that it must have taken place "within a reasonable length of time, either before or after the tax lien date." This is sometimes referred to as the "recency" requirement.

- In general, but subject to the facts and circumstances of the particular case, a sale is *not* considered recent where it takes place (1) more than 24 months *before* the tax-lien date of a reappraisal year, *and* (2) where the Auditor decides *not* to base the value of the property at the sexennial reappraisal on the sale.

- In general, but subject to the facts and circumstances of the particular case, a sale that takes place more than 24 months *after* the tax-lien date of a reappraisal year still enjoys a presumption of recency even when it postdates the tax-lien date by more than 24 months.

- The BTA has stated that recency encompasses all factors that would, by changing with the passage of time, affect the value of the property.

Revised Code Section 5713.03 establishes the factors that are considered in establishing a parcel's true value when that parcel has been the subject of a sale. According to the statute:

> In determining the true value of any…parcel of real estate…if such…parcel has been the subject of an arm's length sale between a willing seller and a willing buyer *within a reasonable length of time, either before or after the tax lien date*, the auditor may consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes. (italics added)

The proponent of the sale price as the property's value must show that the sale was both arm's length and recent to the tax lien date. As stated by the Supreme Court:

> This showing may be made by, for example, furnishing a deed and conveyance fee statement. [Citations omitted]. After such a showing is made, a rebuttable presumption arises that regards the sale [price] as characteristic of true

> value…Thereafter, it falls to the opponent on rebuttal to show that the sale was either not recent or not at arm's length.[525]

The "reasonable length of time" requirement of R.C. 5713.03 is often referred to as the "recency" requirement and, along with the arm's length requirement, must be met before a sale may be used as evidence of value. The "recency" of the sale is important because, as stated by the Supreme Court:

> The essence of an assessment [of the property's value] is that it fixes the value based upon facts as they exist at a certain point in time…The real estate market may rise, fall or stay constant between any two dates, and the assumption that a change in valuation between two given dates is constant and uniform, without proof, may property be rejected by the finder of fact.[526]

Because R.C. 5713.03 establishes the tax lien date (January 1 of the subject year) as the point in time at which the subject property's value is to be determined, in general the closer in time that the sale is to the tax lien date the more likely it is to be considered a valid measure of the subject property's true value.[527] Unfortunately, R.C. 5713.03 does not identify a specific time frame as "a reasonable length of time" either before or after the tax lien date.

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[525] See *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Franklin County Board of Revision*, 153 Ohio St.3d 34, 2018-Ohio-1612, ⁋ 13.

[526] See *Freshwater v. Belmont County Board of Revision*, 80 Ohio St.3d 26, 30 (1997). See also *Jennifer Radin and Brandon Glenn v. Cuyahoga County Board of Revision* (August 7, 2023), BTA No. 2022-1588.

[527] See *HIN, L.L.C. v Cuyahoga County Board of Revision*, 124 Ohio St.3d 481, 2014-Ohio-523, ¶ 20 ("When a property has been the subject of two arm's-length sales between a willing seller and a willing buyer within a reasonable length of time either before or after the tax-lien date, the sale occurring closer in time to the tax-lien date establishes the true value of the property for taxation purposes."). See also *Gahanna-Jefferson Schools BOE v. Franklin County Board of Revision*, (April 24, 2017), BTA No. 2016-471, 472 ("This board [BTA] is mindful that when considering multiple sales of the same property, generally, the sale occurring closest to the tax lien date in question is considered the most reflective of its value."); *Cleveland Metropolitan Schools Board of Education v. Cuyahoga County Board of Revision* (February 11, 2020), BTA No. 2018-2224 ("…the Ohio Supreme Court held "[w]hen a property has been the subject of two arm's-length sales between a willing seller and a willing buyer within a reasonable period of time either before or after the tax lien date, the sale occurring closer in time to the tax lien date establishes the true value of the property for taxation purposes."); *Columbus City Schools Board of Education v. Franklin County Board of Revision* (November 10, 2020), BTA No. 2019-1350; *Immobiltec USA Inc v. Warren County Board of Revision* (October 12, 2021), BTA No. 2020-1304. Further, in a case addressing a property's value as of the January 1, 2018 tax lien date, where the property had been subject to of a recent sale before the tax lien date as well as a recent sale after the tax lien date, the BTA found that the sale closer in time (by eight days) should determine the property's value. "The first sale occurred 143 days before the tax lien date, while the second sale occurred 135 days after. Thus, of the two sales, the May 16, 2018, [after the tax lien date] sale is closest to the tax lien date. The deed shows the property transferred for $400,000 on May 16, 2018. We find no party has rebutted the sale. We likewise find no party has presented better and more persuasive evidence of value." See *Cleveland Metropolitan Schools Board of Education v. Cuyahoga County Board of Revision* (March 21, 2022), BTA No. 2020-1859; *Cleveland Metropolitan Schools Board of Education v. Cuyahoga County Board of Revision* (March 28, 2022), BTA No. 2021-624; *Lakewood City Schools Board of Education v. Cuyahoga County Board of Revision* (May 16, 2022), BTA No. 2020-2205; *Cleveland Metropolitan Schools Board of Education v. Cuyahoga County Board of Revision* (December 27, 2022), BTA No. 2020-1682; *Akron City Schools Board of Education v. Summit County Board of Revision* (March 6, 2023), BTA No. 2022-1032; *Rossford Exempted Village Schools Board of Education v. Wood County Board of Revision* (July 24, 2023), BTA No. 2021-1283.

In 2014, however, in *Akron City School District Board of Education v. Summit County Board of Revision*[528] ("the *Akron* case") the Supreme Court supplied guidance in this area, holding that:

> … a sale that occurred more than 24 months before the lien date … should not be presumed to be recent *when a different value has been determined for that lien date as part of the six-year reappraisal*. Instead, the proponent of the sale price as the value should come forward with evidence showing that market conditions or the character of the property has not changed between the sale date and the lien date.[529] (italics added)

That decision arose in the factual context where the proponent of the sale price sought to use it as evidence of value instead of the more recent value determined by the county auditor as part of the regularly scheduled reappraisal. After the *Akron* decision the BTA discussed the two elements that must be present in order to negate the presumption that a sale was recent to the tax lien date.

> …a sale is not presumed to be recent when a sale occurred more than 24 months before the tax lien date *and* [italics in the original] the auditor…determined a different value [different from the sale price] during the sexennial reappraisal. The court has since reaffirmed the importance that both criteria [more than 24 months and the auditor determined a different value during the sexennial reappraisal] must be met in order to shift the burden of proof from the party opposing the sale to the party in favor of adoption of the sale price.[530]

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[528] See *Akron City School District Board of Education v. Summit County Board of Revision*, ("*Akron*") 139 Ohio St.3d 92, 2014-Ohio-1588. See also *Bilal Abed Allhamzeh v. Lake County Board of Revision* (January 5, 2021), BTA No. 2020-971; *Robert Property Group LLC v. Summit County Board of Revision* (May 24, 2022), BTA No. 2021-929.

[529] See *Akron City School District Board of Education v. Summit County Board of Revision*, ("*Akron*") 139 Ohio St.3d 92, 2014-Ohio-1588, ¶ 26. See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (August 19, 2019), BTA Nos. 2018-1256, 2018-1260 where the BTA, citing *Akron*, stated that "While the Ohio Supreme Court has rejected a bright-line recency rule, it has held a sale occurring more than 24 months before the tax-lien date is generally not recent."; *Columbus City Schools Board of Education v. Franklin County Board of Revision* (September 9, 2019), BTA Nos. 2017-615, 2017-616, 2017-668, 2017-669 ("Here, the subject sale is presumed not to be recent because it occurred more than 24 months before the tax lien date of January 1, 2016."); *Y.B. S.Z. LLC v. Cuyahoga County Board of Revision* (July 19, 2021), BTA No. 2020-816;See *Plain Local Schools Board of Education v. Stark County Board of Revision* (July 7, 2022), BTA No. 2020-116 where the BTA stated that the Supreme Court has reaffirmed that there is"…no presumption of recency accorded "to a sale when (1) the auditor had performed the required reappraisal for the tax year at issue, (2) the sale was more than 24 months before the lien date of the reappraisal year, and (3) the auditor had declined to use the sale in the reappraisal."); *Allen B. Properties v. Summit County Board of Revision* (September 26, 2022), BTA No. 2021-1055.

[530] See *Akron City Schools Board of Education v. Summit County Board of Revision* (August 14, 2019), BTA No. 2018-1087. See also *D.D.K Inv, LLC v. Cuyahoga County Board of Revision* (February 17, 2021), BTA No. 2020-812; *Daniela Lior Ben Nahum LLC v. Cuyahoga County Board of Revision* (March 16, 2021), BTA No. 2020-1345.

It follows, then, that when the sale occurs less than twenty-four months prior to the tax lien date and the Auditor has not rejected the sale price as part of its reappraisal, the sale is considered recent to the tax lien date.[531] Further, where the Auditor has *not* rejected the sale price as part of its reappraisal, the BTA has ruled that a sale may be presumed recent to the tax lien date (but subject to rebuttal) even though it took place *more* than twenty-four months before the tax lien date.[532]

In April 2018, however, the Supreme Court clarified that its twenty-four month ruling applied to those sales that occurred more than twenty-four months *before* the tax lien date of a reappraisal year ("Pre-Appraisal Sales") in circumstances where the Auditor decides *not* to base the value of the property at the sexennial reappraisal on the sale. That twenty-four month time frame did not apply, however, to sales that occurred more than twenty-four months *after* the tax lien date of a reappraisal year ("Post-Appraisal Sales").[533] In other words, sales that occurred more than twenty-four months *after* the tax lien date of a reappraisal year could still be considered recent.[534]

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[531] See *William Hooper Cook, Jr. & Anna Chau Cook v. Montgomery County Board of Revision* (April 3, 2020), BTA No. 2019-675 ("While the Ohio Supreme Court has rejected a bright-line recency rule, it has held a sale occurring less than 24 months before the tax-lien date is presumed recent."). *Airport Hospitality, LLC v. Franklin County Board of Revision* (January 20, 2022), BTA No. 2019-605 ("A sale that transpires fewer than 24 months before the tax-lien date is generally recent and creates a rebuttal presumption of value in favor of the sale price."); *Jeffrey Clark & Linda Naomi Solomon, Trustees v. Cuyahoga County Board of Revision* (May 18, 2022), BTA No. 2020-1956; *GPT Charter Street Owner LLC v. Franklin County Board of Revision* (May 18, 2022), BTA No. 2020-297; *McCauley Law Offices, LLC v. Montgomery County Board of Revision* (March 6, 2023), BTA No. 2020-2317.

[532] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (April 8, 2019), BTA No. 2017-1548 ("The parties do not…dispute that the June 2013 sale was conducted at arm's-length. We must therefore determine whether the sale is recent to the tax lien date, i.e. January 1, 2016...[The Supreme Court] in *Akron* rejected a presumption that a sale is not recent when the sale occurred more than 24 months prior to the tax lien date, *unless* the county auditor considered and rejected such sale in a reappraisal…Here, the sexennial reappraisal for Franklin County did not occur until the subsequent tax year – tax year 2017. The sale is therefore presumed recent to the tax lien date.").

[533] See *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Franklin County Board of Revision*, 153 Ohio St.3d 34, 2018-Ohio-1612, ¶ 19 ("…we conclude that a facially qualifying sale, like the one presented by Lone Star here, still enjoys a presumption of recency even when it postdates the tax-lien date by more than 24 months."). See also *Inland Diversified Pepper Pike Chagrin, L.L.C., A Delaware Limited Liability Company NKA Realty Income Pepper Pike Chagrin, L.L.C.* (July 9, 2018), BTA No. 2016-1571 quoting paragraph 23 of *Akron* which stated that "When a sale occurs more than 24 months before the lien date, and the assessor decides ***not*** to base the reappraisal on it, the sale should not be presumed recent." (emphasis added). It should be noted that while *Inland* involved a triennial *update* year as opposed to the *sexennial reappraisal* year of *Akron*, for purposes of this analysis that is a distinction without a difference. As stated by the BTA in *Cleveland Municipal Schools Board of Education v. Cuyahoga County Board of Revision* (January 9, 2018), BTA No. 2017-336, "The BOE argues that this holding [*Akron*] does not apply to the facts of the instant appeal because the 2015 revaluation was a triennial update and *Akron* is limited only to the rejection of a sale during the sexennial reappraisal. We disagree." (italics added).

[534] See *Green Local Schools Board of Education v. Summit County Board of Revision* (August 15, 2019), BTA No. 2018-1386 ("…a sale that postdates the tax-lien date still creates a presumption of value even if the sale occurs several years after the tax-lien date."). See also *Baybrook Investments, LLC v. Cuyahoga County Board of Revision* (March 29, 2021), BTA No. 2020-848 ("Upon review, we disagree with the BOE and the BOR that [the owner/proponent of the sale] was required to demonstrate that the sale was recent. Because the sale took place after the tax lien date, even 25 months after the tax lien date, it benefits from the presumption

Why does the time period used to measure "recency" differ in pre and post-appraisal sales? The distinction, according to the Court, is that sales that occur more than twenty-four months *before* the tax lien date of a reappraisal year are known, and presumably considered, by the Auditor at the time the Auditor sets the property's value in the reappraisal. Knowing of that sale, the Auditor may have considered factors that occurred after the sale but before the tax lien date, in rejecting the sale price as the measure of value in the sexennial reappraisal.[535]

On the other hand, sales that occur more than twenty-four months *after* the tax lien date of a reappraisal year in question are not, and could not be, known to the Auditor at the time the Auditor sets the property's value in the reappraisal year. As such, those Post-Appraisal sales continue to enjoy a presumption of recency. As stated by the Court:

> …[the twenty-four month rule] applies when a sale occurs more than 24 months before the tax-lien date of a reappraisal year and is reflected in the property record…[h]ere...[the owner's] sale occurred after the tax-lien date, and for that reason alone, *Akron* should not have controlled…Arguably, a later sale [after the tax-lien date of a reappraisal year] constitutes brand new evidence that might call for reconsidering the question of value for the past year…Guided by that logic, we conclude that a facially qualifying sale…still enjoys a presumption of recency even when it postdates the tax-lien date by more than 24 months.[536]

But as with other areas of BOR practice where absolute rules and bright line tests are rare, there is no absolute, specific time frame (pre or post the tax lien date) that controls on the question of recency. Thus, the Supreme Court and BTA have made it clear that other considerations can enter into the determination as to whether a sale took place within a reasonable time of the tax lien date. "The question of how long after a sale the sale price is to be considered the best evidence of value will vary from case to case"[537] and "…whether a sale is 'recent' to or 'remote' from a tax

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of recency that was discussed in *Lone Star*, which also involved a sale occurring roughly 25 months after the tax lien date. Rather, as the opponents of the sale, the appellees were required, but failed, to provide evidence that the sale was not recent…").

[535] See *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Franklin County Board of Revision*, 153 Ohio St.3d 34, 2018-Ohio-1612, ¶ 18.

[536] See *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Franklin County Board of Revision*, 153 Ohio St.3d 34, 2018-Ohio-1612, ¶¶ 17 – 19. See also *BBK/Easton Office, LLC v. Franklin County Board of Revision* (November 19, 2019), BTA No. 2018-2153, ("A sale that post-dates the tax-lien date creates a rebuttable presumption of value in favor of the sales price."); *Princeton City Schools Board of Education v. Butler County Board of Revision* (June 7, 2022), BTA No. 2021-1420.

[537] See *Cleveland Municipal Schools Board of Education v. Cuyahoga County Board of Revision* (October 11, 2017), BTA No. 2016-1806.

lien date is not decided exclusively upon temporal proximity, but may necessarily involve a multitude of other impacts/considerations."[538] Further, as stated by the BTA:

> The Supreme Court has made it clear that no "bright line" test exists when establishing recency and that the mere passage of time does not, per se, render a sale unreliable; rather, recency "encompasses all factors that would, by changing with the passage of time, affect the value of the property."[539]

Following that reasoning, in a case where the character of the property changed significantly after the date of the sale, the BTA found that the sale was not "recent" even though it was not even eighteen months after the sale.

> In this case, we find that the sale 2018 sale [sic] of the subject property is too remote from the tax lien date to provide reliable evidence of value. While the July 2018 transaction was fewer than 18 months before the tax lien date, the evidence shows that the character of the property changed significantly between the sale and the tax lien date. For instance, not only were roads and utilities developed, but also a large warehouse building was constructed on the land.[540]

According to the BTA, "…as a sale becomes more distant in time from a tax lien date, 'the proponent of the sale price as the value should come forward with evidence showing that market conditions or the character of the property have not changed between the sale date and the lien

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[538] See *Wafa and Rana Odeh v. Cuyahoga County Board of Revision* (October 10, 2017), BTA No. 2016-2058. See also *Olentangy Local Schools Board of Education v. Delaware County Board of Revision*, 151 Ohio St.3d 515, 2017-Ohio-8347; *Worthington City Schools Board of Education v. Franklin County Board of Revision* (September 12, 2019), BTA No. 2017-1588 where the BTA found that "The loss of a particular hotel franchise flag can constitute a 'market change' that renders a sale remote from the tax lien date."; *Schwaiger Daniel v. Montgomery County Board of Revision* (March 31, 2020), BTA No. 2019-711 ("The determination of whether a sale is sufficiently "recent" to the tax lien date includes the consideration of a number of factors, including changing conditions to the market generally or more specifically to the property itself."); *Cloverleaf Local Schools Board of Education v. Medina County Board of Revision* (July 7, 2022), BTA Nos. 2021-1525, 2019-1566; *MREV Archwood, LLC v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No 110618, 2022-Ohio-2356, ¶ 16, *LSREF3/AH Chicago LLC v, Cuyahoga County Board of Revision* (June 27, 2023), BTA No. 2020-255 ("The Supreme Court has been clear that there is no bright-line recency rule, meaning whether a sale is "recent" to or "remote" from the tax lien date is not decided exclusively upon temporal proximity."); *REO Investments LLC v. Ottawa County Board of Revision* (August 2, 2023), BTA Nos. 2022-1159, 2022-1160; *Perich Real Estate, LLC v. Franklin County Board of Revision* (September 5, 2023), BTA No. 2023-581 ("The element of recency "encompasses all factors that would, by changing with the passage of time, affect the value of the property," which could include conditions that are specific to the property itself. *(citation omitted).* Thus, a sale that is temporally recent to the tax lien date may be too remote to establish the property's value if its character changed in a way that affected the value of the property.")

[539] See *Zachary A. Zimmer v. Stark County Board of Revision* (November 6, 2017), BTA Nos: 2017-622; 2017-623. See also *Montrose Club, Inc. v. Summit County Board of Revision* (November 6, 2023), BTA No. 2021-1965 ("…a sale that is temporally recent to the tax lien date may be too remote to establish the property's value if its character changed in a way that affected the value of the property."); *MP 11868 Clifton, LLC. v. Cuyahoga County Board of Revision, et al*, 8th Dist. No. 112444, 2023-Ohio-4647, ¶ 12.

[540] See *Christopher Hicks v. Clermont County Board of Revision* (January 10, 2022), BTA No. 2021-1112.

date."[541] However, "[a] proponent can rehabilitate a remote sale…with evidence [that] the sale continues 'to be a reliable indication of value despite the passage of time.'"[542]

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[541] See *Wafa and Rana Odeh v. Cuyahoga County Board of Revision* (October 10, 2017), BTA No. 2016-2058. See also *4103 Crest LLC v. Montgomery County Board of Revision* (October 18, 2019), BTA Nos. 2018-2289, 1338, 1342, 1349, 2290, 2292 ("The *Akron* court explained that the proponent of a sale that is not presumed recent must come forward with evidence demonstrating that neither market conditions nor the character of the property have changed between the date of the sale and the tax lien date.").

[542] See *2RMC Properties LLC v. Hamilton County Board of Revision* (June 7, 2019), BTA Nos. 2018-1749, 2018-1750, 2018-1752, 2018-1753. See also *Wen Wen LLC v. Cuyahoga County Board of Revision* (September 4, 2019), BTA No. 2019-89.

SUMMARY "RECENCY" CHART

SALE OCCURRED ↓	WAS THE SALES PRICE REJECTED AS THE VALUE OF THE SUBJECT IN THE REAPPRAISAL/TRIENNIAL UPDATE?	IS THE SALE PRESUMED TO BE RECENT TO THE TAX LIEN DATE?
Less Than 24 Months **Before** Tax Lien Date	NO	**YES**[543]
More than 24 Months **Before** Tax Lien Date	YES	**NO**[544]
More than 24 Months **Before** Tax Lien Date	NO	**YES**[545]
More than 24 Months **After** Tax Lien Date *of a Reappraisal Year*	N/A	**YES**[546]

[543] See *Inn at the Wickliffe, L.L.C. v. Wickliffe City Board of Education*, 11th Dist. Lake No. 2014-L-045, 2015-Ohio-138, ⁋ 13 ("In this case, there is no dispute that Wickliffe Inn acquired the subject hotel…in May 2008, less than two years prior to the tax lien date of January 1, 2010. Thus, the sale was within 24 months of the lien date, and is presumptively a "recent" sale, evidencing the true tax value of the hotel.").

[544] See *Akron City School District Board of Education v. Summit County Board of Revision*, ("*Akron*") 139 Ohio St.3d 92, 2014-Ohio-1588, ¶ 26 ("We hold that a sale that occurred more than 24 months before the lien date and that is reflected in the property record maintained by the county auditor or fiscal officer should not be presumed to be recent when a different value has been determined for that lien date as part of the six-year reappraisal.").

[545] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (April 8, 2019), BTA No. 2017-1548 ("The parties do not…dispute that the June 2013 sale was conducted at arm's-length. We must therefore determine whether the sale is recent to the tax lien date, i.e. January 1, 2016...[The Supreme Court] in *Akron* rejected a presumption that a sale is not recent when the sale occurred more than 24 months prior to the tax lien date, *unless* the county auditor considered and rejected such sale in a reappraisal…Here, the sexennial reappraisal for Franklin County did not occur until the subsequent tax year – tax year 2017. The sale is therefore presumed recent to the tax lien date.").

[546] See *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Franklin County Board of Revision*, 153 Ohio St.3d 34, 2018-Ohio-1612, ⁋⁋ 18 - 19 where the Supreme Court referred to Justice Kennedy's concurring opinion in *Akron* which reasoned that when a sale postdates the tax-lien date *of a reappraisal year*, the 24-month rule may not apply because "Arguably, a later sale constitutes brand new evidence that might call for reconsidering the question of value for the past year" and that, accordingly, such a post-appraisal sale could not have been accounted for by the reappraisal. Accordingly, in *Lone Star* the Court concluded ruled that "…we conclude that a facially qualifying sale, like the one presented by Lone Star here, still enjoys a presumption of recency even when it postdates the tax-lien date by more than 24 months.".

Land Installment Contracts

The issue of recency becomes a bit more complicated in the case of land-installment contracts. Under R.C. 5313.01(A) a "land installment contract" is defined, in applicable part, as:

> …an executory agreement which by its terms is not required to be fully performed …within one year of the date of the agreement and under which the vendor agrees to convey title in real property…to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation.[547]

"In Ohio, whether or not recorded, a deed passes title upon its proper execution and delivery."[548] But there is an important difference between a straight sale and a land installment contract. "Unlike a sale, a land installment contract is merely an agreement to transfer the property and does not enjoy the presumption that the agreed-upon price is best evidence of value until the sale is complete."[549] In other words, a land installment contract does not transfer title immediately.

By definition, a land installment contract transfers title at some point in the future but typically more than a year from the date the contract is signed. Indeed, the actual transfer of ownership under some land-installment contracts can be many years after signature (or may not happen at all if the terms of the agreement are not met). Owing to that lapse of time, the marketplace for property sales may have changed substantially after the contract is signed but before title transfers. This could mean that the earlier agreed-upon contract price is no longer a good indication of the value of the property at the time the property actually transfers.

For purposes of valuation, then, which date is considered recent to the applicable tax-lien date? Is it the date the contract is signed or the date of the transfer? According to the BTA:

> Although this board has previously relied upon the sale price pursuant to a land contract to establish value when a land contract is completed and title transferred, provided such transfer is "recent" to tax lien date, we have limited our holdings in this context by according a presumption of "recency" to transfers effected by land contract to only those situations where *both* the date on which the contract was

[547] See R.C. 5313.01(A).

[548] See *William M. Puz v. Portage County Board of Revision* (January 11, 2023), BTA No. 2022-1614.

[549] See *Akron City Schools Board of Education v. Summit County Board of Revision* (May 5, 2022), BTA No. 2019-2012.

> entered into *and* the ultimate transfer occur recent to the tax lien date in issue.[550] (italics in original)

In other words, both the date on which the contract is signed and the date on which the property actually transfers must be recent to the tax lien date in question. If either one is *not* recent to the tax lien date, then under the above BTA decision the sale transaction is not valid as an indication of value and the purchase price in the contract may not be used as the value of the property.[551] According to the Supreme Court, "the effective date of a sale for real-property-valuation purposes is the date the conveyance-fee statement is filed with the county auditor's office."[552] Presumably, existing law will govern whether the date of the contract and the date of the transfer are considered recent.

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[550] See *Cuyahoga Falls City Schools Board of Education v. Summit County Board of Revision* (December 18, 2018), BTA No. 2017-1563. See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (May 27, 2020), BTA No. 2019-534 ("This board's cases have been clear that a land installment contract only establishes value when the "contract is completed and title transferred, provided such transfer is 'recent' to" the relevant tax-lien date.") and citing to *Akron City Schools Bd. of Edn. v. Summit Cty. Bd. of Revision* (June 16, 2016), BTA No, 2015-1498, unreported (both contract date and title transfer date must be recent to tax-lien date because "contract merely constitutes the commencement of an agreement to transfer property upon the satisfaction of terms and conditions set forth therein***.").; *Richard L. Stotter Trustees & Stotter Family Limited Partnership v. Cuyahoga County Board of Revision* (July 5, 2022), BTA No. 2020-498.

[551] It is worth noting, however, that in the more recent case of *Canton Local Schools Board of Education v. Stark County Board of Revision* (September 20, 2023), BTA No. 2021-1394 the BTA stated that "a sale [price] does not cease to be indicative of value merely because it stems from a land installment contract" and that "A long length time [sic] between negotiation and closing is not necessarily a basis for disregarding a sale price." The *Canton Local* case did not discuss the BTA's prior ruling that both the contract completion date and the title transfer must both be recent to the tax lien date.

[552] See *Lone Star Steakhouse & Saloon of Ohio, Inc. v. Franklin County Board of Revision*, 153 Ohio St.3d 34, 2018-Ohio-1612, ¶ 11. See also *Kevan D. Ferren v. Belmont County Board of Revision* (February 11, 2020). BTA Nos. 2019-825, 826, 827, 828; *Akron City Schools Board of Education v. Summit County Board of Revision* (May 5, 2022), BTA No. 2019-2012; *Middletown City Schools Board of Education v. Butler County Board of Revision* (December 14, 2022), BTA No. 2022-895.

CHAPTER 9
UNDERSTANDING THE VALUATION OF LOW-INCOME HOUSING

CHAPTER SUMMARY

- Several federal programs support low-income housing efforts. These programs include Low-Income Housing Tax Credits ("LIHTC"), Section 8 housing vouchers, and Section 202 supportive housing for the elderly, to name a few.

- In determining the valuation of a low-income housing property which receives or has received financial support from one or more of these programs, the county auditor or appraiser must consider what, if any, impact these programs have on the subject property's value.

- The law addressing the proper valuation of low-income housing is detailed and complex. It has been the subject of much litigation and has evolved over time. Many low-income property valuation cases have, in the past, concerned whether the county auditor or appraiser should utilize the subject property's actual (contract) rent or a broader market-based rent in determining a low-income property's value.

- Amendments contained in H.B. 33, and particularly newly enacted Revised Code section 5713.031 and the rules adopted thereunder, may help to simplify and clarify the valuation process for these government subsidized housing units.

Background of HUD Low Income Housing

The law addressing the proper way to value low-income housing is complex and over the years the Supreme Court's seemingly inconsistent decisions in that area have led to confusion. Recent amendments to the Revised Code - particularly those to existing sections R.C. 5713.03 and R.C. 5715.01, and recently enacted R.C. 5713.031 - as discussed below, are intended to clarify and simplify the valuation process for these subsidized units.

Before addressing those amendments, however, and to provide context to those changes, we will first review the purposes and operations of HUD-subsidized low-income housing as well as the case law as it existed prior to the enactment of the recent changes.

The seminal case in the area of low-income housing valuation is *Alliance Towers v. Stark County Board of Revision*,[553] where the Supreme Court, in footnote 4, offered an overview of the

[553] See *Alliance Towers v. Stark County Board of Revision*, 37 Ohio St.3d 16 (1988).

purposes and method of operation of "federally subsidized housing" (*Alliance Towers*, at 20). For purposes of context in understanding this area of the law, that footnote is reprinted below in its entirety (with citations omitted).

> The thrust of the HUD assistance program is to provide safe, sanitary, and decent housing for elderly and low-income people. [citations omitted] The properties under review are privately owned, provide limited distributions to the developer, and are built for elderly people.[554]
>
> The process of building these complexes begins with the filing of an application by a developer with HUD in which the developer forecasts the replacement cost of the building, proposed contract rent, and the projected expenses necessary to operate the apartment project. [citations omitted] "Contract rent" is the total amount of rent specified in the Housing Assistance Payment Contract. It is comprised of the rent paid by the tenant (a percentage of his or her income) **and the housing assistance payment**. [citations omitted] Contract rent depends on the cost of constructing the project, the projected expenses necessary to operate the project, and debt service. [citations omitted] (bold added).
>
> If HUD approves the developer's proposal, such approval includes HUD's issuance of mortgage insurance to the lender and a determination of the rent that will be necessary to build and operate the project. [citations omitted] **The contract rent plus a utility allowance may exceed what HUD has already determined to be the "fair market rent" (rents including utilities and housing services necessary to attract private development) by as much as twenty percent.** [citations omitted] The cost of construction tends to be higher than the cost of a conventional apartment complex due to the extra features required by the minimum property standards [citations omitted] and the payment of Davis–Bacon wage rates [citations omitted] to the construction workers. [citations omitted] (bold added)
>
> When the project is ready for occupancy, a tenant will pay, as rent, a percentage of his or her income not to exceed thirty percent. [citations omitted] As stated, **tenant rent and the housing assistance payment, or subsidy, equal "contract rent."** This "contract rent" is available to the developer in order to pay the mortgage and expenses. **In the cases under review, the evidence indicates that the rents generally available in the market for comparable units were below the "contract rent."** (bold added)
>
> In exchange for financing and subsidy concessions, the developer must accept a regulatory agreement which embodies the management requirements contained in Section 880.601 *et seq.*, Title 24, C.F.R., and which controls to whom and under what conditions an apartment may be rented. The developer is permitted to earn **an annual limited distribution, that, in these cases, is limited to six percent of his**

[554] Under 24 Code of Federal Regulations ("CFR") 5.100, "*Elderly Person* means an individual who is at least 62 years of age."

> **equity or initial investment**. [citations omitted] If there is insufficient income to cover debt service and expenses, the developer is still obliged to pay these items. [citations omitted] If there is an excess of income over debt service, expenses, reserve requirements, and limited distributions, that excess goes into a trust fund managed by the mortgagee. [citations omitted] This fund is used to enhance the property or reduce rents. [citations omitted] Previous losses can usually be made up from this trust fund. [citations omitted] The primary reason for investing in such subsidized housing projects is the favorable after-tax cash flow generated by the accelerated depreciation permitted under the Economic Recovery Tax Act of 1981. [citations omitted] (bold added).

A Preface to the Analysis

Some of the Court's decisions subsequent to *Alliance Towers* appear to contradict the holding of that case. In order to make sense of those seemingly conflicting decisions (some that used market rents in valuations of low income housing; others that used contract or actual rents), and to find the common threads that the Court says run through the cases, we examine the Court's reasoning in *Alliance Towers* and its progeny in greater depth.

Alliance Towers Says Market Rents Should Be Used

In *Alliance Towers* the Court held in its Syllabus that:

> 1. For real property tax purposes, the fee simple estate is to be valued as if it were unencumbered…
>
> 2. An apartment property built and operated under the auspices of the Department of Housing and Urban Development is to be valued, for real property tax purposes, with due regard for market rent and current returns on mortgages and equities.

The second Syllabus holding makes clear that market rents – as opposed to actual or contract rents collected at the subject property - are to be used in determining the valuation of HUD housing. The Court in *Alliance Towers* went on to say that:

> It is the fair market value of the property in its unrestricted form of title which is to be valued. It is to be valued free of the ownerships of lesser estates such as leasehold interests, deed restrictions, and restrictive contracts with the government. For real

> property tax purposes, the fee simple estate is to be valued as if it were unencumbered.[555]

Further, it stated that:

> The contract rents, which are a combination of the amount paid by the tenant and the amount paid by the government, are artificially derived without any direct relation to the market. The fee simple estate is not enhanced by the above-market rents because the owner does not keep this total rent as profit; he receives only a limited distribution and after-tax benefits. [citation omitted] In sum, the artificial effects of the government housing assistance program are not indicative of the valuation of the real estate.[556]

The Court Reiterates that Market Rents Should Be Used

Six years later, in *Delhi Estates, Ltd. v. Hamilton County Board of Revision*,[557] the Court reiterated its *Alliance Towers* ruling.

> We confirm the test set forth in *Alliance Towers, supra.* To determine the true value of federally subsidized housing under R.C. 5713.03, "[i]t is the fair market value of the property in its unrestricted form of title which is to be valued. It is to be valued free of the ownerships of lesser estates * * * and restrictive contracts with the government. * * * [T]he fee simple estate is to be valued as if it were unencumbered." [citation omitted][558]
>
> > "In sum, the artificial effects of the government housing assistance program are not indicative of the valuation of the real estate.
>
> " * * * An apartment property built and operated under the auspices of HUD is to be valued, for real property tax purposes, with due regard for market rent and current returns on mortgages and equities." [citation omitted].

[555] *Alliance Towers v. Stark County Board of Revision*, 37 Ohio St.3d 16, 23 – 24 (1988).

[556] *Alliance Towers v. Stark County Board of Revision*, 37 Ohio St.3d 16, 23 – 24 (1988).

[557] See *Delhi Estates, Ltd. v. Hamilton County Board of Revision*, 68 Ohio St.3d 192, 193 (1994).

[558] See *Delhi Estates, Ltd. v. Hamilton County Board of Revision*, 68 Ohio St.3d 192, 193 (1994).

The Court Decides *Woda Ivy Glen Limited Partnership v. Fayette County Board of Revision*

In 2009 the Supreme Court issued its decision in *Woda Ivy Glen Limited Partnership v. Fayette County Board of Revision*,[559] a decision which caused some confusion as to the proper way to value low-income housing. In *Woda* the Court addressed the valuation of parcels "developed pursuant to the federal low-income housing tax credit ("LIHTC") enacted in 1986…"[560] In reviewing the BTA's decision in that case, the Court stated that "the BTA disregarded the effect of use restrictions imposed under the federal tax-credit program…" and that "…the BTA erred by *failing to consider* the federally mandated use restrictions imposed in connection with the LIHTC."[561] (italics added)

That ruling *seemed* to contradict the Court's earlier decisions in *Alliance Towers* and *Delhi Estates* where it ruled that low-income properties are to be valued "free of…restrictive covenants with the government…as if it were unencumbered."[562] Under *Alliance Towers* and *Delhi Estates* those restrictive covenants with the government were *not* to be considered in determining value. Yet, in *Woda* the Court seemed to be saying just the opposite: that the restrictive covenants imposed by HUD *should* be considered. How did the Court reconcile those seemingly contradictory positions?

The Court's *Woda* Analysis

A. The LIHTC Program Exercises a "Police Power"

In brief, the Court reconciled those decisions by distinguishing the LIHTC restrictions under review in *Woda* from the subsidies that were under review in *Alliance Towers* and *Delhi Estates.* The difference, said the Court in *Woda*, was that the LIHTC restrictions in *Woda* should be considered in determining valuation because they were an exercise of the government's "police power". Because under R.C. 5713.03: "The county auditor…shall determine… the true value of

[559] See *Woda Ivy Glen Limited Partnership v. Fayette County Board of Revision* 121 Ohio St.3d 175, 2009-Ohio-762.

[560] See *Woda Ivy Glen Limited Partnership v. Fayette County Board of Revision* 121 Ohio St.3d 175, 2009-Ohio-762, ¶ 1. See also *CHN Housing Partners v. Cuyahoga County Board of Revision* (October 3, 2022), BTA No. 2021-874.

[561] See *Woda Ivy Glen Limited Partnership v. Fayette County Board of Revision* 121 Ohio St.3d 175, 2009-Ohio-762, ¶ 5.

[562] See *Delhi Estates, Ltd. v. Hamilton County Board of Revision*, 68 Ohio St.3d 192, 193 (1994).

the fee simple estate, as if unencumbered *but subject to any effects from the exercise of police powers or from other governmental actions*…" (emphasis added) the LIHTC restrictions had to be considered in the valuation of the property.[563]

The Court's classification of the LIHTC restrictions as "police powers" in *Woda* was perhaps the critical distinction that differentiated *Woda* from *Alliance Towers* and *Delhi Estates*. Because, according to the Court, the subsidies in *Alliance Towers* and *Delhi Estates* were not exercises of the "police power" they were not to be considered in valuing the property. The Court in *Woda* explained that:

> …the standards for appraising property call for a valuation of the "fee simple estate" to be performed as if that estate were free from *private* [emphasis in the original] encumbrances, but they nonetheless require an appraiser to consider "police power" limitations on use…Even after *Alliance Towers,* we have acknowledged that governmental restrictions must be taken into account.[564]

The Court explained that "police powers" refer to the "right of government through which property is regulated to protect public safety, health, morals, and general welfare" and that the LIHTC restrictions serve "the general welfare"; presumably because they encourage housing for low-income individuals who might not otherwise be able to afford it. Further, the Court stated that "the fact that such [LIHTC] restrictions are triggered by the developer's decision to seek the benefit of the tax credits does not reduce [the restrictions] to the status of contract obligations."[565] Thus, because the LIHTC restrictions were "police power" restrictions promulgated under the "general welfare" clause of the U.S. Constitution, they were governmental as opposed to private encumbrances and must be considered in establishing the property's value.

<u>After *Woda*, the *Alliance Towers* Decision Remains Good Law</u>

The Court seemed to recognize, however, that its *Woda* decision might be viewed as being in conflict with its decision in *Alliance Towers* (market rates should be used) and so was quick to

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[563] See *Hillwood II Holdings LLC v. Summit County Board of Revision* (August 21, 2019), BTA No. 2018-1469 ("…LIHTC restrictions are police power regulations for purposes of R.C. 5713.03.") and ("The *Woda Ivy* court ultimately concluded LIHTC restrictions must be considered in valuation because LIHTC restrictions are 'police power' limitations.").

[564] See *Woda Ivy Glen Limited Partnership v. Fayette County Board of Revision* 121 Ohio St.3d 175, 2009-Ohio-762, ¶ 23.

[565] See *Woda Ivy Glen Limited Partnership v. Fayette County Board of Revision* 121 Ohio St.3d 175, 2009-Ohio-762, ¶ 24.

explain in *Woda* that *Alliance Towers* was still good law and that *Woda* did not contradict its ruling in *Alliance Towers*.

> Our conclusion [in *Woda*] that the tax assessor must consider the effect the LIHTC use restrictions exercise on the value of the property does not disturb the specific holding of *Alliance Towers*...and its progeny.[566]

In further explaining how *Woda* and *Alliance Towers* did not contradict each other, the Court explained that *Alliance Towers* was a case that addressed *Section 8 programs*[567] that both furnished affirmative assistance in financing residential facilities and supplemented the rent paid at those facilities by low-income tenants. Because the Section 8 "contract rents" in those cases are a combination of both the amount paid by the tenant plus the amount paid by the government, they were artificially derived "without any relation to the market."[568] In concluding its analysis, the Court in *Woda* stated that:

> Thus, in spite of the sweeping language of *Alliance Towers*, the plain import of the [*Alliance Towers*] decision lies in preventing the *affirmative benefit of government subsidies* [italics in original] from inflating the value of the property for tax purposes. In the present case, that precept would call into question any attempt to regard the value of the tax credits to the limited partners as part of the value of the real estate. But that does not prevent the tax assessor from considering the effect of concomitant use restrictions imposed under I.R.C. 42 [the Section 8 housing subsidy program] —restrictions that the statute requires to be recorded in the chain of title.[569]

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[566] See *Woda Ivy Glen Limited Partnership v. Fayette County Board of Revision* 121 Ohio St.3d 175, 2009-Ohio-762, ¶ 26.

[567] See 42 U.S.C. 1437f ("Section 8"). Under 42 U.S.C. 1437f(a) the purpose of Section 8 is to aid "low-income families in obtaining a decent place to live and of promoting economically mixed housing" and that to achieve that objective "assistance payments may be made with respect to existing housing in accordance with the provisions of this section." Under 42 U.S.C. 1437f(b)(1), the Secretary of the Department of Housing and Urban Development ("HUD") "is authorized to enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section." Under 42 U.S.C. 1437f(c)(1)(a), "An assistance contract entered into pursuant to [Section 8] shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary …" For more information on fair market rents, see https://www.huduser.gov/portal/datasets/fmr.html and https://www.huduser.gov/portal/sites/default/files/pdf/fmr-overview.pdf.

[568] Although the Court did not say so explicitly in *Woda*, it appears clear that the Court then-believed that the subsidies artificially increased the rents and, therefore, artificially increased the valuation of the Section 8 subsidized property. In *Notestine*, decided years later in 2018, the Court explicitly identified the impact of Section 8 subsidies on value ("…Section 8 subsidies…tend to inflate rents above market rent.").

[569] See *Woda Ivy Glen Limited Partnership v. Fayette County Board of Revision* 121 Ohio St.3d 175, 2009-Ohio-762, ¶ 29. See also *Colonial Village, Ltd. v. Washington County Board of Revision*, 123 Ohio St.3d 268, 2009-Ohio-4975, ¶ 7, where, subsequent to its *Woda* decision, the Court reiterated that "As we have more recently explained, our subsidized-housing case law seeks to prevent the affirmative benefits of government subsidies from unduly inflating the value of the property for tax purposes."

Network Restorations III

The *Woda* decision – seeming as it did to deviate from prior law – caused confusion and the Court seemed to acknowledge as much in *Columbus City Schools Board of Education v. Franklin County Board of Revision ("Network Restorations III")*,[570] a May 2017 decision that addressed subsidized rents. *Network Restorations III* involved a low-income housing project that was subsidized both through low-income housing tax credits ("LIHTC") and housing assistance payments ("HAP") made available to tenants through Section 8. In reviewing the prior case law, the Court stated that "[b]roadly speaking" the case law "is that in applying the income approach, market rents and expenses, as opposed to actual rents of the properties at issue, are used."[571] In discussing its prior decisions, the *Network Restorations III* Court explained that:

> The case law establishes that in valuing low-income housing using an income approach, government subsidies should not be taken into account in a way that would increase the value of the property. We have referred to the value of government subsidies as "the affirmative value" and have stated that the affirmative value should be adjusted out of the property valuation.[572]

Further, while Court stated that "…our holding in *Woda* involved no departure from earlier case law"[573] it also seemed to acknowledge the confusion that stemmed from its prior rulings when it stated:

> To the extent that our decision in *Woda* has proved confusing…today we clarify that *Woda* adheres to the rule for using a market-rent income approach when valuing government-subsidized residential properties.[574]

Any seeming ambiguity, then, seemed to be resolved: market rents were to be used in the income approach in valuing government subsidized low-income housing. Then came the Court's decision in *Notestine*.

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[570] *Columbus City Schools Board of Education v. Franklin County Board of Revision* ("*Network Restorations III* "), 151 Ohio St. 3d. 12, 2017-Ohio-2734.

[571] *Network Restorations III*, at ¶16.

[572] *Network Restorations III*, at ¶17.

[573] *Network Restorations III*, at ¶21.

[574] *Network Restorations III*, at ¶22.

Notestine is Decided

On January 2, 2018 the Supreme Court decided *Notestine Manor, Inc. v. Logan County Board of Revision*,[575] a case dealing with the valuation of government subsidized low income housing under the federal Section 202 program.[576] The Court in *Notestine* ruled that under the facts, and in light of the workings of the Section 202 subsidy program, actual or contract rents should be utilized as opposed to market rents in valuing low-income housing. This seemingly contradicted its decision in *Network Restorations III*, decided seven months earlier, where in the context of valuing low-income housing the Court stated that "Broadly speaking…in applying the income approach, market rents and expenses, as opposed to the actual rents of the properties at issue, are used."[577] The Court's *Notestine* decision addresses that seeming disparity and seeks to harmonize its ruling with its earlier rulings in *Alliance Towers*[578], *Woda Ivy Glen*[579], and *Network Restortions III.*[580] [581]

Although in *Notestine* the Court acknowledged that in *Network Restorations III* it had announced a "rule" that market rents should be used over actual or contract rents in valuing low-income housing, it clarified that "the preference for market rent over contract rent is presumptive,

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[575] *Notestine Manor, Inc. v. Logan County Board of Revision*, 152 Ohio St.3d 439, 2018-Ohio-2.

[576] See 12. U.S.C. 1701q. Under the Section 202 program the Secretary of the Department of Housing and Development ("HUD") "is authorized to provide assistance to private nonprofit organizations and consumer cooperatives to expand the supply of supportive housing for the elderly. Such assistance shall be provided as (1) capital advances in accordance with subsection (c)(1), and (2) contracts for project rental assistance ["PRAC"]." Under 12 U.S.C. 1701q(c)(1), "A capital advance provided under this section shall bear no interest and its repayment shall not be required so long as the housing remains available for very low-income elderly persons in accordance with this section." Under 12 U.S.C. 1701q(c)(2), the PRAC contracts "…for project rental assistance shall obligate the Secretary to make monthly payments to cover any part of the costs attributed to units occupied (or, as approved by the Secretary, held for occupancy) by very low-income elderly persons that is not met from project income. The annual contract amount for any project shall not exceed the sum of the initial annual project rentals for all units so occupied and any initial utility allowances for such units, as approved by the Secretary."

[577] *Network Restorations, III* at ¶16.

[578] *Alliance Towers v. Stark County Board of Revision*, 37 Ohio St.3d 16 (1988).

[579] *Woda Ivy Glen Limited Partnership v. Fayette County Board of Revision* 121 Ohio St.3d 175, 2009-Ohio-762.

[580] *Network Restorations III*,, 151 Ohio St.3d 12, 2017-Ohio-2734.

[581] The syllabus in *Alliance Towers* states in applicable part that "An apartment property built and operated under the auspices of the Department of Housing and Urban Development is to be valued, for real property tax purposes, with due regard for *market rent*…" (italics added). The *Notestine* Court distinguished the ruling in *Woda Ivy Glen* from the instant case because, it said, "*Woda Ivy Glen*…addressed only the proper determination of highest and best use; it did not involve a conflict between a contract-rent appraisal and a market-rent appraisal. It therefore does not control the resolution of the issue presented here." *Notestine* at ¶19.

not conclusive."[582] Further, the Court in *Notestine* laid out a broader principle in the valuation of low-income housing.

> The guiding principle [in valuing subsidized property] from *Alliance Towers*, articulated in *Woda Ivy Glen* and reiterated in [*Network Restorations III*], is that the valuation method must account for the "affirmative value" of government subsidies, i.e., the tendency of government subsidies to inflate the value above what the market would otherwise bear.[583]

The Court went on to say that the affirmative value of those subsidies should be "adjusted out of the property valuation."[584]

In *Notestine* the Court distinguished the different impacts on a property's value caused by subsidies under Section 8[585] versus subsidies under Section 202. According to the Court, "With Section 8 rent subsidies, using market rent removes the affirmative value of government subsidies because the subsidies tend to inflate rents above market rent."[586] That was not the case, the Court said, with the Section 202 program which "presents a different situation."[587] The Court went on to say that "There is no evidence here [under the 202 program] that any adjustment from contract

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[582] *Notestine Manor, Inc. v. Logan County Board of Revision*, 152 Ohio St.3d 43, 92018-Ohio-2, ¶ 22.

[583] *Notestine Manor, Inc. v. Logan County Board of Revision*, 152 Ohio St.3d 43, 2018-Ohio-2, ¶ 22. Subsequent to *Notestine Manor*, the Supreme Court issued its decision in *Columbus City Schools Board of Education v .Franklin County Board of Revision*, 154 Ohio St.3d 146, 2018-Ohio-3254, ¶ 19, where the Court described and reiterated its reasoning in *Notestine Manor* by stating that "[in *Notestine Manor*]:

> "Harmonizing the case law, we instructed that "[t]he guiding principle from Alliance Towers, articulated in Woda Ivy Glen, and reiterated in Columbus City Schools, is that the valuation method must account for the 'affirmative value' of government subsidies, i.e., the tendency of government subsidies to inflate the value above what the market would otherwise bear." Id. In light of these principles, we upheld the BTA's adoption of an appraisal predicated on actual restricted rents. There was no evidence that adjusting from contract rent to market rent would have eliminated the subsidies' affirmative value. Id. at ¶ 23. And the record did not establish that contract rents exceeded those in the general market or that the property benefited from additional tax incentives."

[584] *Notestine Manor, Inc. v. Logan County Board of Revision*, 152 Ohio St.3d 43, 2018-Ohio-2, ¶ 22.

[585] 42 U.S.C 1437f. According to the Department of Housing and Urban Development "The Section 8 Rental Certificate program increases affordable housing choices for very low-income households by allowing families to choose privately owned rental housing. Families apply to a local public housing authority (PHA) or administering governmental agency for a Section 8 certificate. The PHA pays the landlord the difference between 30 percent of the household's adjusted income and the unit's rent." See also https://www.hud.gov/programdescription/cert8.

[586] *Notestine Manor, Inc. v. Logan County Board of Revision*, 152 Ohio St.3d 43, 2018-Ohio-2, ¶ 22.

[587] *Notestine Manor, Inc. v. Logan County Board of Revision*, 152 Ohio St.3d 43, 2018-Ohio-2, ¶ 22.

rent to market rent would eliminate the 'affirmative value' of the government subsidies."[588] Accordingly, contract rents could be used under the circumstances of that case.[589]

Subsequent to the Supreme Court's decision in *Notestine*, the BTA extended the reach of the *Notestine* decision in *Woda Meadow Glen Limited Partnership v. Wyandot County Board of Revision*[590] *("Woda Meadow")* to another federal subsidized housing program by applying *Notestine*'s reasoning to a case involving *not* Section 202 housing, but rather subsidized housing under the U.S. Department of Agriculture's Rural Development ("RD") program. Under the RD program, "the property owner is restricted in the amount of rent it can charge in exchange to [sic] favorable mortgage interest rates."[591] Similar to the appraiser in *Notestine*, the owner's appraiser in *Woda Meadow* used the property's actual below-market rates in reaching a value conclusion for the RD property. In justifying the use of actual rents, as opposed to market rents, the BTA once again distinguished this case from the market rent "rule" announced in *Network Restorations III* and stated that:

> This property, just like the property in *Notestine*, receives below-market rents, a fact that distinguishes this matter from the *Network Restorations* decisions. This property, just like the property in *Notestine*, is limited in the amount of rent that can be charged to tenants because of USDA restrictions…This property, just like the property in *Notestine*, is required to pass on surplus profit to USDA. Indeed, the court [in *Notestine*] noted *Network Restoration III* had no application to *Notestine* because below-market rents were at issue instead of above-market rents, i.e., "affirmative value" of government subsidies.[592]

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[588] *Notestine Manor, Inc. v. Logan County Board of Revision*, 152 Ohio St.3d 43, 2018-Ohio-2, ¶ 23.

[589] See also *Massillon City Schools Board of Education v. Stark County Board of Revision* (July 30, 2018), BTA No. 2017-86 where the BTA followed that reasoning. Thereafter, the BTA decided *Delaware City Schools Board of Education v. Delaware County Board of Revision* (November 19, 2019), BTA No. 2018-1506 where the BTA appeared to interpret *Notestine* as requiring that contract (actual) rents be used in Section 202 cases. The BTA stated that in the *Notestine* decision, "The court also specifically spoke to Section 202 properties, stating that rents in Section 202 property 'appear to be minimal, and any federal subsidization is strictly controlled by rigorous HUD-imposed restrictions on the accumulation of surpluses.' *The need to look to market rent, as opposed to contract rent, is therefore unnecessary in a Section 202 property*." (italics added).

[590] See *Woda Meadow Glen Limited Partnership v. Wyandot County Board of Revision* (March 5, 2020), BTA No. 2017-1458 and companion case. *Crawford Place Limited Partnership v. Wyandot County Board of Revision* (March 5, 2020), BTA No. 2017-1457.

[591] See *Woda Meadow Glen Limited Partnership v. Wyandot County Board of Revision* (March 5, 2020), BTA No. 2017-1458 and companion case *Crawford Place Limited Partnership v. Wyandot County Board of Revision* (March 5, 2020), BTA No. 2017-1457.

[592] See *Woda Meadow Glen Limited Partnership v. Wyandot County Board of Revision* (March 5, 2020), BTA No. 2017-1458 and companion case *Crawford Place Limited Partnership v. Wyandot County Board of Revision* (March 5, 2020), BTA No. 2017-1457.

Accordingly, the BTA applied the Supreme Court's reasoning in *Notestine* and permitted the use of the subject property's actual below-market rents as opposed to conventional above-market rents.

Network Restorations I is Decided

On August 15, 2018, seven months after *Notestine* was decided, the Supreme Court issued its decision in *Columbus City Schools Board of Education v. Franklin County Board of Revision*[593] ("*Network Restorations I*"), a case appealed from the BTA. *Network Restorations I* dealt with a low-income housing property that was both (1) rent-restricted under the LIHTC program (where rents could not be charged above a certain governmentally mandated level)[594] as well as (2) rent-subsidized (where part of the already restricted rent is paid by the tenant with the balance paid by the government). Because the BTA failed to weigh and analyze certain evidence that it should have considered, the Court ultimately remanded the case for the BTA for further consideration.

Prior to remanding the case, however, the Court in *Network Restorations I* reviewed and approved of the appraisal methodology used by the owner's appraiser. In that methodology the appraiser determined that in valuing the LIHTC rent-restricted/rent-subsidized subject property, he should (1) limit his rent comparables to those in the *LIHTC market* (i.e.: rents charged by other properties in the LIHTC program) as opposed to the general commercial market, while simultaneously (2) *not* considering the effect that the rent subsidies have on rent (i.e.: not adding in the rent subsidies to the comparables' rents).

The use of comparables limited to the LIHTC market would seem, at least on its face, to contradict the holding of *Network Restorations III* where the Court said that "today we clarify that *Woda* adheres to the rule for using a market-rent income approach when valuing government-subsidized residential properties."[595] The Court reconciled those seemingly contradictory rulings

[593] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* 154 Ohio St.3d 146, 2018-Ohio-3254.

[594] As explained in *Network Restorations I*, at ⁋ 5, "…the property is bound by a restrictive covenant in accordance with the LIHTC program. The restrictive covenant here provides that 21 percent of the units must be made affordable to person with incomes at or below 35 percent of the median gross income in the area ("AMGI"), 23 percent of the units must be made affordable to persons with incomes at or below 40 percent AMGI, and 56 percent of the units must be made affordable to persons with incomes at or below 45 percent AMGI."

[595] See *Network Restorations III*, at ¶22.

(general market comparables in *Network Restorations III* vs. LIHTC-only comparables in *Network Restorations I*) by discussing the LIHTC *subset market* in which the subject property competes.

> First, in developing a LIHTC market rent based on rents taken from comparable LIHTC properties, [the owner's appraiser] heeded *Woda*'s directive to take the LIHTC restrictions into account. Indeed, had [the owner's appraiser] developed a market rent based on properties not subject to LIHTC restrictions, the LIHTC restrictions would not have been taken into account. Second, [the owner's appraiser's] evaluation of rents from the LIHTC market rather than the property's actual rents is consistent with the court's instructions in [*Network Restorations III*] and [*Notestine*] to consider market rents. To be sure, the reference to market rents in those decisions is best understood as describing rents that are both unrestricted and unsubsidized. But the logic of those decisions can be extended to permit consideration of an appropriate *subset* [italics in original] of market rents, here, the appropriate subset is rents from the LIHTC market. As [the owner's appraiser] stated … "[m]arket rent is derived from the market place a property competes within." Thus, in developing a market rent for a LIHTC property…it is permissible to look to rents from other LIHTC properties because these types of properties compete against each other.[596]

By that reasoning the Court introduced the concept that, consistent with *Network Restorations III* and *Notestine,* there are *subset markets* that differ in scope (i.e. are narrower) from the general commercial market that should be considered in determining the appropriate comparables market for low-income housing. Further, the Court reiterated that the affirmative value of the subject property's rent subsidies should be "adjusted out", removed, from the appraiser's consideration "to the extent that they raise rents above market rents."[597]

Five months after *Network Restorations I* was decided, the BTA issued its decision in *Abbey Church Village (TC2) Housing Limited Partnership v. Franklin County Board of Revision*

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[596] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* 154 Ohio St.3d 146, 2018-Ohio-3254, ¶ 20. See also *Sylvania Senior Residence, LLC v. Lucas County Board of Revision* (July 26, 2019), BTA No. 2017-2062 ("…when the subject property competes in the LIHTC market, these restricted rents may be included as part of the appropriate market subset."). See also *Hillwood II Holdings LLC v. Summit County Board of Revision* (August 21, 2019), BTA No. 2018-1469 (…this board's [BTA] many LIHTC cases recognize a sales comparison approach using LIHTC comparables is legally permissible."); *Muddy Run Limited Partnership v. Harrison County Board of Revision* (March 24, 2020), BTA No. 2018-1238 ("[The appraiser] relied upon a subset of market income and expenses, specifically the LIHTC market, in his analysis. The court approved of such methodology … The court acknowledged that, in valuing low-income housing properties, the law "permit[s] consideration of an appropriate *subset* of market rents, here, the appropriate subset is rents from the LIHTC market. *** 'Market rent is derived from the market place a property competes within.' Thus, in developing a market rent for a LIHTC property, *** it is permissible to look to rents from other LIHTC properties because these types of properties compete against each other."); *Cadiz Homes Limited Partnership v. Harrison County Board of Revision* (March 25, 2020), BTA No. 2018-1239.

[597] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* 154 Ohio St.3d 146, 2018-Ohio-3254, ¶ 21.

(*"Abbey Church"*)[598] - a case dealing with the valuation of LIHTC low-income housing - in which the BTA applied the teachings of *Network Restorations I*. In *Abbey Church* the BTA was faced with two competing appraisals. In determining which of the appraisals (or portions thereof) should be credited, it discussed *Network Restorations I* and stated that "the appropriate subset of "market" rents to consider [in LIHTC cases] may include LIHTC market rent when that is the market place in which the [subject] property competes."[599] Further, "As we apply these principles to the present appeal, *we must first determine* in which market place the subject property competes to apply the appropriate 'market rents'."[600] (italics added). Thus, at least according to *Abbey Church*, in LIHTC low-income housing cases, the initial inquiry should be to determine the appropriate subset market in which the subject property competes.

The legally detailed, sometimes-fact-driven, outcomes of the Court's decisions discussed above left many boards of revision, as well as those individuals who practice before them, with the uneasy feeling that they were wandering in a land of legal uncertainty, lacking clear guidance from the Court. Based on all of the above, in the last edition of this Handbook we distilled the overall guidance of the above cases in the valuation of low income/subsidized housing as follows:

Making Sense of the Prior Cases

What overall lessons or guidance, then, could be drawn from these cases? Given what appear to be the fact-driven outcomes of some of the above cases, caution was called for in attempting to extract broad overarching legal principles from their holdings. Nonetheless, there *are* some principles and approaches that do appear to be supported by the cases. Thus, when undertaking the valuation of low income housing the following should be considered:

[598] *Abbey Church Village (TC2) Housing Limited Partnership v. Franklin County Board of Revision* (January 28, 2019), BTA No. 2017-1055. See also *Forest Edge LLC v. Hancock County Board of Revision* (September 11, 2019), BTA No. 2017-1370.

[599] *Abbey Church Village (TC2) Housing Limited Partnership v. Franklin County Board of Revision* (January 28, 2019), BTA No. 2017-1055.

[600] *Abbey Church Village (TC2) Housing Limited Partnership v. Franklin County Board of Revision* (January 28, 2019), BTA No. 2017-1055, at 5. See also *Buckeye Community Twenty One LP v. Muskingum County Board of Revision* (May 20, 2019), BTA No. 2016-1047.

1. **"**When a property is encumbered by governmental restrictions on land use, it should be valued as a low-income development, and these restrictions must be taken into account."[601]

2. "… [I]n valuing low-income housing using an income approach, government subsidies should not be taken into account in a way that would increase the value of the property. We [the Supreme Court] have referred to the value of government subsidies as 'the affirmative value'…"[602]

3. "…[T]he case law disfavors a cost approach for valuing government-subsidized low-income housing, even for a newly constructed property."[603]

4. "The guiding principle…is that the valuation method [used by the appraiser] must account for the 'affirmative value' of government subsidies, i.e. the tendency of government subsidies to inflate the value above what the market would otherwise bear."[604]

5. There is a *presumption* (which is not conclusive) that market rents, as opposed to actual (contract) rents, should be used in valuation of low-income housing.[605] There is also a

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[601] See *Lutheran Social Services of Central Ohio Pleasant View Housing Inc. v. Fairfield County Board of Revision* (January 7, 2020), BTA No. 2018-1132 citing to *Notestine Manor, Inc. v. Logan County Board of Revision*, 152 Ohio St.3d 43, 2018-Ohio-2 and *Columbus City Schools Board of Education v. Franklin County Board of Revision* ("*Network Restorations III* "), 151 Ohio St. 3d. 12, 2017-Ohio-2734. ⁋ 17. See also *Westerly I, L.P. v. Cuyahoga County Board of Revision* (January 8, 2020), BTA No. 2019-207.

[602] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* ("*Network Restorations III* "), 151 Ohio St. 3d. 12, 2017-Ohio-2734. ⁋ 16.

[603] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* ("*Network Restorations III* "), 151 Ohio St. 3d. 12, 2017-Ohio-2734. ⁋ 18. In low-income housing cases, most of the BTA cases show that while appraisers sometimes develop a sales comparison approach analysis along with the income approach, for the most part they give primary weight to, and rely on, the income approach. See *Tallmadge City Schools Board of Education v. Summit County Board of Revision* (March 10, 2020), BTA No. 2017-1500 ("[The board of education's appraiser] developed the sales comparison approach, which he gave little weight, and income approach to valuing real property]"); *Delaware City Schools Board of Education v. Delaware County Board of Revision* (November 19, 2019), BTA No. 2018-1506 ("Although [the owner's appraiser] performed a sales comparison approach, he gave most weight to his income capitalization approach."); and *Lutheran Social Services of Central Ohio Pleasant View Housing Inc. v. Fairfield County Board of Revision* (January 7, 2020), BTA No. 2018-1132 ("The [owner's appraiser] relied primarily on the income approach" although he "also performed a sales comparison approach.").

[604] See *Notestine Manor, Inc. v. Logan County Board of Revision*, 152 Ohio St.3d 43, 2018-Ohio-2, ¶ 22. See also *Abbey Church Village (TC2) Housing Limited Partnership v. Franklin County Board of Revision* (January 28, 2019), BTA No. 2017-1055, at 5 ("… in using an 'income approach, government subsidies should not be taken into account in a way that would increase the value of the property'.");*Lutheran Social Services of Central Ohio Pleasant View Housing Inc. v. Fairfield County Board of Revision* (January 7, 2020), BTA No. 2018-11342 ("…government subsidies should not be taken into account if they increase the property's value above the conventional market…").

[605] See *Notestine Manor, Inc. v. Logan County Board of Revision*, 152 Ohio St.3d 43, 2018-Ohio-2,¶ 22 ("… the preference for market rent over contract rent is presumptive, not conclusive."). See also *Abbey Church Village (TC2) Housing Limited Partnership v. Franklin County Board of Revision* (January 28, 2019), BTA No. 2017-1055, at 5 ("… "First, 'in applying the income approach, market rents and expenses, as opposed to the actual rents of the properties at issue, are used.' [*Network Restorations III*,] at ¶ 16."). For examples of where the presumption in favor of market rents (and expense) *was* overcome in favor of actual (contract) expenses see *Delaware City Schools Board of Education v. Delaware County Board of Revision* (November 19, 2019), BTA No. 2018-1506 ("The need to look to market rent, as opposed to contract rent, is therefore unnecessary in a Section 202 property…[The owner] argues that using actual expenses complies with the court's directive in *Woda Ivy Glen*…to take into account the restrictions imposed by the government in low-income housing. We agree.");*Lutheran Social Services of Central Ohio*

presumption that market expenses should be used in the valuation of low income housing.[606] But – and this may be critical in the ultimate valuation of the low income subject property - there may be circumstances in which a subset market (which, like the subject, may have rent restrictions) can or should be utilized as the appropriate "market".[607]

6. When valuing Section 8 low-income housing, market rents should presumptively be used.[608]

7. When valuing Section 202 low-income housing, market rents expenses should presumptively be used but the applicable "market" may be a subset of the general market so as to better reflect the low income housing market in which the subject property competes.

8. When valuing low-income housing units that are subject to low-income housing tax credits ("LIHTC"), the impact of the LIHTC restrictions on use of the property must be considered and actual (contract) rents should be utilized.

Pleasant View Housing Inc. v. Fairfield County Board of Revision (January 7, 2020), BTA No. 2018-1132 ("In a §202 property, the income must match the expenses. As such, in order to achieve 'market-level' rents, the actual expenses incurred by a §202 property may be above the conventional unrestricted market…Thus, we find that [the owner's appraiser's] expenses are appropriate for the subject property and that [the BOE's appraiser's] reliance upon the unrestricted properties to determine market expenses does not fully capture the impact of the restrictions on the property's overall NOI [net operating income]."). But for an example of a case where the presumption in favor of market rents was *not* overcome in favor of actual (contract) rent, see *Tallmadge City Schools Board of Education v. Summit County Board of Revision* (March 10, 2020), BTA No. 2017-1500 where the BTA said "…we find that the record does *not* [italics in original] overcome the presumption in favor of market income and expense information and do not agree with the property owner that the record supports using the subject property's actual income and expense information. In *Notestine*, there was testimony that detailed the specific low-income housing program by which the property was bound…terms of such program, limited income-producing potential as the consequence of such program, and consequences of surplus profit (must be returned to Department of Housing and Urban Development…Here, we have very little, if any, of this information...[W]e cannot confirm that the subject property was subject to LIHTC use restrictions as of the tax lien date because the restrictive covenant was not submitted into evidence at the BOR hearing or this board's hearing."

[606] See *Tallmadge City Schools Board of Education v. Summit County Board of Revision* (March 10, 2020), BTA No. 2017-1500 ("…in *Notestine*, the court…noted that '[a]lthough we did state that use of market rents and expenses constituted a rule to be applied when valuing low-income government housing generally [citation omitted], the preference for market rent over contract rent is presumptive, not conclusive.' [citation omitted] Thus, our beginning point is market rent *and market expenses* unless the record supports deviating from the 'rule.'"). (italics added).

[607] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* 154 Ohio St.3d 146, 2018-Ohio-3254, ¶ 21. See also *Fairway Crossing Limited Partnership v. Seneca County Board of Revision* (January 7, 2020), BTA No. 2018-610 ("…market rents expenses should be used, though the appropriate "market" may consist of a smaller subset comprised of restricted rents…").

[608] See *Notestine Manor, Inc. v. Logan County Board of Revision*, 152 Ohio St.3d 43, 2018-Ohio-2, ¶ 22.

H.B. 33's Amendments Regarding "Federally Subsidized Residential Property"

The complex tangle of the prior cases cried out for simplification and clarity. Indeed, in the last version of this Handbook we expressed that "There is little doubt that this complex – some might say convoluted - area of property valuation law could benefit from a 'legislative fix' that could provide clear statutory guidance to county auditors and BORs as to how to value low-income properties." That, indeed, appears to be what the General Assembly ("GA") had in mind because shortly before the finalization of the last edition of this Handbook, the GA created a Federally Subsidized Housing Study Committee comprised of a variety of stakeholders involved in the area of low-income housing." Whether as a result of that Study Committee or otherwise, the Budget Bill that was passed by the 135th General Assembly as H.B. 33 contained changes to three sections of the Revised Code designed to address the confusion that previously existed in the valuation of subsidized housing. Those changes are primarily contained in (1) newly enacted R.C. section 5713.031, (2) and in newly enacted subsection (4) to R.C. section 5715.01(A).

Those new sections, effective October 3, 2023, concern "federally subsidized residential rental property," which is defined as including one or more of several federal programs identified in the bill (collectively, these programs and their associated housing units will be referred to hereafter, as applicable, as "low income housing programs," or "LIH programs"[609]; "low income housing units" or "LIH units"). In general, among other things, the amendments: (1) require the filing of certain information by the owners of LIH units with the county auditor; (2) call for the enactment by the Tax Commissioner of rules establishing a formula to determine the value of low income housing; (3) contain certain rebuttable presumptions about the percentages of vacancy and collection loss as well as operating expenses to be used in the value calculation; (4) require a "market-appropriate uniform capitalization rate" and discuss some of the specifics in the

[609] Under R.C. 5713.031 "federally subsidized low residential rental property" includes property to which one or more of the following apply: (1) It is part of a qualified low-income housing project, through its compliance and extended use period, as those terms are defined in section 42 of the Internal Revenue Code, or any other period during which it is similarly restricted under section 42 of the Internal Revenue Code; (2) It receives assistance pursuant to section 202 of the "Housing Act of 1959," 12 U.S.C. 1701q, and remains restricted pursuant to that section; (3) Property that receives assistance pursuant to Section 811 of the "Cranston-Gonzalez National Affordable Housing Act," 42 U.S.C. 8013, and remains restricted pursuant to that section; (4) Property that receives project-based assistance pursuant to section 8 of the "United States Housing Act of 1937," 42 U.S.C. 1437f, and remains restricted pursuant to that section; (5) Property that receives assistance pursuant to section 515 of the "Housing Act of 1949," 42 U.S.C. 1485, and remains restricted pursuant to that section; (6) Property that receives assistance pursuant to section 538 of the "Housing Act of 1949," 42 U.S.C. 1490p-2, and remains restricted pursuant to that section; and (7) Property that receives assistance pursuant to section 521 of the "Housing Act of 1949," 42 U.S.C. 1490a, and remains restricted pursuant to that section."

determination of that rate; and (5) set a minimum value or, in the alternative, a method for determining a minimum total value for the subsidized property.

R.C. 5713.031 identifies the information required to be filed by the owner of LIH units. In particular, the owner is required to "file with the county auditor of the county in which the property is located the following information from the preceding calendar year or up to three preceding calendar years, as applicable."[610] That information is to include:

> (1) "The operating income of the property which shall include gross potential rent, any forgiveness of or allowance received for losses due to vacancy or unpaid rent, and any income derived from other sources."[611]
>
> (2) "The operating expenses of the property including all non-capitalized expenses related to staffing, utilities, repairs, supplies, telecommunication, management fees, audits, legal and contract services, and any other expense a prospective buyer might consider in purchasing the property. Real property taxes, depreciation, and amortization expenses and replacement of short-term capitalized assets shall be excluded from operating expenses,"[612] and
>
> (3) "The annual amount of contribution to replacement reserve funds or accounts related to the property."[613]

The required information "shall have first been audited by an independent public accountant or auditor or a certified public accountant prior to filing"[614] and is required to be filed "both before the property is placed in service and after the commencement of the property's operations and each following year to which section 5715.24[615] [addressing the sexennial

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[610] See R.C. 5713.031(B).

[611] See R.C. 5713.031(B)(1).

[612] See R.C. 5713.031(B)(2).

[613] See R.C. 5713.031(B)(3).

[614] See R.C. 5713.031(C)(2).

[615] R.C. 5715.24(A) refers to a county's sexennial reappraisal and states, in applicable part, that "The tax commissioner, annually, shall determine whether the real property…in the several counties…which have completed a sexennial reappraisal in the current year…have been assessed as required by law…" R.C. 5713.24(B) addresses the triennial update and states that "Division (A) of this section applies to a county in the third calendar year following the year in which the sexennial reappraisal is completed."

reappraisal and the triennial update] of the Revised Code applies in the county, on or before the first day of March." Further, the information shall be reported "for the preceding three calendar years or for the period of time the property has been in operation if less than three years."[616] The county auditor is required to use the reported information to determine the valuation of the property in accordance with rules adopted by the Tax Commissioner pursuant to R.C. 5715.01(A)(4).[617]

If the property owner fails to timely submit the required information, then under R.C. 5713.031(C)(3) "the county auditor is not required to value the property in accordance with [newly enacted] division (A)(4) of section 5715.01…and shall otherwise proceed under section 5713.01 of the Revised Code to value the property in compliance with Ohio Constitution, Article XII, Section 2 for that tax year."[618] Presumably, this is intended to encourage compliance and avoid what might be a higher property valuation under standard appraisal rules. Under R.C. 5713.031(E), any information submitted under R.C. 5713.031 is not a public record for purposes of R.C. 149.43, Ohio's public records law.[619]

While under prior law, county auditors were authorized to use any one or more of the three recognized approaches to value property (the cost approach, sales comparison approach, and income approach), the act "repeals this authorization and instead requires the Tax Commissioner to adopt rules prescribing a formula for the uniform valuation of all federally subsidized residential rental property, including LIHTC property. The formula must take into account the operating income and expenses of the property, as reported by the owner, and a uniform capitalization rate."[620]

The formula itself is not set forth in the statute but, instead, is to be included in the adopted rules. R.C. 5715.01(A)(4) establishes certain parameters for those rules, requiring that they prescribe a method to determine the value of LIH property through a formula that accounts for

[616] See R.C. 5713.031(C)(1).

[617] See R.C. 5713.031(D).

[618] See R.C. 5713.031(C)(3).

[619] See R.C. 5713.031(E).

[620] See Ohio Legislative Service Commission, *Final Analysis of H.B. 126*, 134th General Assembly at https://www.legislature.ohio.gov/download?key=21327&format=pdf, at 591.

operating income, operating expenses, and a capitalization rate. As to operating income, the statute says that the formula must account for:

> Up to three years of operating income of the property, which includes gross potential rent, and any income derived from other sources as reported by the property owner to the county auditor under section 5713.031 of the Revised Code. Operating income shall include an allowance for vacancy losses, which shall be presumed to be four per cent of gross potential rent, and unpaid rent losses, which shall be presumed to be three per cent of gross potential rent. These presumptive amounts may be exceeded with evidence demonstrating the actual income of the property.[621]

The statute also requires that the formula account for operating expenses of the property:

> …which shall be presumed to be forty-eight per cent of operating income plus utility expenses as reported by the property owner to the county auditor under section 5713.031 of the Revised Code. Operating expenses shall also include replacement reserve fund or account contributions which shall be presumed to be five per cent of gross potential rent. These presumptive amounts may be exceeded with evidence demonstrating the actual expenses of the property. Real property taxes, depreciation, and amortization expenses and replacement of short-term capitalized assets shall be excluded from operating expenses.[622]

It will be noted that the presumptions for both operating income and operating expenses may be *exceeded*, but not diminished, with evidence demonstrating the actual income or expenses of the property. Presumably, as in other areas of valuation law, the party challenging the presumptive percentages would bear the burden to disprove the presumption.

The statute also requires that the formula include a capitalization rate which it describes as:

> A market-appropriate, uniform capitalization rate plus a tax additur accounting for the real property tax rate of the property's location. For federally subsidized residential rental property described in division (A)(1) of section 5713.031 of the Revised Code, one percentage point shall be subtracted from the uniform capitalization rate.[623]

Finally, the rules are required to prescribe a minimum total value for the LIH units.

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[621] See R.C. 5715.01(A)(4)(a).

[622] See R.C. 5715.01(A)(4)(b).

[623] See R.C. 5715.01(A)(4)(c).

> The uniform rules shall also prescribe a minimum total value for federally subsidized residential rental property of five thousand dollars multiplied by the number of dwelling units comprising the property or one hundred fifty per cent of the property's unimproved land value, whichever is greater.[624]

The seeming intent of these changes is to simplify the LIH housing valuation process and eliminate, or at least reduce, the uncertainty that has afflicted the valuation of low income housing units over the years, as discussed above. Only time will tell if these amendments achieve that goal.

As required by the amendments, the Tax Commissioner drafted proposed rules in early 2024 and published them for comment for a period that ended March 1, 2024.[625] As of the time this work was submitted for publication, the rules had not yet been finalized.[626]

[624] See R.C. 5715.01(A)(4)(c).

[625] See Ohio Department of Taxation Draft rule 5705-25-20.

[626] As of March 1, 2024, draft rule OAC 5705-25-20(C) included a formula to determine the value of LIH housing units as follows:

> (C) Method for determining the value of federally subsidized residential rental property.
>
> The value of federally subsidized residential rental property will be determined using the following formula:
>
> (1) The total value will be the greater of the following:
> (a) the appraised value;
> (b) five thousand dollars ($5,000) multiplied by the number of units comprising the property; or
> (c) one hundred fifty percent of the property's unimproved land value.
>
> (2) The appraised value will be Operating Income minus the Operating Expenses, the result of which is divided by the adjusted capitalization rate

CHAPTER 10
CURRENT AGRICULTURAL USE VALUATION

CHAPTER SUMMARY

- The general rule that real property is to be valued at its "highest and best probable legal use" is modified where it is "devoted exclusively to agricultural use" and accepted into Ohio's Current Agricultural Use Valuation ("CAUV") program.
- CAUV valuations typically result in lower property valuations and lower property taxes than a true highest and best use valuation.
- Landowners must timely apply to the county auditor for acceptance into the CAUV program and, once accepted, must timely file annual renewal applications.
- Land can be removed from the CAUV program for, amongst other reasons, the landowner's failure to timely file a renewal application.
- The BOR hears complaints brought by landowners who claim they are aggrieved due to, amongst other things, the improper denial of acceptance into or removal from the CAUV program.
- At the BOR, landowners who have failed to timely file applications for the CAUV program may show "good cause" for the failure to file and be (re) admitted into the program.

The CAUV Program

While a number of factors should be considered in appraising land for the purpose of real property taxation,[627] superimposed across all of them is the general rule in Ohio that land is to be appraised at its "highest and best probable legal use."[628] That general rule is modified, however,

[627] See OAC §5703-25-11(B) which reads, in applicable part, as follows: "All relevant facts tending to influence the market value of land should be considered, including, but not limited to, size, shape, topography, soil and subsoil, drainage, utility connections, street or road, land pattern, neighborhood type and trend, amenities, zoning, restrictions, easements, hazards, etc."

[628] See OAC §5703-25-11(A) which reads, in applicable part, as follows: "General - All land shall be appraised at its true value in money as of tax lien date of the year in which the appraisal or update of values is made. In arriving at the true value in money the county auditor shall consider, along with other factors, not only the present use of the land but also **its highest and best probable legal use** consistent with existing zoning and building regulations. The requirement that land be classified under rule 5703-25-10

and preferential tax treatment is granted,[629] where land is "devoted exclusively to agricultural use"[630] ("Agricultural Land"). Further, "The [BTA] held the word "exclusively" should be constructed to mean "primarily" to determine whether a property is "land devoted exclusively to agricultural use."[631] That modification of the general rule was described by the Supreme Court as follows:

> By a 1973 amendment to the state Constitution, Ohio voters authorized the General Assembly to depart from uniformity in valuing real property by permitting farms to be valued in accordance with their current agricultural use rather than their market value…Under the authorizing amendment and the implementing statutes, 'the auditor disregards the highest and best use of the property and values the property according to its current agricultural use,' a procedure that 'usually results in lower valuation and a lower real property tax.'[632]

To implement that modification to the "highest and best use" rule, Ohio's Tax Commissioner has adopted rules[633] to "prescribe the method for determining the current agricultural use value of land devoted exclusively to agricultural use".[634] Those rules appear in the Ohio Administrative Code ("OAC") which mandates that Agricultural Lands be "classified and valued according to their characteristics and capabilities for use, based primarily on what they will produce under average conditions and typical management in the locality."[635] Classifying and

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of the Administrative Code according to its principal use shall not affect the requirement of this rule that it be appraised at its highest and best probable legal use. The present improvements to the land, the demand and supply of land, the demand and supply of land for such use, financing method, the length of time until developed and the cost of development are factors that should be considered in determining the highest and best probable legal use of the land."

[629] See *Clyde T. Reel v. Licking County Board of Revision* (May 17, 2021), BTA No. 2020-2198 ("The CAUV program grants preferential tax treatment of "land devoted exclusively to agricultural use.").

[630] See R.C. §5713.30(A) for definition.

[631] See *Dalton G. Bixler 2016 Trust v. Tuscarawas County Board of Revision* (January 4, 2023), BTA Nos. 2020-1612, 2019-1553, 2020-1613. See also *Wenger Acquisitions LLC v. Stark County Board of Revision* (December 7, 2023), BTA No. 2023-465.

[632] See *Maralgate, L.L.C. v. Greene County Board of Revision*, 130 Ohio St.3d 316, 2011-Ohio-5448, ⁋ 13. See also *Johnson v. McClain*, 2021-Ohio-1664, ⁋ 7. *Thomas Harris v. Licking County Board of Revision* (July 24, 2023), BTA No. 2020-2229.

[633] See R.C. §5715.01(A). See also *Johnson v. McClain*, 2021-Ohio-1664, ⁋ 8.

[634] See R.C. §5715.01(A)(2).

[635] See OAC §5703-25-11(E).

valuing the property in that manner usually results in lower property valuations and, as a result, imposes lower property taxes than would otherwise be incurred were the property assessed at its true highest and best use.[636] Indeed, the BTA has stated that, "Land used for commercial purposes generally has a greater sale value than land used for agricultural purposes."[637] According to the Supreme Court:

> CAUV is a preferred tax status because, in general, a value determined by agricultural use is lower than a property's true market value and therefore, CAUV status typically results in a lower real-property-tax liability.[638]

For example, if a parcel of farmland could serve as either land for a manufacturing facility or land to grow soybeans, it's "highest and best use" value would clearly be as land for a manufacturing facility. Were it assessed in that manner, the owner would pay taxes in a substantially higher amount than were the same property found to be Agricultural Land. Agricultural Land that qualifies for this treatment is considered part of Ohio's Current Agricultural Use Valuation ("CAUV") program.

The CAUV Application Process

But the process to obtain CAUV status is not automatic and the owner of lands seeking that status may only enter the CAUV program by making application to the auditor in the county where the land is located.[639] It should be noted that where property included in the CAUV program is sold to a new owner, the property does not automatically remain in the program. Rather, the BTA has made clear that the "new owners…[are] required to file an initial application for C.A.U.V.

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[636] *Thomas Harris v. Licking County Board of Revision* (July 24, 2023), BTA No. 2020-2229.

[637] See *Dalton G. Bixler 2016 Trust v. Tuscarawas County Board of Revision* (January 4, 2023), BTA Nos. 2020-1612, 2019-1553, 2020-1613.

[638] See *Johnson v. Clark County Board of Revision*, 155 Ohio St.3d 264, 2018-Ohio-4390, ¶ 12. See also *Wenger Acquisitions LLC v. Stark County Board of Revision* (December 7, 2023), BTA No. 2023-465, ("Generally, a value determined by agricultural use is lower than a property's true market value, and therefore, CAUV status typically results in a lower real-property-tax liability.").

[639] See R.C. §5713.31. See also *Lester Vandenbark v. Muskingum County Board of Revision* (August 2, 2018), BTA No. 2017-1765 ("When land is devoted exclusively to agricultural use, the property owner may apply for CAUV status to avoid real property tax assessment based on the true value as appraised by the auditor. R.C. 5713.30 provides an alternative value for land devoted exclusively to agricultural use.").

status and that the…County Auditor [is] not required to notify the [new owners] that said application had to be filed."[640]

The application must be timely-filed[641] and must show that the subject land qualifies for CAUV treatment by, amongst other things, showing that it was "devoted exclusively to agricultural use"[642] for the three years prior to the year in which the application was made.[643] The BTA has held that the word "exclusively," "…should be construed to mean 'primarily' to determine whether a property is 'land devoted exclusively to agricultural use."[644] Further, "CAUV is determined by actual use, not intent."[645]

For purposes of determining whether land is "devoted exclusively to agricultural use," owners of parcels that are less than ten acres must show that the that they were farmed commercially and that the land "produced an average yearly gross income of at least twenty-five hundred dollars during such three-year period or where there is evidence of an anticipated gross income of such amount from such activities during the tax year in which application is made."[646] However, "The Ohio Supreme Court has applied the single economic unit doctrine when determining if a property falls above or below the ten-acre rule. [citation omitted]. Tracts that are more than one parcel should be considered the same property for CAUV purposes when the entire property is used as a single economic unit."[647] Unlike those smaller parcels, farmed parcels larger than ten acres do not have to prove their gross income over the prior three-year period.[648]

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[640] See *McCall v. Clark County Board of Revision* (June 30, 1988), BTA No. 85-D-511. See also *Biniker v. Lucas County Board of Revision*, 79-E-566 (1981).

[641] See R.C. §5713.31 ("At any time after the first Monday in January and prior to the first Monday in March of any year, an owner of agricultural land may file an application with the county auditor of the county in which such land is located, requesting the auditor to value the land for real property tax purposes at the current value such land has for agricultural use…").

[642] See R.C. §5713.30 for an extensive definition of what qualifies as "Land devoted exclusively to agricultural use."

[643] See R.C. §5713.30 contains other requirements in addition to the three-year exclusivity period.

[644] See *Chrisman v. Licking Cty. Bd. of Revision*, BTA No. 1985-C-753, 1986 Ohio Tax LEXIS 708 (Sept. 19, 1986). See also *Thomas Harris v. Licking County Board of Revision* (July 24, 2023), BTA No. 2020-2229.

[645] *Thomas Harris v. Licking County Board of Revision* (July 24, 2023), BTA No. 2020-2229.

[646] See R.C. §5713.30(A)(2).

[647] See *Dow and Thelma Fosselman v. Pickaway County Board of Revision* (February 11, 2020), BTA No. 2019-768 citing *Renner v. Tuscarawas County Board of Revision*, 59 Ohio St.3d 142 (1991).

[648] See R.C. §5713.30(A)(1).

Upon completion of the application, the county auditor is required to "view…the land described in the application and determine whether the land is land devoted exclusively to agricultural use."[649] If the auditor grants the CAUV application then, amongst other things, he/she is required to appraise the land under the strictures of the CAUV program and place it on the agricultural land tax list."[650] If, however, the CAUV application is denied, then the auditor is required to notify the applicant of the denial.[651]

Removal from the CAUV Program

Once land is accepted into the CAUV program, its owner is required to file annual renewal applications with the auditor to maintain the land's CAUV status.[652] If the application is not renewed[653] or the land is otherwise removed from the CAUV program,[654] then it is considered to have been "converted".[655] Once the auditor determines that the Agricultural Land has been converted,[656] the auditor is required to levy a charge against the land to recoup the tax savings realized during the three years immediately preceding the year in which the conversion occurs[657] (i.e. the difference between the taxes that should have been paid had the land been assessed at its true highest and best use and the reduced taxes that were paid under the CAUV program). That three-year recoupment charge is placed as a separate item on the tax list for the current tax year

[649] See R.C. §5713.31.

[650] See R.C. §5713.33. See also OAC 5703-25-34.

[651]See R.C. §5713.32.

[652] See R.C. §5713.31.

[653] The Revised Code includes a notification procedure whereby notice is sent to those whose application is incomplete or who fail to file a renewal application. See R.C. §5713.31.

[654] See R.C. §5713.30(B) where, in addition to the failure to renew or file an initial CAUV application, land is considered converted due to the "…failure of such land…to qualify as land devoted exclusively to agricultural use for the current calendar year…"[5713.30(B)(3)] or due to the "…failure of the owner of the land…to act on such land in a manner consistent with the return of the land to agricultural production after three years." [5713.39(B)(4)].

[655] See R.C. §5713.35.

[656] See R.C. §5713.35.

[657] See R.C. §5713.34. *Thomas Harris v. Licking County Board of Revision* (July 24, 2023), BTA No. 2020-2229.

and collected at the same time as other real property taxes collected against that parcel for the current calendar year.[658]

Appeal to the BOR

Not surprisingly, landowners[659] may feel aggrieved where the auditor either denies their application to have their land placed in the CAUV program or, once their land has been placed in the program, is later found to have been "converted" and removed from the program. To address those concerns, the Revised Code grants the BOR the authority to hear complaints where the complainant : (1) alleges that the auditor incorrectly determined that land did not qualify for acceptance into the CAUV program;[660] (2) alleges that land in the CAUV program was incorrectly "converted" and removed from the program;[661] (3) challenges the recoupment charge levied against land removed from the CAUV program;[662] or (4) challenges the total valuation for any parcel on the agricultural land tax list.[663] In addition, where the county auditor determines that a conversion has occurred [item (2), above] because the owner failed to file an initial or renewal CAUV application, and if the auditor determines that the land would otherwise qualify for the CAUV program if the BOR were to find good cause for the owner's failure to file or renew the application, then the owner may file a complaint at the BOR on the grounds that there was "good cause" for its failure to file or renew the CAUV application. If the BOR finds that there was good cause, then the application is then considered as if it were properly filed.[664]

[658] See R.C. 5713.35.

[659] While R.C §5715.19(A) authorizes individuals and entities other than the landowner to file the complaint, it is typically the landowner who will file a complaint where land is either denied entry into or later removed from the CAUV program.

[660] See R.C. §5715.19(A)(1)(b) which references R.C. §5713.32 and R.C. §5713.35.

[661] See R.C. §5713.35. For an example of an appeal where the owner claimed the land was improperly removed from the CAUV program see *Richard A. and Sandra M. Sautter v. Morrow County Board of Revision* (April 6, 2020), BTA No. 2018-2058.

[662] See R.C. §5715.19(A)(1)(c) which references R.C. §5713.35.

[663] See R.C. §5715.19(A)(1)(e).

[664] See R.C. §5713.351.

Good Cause for Failure to File

The BTA has found that despite missing the CAUV filing deadline, "good cause" existed where the purchaser of property under a land installment contract did not timely receive notice as required by statute of its obligation to file a renewal application for the property[665] even though the seller had received such notice. In addition, good cause was also found where the owner did not receive the CAUV renewal application due to an error in the auditor's office.[666] Conversely, the BTA has not found good cause where the CAUV filing deadline was missed due to delay caused (1) by the owner's misplacement of the renewal application;[667] (2) by a company's internal misrouting of the renewal application;[668] (3) due to personal illness;[669] or (4) due to the fact that the imposition of the recoupment would cause financial hardship.[670]

It is worth noting that the cases above where good cause was found seem to focus on the receipt of notice. Where notice was not received through no fault of the recipient, the BTA found good cause for the failure to file. Where, however, notice is received but there are other circumstances as to why application was not filed/renewed, then the BTA is less likely to find good cause.

[665] See *James S. Killibrew v. Licking County Board of Revision* (May 6, 1994), BTA No. 92-1041.

[666] See *Marjorie L. Nearing v. Montgomery County Board of Revision*, BTA No. 90-472.

[667] See *Gale A. and Sandra L. Lang v. Washington County Board of Revision* (June 30, 1999), BTA No. 98-T-641.

[668] See *Cemex, Incorporated v. Green County Board of Revision* (May 12, 2009), BTA Nos. 2007-317 – 365, 2007- 367-383.

[669] See *John C. Phillips III v. Preble County Board of Revision* (June 7, 1996), BTA No. 94-935.

[670] See *Jennie Greene v. Knox County Board of Revision* (March 10, 2006), BTA No. 2005-694.

CHAPTER 11
MANUFACTURED HOMES – RC 4503.06

CHAPTER SUMMARY

- The valuation of manufactured or mobile homes raises special issues owing to the hybrid nature of that property: it starts out as personal property but can be converted to real property after it is affixed to the ground.

- Under R.C. 4503.06, a manufactured or mobile home may be taxed (1) "as real property" and be subject to real property taxes or (2) as a manufactured or mobile home and be subject to manufactured home taxes, in which case it is taxed either (a) under a depreciation schedule or (b) "like real property," as set forth in that statute.

- A manufactured or mobile home will be taxed "as real property" if it meets certain conditions, and for valuation purposes is treated as if it were a parcel of traditional real estate. Valuation disputes regarding manufactured or mobile homes are resolved at the BOR when taxed (1) "as real property" or (2) under the Manufactured Home Tax when taxed "like real property." They cannot be addressed at the BOR when taxed under the depreciation schedules of the manufactured home tax.

- Once a case reaches the BOR, the handling of a challenge against the auditor's values assessed against a mobile or manufactured home is virtually identical to the manner in which an owner challenges the auditor's values assessed against real property.

Similar to the manner for traditional parcels of real property, the BOR also adjudicates certain disputes where a party challenges the valuation of a "manufactured[671] or mobile[672] home" (either hereafter referred to as a "Home"). The valuation of a Home for property tax purposes is an area of the law which raises special issues - and is addressed in Revised Code provisions separate from those relating to the valuation of traditional real property parcels - because unlike

[671] R.C. 4501.01(M)(M) adopts the definition of "manufactured home" used in R.C. 3781.06(C)(4) which defines it as "…a building unit or assembly of closed construction that is fabricated in an off-site facility and constructed in conformance with the federal construction and safety standards established by the secretary of housing and urban development pursuant to the "Manufactured Housing Construction and Safety Standards Act of 1974," 88 Stat. 700, 42 U.S.C.A. 5401, 5403, and that has a permanent label or tag affixed to it, as specified in 42 U.S.C.A. 5415, certifying compliance with all applicable federal construction and safety standards."

[672] R.C. 4501.01(O) defines "mobile home" as "a building unit or assembly of closed construction that is fabricated in an off-site facility, is more than thirty-five body feet in length or, when erected on site, is three hundred twenty or more square feet, is built on a permanent chassis, is transportable in one or more sections, and does not qualify as a manufactured home as defined in division (C)(4) of section 3781.06 of the Revised Code or as an industrialized unit as defined in division (C)(3) of section 3781.06 of the Revised Code."

traditional real property, a Home starts out as personal property, can be "changed" to real property, or can be moved from one location to another.[673]

R.C. 4503.06 (hereafter, sometimes referred to as "the statute") is the primary Revised Code section relating to the property taxation of a Home. The statute is lengthy and complex and for property taxation purposes places Homes in three different categories, where a Home can be: (1) taxed "as" real property; (2) taxed under the depreciation schedules of the manufactured home tax; or (3) taxed "like" real property under the manufactured home tax. Because the statute's BOR complaint provisions do not apply to all of those categories, a basic understanding of the statute is necessary to identify which Homes are, and are not, subject to the statute's BOR provisions and adjudication process.

Statutory Changes to the Taxation of a Home

In 1999 and 2000, R.C. 4503.06 was substantially amended.[674] Under the amended statute, depending upon a number of identified factors, the owner of a Home is required to pay either real property tax or a "manufactured home tax".[675] The statute requires taxation as one or the other: "Any mobile or manufactured home that is not taxed as real property…is subject to an annual manufactured home tax…"[676]

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[673] As an example of the issues this raises, see *Randy Zelenitz v. Belmont County Board of Revision* (September 13, 2017), BTA No. 2016-2391 where, in a manufactured/mobile home case, the BTA stated "We now must decide whether these mobile homes may be taxed as real property under Revised Code Title 57 or if they should be assessed as manufactured or mobile homes pursuant to R.C. 4503.06."

[674] See http://archives.legislature.state.oh.us/bills.cfm?ID=122_SB142 and http://archives.legislature.state.oh.us/bills.cfm?ID=123_HB_672. See also DTE Bulletin 11, Revised 12/02, *Property Taxation of Manufactured and Mobile Homes*, at https://www.tax.ohio.gov/portals/0/government/dte_bulletin11rev.pdf, page 1. The directives of DTE tax bulletins have the effect of law. See R.C. 5715.28, 5715.29, OAC 5703-1-04, and OAG 2014-037.

[675] See R.C. 4503.06(A). See also *Randy Zelenitz v. Belmont County Board of Revision* (September 13, 2017), BTA No. 2016-2391 ("The owner of a manufactured or mobile home situated in the State of Ohio is required to pay either manufactured home tax or real property tax for that home."). See also *Richard Bockmore v. Lorain County Board of Revision* (January 7, 2005), BTA No. 2004-397 ("By virtue of R.C. 4503.06(A), the owner of any manufactured or mobile home situated in this state must pay either a real property tax pursuant to Title LVII of the Ohio Revised Code or a manufactured home tax.").

[676] See R.C. 4503.06(C). In applicable part, R.C. 4503.06(C)(1) states, "Any mobile or manufactured home that is not taxed as real property as provided in division (B) of this section is subject to an annual manufactured home tax, payable by the owner, for locating the home in this state. The tax as levied in this section is for the purpose of supplementing the general revenue funds of the local subdivisions in which the home has its situs pursuant to this section." Subsection (G) deals with interest and penalties for the late payment of the manufactured home tax.

At the administrative level, the statutory mandate that the owner of a Home must pay either real property tax or a manufactured home tax is implemented in part by the requirement that the county auditor place the Home on one of two lists.[677] Under R.C. 4503.061(A), "All manufactured and mobile homes shall be listed on either the real property tax list or the manufactured home tax list of the county in which the home has situs."[678]

After the 1999 and 2000 changes, the Division of Tax Equalization ("DTE") of Ohio's Department of Taxation explained that under certain specified conditions a Home could be taxed "as" real property under the real property tax. Alternatively, under other conditions specified in the statute, a Home could be taxed under the manufactured home tax in one of two ways: (1) by using the depreciation schedules set forth in R.C. 4503.06 using gross tax rates or (2) by taxing the Home "like" real property using net tax rates.[679] Graphically, R.C. 4503.06 looks like this:

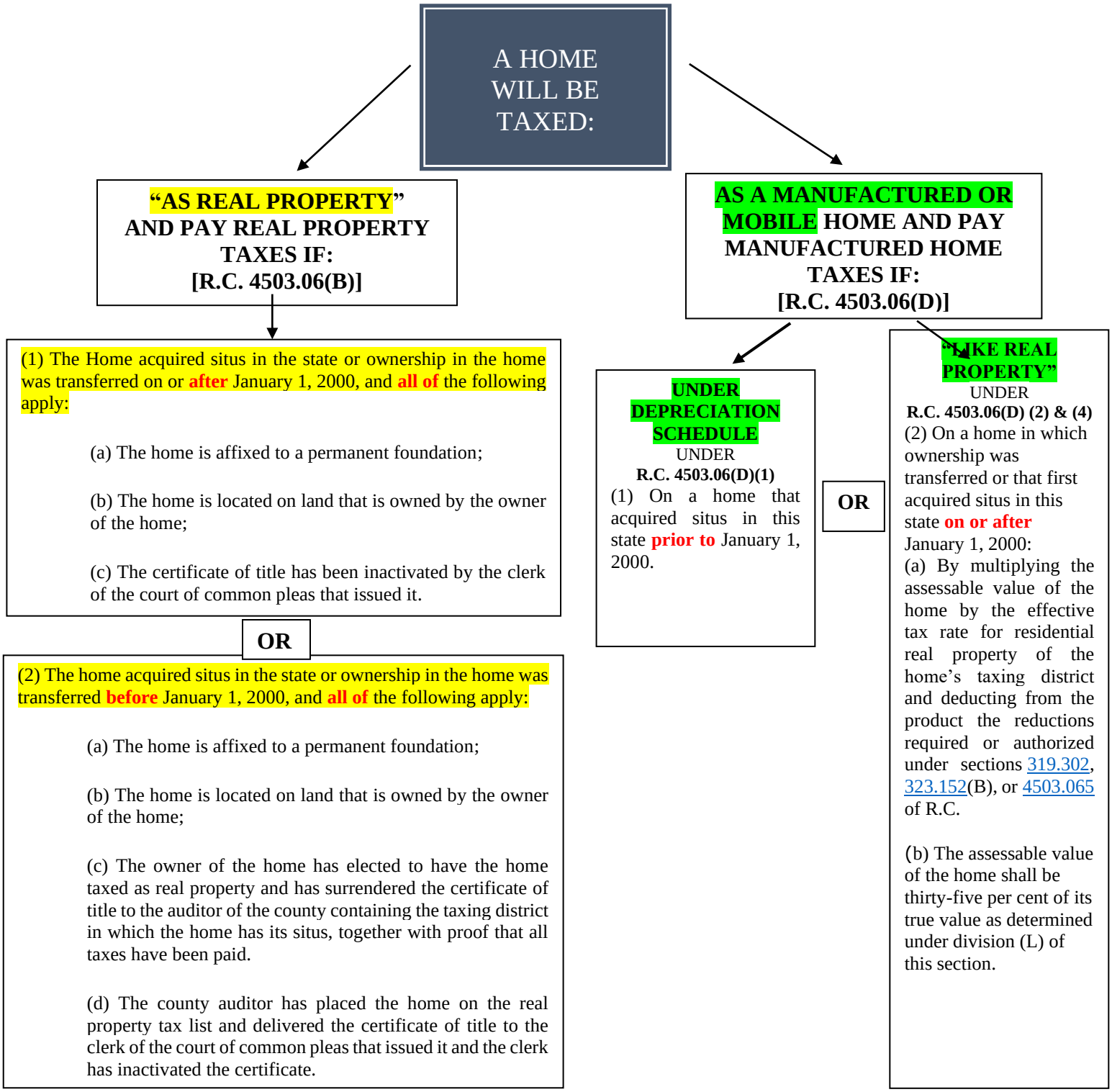
[677] See R.C. 4503.061(A) which requires that the auditor "place the home on the appropriate tax list."

[678] See R.C. 4503.061(A). Under R.C. 319.28, in applicable part, the county auditor is required to "compile and make up a general tax list of real and public utility property in the county" and to deliver a copy – known as the duplicate – to the county treasurer. "The copies prepared by the auditor shall constitute the auditor's general tax list and treasurer's general duplicate of real and public utility property for the current year…" The real property tax list is required to include the name(s) of the owner(s) of the real property as well as a description of the property, its value, and the value of the improvements thereon. At a more mechanical level, a Home is taxed "as" real property under R.C. 4503.06(B) while a Home taxed "like" real property is addressed in statutory subsections R.C. 4503.06(D)(2) and (4). Administratively, a Home taxed "as" real property is taxed on the real property tax list while a Home taxed "like" real property is taxed on the manufactured home tax list. For a Home to be taxed "as" real property, the owner must own the land under the Home and the Home must be affixed to a permanent foundation whereas a Home taxed "like" real property does not require that the owner own the land on which the Home sits.

[679] See DTE Bulletin 11, Revised 12/02, *Property Taxation of Manufactured and Mobile Homes*, at https://www.tax.ohio.gov/portals/0/government/dte_bulletin11rev.pdf, page 1, where the DTE stated that a Home could be taxed "(1) *as* real property, (2) with the depreciation schedules [set forth in R.C. 4503.06] using gross tax rates, or (3) *like* real property using the net tax rates, while still remaining on the manufactured home tax list. The intent of these Acts is to tax manufactured and mobile homes, as much like real property as possible. (italics added)." See also the summary page of DTE Bulletin 11 where the DTE lists three categories of taxation applicable to Manufactured Homes: "Taxed as Real" [Property]; "MH Tax (dep. sch.)" [Depreciation Schedule]; and "MH Tax (like real)" [property],

The Property Taxation of a Home

Under R.C. 4503.06



A Home Taxed "As" Real Property – R.C. 4503.06(B)(1) and (B)(2)

A Home taxed "as" real property is taxed on the real property tax list[680] and treated as if it were a parcel of traditional real property.[681] As discussed below, for BOR purposes the valuation complaints filed in connection with a Home taxed "as" real property are handled similarly to the manner they would be handled for traditional real property. There are no special BOR provisions in R.C. 4503.06 that deviate from standard BOR requirements regarding a Home taxed "as" real property.

A Home will be taxed "as" real property if it meets certain conditions.[682] Under R.C. 4503.06(B)(1), for Homes transferred on or after January 1, 2000, real property (as opposed to manufactured home) taxes are owed if, in addition to having acquired situs in Ohio, the Home is: (1) affixed to a permanent foundation,[683] (2) located on land that is owned by the owner of the Home,[684] and (3) the certificate of title for the Home has been inactivated by the clerk of the court of common pleas that issued it.[685] Once the Home meets the first two conditions, the owner is required to surrender the title to the Home to the county auditor.[686]

Under R.C. 4503.06(B)(2), for Homes transferred before January 1, 2020, the first two requirements are the same but instead of the third requirement, in order for the Home to be taxed "as" real property the owner must have elected to have the Home taxed as real property,

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[680] See also DTE Bulletin 11, Revised 12/02, *Property Taxation of Manufactured and Mobile Homes*, at https://www.tax.ohio.gov/portals/0/government/dte_bulletin11rev.pdf, page 5 ("A manufactured or mobile home that acquires situs in Ohio or is transferred on or after January 1, 2020, and that meets the following three conditions, is taxed on the real property tax list…");County Commissioners Association of Ohio, *Handbook*, Chapter 14 ("While those [Homes] taxed as real property are shown on the county auditor's general tax list and duplicate with all other real property, those taxed under depreciation schedules and like real property, are shown on the county auditor's manufactured and mobile home tax list and duplicate.") at http://www.ccao.org/wp-content/uploads/HBKCHAP014%2010-2-14.pdf.

[681] See also DTE Bulletin 11, Revised 12/02, *Property Taxation of Manufactured and Mobile Homes*, at https://www.tax.ohio.gov/portals/0/government/dte_bulletin11rev.pdf, page 1 ("…for homes taxed as real property…the usual real property laws will apply once the home is converted to realty.").

[682] See *Randy Zelenitz v. Belmont County Board of Revision* (September 13, 2017), BTA No. 2016-2391.

[683] See R.C. 4503.06(B)(1)(a).

[684] See R.C. 4503.06(B)(1)(b).

[685] See R.C. 4503.06(B)(1)(c).

[686] See R.C. 4505.11(H)(1) ("An owner whose home qualifies for real property taxation under divisions (B)(1)(a) and (b) of section 4503.06 of the Revised Code shall surrender the certificate within fifteen days after the home meets the conditions specified in those divisions. The auditor shall deliver the certificate of title to the clerk of the court of common pleas who issued it.").

surrendered the certificate of title for the Home to the auditor of the county where the Home had its situs, provided proof that all taxes have been paid, and the county auditor must have placed the Home on the real property tax list and delivered the title to the common pleas clerk who inactivated the certificate.[687]

A Home Taxed Under the Manufactured Home Tax Using Depreciation Schedules – R.C. 4503.06(D)(1) – Claim *Cannot* Be Filed at the BOR

But there will be situations where a Home does not meet the conditions in R.C. 4503.06(B)(1) or (B)(2) (i.e., no permanent foundation, etc.) for it to be taxed "as" real property. In those cases, it will be taxed under the manufactured home tax using one of two methods. The first method - using the depreciation schedules of R.C. 4503.06(D)(1) - applies to a Home "that acquired situs in [Ohio] prior to January 1, 2000…"[688] The BOR provisions of R.C. 4503.06(L) – which deal with challenges to a Home's value at the BOR - do not apply to Homes which are taxed under the depreciation schedules of R.C. 4503.06(D)(1),[689] and valuation complaints for a Home taxed under those depreciation schedules may *not* be filed at the BOR.[690]

According to the DTE, such a Home "…remains subject to the tax calculation using the depreciation schedules with the real property gross rates until the home is transferred, or the owner elects to have the home taxed like real property."[691] That election is discussed in greater detail below. Unlike a Home taxed "as" real property which, like traditional real property, pays taxes in

[687] See R.C. 4503.06(B)(2)(c).

[688] See R.C. 4503.06(D)(1).

[689] See DTE Bulletin 11, Revised 12/02, *Property Taxation of Manufactured and Mobile Homes*, at https://www.tax.ohio.gov/portals/0/government/dte_bulletin11rev.pdf, Summary of Provisions Applicable to Manufactured Homes Under Three Methods of Taxation, page 25.

[690] See DTE Bulletin 11, Revised 12/02, *Property Taxation of Manufactured and Mobile Homes*, at https://www.tax.ohio.gov/portals/0/government/dte_bulletin11rev.pdf, page 4.

[691] See DTE Bulletin 11, Revised 12/02, *Property Taxation of Manufactured and Mobile Homes*, at https://www.tax.ohio.gov/portals/0/government/dte_bulletin11rev.pdf, page 3 ("If the home acquired situs in Ohio before January 1, 2000, and is not taxed on the real property tax list, it remains subject to the tax calculation using the depreciation schedules with the real property gross rates until the home is transferred, or the owner elects to have the home taxed like real property."

arrears (due December 31 for full payment, or December 31 and June 20 for half-payments),[692] if the Home had situs in Ohio on January 1 then the manufactured home tax is paid on March 1 and July 31 of the then-current tax year.[693]

A Home Taxed Under the Manufactured Home Tax "Like" Real Property – R.C. 4503.06(D)(2) and (4) – Claim *Can* Be Filed at the BOR

Under. R.C. 4503.06(D)(2),[694] the second method where a Home is taxed under the manufactured home tax – and the one where a valuation claim *can* be filed at the BOR under R.C. 4503.06(L) - is if the Home is taxed "like" real property. As stated by the DTE, where a manufactured or mobile home is taxed under the manufactured home tax "The complaint process only applies to manufactured or mobile homes that are treated like real property, not to the homes still using the depreciation schedules."[695] [underlining in original].

Homes taxed "like" real property include those (1) "in which ownership was transferred or that first acquired situs in [Ohio] on or after January 1, 2000"[696] or (2) where an owner whose Home is being taxed under the depreciation schedules of R.C. 4503.06(D)(1) elects, under the provisions of R.C. 4503.06(D)(4), to have the Home taxed "like" real property under subsection (D)(2). As to that election, subsection (D)(4) states:

> After January 1, 1999, the owner of a manufactured or mobile home taxed pursuant to division (D)(1) [the depreciation schedules] of this section may elect to have the home taxed pursuant to division (D)(2) of this section by filing a written request with the county auditor of the taxing district in which the home is located[697]…Upon

[692] See R.C. 323.12(A) ("Each person charged with taxes shall pay to the county treasurer the full amount of such taxes on or before the thirty-first day of December, or shall pay one-half of the current taxes together with the full amount of any delinquent taxes before such date, and the remaining half on or before the twentieth day of June next ensuing.").

[693] See DTE Bulletin 11, Revised 12/02, *Property Taxation of Manufactured and Mobile Homes*, at https://www.tax.ohio.gov/portals/0/government/dte_bulletin11rev.pdf, Summary of Provisions Applicable to Manufactured Homes Under Three Methods of Taxation, page 25.

[694] See R.C. 4503.06(D)(2).

[695] See DTE Bulletin 11, Revised 12/02, *Property Taxation of Manufactured and Mobile Homes*, at https://www.tax.ohio.gov/portals/0/government/dte_bulletin11rev.pdf, page 4.

[696] See R.C. 4503.06(D)(2).

[697] The election to be taxed "like" real property is made using DTE Form 55. According to the form, that election "is final and the home will be taxed like real property for all future years. See https://www.tax.ohio.gov/portals/0/forms/real_property/DTE_DTE55.pdf.

> the filing of the request, the county auditor shall determine whether all taxes levied under division (D)(1) of this section have been paid, and if those taxes have been paid, the county auditor shall tax the manufactured or mobile home pursuant to division (D)(2) of this section commencing in the next tax year.[698]

The Valuation of a Home Taxed "Like" Real Property

Appraisal of a Home

A Home taxed "like" real property is appraised under R.C. 4503.06(D)(2)(a) and (b) in a manner similar to traditional real property. The statute requires that the county auditor:

> …shall have each home viewed and appraised at least once in each six-year period in the same year in which real property in the county is appraised pursuant to Chapter 5713…and shall update the appraised values in the third calendar year following the appraisal…In conducting the appraisals and establishing the true value, the auditor shall follow the procedures set forth for appraising real property in sections 5713.01 and 5713.03 of the Revised Code.[699]

As stated by the BTA:

> If a mobile or manufactured home is purchased or acquires a situs within the state on or after January 1, 2000 (or if an owner takes steps to have the owner's home taxed similarly to those purchased after January 1, 2000), future appraisals of the manufactured or mobile home are performed much like appraisals of real property for ad valorem tax purposes.[700]

Under (D)(2)(b), "The assessable value of the home shall be thirty-five per cent of its true value as determined under division (L) of this section."[701] Division (L) of R.C. 4503.06 reiterates[702] that the Homes for which true value is to be determined include:

> …any manufactured or mobile home in which ownership is transferred or which first acquires situs in this state on or after January 1, 2000, and any manufactured

[698] See R.C. 4503.06(D)(4).

[699] See R.C. 4503.06(L)(3).

[700] See *Richard Bockmore v. Lorain County Board of Revision* (January 7, 2005), BTA No. 2004-397.

[701] See R.C. 4503.06(D)(2)(b).

[702] See R.C. 4503.06(D(2) and (4).

> or mobile home the owner of which has elected, under division (D)(4) of this section, to have the home taxed under division (D)(2) of this section.[703]

Determining True Value of a Home

Regarding the factors to be considered in determining the true value of Home, division (L) states that:

> The true value shall include the value of the home, any additions, and any fixtures, but not any furnishings in the home. In determining the true value of a manufactured or mobile home, the auditor shall consider all facts and circumstances relating to the value of the home, including its age, its capacity to function as a residence, any obsolete characteristics, and other factors that may tend to prove its true value.[704]

Although there are similarities between the auditor's valuation of the Home and his/her valuation of traditional real property, there is at least one important distinction. R.C. 5713.03, the statute that sets the standard for auditors in their valuation of real property, states in applicable part, that:

> In determining the true value of any tract, lot, or parcel of real estate under this section, if such tract, lot, or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor **may** consider the sale price of such tract, lot, or parcel to be the true value for taxation purposes.[705] (emphasis added).[706]

The use of the word "may" in R.C. 5713.03 was changed from the word "shall" in legislation effective June 11, 2012.[707] That amendment to "may" overrode the prior law which required that a recent arm's length sale must, or "shall", be considered the value for taxation purposes.[708]

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[703] See R.C. 4503.06(L)(1).

[704] See R.C. 4503.06(L)(1).

[705] See R.C. 5713.03.

[706] See R.C. 5713.03.

[707] See 2012 Ohio Laws File 127 (Am. Sub. H.B. 487) at https://www.lsc.ohio.gov/documents/gaDocuments/analyses129/12-hb487-129.pdf and http://lsc.state.oh.us/coderev/hou129.nsf/House+Bill+Number/0487?OpenDocument.

[708] See *Terraza 8, L.L.C. v. Franklin County Board of Revision*, 150 Ohio St.3d 527, 2017-Ohio-4415, ¶ 26 ("[The owner] is correct that the statutory amendment overrides *Berea*. The fundamental question in *Berea* was whether a property should be valued as if unencumbered even when it was the subject of a recent arm's length sale. [citation omitted]. Relying on the plain language of former R.C. 5713.03, we held that 'when the property has been the subject of a recent arm's length sale between a willing seller and a willing buyer, the sale price of the property shall be 'the true value for taxation purposes.'").

Notably, a similar change from "shall" to "may" was *not* made in R.C. 4503.06(L)(2)(a), which sets the valuation standard for manufactured or mobile homes. As set forth in that statute:

> If a manufactured or mobile home has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time prior to the determination of true value, the county auditor **shall** consider the sale price of the home to be the true value for taxation purposes.[709] (emphasis added).

The BTA has noted that difference.

> …R.C. 4503.06(L)(2) states that, if a manufactured home has been the subject of a recent, arm's-length sale, "the county auditor *shall* [italics in original] consider the sale price of the home to be the true value for taxation purposes." [Citation omitted] Compare R.C. 5713.03 (auditor *may* [italics in original] consider a recent, arm's length sale in valuing real property).[710]

The statute does go on to state, however, that the sale price shall *not* be considered the true value of the Home if, after the sale, the Home either lost value due to a casualty or an addition or fixture was added to the Home.[711] Upon the completion of the Home's appraisal, the auditor is required to "place the true value of each home on the manufactured home tax list…"[712]

Challenging the Valuation of a Home Taxed "Like" Real Property at the BOR

At the outset, H.B. 126 amended R.C. 4503.06(L)(5)(b) regarding the person or entity that may bring a challenge under that section, so as to bring it into conformity with amended R.C. 5715.19(A). In applicable part, amended R.C. 4503.06(L)(5)(b) now reads that "Any owner of a home or any other person or party that would be authorized to file a complaint under division (A)

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[709] See R.C. 4503.06(L)(2)(a).

[710] See *James M. Lukacsko v. Belmont County Board of Revision* (April 2, 2019), BTA No. 2018-924. See also *Gertz, Chrystal & Supple, Eric E. v. Lorain County Board of Revision* (May 30, 2013), BTA No. 2012-3641 in a footnote following the statement "Typically, the 'best evidence' of a property's value is the amount for which it transfers between two unrelated parties near the tax lien date." The BTA added "R.C. 4503.06(L)(2)(a) appears to adopt this longstanding view in its direction to auditors that a recent arm's-length sale "shall" be considered a home's true value."

[711] See R.C. 4503.06(L)(2)(a).

[712] See R.C. 4503.06(L)(4).

of section 5715.19 of the Revised Code if the home was real property may file a complaint against the true value of the home as appraised under this section."[713]

The Tax Lien Date for a Home

A first, and critical, component of any valuation complaint is the applicable tax lien date. Indeed, the applicable tax year is the very first item to be completed on the DTE 1M valuation complaint form for manufactured or mobiles homes treated like real property.[714] R.C. 4503.06 identifies the date on which the tax lien for the manufactured home tax attaches to Homes.

> The lien of the state for the [manufactured home] tax for a year shall attach on the first day of January to a home that has acquired situs on that date. The lien for a home that has not acquired situs on the first day of January, but that acquires situs during the year, shall attach on the next first day of January. The lien shall continue until the tax, including any penalty or interest, is paid.[715]

For example, if a Home has situs on January 1, 2020, its tax lien date will also be January 1, 2020. Under the statute, however, if situs for the Home is established on January 2, 2020, or any other date in calendar year 2020, its tax lien date will be January 1, 2021. As discussed below, the date on which the manufactured home tax lien attaches determines when a valuation complaint needs to be filed.

Filing the Complaint

Like valuation challenges for real property, the complaint challenging the valuation of a Home is filed with the county auditor. But there is one important difference between the two. The filing deadline for BOR complaints is different for a Home taxed "like" real property than for traditional real property under R.C. 5715.19. For traditional real property:

> …a complaint against any of the determinations [challenged in the complaint] for the current tax year shall be filed with the county auditor on or before the thirty-first day of March of the ensuing tax year or the date of closing of the collection for

[713] See R.C. 4503.06(L)(5)(b).

[714] See DTE Form 1M.

[715] See R.C. 4503.06(C)(2).

> the first half of real and public utility property taxes for the current tax year, whichever is later…[716] (underlining added)

In other words, for a traditional real property parcel a BOR complaint would be filed on or before March 31, 2020 for a TY 2019 valuation with a tax lien date of January 1, 2019.

That differs from a BOR valuation complaint for a Home filed under R.C. 4503.06. Under that statute:

> The complaint shall be filed with the county auditor on or before the thirty-first day of March <u>of the current tax year</u> or the date of closing of the collection for the first half of manufactured home taxes for the current tax year, whichever is later...[717] (underlining added)

According to the BTA:

> The primary distinction between the two procedures [valuation challenges under R.C. 5715.19 versus those under R.C. 4503.06] relates to the year in which the valuation is challenged. R.C. 4503.06(L)(5)(b) requires that complaints against the value of manufactured or mobile homes are filed by March 31 of the current tax year, while complaints against the value of real property are filed by March 31 of the ensuing year. R.C. 5715.19.[718]

In the normal course, a complaint filed by March 31 of the current year challenging a Home's valuation would have a hearing at the BOR in the current year. A complaint filed for traditional real property in the ensuing year would, in the normal course, have a hearing in the ensuing year which would be more than a year after the tax lien date in question.

<u>Procedure at the BOR</u>

Other than the year in which the valuation is challenged, procedurally there is little difference between the procedures utilized to resolve valuation complaints at the BOR for traditional real property and those used at the BOR under R.C. 4503.06 to resolve valuation complaints for Homes. As stated by the BTA:

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[716] See R.C. 5715.19(A)(1).

[717] See R.C. 4503.06(L)(5)(b).

[718] See also *Ramp Creek III, Ltd. v. Licking County Board of Revision* (October 1, 2013), BTA Nos. 2009-362, 363, 364, 365, 367 (fn. 5).

> …it is clear that the manner in which on [sic] owner challenges the auditor's values assessed against a mobile or manufactured home is virtually identical to the manner in which an owner challenges the auditor's values assessed against real property.[719]

A review of the statute makes this manifest. R.C. 4503.06(L) (hereafter, "Subdivision L") governs the BOR procedure where a challenge is filed to the auditor's valuation of a Home. It's language is similar to that of R.C. 5715.11 - the general BOR provision addressing the duty of the BOR to hear complaints – which mandates that the BOR "…shall hear complaints relating to the valuation or assessment of real property…shall investigate all such complaints and may increase or decrease any such valuation or correct any assessment complained of, or it may order a reassessment by the original assessing officer."[720] Further, the powers that the BOR can exercise in adjudicating valuation complaints of a Home are the same as those exercised by the BOR in connection with the adjudication of real property complaints.[721] It is also not surprising, then, that the same BOR case law jurisprudence that applies in the resolution of valuation complaints for traditional real property also applies to the resolution of valuation complaints under R.C. 4503.06 for manufactured and mobile homes.[722] In short, once a valuation complaint for a Home is filed with the BOR it is handled in a manner virtually indistinguishable from the handling of a valuation complaint against traditional real property.

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[719] See *Richard Bockmore v. Lorain County Board of Revision* (January 7, 2005), BTA No. 2004-397. See also *Ramp Creek III, Ltd. v. Licking County Board of Revision* (October 1, 2013), BTA Nos. 2009-362, 363, 364, 365, 367 ("Similar to the procedures set forth in R.C. 5715.19 to challenge an auditor's determination of the true value of real property for tax purposes, R.C. 4503.06(L)(5)(b) permits the owner of a manufactured or mobile home to file a complaint against the true value as appraised by the auditor.").

[720] See R.C. 5715.11. For comparison see R.C. 4503.06(L)(5)(b) ("The board shall hear and investigate the complaint and may take action on it as provided under sections 5715.11 to 5715.19 of the Revised Code.").

[721] See R.C. 4503.06(L)(5)(b). (""The board…may take any action on [a valuation complaint] as provided under sections 5715.11 to 5715.19 of the Revised Code.").

[722] See *Richard Bockmore v. Lorain County Board of Revision* (January 7, 2005), BTA No. 2004-397 ("We make our determination [in connection with a Home case] relying upon the law developed in the real property arena."). See also *Ramp Creek III, Ltd. v. Licking County Board of Revision* (October 1, 2013), BTA Nos. 2009-362, 363, 364, 365, 367 ("Based on the similarities in procedure, we make our determination based upon the law developed regarding the valuation of real property.").

CHAPTER 12
RESIDENTIAL APPRAISALS
USING THE UNIFORM RESIDENTIAL APPPRAISAL REPORT ("URAR")
Table of Contents

CHAPTER OUTLINE

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Preparing to question an appraiser at the BOR can be an intimidating prospect, especially for those who do not have legal training or extensive BOR experience. In general, the licensed appraisers who appear before the BOR are well-credentialed, highly trained, articulate, and frequently have years of experience. Many of them are practiced "professional witnesses", having qualified as expert witnesses and testified at BORs across the state as well as the BTA. To those untrained in the discipline of real estate appraisal, questioning their methodologies or valuation conclusions can feel like a fool's errand. Let me assure you, it is not. Appraisers are not infallible.

In numerous decisions across the years, the BTA has repeatedly stressed that appraisal is an inexact, and very human, endeavor based partially on quantifiable facts but also based in significant part on subjective judgments and determinations by the appraiser.[723] "[T]he appraisal of real property is not an exact science, but is instead an opinion."[724] As stated by the BTA:

> Here, we have been presented with an expert opinion of value. In this regard, we note that the valuation of real property is an inexact science…[(“] Valuations of real property***are inherently imprecise. Opinions realistically may differ, depending upon the method of valuation used and the nature of assumptions adopted.[“)][725]

In recognition of the inexact nature of appraisal practice, the Ohio Supreme Court has consistently ruled that the BTA (and the BOR as well), "need not adopt any expert's valuation"[726] and has "wide discretion in determining the weight to be given the evidence and credibility of witnesses."[727] The Supreme Court has ruled that the BTA (and presumably the BOR as well) may "accept all, part or none of the testimony of any appraiser."[728] Indeed, the Court has rejected the

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[723] See *North Ridge Shopping Center LLC and Rossell-North Joint Venture L.L.C.* (December 31, 2019), BTA Nos. 2018-1140-1141 ("The appraisal process requires a wide variety of subjective judgments about underlying data with the goal of ascertaining a hypothetical market value."). See also *Spirit Master Funding IX, LLC v. Cuyahoga County Board of Revision* (December 8, 2020), BTA Nos. 2015-2188, 2015-2195 ("…the income approach requires subjective judgments based on the experience of other properties…"); *Spirit Master Funding IX, LLC v. Cuyahoga County Board of Revision* (January 5, 2020), BTA No. 2017-73 (reiterating that "…the income approach requires subjective judgments based on the experience of other properties rather than the experience of the subject."); *South-Western City Schools Board of Education v. Franklin County Board of Revision* (July 11, 2022), BTA No. 2018-1610. ("We have often acknowledged in cases where competing appraisals are offered that inherent in the appraisal process is the fact that an appraiser must necessarily make a wide variety of subjective judgments in selecting the data to rely upon, effect adjustments deemed necessary to render such data usable, and interpret and evaluate the information gathered in forming an opinion.").; *Columbus City Schools Board of Education v. Franklin County Board of Revision* (January 30, 2023), BTA No. 2018-1858.; *Sterling Hospitality, LLC v. Butler County Board of Revision* (July 13, 2023), BTA No. 2021-2226; *Kane Hospitality, LLC v. Butler County Board of Revision* (July 13, 2023), BTA No. 2021-2225.

[724] See *Thistledown Racetrack, LLC v. Cuyahoga County Board of Revision* (January 6, 2020), BTA Nos. 2017-635, 2017-788, 2017-790. See also *Joseph Chiofolo v. Summit County Board of Revision* (February 12, 2020), BTA No. 2019-1053; *Daniel and Bonnie Kossin v. Cuyahoga County Board of Revision* (June 29, 2020), BTA No. 2019-2390; *Emma Warner Steele DBA Grade A Builders v. Cuyahoga County Board of Revision* (August 31, 2020), BTA No. 2020-419; *Columbus City Schools Board of Education v. Franklin County Board of Revision* (October 4, 2021), BTA No. 2019-264.

[725] See *Graceland Shoppers Limited Partnership v. Franklin County Board of Revision* (October 7, 2008), BTA No. 2006-112.

[726] See *Witt Company v. Hamilton County Board of Revision*, 61 Ohio St.3d 155 (1991).

[727] See *Apple Group Ltd. V. Medina County Board of Revision*, 139 Ohio St.3d 434, 2004-Ohio-2381, ¶ 14.

[728] See *Musto v. Lorain County Board of Revision*, 148 Ohio St.3d 456, 2016-Ohio-8058, ⁋ 39. See also *Buckeye Terminals LLC v. Franklin County Board of Revision* (August 27, 2018), BTA No. 2014-4958. As an example of where the BTA accepted part of one appraiser's analysis while giving greater weight to the other appraiser's analysis see *Columbus City Schools Board of Education v. Franklin County Board of Revision* (November 30, 2018), BTA Nos. 2016-561, 2016-562; *Keith Chacksfield v. Hamilton County Board of Revision* (June 5, 2019), BTA No. 2018-1988 ("Where…a party relies upon an appraiser's opinion of value, this board [BTA] may accept all, part, or none of the appraiser's opinion.").

testimony of experienced and well-regarded appraisers[729] and there have been instances in which the BTA has rejected the appraisals offered by opposing appraisers testifying at a hearing because it found neither to be competent and probative.[730] As stated by the BTA, "…the BTA is statutorily required to weigh the evidence and assess credibility of both appraisals…"[731] and:

> … where multiple qualifying appraisals have been presented by the parties, the court has again held that the case law "makes clear" that the BTA…"has discretion to depart from any particular appraisal opinion of value and independently determine a value based on whatever evidence in the record the BTA finds to be most probative."[732]

In addition, where the BTA has found shortcomings in competing appraisals, it also has the discretion to reach a value determination by "blending the two appraisal reports."[733]

It is important to remember that in questioning an appraiser, the overarching concern is to insure that in reaching her ultimate value conclusion the appraiser was thorough in her research, logical in her analysis, exercised good and factually-supported judgment in the selection of comparables, made appropriate and proportionate adjustments to those comparables and, perhaps most importantly, did not show bias or undue subjectivity in favor of one party or the other. These concerns can only be allayed if the appraiser's conclusions and methodologies are "tested" through questioning and cross-examination at the BOR.

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[729] See, for example, *EOP-BP Tower, L.L.C. v. Cuyahoga County Board of Revision*, 106 Ohio St.3d 1, 2005-Ohio-3096. See also *Kettering City Schools Board of Education v. Montgomery County Board of Revision* (August 6, 2019), BTA No. 2017-2053; *MDC Coast I, LLC v. Union County Board of Revision* (June 12, 2021), BTA No. 2016-2088 (on remand from 10th District Court of Appeals).

[730] See *James A. Monton v. Hamilton County Board of Revision* (December 5, 2018), BTA No. 2018-603. In rejecting the methodologies used by both appraisers in compiling their data, the BTA stated that "we are unable to rely upon such data to fulfill our duty to independently determine the subject property's value…Therefore, we find that the subject property should be valued consistent with its initially assessed value." See also *HCP EMOH LLC v. Washington County Board of Revision* (October 22, 2019), BTA No. 2015-700.

[731] See *ARC TKDBNOH001, LLC v. Franklin County Board of Revision* (January 7, 2020), BTA No. 2017-1572.

[732] See *Abbey Church Village (TC2) Housing Limited Partnership v. Franklin County Board of Revision* (January 28, 2019), BTA No. 2017-1055. See also *Grandview Heights City Schools Board of Education v. Franklin County Board of Revision* (August 12, 2019), BTA Nos. 2018-387, 2018-388.; *Hilliard City Schools Board of Education v. Franklin County Board of Revision* (February 12, 2020), BTA No. 2018-1104; *New Albany-Plain Local Schools Board of Education v. Franklin County Board of Revision* (July 12, 2023), BTA No. 2020-1929

[733] *Marietta Care, LLC v. Washington County Board of Revision* (September 5, 2019), BTA No. 2017-1723 ("Upon review, we find shortcomings with both appraisal reports and believe that the subject's real property value is best determined by blending the two appraisal reports.").

Overview - The Appraisal Process

Appraisers are licensed by the State of Ohio[734] through the Division of Real Estate and Professional Licensing of its Department of Commerce.[735] Ohio law requires that licensed appraisers perform their appraisals in accordance with the standards of The Uniform Standards of Professional Appraisal Practice ("USPAP")[736] which are promulgated by The Appraisal Foundation. According to the Appraisal Foundation's website:

> The ***Uniform Standards of Professional Appraisal Practice*** (USPAP) are the generally recognized ethical and performance standards for the appraisal profession in the United States. USPAP was adopted by Congress in 1989, and contains standards for all types of appraisal services, including real estate, personal property, business and mass appraisal. Compliance is required for state-licensed and state-certified appraisers involved in federally-related real estate transactions.[737]

The ultimate goal of the appraisal process is for the appraiser to develop an opinion of value based on research into appropriate market areas, the assemblage of pertinent data, and the application of knowledge, experience and professional judgment.[738]

The Appraiser's Selection of Data and the Role of Subjectivity

Boards of Revision most commonly encounter appraisers/appraisals in two contexts: the appraisal of a single-family residence or the appraisal of a commercial property (includes multi-family residential units). In both contexts an appraisal completed in accordance with the requirements of USPAP contains a number of sections, or components.[739] The compilation of each of those sections calls for not only the use of the appraiser's professional judgment, but also for

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[734] See Revised Code Chapter 4763.

[735] See https://www.com.ohio.gov/documents/real_COM3651ApplicationAppraiserLicenseCertificate.pdf .

[736] See R.C. 4763.13(A) ("In engaging in appraisal activities, a person certified, registered, or licensed under this chapter shall comply with…the uniform standards of professional appraisal practice, as adopted by the appraisal standards board of the appraisal foundation and such other standards adopted by the real estate appraiser board…").

[737] See *The Appraisal Foundation* website at https://www.appraisalfoundation.org/imis/TAF/Standards/Appraisal_Standards/TAF/Standards.aspx?hkey=5a640dda-464d-4683-b4e1-190201e0eda7

[738] *The Appraisal of Real Estate* (12th Edition, 2001), at 12.

[739] See *Understanding the Appraisal*, at http://www.appraisalinstitute.org/assets/1/7/understand_appraisal_1109_(1).pdf .

the culling and selection of appropriate market, financial, and comparable sales data (collectively, "Data").

To ensure that the appraiser's research and ultimate opinions can be supported, USPAP has a record keeping rule which states that:

> An appraiser must prepare a workfile for each appraisal or appraisal review assignment. A workfile must be in existence prior to the issuance of any report or other communication of assignment results. A written summary of an oral report must be added to the workfile within a reasonable time after the issuance of the oral report.[740]

Amongst other things, the rule requires that the appraisal contain "…data, information, and documentation necessary to support the appraiser's opinions and conclusions and to show compliance with USPAP, or references to the location(s) of such other data, information, and documentation."[741] The record keeping rule requires that the appraiser retain the workfile for a period of at least five years after preparation or at least two years after the final disposition of any judicial proceeding, whichever is longer.[742] In addition, the Revised Code also requires that licensed appraisers in Ohio retain their work files for at least five years.[743]

Of necessity, the decision to include certain Data in the appraisal requires the exclusion of certain other Data. That selection process involves elements of subjectivity and, as a result, it is not uncommon for competent and experienced appraisers to come to sometimes dramatically different value conclusions for the same property. The Appraisal Institute itself has acknowledged that "Appraisal has a creative aspect in that appraisers use their judgment to analyze and interpret quantitative data."[744] It is not unusual, for example, for different appraisers appraising the same

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[740] See http://www.uspap.org/files/assets/basic-html/page-22.html.

[741] See http://www.uspap.org/files/assets/basic-html/page-22.html.

[742] See http://www.uspap.org/files/assets/basic-html/page-22.html.

[743] See R.C. 4763.14 which states, in applicable part, that "A person licensed, registered, or certified under this chapter shall retain for a period of five years the original or a true copy of each written contract for the person's services relating to real estate appraisal work, all appraisal reports, and all work file documentation and data assembled in preparing those reports. The retention period begins on the date the appraisal report is submitted to the client unless, prior to expiration of the retention period, the certificate holder, registrant, or licensee is notified that the appraisal or report is the subject of or is otherwise involved in pending litigation, in which case the retention period shall commence two years from the date of final disposition of the litigation."

[744] *The Appraisal of Real Estate*, 12th Edition, at 441.

subject property to select different comparable sales. Indeed, in acknowledgment of the reality of the differing data choices and other influences that impact an appraiser's value conclusions, the BTA has repeatedly stated that appraisal is not an exact science and that each appraisal involves aspects of subjectivity.

> We have often acknowledged that inherent in the appraisal process is the fact that an appraiser must necessarily make a wide variety of subjective judgments in selecting the data to rely upon, effect adjustments deemed necessary to render such data usable, and interpret and evaluate the information gathered in forming an opinion.[745]

In acknowledgement of that reality, the BTA has stated that "We look not for a perfect opinion of value, but the most probative one."[746]

Further, the BTA has stated that the reliability of each appraisal "depends upon the basic competence, skill, and ability demonstrated by the appraiser."[747] It is the subjective choices by the appraiser – the favoring of certain evidence over other evidence - that often provide the most fruitful avenues of inquiry at the BOR in testing the objectivity and credibility of the appraiser's testimony and her appraisal report.[748] According to the BTA, "the credibility of a[n appraisal] report is substantially damaged when a key feature of the report is supposedly wrong."[749]

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[745] See *Brunswick City Schools Board of Education v. Medina County Board of Revision* (May 23, 2018), BTA No. 2017-1016; *Buckeye Terminals LLC v. Franklin County Board of Revision* (August 27, 2018), BTA No. 2014-4958; *Fargo Industrial Properties, Ltd. v. Cuyahoga County Board of Revision* (July 5, 2019), BTA Nos. 2018-126, 2018-136; *Marietta Care, LLC v. Washington County Board of Revision* (September 5, 2019), BTA No. 2017-1723; *Lowe's Home Centers, Inc., Lowes Home Centers, LLC v. Washington County Board of Revision* (September 10, 2019), BTA No. 2014-4606; *Thistledown Racetrack, LLC v. Cuyahoga County Board of Revision* (January 6, 2020), BTA Nos. 2017-635, 2017-788, 2017-790; *Woda Meadow Glen Limited Partnership v. Wyandot County Board of Revision* (March 5, 2020), BTA No. 2017-1458.; *Akron City Schools Board of Education v. Summit County Board of Revision* (October 13, 2020), BTA No. 2018-1394.; *Columbus City Schools Board of Education v. Franklin County Board of Revision* (October 4, 2021), BTA No. 2019-264.

[746] See South-Western City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision (July 11, 2022), BTA No. 2018-1610.

[747] See *Lorain County Savings & Trust Company NKA Firstmerit Bank, NA (Firstmerit Corporation) v. Cuyahoga County Board of Revision* (October 15, 2018), BTA No. 2017-678. See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (October 8, 2019), BTA No. 2018-2105.

[748] See *Forest Edge LLC v. Hancock County Board of Revision* (September 11, 2019), BTA No. 2017-1370, where when faced with competing appraisals the BTA has stated that "This board must weigh the appraisal reports and assess their credibility." See also *Viola Assocs., L.L.C. v. Lorain Cty. Bd. of Revision*, 9th Dist. Lorain C.A. No. 18CA011386 18CA011387, 2021-Ohio-991, ¶ 36 ("Where the parties present competing appraisals, the BTA is vested with wide discretion in determining the credibility of the witnesses and weighing the evidence before it.").

[749] See *SAR Holdings III, LLC, v. Hamilton County Board of Revision* (October 16, 2019), BTA No. 2019-899.

Appraisal of a Single-Family Residence

When appraising a single-family residential unit, appraisers typically utilize an appraisal form known as the Uniform Residential Appraisal Report ("URAR").[750] The instructions to the URAR state that "This report is designed to report an appraisal of a one-unit property or a one-unit property with an accessory unit…based on an interior and exterior inspection of the subject property."[751] Because most residential appraisals rely on the sales comparison approach, it is not surprising that the bulk of the URAR is designed for the appraiser to base her opinion of value on comparable sales. On the other hand, most appraisals of commercial properties utilize both the sales comparison and income approaches. When appraising commercial property, appraisers typically utilize their own narrative appraisal formats and do not utilize the URAR.

The URAR form contains eleven segments, not all of which are applicable to, or of equal importance in, all appraisals. Those segments are (1) a general overview of the subject property; (2) the contract for sale of the property; (3) the neighborhood in which the subject is located; (4) the site on which the subject building is located; (5) the improvements made to the property; (6) the sales comparison approach and analysis of comparable sales; (7) the reconciliation of values between the sales, cost, and income approaches, if applicable; (8) space for additional comments; (9) the cost approach (if applicable); (10) the income approach (if applicable); and (11) information on planned unit developments ("PUDs").

Understanding the URAR

On the following pages, for reference, I have reproduced the first two pages of the URAR and numbered eleven specific items which are relevant to almost all residential appraisals. We will discuss in greater detail below each of those eleven items and how questions concerning them can be useful in analyzing whether the URAR-based appraisal was appropriately performed.

[750] See copy of the URAR, attached at Appendix, page 3.

[751] See Instructions to URAR at https://www.fanniemae.com/content/guide_form/1004.pdf.

Uniform Residential Appraisal Report

File #

1

2

3

4

The purpose of this summary appraisal report is to provide the lender/client with an accurate, and adequately supported, opinion of the market value of the subject property.

SUBJECT

Property Address | City | State | Zip Code

Borrower | Owner of Public Record | County

Legal Description

Assessor's Parcel # | Tax Year | R.E. Taxes $

Neighborhood Name | Map Reference | Census Tract

Occupant ☐ Owner ☐ Tenant ☐ Vacant | Special Assessments $ | ☐ PUD | HOA $ ☐ per year ☐ per month

Property Rights Appraised ☐ Fee Simple ☐ Leasehold ☐ Other (describe)

Assignment Type ☐ Purchase Transaction ☐ Refinance Transaction ☐ Other (describe)

Lender/Client | Address

Is the subject property currently offered for sale or has it been offered for sale in the twelve months prior to the effective date of this appraisal? ☐ Yes ☐ No

Report data source(s) used, offering price(s), and date(s).

CONTRACT

I ☐ did ☐ did not analyze the contract for sale for the subject purchase transaction. Explain the results of the analysis of the contract for sale or why the analysis was not performed.

Contract Price $ | Date of Contract | Is the property seller the owner of public record? ☐ Yes ☐ No | Data Source(s)

Is there any financial assistance (loan charges, sale concessions, gift or downpayment assistance, etc.) to be paid by any party on behalf of the borrower? ☐ Yes ☐ No

If Yes, report the total dollar amount and describe the items to be paid.

NEIGHBORHOOD

Note: Race and the racial composition of the neighborhood are not appraisal factors.

Neighborhood Characteristics		One-Unit Housing Trends		One-Unit Housing		Present Land Use %	
Location	☐ Urban ☐ Suburban ☐ Rural	Property Values	☐ Increasing ☐ Stable ☐ Declining	PRICE	AGE	One-Unit	%
Built-Up	☐ Over 75% ☐ 25–75% ☐ Under 25%	Demand/Supply	☐ Shortage ☐ In Balance ☐ Over Supply	$ (000)	(yrs)	2-4 Unit	%
Growth	☐ Rapid ☐ Stable ☐ Slow	Marketing Time	☐ Under 3 mths ☐ 3–6 mths ☐ Over 6 mths	Low		Multi-Family	%
Neighborhood Boundaries				High		Commercial	%
				Pred.		Other	%

Neighborhood Description

Market Conditions (including support for the above conclusions)

SITE

Dimensions | Area | Shape | View

Specific Zoning Classification | Zoning Description

Zoning Compliance ☐ Legal ☐ Legal Nonconforming (Grandfathered Use) ☐ No Zoning ☐ Illegal (describe)

Is the highest and best use of the subject property as improved (or as proposed per plans and specifications) the present use? ☐ Yes ☐ No If No, describe

Utilities	Public	Other (describe)		Public	Other (describe)	Off-site Improvements—Type	Public	Private
Electricity	☐	☐	Water	☐	☐	Street	☐	☐
Gas	☐	☐	Sanitary Sewer	☐	☐	Alley	☐	☐

FEMA Special Flood Hazard Area ☐ Yes ☐ No | FEMA Flood Zone | FEMA Map # | FEMA Map Date

Are the utilities and off-site improvements typical for the market area? ☐ Yes ☐ No If No, describe

Are there any adverse site conditions or external factors (easements, encroachments, environmental conditions, land uses, etc.)? ☐ Yes ☐ No If Yes, describe

IMPROVEMENTS

General Description	Foundation	Exterior Description materials/condition	Interior materials/condition
Units ☐ One ☐ One with Accessory Unit	☐ Concrete Slab ☐ Crawl Space	Foundation Walls	Floors
# of Stories	☐ Full Basement ☐ Partial Basement	Exterior Walls	Walls
Type ☐ Det. ☐ Att. ☐ S-Det./End Unit	Basement Area sq. ft.	Roof Surface	Trim/Finish
☐ Existing ☐ Proposed ☐ Under Const.	Basement Finish %	Gutters & Downspouts	Bath Floor
Design (Style)	☐ Outside Entry/Exit ☐ Sump Pump	Window Type	Bath Wainscot
Year Built	Evidence of ☐ Infestation	Storm Sash/Insulated	Car Storage ☐ None
Effective Age (Yrs)	☐ Dampness ☐ Settlement	Screens	☐ Driveway # of Cars
Attic ☐ None	Heating ☐ FWA ☐ HWBB ☐ Radiant	Amenities ☐ Woodstove(s) #	Driveway Surface
☐ Drop Stair ☐ Stairs	☐ Other Fuel	☐ Fireplace(s) # ☐ Fence	☐ Garage # of Cars
☐ Floor ☐ Scuttle	Cooling ☐ Central Air Conditioning	☐ Patio/Deck ☐ Porch	☐ Carport # of Cars
☐ Finished ☐ Heated	☐ Individual ☐ Other	☐ Pool ☐ Other	☐ Att. ☐ Det. ☐ Built-in

Appliances ☐ Refrigerator ☐ Range/Oven ☐ Dishwasher ☐ Disposal ☐ Microwave ☐ Washer/Dryer ☐ Other (describe)

Finished area above grade contains: Rooms | Bedrooms | Bath(s) | Square Feet of Gross Living Area Above Grade

Additional features (special energy efficient items, etc.)

Describe the condition of the property (including needed repairs, deterioration, renovations, remodeling, etc.).

Are there any physical deficiencies or adverse conditions that affect the livability, soundness, or structural integrity of the property? ☐ Yes ☐ No If Yes, describe

Does the property generally conform to the neighborhood (functional utility, style, condition, use, construction, etc.)? ☐ Yes ☐ No If No, describe

5

6

Uniform Residential Appraisal Report

File #

There are comparable properties currently offered for sale in the subject neighborhood ranging in price from $ to $

There are comparable sales in the subject neighborhood within the past twelve months ranging in sale price from $ to $

SALES COMPARISON APPROACH

FEATURE	SUBJECT	COMPARABLE SALE # 1		COMPARABLE SALE # 2		COMPARABLE SALE # 3	
Address							
Proximity to Subject							
Sale Price	$		$		$		$
Sale Price/Gross Liv. Area	$ sq. ft.	$ sq. ft.		$ sq. ft.		$ sq. ft.	
Data Source(s)							
Verification Source(s)							
VALUE ADJUSTMENTS	DESCRIPTION	DESCRIPTION	+(-) $ Adjustment	DESCRIPTION	+(-) $ Adjustment	DESCRIPTION	+(-) $ Adjustment
Sale or Financing Concessions							
Date of Sale/Time							
Location							
Leasehold/Fee Simple							
Site							
View							
Design (Style)							
Quality of Construction							
Actual Age							
Condition							
Above Grade Room Count	Total / Bdrms. / Baths	Total / Bdrms. / Baths		Total / Bdrms. / Baths		Total / Bdrms. / Baths	
Gross Living Area	sq. ft.	sq. ft.		sq. ft.		sq. ft.	
Basement & Finished Rooms Below Grade							
Functional Utility							
Heating/Cooling							
Energy Efficient Items							
Garage/Carport							
Porch/Patio/Deck							
Net Adjustment (Total)		☐ + ☐ -	$	☐ + ☐ -	$	☐ + ☐ -	$
Adjusted Sale Price of Comparables		Net Adj. % Gross Adj. %	$	Net Adj. % Gross Adj. %	$	Net Adj. % Gross Adj. %	$

7

8

I ☐ did ☐ did not research the sale or transfer history of the subject property and comparable sales. If not, explain

My research ☐ did ☐ did not reveal any prior sales or transfers of the subject property for the three years prior to the effective date of this appraisal.

Data source(s)

My research ☐ did ☐ did not reveal any prior sales or transfers of the comparable sales for the year prior to the date of sale of the comparable sale.

Data source(s)

Report the results of the research and analysis of the prior sale or transfer history of the subject property and comparable sales (report additional prior sales on page 3).

ITEM	SUBJECT	COMPARABLE SALE # 1	COMPARABLE SALE # 2	COMPARABLE SALE # 3
Date of Prior Sale/Transfer				
Price of Prior Sale/Transfer				
Data Source(s)				
Effective Date of Data Source(s)				

Analysis of prior sale or transfer history of the subject property and comparable sales

Summary of Sales Comparison Approach

9

Indicated Value by Sales Comparison Approach $

RECONCILIATION

10

Indicated Value by: Sales Comparison Approach $ Cost Approach (if developed) $ Income Approach (if developed) $

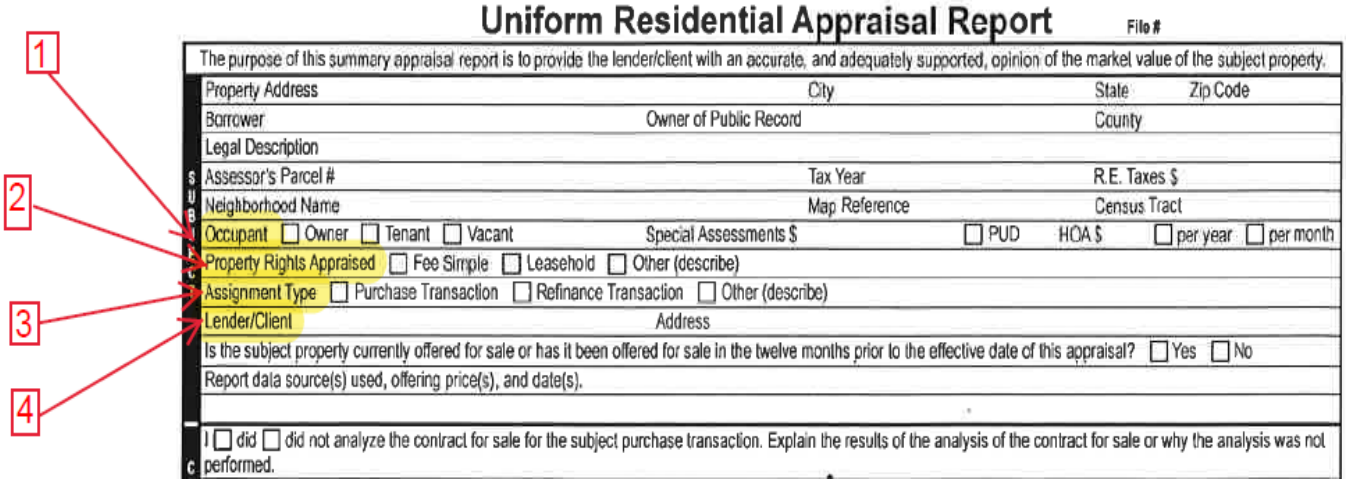
This appraisal is made ☐ "as is", ☐ subject to completion per plans and specifications on the basis of a hypothetical condition that the improvements have been completed, ☐ subject to the following repairs or alterations on the basis of a hypothetical condition that the repairs or alterations have been completed, or ☐ subject to the following required inspection based on the extraordinary assumption that the condition or deficiency does not require alteration or repair:

11

Based on a complete visual inspection of the interior and exterior areas of the subject property, defined scope of work, statement of assumptions and limiting conditions, and appraiser's certification, my (our) opinion of the market value, as defined, of the real property that is the subject of this report is $, as of , which is the date of inspection and the effective date of this appraisal.

Boxes 1, 2, 3, and 4

Below, I have identified four items that are typically completed in a URAR-based appraisal. Each of those items provides information that is important to every appraisal.



(1) Box 1 – Occupant

Box 1 is important for a number of reasons. At the outset if the "Owner" box is checked, then the property is likely a "mom and pop" owner-occupied residence. This means that rental or other business records are not likely required for the appraiser to reach a valuation determination.

On the other hand, if a box other than "Owner" is checked, then this provides an early "heads up" that what otherwise seemed to be a single-family residence might actually be a rental business. If it is, in fact, a rental then that signals to the BOR that in addition to the sales comparable approach, the income approach may be relevant to consider in the valuation. Once the income approach is implicated, the BOR may wish to seek business records or other data – or question the appraiser about those business records – that show the income generated from the property. It might also mean that a reconciliation might have to be made between the valuation reached through the sales comparison approach and the income approach.

(2) Box 2 – Property Rights Appraised

R.C. §5713.03 requires that the interest to be assessed is "the fee simple estate, as if unencumbered." While, typically, there is little doubt that the value of the fee simple estate is

being appraised, if anything other than "Fee Simple" is checked here, then the appraisal may be invalid for purposes of an appraisal before the BOR. As such, it is important to insure that Box 2 is appropriately checked before questioning an expert appraiser.

(3) Box 3 and Box 4 – Assignment Type and Lender/Client

Box 3, "Assignment Type", is often read in conjunction with Box 4, "Lender/Client", immediately underneath it. Read together, those two lines show whether the appraisal was performed for purposes of ad valorem taxation, was done at the request of a lender in connection with the financing or refinancing of the property or was commissioned by the property owner in connection with the sale/purchase of the property or for other purposes. Identification of the client and the reasons for which the appraisal is being done are important for a number of reasons.

First, in our review of the URAR the reason for the "assignment" may give an early indication as to whether the appraisal speaks as of the tax lien date. That date is important because the Supreme Court has ruled that valuation opinions must speak "as of the tax lien date of the year in question…"[752], the first day of the subject year. "The general rule is that non-tax-lien dated appraisals are not indicative of value as of the tax-lien date."[753] New Year's Day is not usually the opinion date for appraisals written for financing or refinancing purposes, which are intended to determine a value as close as possible to the date the loan or sale closes.

But beyond that, using a URAR appraisal for ad valorem tax valuations may raise other concerns. In particular, the Supreme Court has stated that "applying a financing appraisal in the tax-valuation setting can be problematic because those types of appraisals may not necessarily represent a 'complete and thorough evaluation of the property.'"[754] In other words, the limited

[752] See *South-Western City Schools Board of Education v. Franklin County Board of Revision*, 152 Ohio St.3d 548, 2018-Ohio-919, ⁋ 17 ("the first day of January of the tax year in question is the crucial valuation date for tax assessment purposes."). See also *Olmsted Falls Village Assn. v. Cuyahoga County Board of Revision*, 75 Ohio St.3d 552 (1996).

[753] See *Laura Rosborough and Stacey Rakes v. Lake County Board of Revision* (May 26, 2020), BTA No. 2019-1240. See also *Akron City Schools Board of Education v. Summit County Board of Revision* (September 14, 2023), BTA No. 2022-1034 ("The Ohio Supreme Court has been clear that "[t]he vintage of an appraisal matters because 'the essence of an assessment is that it fixes the value based upon facts as they exist at a certain point in time.'" *Jakobovitch v. Cuyahoga Cty. Bd. of Revision*, 152 Ohio St.3d 187, 2017-Ohio-8818, 94 N.E.3d 519, quoting *Musto v. Lorain Cty. Bd. of Revision*, 148 Ohio St.3d 456, 2016-Ohio-8058, 71 N.E.3d 279, ¶¶ 40-42."); *Green Local Schools Board of Education (Summit) v. Summit County Board of Revision* (November 15, 2023), BTA No. 2021-2044.

[754] See *Jakobovitch v. Cuyahoga County Board of Revision*, 152 Ohio St.3d 187, 2017-Ohio-8818, ⁋ 15. See also *South-Western City Schools Board of Education v. Franklin County Board of Revision* (January 3, 2023), BTA Nos. 2021-2038, 2021-2039.

purposes for which a financing appraisal is conducted – primarily to make sure that the asset to be mortgaged provides sufficient collateral to properly secure the lender - may not evaluate a property as thoroughly or completely as an appraisal conducted for ad valorem taxation purposes.

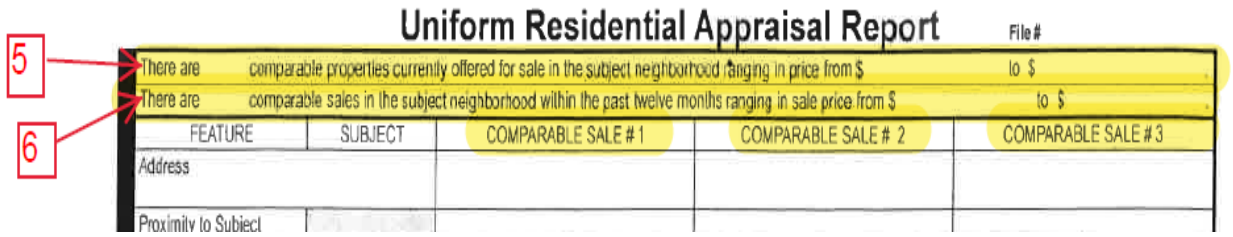
Secondly, the identity of the "Lender/Client" for whom the appraisal is performed matters because there may be limitations placed on who can, and cannot, use and rely upon the URAR appraisal. An appraisal which indicates that it is not intended for use by the BOR for ad valorem taxation purposes may be of no use to the owner. For example, the general instructions to the URAR form state that, "This appraisal report is subject to the following…intended use, intended user…" Under its Intended Use instruction, the URAR form states that "The intended use of this appraisal report is for the lender/client to evaluate the property…*for a mortgage finance transaction*." (italics added). Because the appraisal is being offered for purposes of an ad valorem taxation valuation, and not in the course of a mortgage finance transaction, its utility may be limited. This is particularly so in light of the Supreme Court's determination (discussed above) that appraisals done for financing purposes "can be problematic".[755] In addition, under the URAR instruction entitled "Intended User" the instructions state that "The intended user of this appraisal report is the lender/client." By its terms, then, the appraisal makes clear that it is not intended for use by others, like the BOR. Accordingly, Boxes 3 and 4 provide an up-front indication as to whether the appraisal can be utilized at all or only under limited circumstances.

When questioning an appraiser about Boxes 3 and 4, you may wish to explore the following areas:

1. The identity of the client.
2. Who is paying the appraiser for her work?
3. The appraiser's scope of work.
4. The purpose for which the appraisal was undertaken.
5. When was the assignment given.
6. The person (if a company gave the assignment) who discussed the assignment with the appraiser.

[755] See *Michaels Inc. v. Lake County Board of Revision* (March 20, 2023), BTA No. 2022-14 ("…we have stated, '[a]ppraisals for financing purposes are not necessarily a complete and thorough evaluation of the property.'").

Box 5 and Box 6 – Comparable Sales Properties



These two boxes are related and set forth the number of comparable sale properties for sale, currently and within the past twelve months, in the subject property's "neighborhood" and the price range for those comparables. This information, which on the URAR appears immediately above the identification of the three comparable sales selected by the appraiser, provides a glimpse of the potential pool of "comparables" from which the appraiser selected the three sales comparables.

Why is that important? The Appraisal Practices Board has determined that "the identification of what constitutes a similar, or 'comparable property' is critical to the proper application of the three approaches to value."[756] The three (or in some instances, more) - comparables on the URAR establish the factual foundation of the "comparable" sales approach for the subject property. It is not surprising, then, that the selection of appropriate comparables is key to reaching a proper valuation for the subject. Accordingly, especially in the context or residential appraisals where the comparable sales approach is almost always the exclusive approach utilized, it is important to insure that the appraiser has selected appropriate comparables.

Despite the unavoidable element of subjectivity inherent in appraisal practice, appraisers should strive to keep it to a minimum. Reducing that subjectivity is particularly important in the appraiser's selection of comparable sales, where there is frequently a broad array of potential comparable sales from which to choose. In selecting comparable sales "The goal is to find a set of comparable sales as similar as possible to the subject property"[757] and, after such selection, to

[756] See Revised APB Valuation Advisory #4 at https://www.appraisalfoundation.org/imis/docs/Valuation_Advisory_4_Identifying_Comparable_Properties_Upated_Final_09262013.pdf..

[757] 12th Edition, at 422.

"then adjust [those comparable sales] for differences that cannot be eliminated."[758] Further, "As a general rule, the greater the difference between the subject and the comparables, the more potential there is for distortion and error in sales comparison."[759]

There are a few avenues of inquiry through which Boxes 5 and 6 provide potentially important information for cross-examining the appraiser. One is to determine the geographic area from which the appraiser selected the comparables. In both Boxes 5 and 6 the URAR form refers to the subject property's "neighborhood". That term, however, is not self-defining and depending upon the facts and circumstances is subject to different interpretations. It is potentially valuable, then, to determine the appraiser's delineation of the subject "neighborhood" from which she selected the comparables.

The Appraisal of Real Estate (sometimes referred to hereafter as "*The ARE*") defines "neighborhood" as "A group of complementary land uses; a related grouping of inhabitants, buildings, or business enterprises."[760] Unfortunately, that vague definition provides little guidance to help an appraiser define a specific geographic neighborhood. As a result, the determination of the confines of the pertinent neighborhood is left largely to the judgment and discretion of the individual appraiser.[761]

But the lack of firm guidance as to the meaning of "neighborhood" does not diminish the importance of its proper delineation. Amongst other things, the appraiser's demarcation of the appropriate neighborhood drives the appraiser's selection of comps from that neighborhood. In addition, the subject's neighborhood as defined by the appraiser will have a value structure which adds or detracts from the value of the subject property.[762] If the appraiser misidentifies the confines of the "neighborhood" then she might have improperly limited or expanded the pool from which the comparable sales were selected. This might have the effect of skewing the results of the

[758] 12th Edition, at 337.

[759] 12th Edition, at 338.

[760] *The Appraisal of Real Estate*, 12th Edition, at 164.

[761] See Revised APB Valuation Advisory #4, page 9, at https://www.appraisalfoundation.org/imis/docs/Valuation_Advisory_4_Identifying_Comparable_Properties_Upated_Final_09262013.pdf According to the Appraisal Practices Board, "Ideally, a comparable property would compete with the subject property in location as well as other characteristics."

[762] See *The Appraisal of Real Estate*, 12th Edition, at 164 ("The boundaries of…neighborhoods…identify the areas that influence a subject property's value.").

appraisal. To take an extreme example, if the subject residence is located in Lancaster, Ohio and the appraiser selected "comparables" in Cleveland – a distant metropolitan area with a very different housing market - that would throw the appraisal into question.

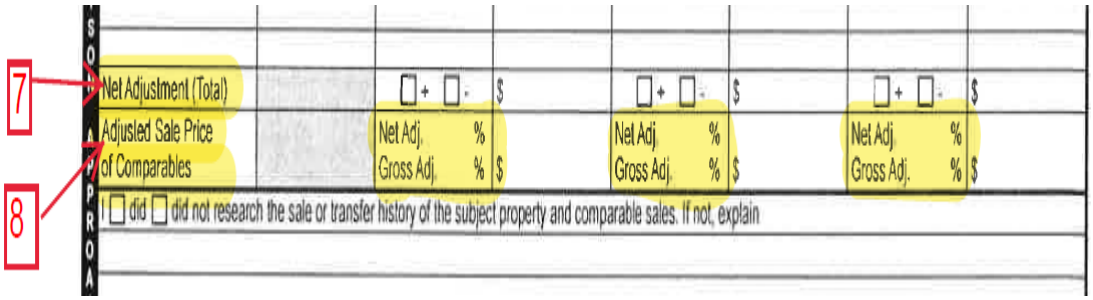
With that in mind, some questions that may be asked of the appraiser in connection with Boxes 5 and 6 include the following:

1. What criteria did you use to determine the subject property's "neighborhood"?
2. What are the geographic boundaries of that neighborhood?
3. What factors did you use in concluding that the neighborhood's buildings were "related"?
4. What data sources did you utilize in determining the number and price range of the pool of comparable sales?
5. Were all of the comparable sales located in the subject's neighborhood? If not, why not?

In addition, the appraiser's objectivity, or lack of it, can be "tested" through questions directed at the methodology she used in selecting the comps she identified as comparables on the URAR form. It stands to reason, of course, that the larger the size of the comparables pool, the greater the ability of the appraiser to pick and choose which comparables she wishes to use and, therefore, the greater the potential subjectivity of the appraiser. Thus, some of the questions to the appraiser in this regard may include the following:

1. What characteristics did this comparable have in common with the subject?
2. How many other sales of the entire pool of comparables had those or similar characteristics in common with the subject?
3. Given that potential number, why did you select this comparable?
4. In your search for appropriate comparables, were there any characteristics of those potential comparables that carried more weight with you than others?
5. When was this comparable last sold in an arm's length sale?
6. Did you verify the facts of that sale?

<u>Boxes 7 and Box 8 – Adjustments to Comparable Sales</u>



Boxes 7 and 8 appear at the bottom of the three comparable sales columns on the URAR and address "adjustments" made by the appraiser. *The Appraisal of Real Estate* states that "The goal of the sales comparison approach is to select the most comparable market sales and then *adjust for differences that cannot be eliminated* within the selection process."[763] (italics added). Adjustments, properly made, are a critical component of the sales comparison approach and have been defined as the "Mathematical changes made to basic data to facilitate comparison or understanding."[764] Adjustments are represented using either dollar amounts or percentages.

> When dollar adjustments are used, individual differences between the comparables and the subject property are expressed in terms of positive or negative dollar amounts; when percentage adjustments are made, individual differences are reflected in positive or negative percentage differentials.[765]

The totality of the adjustments is characterized as the net adjustment or the gross adjustment.

As discussed in more detail below, the adjustments made by the appraiser involve her judgment and experience. Adjustment practice, like the broader appraisal practice, it is not an exact science. As stated by the Appraisal Institute:

> Even when they are supported by comparable data, the adjustment process and the values indicated reflect human judgment. Small inaccuracies can be compounded when several adjustments are added or multiplied. For this reason, the precise arithmetic conclusion derived from adjusted data should support, rather than control, the appraiser's judgment.[766]

Accordingly, the items selected for adjustment and the degree or dollar amount of the adjustments made by the appraiser are perhaps as, or more, likely than other areas of appraisal practice to inject elements of subjectivity into the appraiser's analysis. The BTA has found that "The greater the magnitude of the adjustments, the less reliable the appraisal report will be."[767]

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[763] *The Appraisal of Real Estate*, 12th Edition, at 337.

[764] *The Appraisal of Real Estate*, 12th Edition, at 338.

[765] *The Appraisal of Real Estate*, 12th Edition, at 338.

[766] *The Appraisal of Real Estate*, 12th Edition, at 447.

[767] See *Daniel and Bonnie Kossin v. Cuyahoga County Board of Revision* (June 29, 2020), BTA No. 2019-2390. See also *Ephraim Fitterman v. Cuyahoga County Board of Revision* (March 29, 2021), BTA No. 2020-26; *Deborah A. Capretta and Richard A. Capretta v. Cuyahoga County Board of Revision* (July 20, 2021), BTA No. 2019-1291 ("We also note the large gross adjustments effected by [the appraiser], which suggests that the comparable properties may not have been truly comparable to the subject property. This Board has previously held that sales that require large adjustments are properly given less weight."); *Deborah A. Capretta and Richard A. Capretta v. Cuyahoga County Board of Revision* (July 20, 2021), BTA No. 2019-1291 ("We also note the

While the BTA has not established what level or magnitude of adjustment is too large to be considered reliable, in at least one case it noted that "gross adjustments of approximately 27.6% applied to comparable sale one; gross adjustments of approximately 24.1% applied to comparable sale two; and gross adjustments of approximately 28.8% applied to comparable sale three" "suggest[s] that the properties really were not comparable to the subject property."[768] It is not surprising, then, that according to the Appraisal Institute, "Adjusting for comparables is often the most contentious part of an appraisal."[769] Because of that, the degree and kind of adjustments made by an appraiser sometimes present the questioner with a rich opportunity to test the appraiser's judgment, reasoning, and credibility.

Why Do Appraisers Make Adjustments?

Before discussing the avenues of questioning presented by Boxes 7 and 8, it is important to understand why and how adjustments are made and the role those adjustments play in determining value through the comparable sales approach. The Appraisal Foundation makes clear that:

> The principal of substitution is the foundation of comparability. It states that a rational buyer will not pay more for an item than the cost of an acceptable substitute…The appraiser must analyze transactions…and determine which are acceptable substitutes by weighing the elements of comparison.[770]

large gross adjustments effected by [the appraiser], which suggests that the comparable properties may not have been truly comparable to the subject property. This Board has previously held that sales that require large adjustments are properly given less weight."); *S&S Properties of Cleveland L.L.C. v. Cuyahoga County Board of Revision* (July 14, 2022), BTA Nos. 2019-2892, 2019-2896, 2019-2898, 2020-1215, 2020-1217, 2020-1218.

[768] See *Nachi Investments, LLC v. Cuyahoga County Board of Revision* (April 5, 2021), BTA No. 2020-25. See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (October 4, 2021), BTA No. 2018-1630 ("…the appraiser applied large adjustments to three of the four comparables under the sale comparison approach, which suggests that that the comparables were, in fact, incomparable."); *Raymond S. & Wendy S. Tritt v. Stark County Board of Revision* (January 24, 2023), BTA No. 2020-6 ("We find that the appraisal submitted by the property owner is not probative evidence of value. The most pressing issue with the appraisal is the size of the adjustments. The gross adjustments are 28.1 percent and higher, and the net adjustments are 18 percent and higher. The size of these adjustments is large, which suggest they really were not comparable to the subject property.").

[769] See, *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 179.

[770] See Revised APB Valuation Advisory #4, page 3, at https://www.appraisalfoundation.org/imis/docs/Valuation_Advisory_4_Identifying_Comparable_Properties_Upated_Final_09262013.pdf..

In general, the goal of comparable sales analysis, then, is to reach a proper value for the subject property by selecting a previously sold comparable property (for which we have a known sales price) and then "substitute it in" for the subject parcel. Through that "substitution", the hope is that the comparable property will guide us to the proper value for the subject. If we could find comparable sales that were exact replicas of the subject property, it would be easy to determine the value of the subject parcel by merely using the sales price of the previously sold comparable sale and applying it to the subject. Such exact replication, of course, is not possible and the law has long recognized that each parcel of real estate is unique.[771] Even if the selected comp has the same floor plan, was built by the same builder, and is in the same neighborhood, there are differences in lot size, lot location, and condition of the house, etc. between it and the subject.

But because the principal of substitution remains the "foundation of comparability", the appraiser's challenge is to find comparable sales that are substitutable for – the "equivalent" of – the subject. As stated by the BTA:

> Ideally, if all comparable properties were identical to the property in issue, no adjustments would be required. However, this is rarely the case and therefore '[t]he first step in any comparative analysis is to identify which elements of comparison affect property values in the subject market. Each of the basic elements of comparison must be analyzed to determine whether an adjustment is required.'[772]

To create an "equivalency" between the subject property and the comparable sales properties, the appraiser is required to make monetary "adjustments" to the features of the comps as compared to those same features (or the lack thereof) on the subject, so that the sales prices of the comps for purposes of comparison are "equivalent" to the subject. As we shall see, the appraiser does this by comparing the condition and other specific attributes of the subject to those of the selected comps. The selection of appropriate comps, then, and the adjustments made thereto is a critical component of the appraiser's work. The Supreme Court has recognized that "…[t]he validity of every comparable turns on whether, and to what extent, the sale is in fact comparable, and an appraiser must make adjustments to account for differences ***."[773] In common parlance,

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[771] See *Thies v. Wheelock*, 2nd Dist. Miami C.A. Case No. 2017-CA-8, 2017-Ohio-8605, ⁋ 35 ("We have recognized 'the legal principle that an interest in land is unique; different locations are not interchangeable.").

[772] See *Rex Overstreet v. Hamilton County Board of Revision* (December 14, 2007), BTA No. 2006-K-871.

[773] See *Westerville City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 146 Ohio St.3d 412, 2016-Ohio-1506, ¶ 32. See also *Earl Mullins v. Warren County Board of Revision* (September 17, 2018), BTA No. 2017-1951.

the adjustments need to be made to the comps so that there is an "apples to apples" comparison between the subject and the selected comps and the structural and other differences between the subject and the comps are financially "zeroed out".

How Are Adjustments Made? – Some Examples

Before exploring avenues of inquiry in questioning whether the appraiser/appraisal is credible, it might be instructive to use an example of how an appraiser makes adjustments in her attempt to create an equivalency between the subject and the comparable. Let's suppose that Comparable Sale 1 ("Comp 1") is in the subject's neighborhood, has a similar floor plan, and the same number, size, and type of rooms as the subject. It recently sold for $150,000. But upon closer inspection, the appraiser determines that Comp 1 is on a slightly larger lot, has better exterior finishes, and has newer interior finishes and appliances than the subject. In short, Comparable 1 is a slightly "better" property than the subject. The question to be solved for, then, is "If Comp 1, a slightly better property than the subject, sells for $150,000, what amount would the subject sell for under the same circumstances?"

To determine what the subject would sell for in light of the $150,000 sales price for Comp 1, the appraiser will make adjustments to Comp 1's sale price to make it the "equivalent" of the subject. Obviously, the appraiser cannot make actual physical changes to Comp 1 to make it the physical equivalent of the subject. But she can make, or at least attempt to make, Comp 1 the value "equivalent" of the subject by deducting value from Comp 1's sale price (for those physical characteristics where Comp 1 is superior to the subject) and/or by adding value to Comp 1's sale price (for those physical characteristics where Comp 1 is inferior to the subject) so that the structural/condition differences between the subject and Comp 1 are negated, or "zeroed out". The appraiser determines, for example, that Comp 1 has a finished basement while the subject does not and that the finished basement adds $5,000 of value to Comp 1. To make Comp 1 the "equivalent" of the subject, then, the appraiser "deducts" or "adjusts down" the $5,000 from Comp 1's sale price so that, at least in terms of value, Comp 1 no longer has a finished basement; just like the subject. Other adjustments using that methodology are made to other areas of Comp 1 as well. As

seen, the appraiser's determination – in this case that Comp 1's basement adds $5,000 of value to Comp 1 – forms the underlying basis for her $5,000 adjustment.

Now, let's take a real world example of how adjustments *were* made in a particular case depicted on the next page ("the real world example"). In the comparable sale portion of the URAR, below, the subject is a 6 room home, with 3 bedrooms, 1 bathroom and gross living space of 1,052 square feet. The appraiser selects three comparable sales (collectively, "the Comps"). Comp 1 also has 6 rooms, 3 bedrooms, and 1 bath but has gross living area of 1,000 square feet, slightly smaller than the subject. Comp 2 has 7 rooms with 4 bedrooms, 1 bathroom and gross living area of 1,128 square feet which is slightly larger than the subject. Finally, Comp 3 has 6 rooms, 3 bedrooms, and 1 bath and gross living area of 1,224, being larger than Comp 1, Comp 2, and the subject. Comps 1, 2, and 3 are respectively .36, 1.5, and 1.06 miles from the subject. So far, the Comps seem very similar to the subject.

FEATURE	SUBJECT	COMPARABLE SALE # 1		COMPARABLE SALE # 2		COMPARABLE SALE # 3	
Address	112 Courtney Drive ELKTON, MD 21921-6202	105 TARTAN DRIVE ELKTON, MD 21921		216 WHITEHALL ROAD ELKTON, MD 21921		124 WHITEHALL ROAD ELKTON, MD 21921	
Proximity to Subject		0.36 miles NE		1.50 miles SW		1.06 miles W	
Sale Price	$ N/A		$ 171,000		$ 194,500		$ 180,000
Sale Price/Gross Liv. Area	$ sq.ft.	$ 171.00 sq.ft.		$ 172.43 sq.ft.		$ 147.06 sq.ft.	
Data Source(s)		MLS #CC7001824 DOM 27		MLS #CC6912442 DOM 79		MLS# CC6781527 DOM 222	
Verification Source(s)		PUBLIC RECORDS/VISUAL		PUBLIC RECORDS/VISUAL		PUBLIC RECORDS/VISUAL	
VALUE ADJUSTMENTS	DESCRIPTION	DESCRIPTION	+(-) $ Adjustment	DESCRIPTION	+(-) $ Adjustment	DESCRIPTION	+(-) $ Adjustment
Sales or Financing Concessions		CONVENTIONAL SUBSIDY $5,130		CONVENTIONAL SUBSIDY$8,000		CONVENTIONAL NO CONCESS	
Date of Sale/Time		05/08/2009		02/09/2009		01/30/2009	
Location	AVERAGE	AVERAGE		AVERAGE		AVERAGE	
Leasehold/Fee Simple	Fee Simple	FEE SIMPLE		FEE SIMPLE		FEE SIMPLE	
Site	0.35 ACRE(S)	0.34 ACRE(S)		0.25 ACRE(S)		0.29 ACRES	
View	RESIDENTIAL	RESIDENTIAL		RESIDENTIAL		RESIDENTIAL	
Design (Style)	RANCH	RANCH		RANCH		RANCH	
Quality of Construction	BRICK/VINYL	VINYL SIDING	+2,500	VINYL SIDING	+2,500	VINYL SIDING	+2,500
Actual Age	41 +/- YEARS	29 +/- YEARS		54 +/- YEARS		20 +/- YEARS	
Condition	AVERAGE	AVERAGE		AVERAGE		AVERAGE	
Above Grade Room Count (Total / Bdrms. / Baths)	6 / 3 / 1.0	6 / 3 / 1.0		7 / 4 / 1.0		6 / 3 / 1.0	
Gross Living Area	1,052 sq.ft.	1,000 sq.ft.	+1,300	1,128 sq.ft.	-1,900	1,224 sq.ft.	-4,300
Basement & Finished Rooms Below Grade	FULL, PR BED, FAMILY	SLAB N/A	+7,500 +5,000	SLAB N/A	+7,500 +5,000	FULL REC RM,OFFICE	+2,500
Functional Utility	AVERAGE	AVERAGE		AVERAGE		AVERAGE	
Heating/Cooling	GFA/CAC	EFA/CAC		EFA/CAC		EFA/CAC	
Energy Efficient Items	AVERAGE	AVERAGE		AVERAGE		AVERAGE	
Garage/Carport	NONE	NONE		1 CAR ATT	-4,000	NONE	
Porch/Patio/Deck	NONE	DECK	-3,000	PORCH, DECK	-6,000	DECK	-3,000
FIREPLACE/WOODSTOVE	NONE	NONE		NONE		NONE	
FENCE/POOL/OTHER	REAR FENCE	ABV POOL,FENCE	-2,500	NONE	+2,000	REAR FENCE	
OTHER	NONE	NONE		NONE		NONE	
Net Adjustment (Total)		☒ + ☐ -	$ 10,800	☒ + ☐ -	$ 5,100	☐ + ☒ -	$ -2,300
Adjusted Sale Price of Comparables		Net Adj. 6.3 % Gross Adj. 12.7 %	$ 181,800	Net Adj. 2.6 % Gross Adj. 14.9 %	$ 199,600	Net Adj. 1.3 % Gross Adj. 6.8 %	$ 177,700

Comp 1 sold for $171,000, Comp 2 for $194,500, and Comp 3 for $180,000. With those actual sales prices in mind, the appraiser compares the attributes of the subject (for which she seeks

to find a value) to those same attributes for the comps (for which sales prices are known) and then adjusts the comps to compensate for the physical and condition differences between each of them and the subject. For example, the appraiser determines that the subject and all the comps are of "Average" condition, therefore requiring no adjustment for *that* characteristic (Arrow 1).

Arrow 2 shows that the appraiser determines that there are differences in the quality of construction between the subject and the comps. In particular, the appraiser finds that the exterior of the subject is constructed of both brick and vinyl siding, while the exteriors of each of the comps are constructed with vinyl siding only. She also determines that the brick/vinyl siding exterior of the subject is superior to the vinyl-only siding of each comp and further determines that the brick/vinyl exterior of the subject is worth $2,500 more than the vinyl-only siding of the comps.

Each of the above determinations involved the exercise of the appraiser's judgment which, presumably, was informed by the appraiser's knowledge and experience. To make the subject and the comps equivalent *on this feature*, the appraiser adds (adjusts upward) to the sale price of each of the comps the $2,500 that she believes this feature of the subject is worth. Thus, she has "neutralized" or "zeroed out" the difference between the subject and the comps *on that feature* by adding to the known purchase price of the comps the value of that feature which is physically possessed by the subject but not by the comps. In making that adjustment, the appraiser has created an equivalency on that feature between the subject and the comps. The appraiser makes similar determinations and calculations for other features of the subject and comps.

Adding a further layer of potential subjectivity to the adjustment process is that the value of the adjustment made by the appraiser for a particular feature or characteristics of the property does not necessarily represent the dollar cost to build or construct that particular feature. As explained in *Fundamentals of Real Estate Appraisal*, "It is important to remember that the adjustment value of a property feature is not simply the cost to construct or add that feature but instead what a buyer is willing to pay for it, typically a lesser amount."[774] That marketplace component must also be factored in by the appraiser. In the above example, for instance, the appraiser has adjusted the "Quality of Construction" feature for the comparables by adding $2,500 to the sales price of each based upon the comparables' lesser vinyl siding construction as compared

[774] See *Fundamentals of Real Estate Appraisal*, 9th Edition, (2005), Dearborn Real Estate Education at 195.

to the subject's brick and vinyl siding construction. That $2,500 adjustment, however, should not be the direct cost of construction to bring the exteriors of the subject and the comps to an equivalent state, but rather, what a willing buyer would *pay* to bring those exteriors to an equivalent condition. Under applicable marketplace conditions, for example, it is possible that such construction could cost $10,000 but that a willing buyer would only pay $2,500 for such construction. In that circumstance, the appraiser would adjust it only $2,500 and not the $10,000 cost of construction.

Net Adjustments and Gross Adjustments

Unlike the more detailed numbers and calculations contained in the comparables columns, a review of Boxes 7 and 8 at the bottom of those columns provides a quick summary in percentage format of the adjustments made to that comp and whether it was a negative (downward) adjustment (meaning that the selected comp is an overall superior property and needs to have value deducted from it to make it "equivalent" to the subject) or a positive (upward) adjustment (meaning that the selected comp is an overall inferior property and needs to have value added to it to make it the "equivalent" of the subject). By reviewing those two boxes you can quickly tell whether the comps are substantially similar to the subject (fewer or lesser adjustments) or substantially different (more or greater adjustments).

Those boxes make a distinction between a "net" adjustment and a "gross" adjustment. To determine the gross adjustment, the appraiser simply tallies up the dollar amount of all adjustments, disregarding whether they are positive or negative adjustments. Once that number is determined, it is divided by the known purchase price to determine the gross adjustment percentage. In our real-world example, for instance, Comp 1's gross adjustments totaled $21,800. When divided by the $171,000 selling price for Comp 1, we see a gross adjustment of 12.7% as you can see in Box 8.

On the other hand, to determine a net adjustment you first add the total of the positive adjustments to get a total amount of positive adjustments. You next add all the negative adjustments to get a total amount of negative adjustments. You then deduct the total of the smaller amount from the total of the larger amount, disregarding whether the amount is positive or negative.[775] To use the same example, the total of all the positive adjustments is $16,300. The

[775] See *The Appraisal of Real Estate*, 12th Edition at 447.

total of all the negative adjustments is $5,500. You then deduct the total of the negative adjustments ($5,500) from the total of the positive adjustments ($16,300) to reach $10,800. As we did with gross adjustments, you then divide that number by the $171,000 selling price for Comp 1 to reach a net adjustment percentage of 6.3%, as shown in Box 8.

Using Net and Gross Adjustments in a Value Conclusion

In reaching her value conclusion the appraiser will often ascribe greater weight – and thereby give greater influence on her ultimate value conclusion – to one of the comps as opposed to the others. This means that, at least in the appraiser's view, the selected comp has greater similarity to the subject than do the other comps.

In selecting the comp entitled to the greatest weight the appraiser will often review the percentage of net adjustment and the percentage of gross adjustment of each comp to see the degree to which the comp differs from the subject. As stated in *The Appraisal of Real Estate*, "If the sales are similar otherwise, less accuracy will probably be attributed to the comparable property that required larger adjustments."[776]

But selecting the comp entitled to the greatest weight is not a mechanical or purely mathematical process and the comp with the lowest gross or net adjustment percentage is not *automatically* entitled to the greatest weight relative to the other comps. As explained by the Appraisal Institute, the value of adjustments is in their ability to *support*, as opposed to control, an appraiser's opinion of value.[777] The facts and circumstances of each case must be considered and an appraiser should be careful not to let the raw net and gross adjustment percentages mechanically control the "weighting" (influencing) process.

Finally, it is common for the net and gross adjustment percentages to differ one from the other. In that case, which should carry more weight with the appraiser? As stated by *The Appraisal of Real Estate ("The ARE")*:

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[776] *The Appraisal of Real Estate*, 12th Edition, at 447.

[777] *The Appraisal of Real Estate*, 12th Edition, at 447.

> Usually, the magnitude of net adjustments is a less reliable indicator of accuracy…A net adjustment figure may be misleading because one cannot assume that any inaccuracies in the positive and negative adjustments will cancel each other out.[778]

The ARE cites an example in support of that position:

> … if a comparable property is 20% superior to the subject in some characteristics and 20% inferior in others, the net adjustment is zero but the gross adjustment is 40%. Another comparable may require several adjustments, all positive or all negative, resulting in a net adjustment of 6%. This [the second] property may well be a more accurate indicator of the subject's value than the comparable with the 0% net adjustment with large positive and negative adjustments. Several adjustments that are all positive or all negative may be more correct and produce a smaller total gross adjustment than a combination of positive and negative adjustments.[779]

Like so much else in appraisal practice, it is the appraiser's professional judgment that will control the ultimate value conclusion, and not the rigid application of arithmetic calculations or formulas.

Judgments and Questions

As shown above, the appraiser in the real-world example has made a number of subjective determinations or judgments. While the presence of *some* subjectivity is not at all unusual in an appraisal, its impact should not be disregarded. The consequences of subjective choices are commonly seen where two appraisers reach dramatically different opinions of value based upon the same exact evidence; those different value opinions result from their subjective choices (selection of comps, type and degree of adjustments, etc.). The BTA has frequently acknowledged that a certain amount of subjectivity is unavoidable and has made clear that aspects of subjectivity are an inherent part of the appraisal process.[780] In the context of competing appraisals, it has said that "We look not for a perfect opinion of value, but the most probative one."[781]But to acknowledge

[778] *The Appraisal of Real Estate*, 12th Edition, at 447. See also *Al Gammarino v. Hamilton County Board of Revision* (September 30, 2019), BTA Nos. 2018-622, 753, 938 – 946, 972 – 974, 1301; *Daniel and Bonnie Kossin v. Cuyahoga County Board of Revision* (June 29, 2020), BTA No. 2019-2390.

[779] *The Appraisal of Real Estate*, 12th Edition, at 447.

[780] See, for example, *Brunswick City Schools Board of Education v. Medina County Board of Revision* (May 23, 2018), BTA No. 2017-1016; *Buckeye Terminals LLC v. Franklin County Board of Revision* (August 27, 2018), BTA No. 2014-4958.

[781] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (October 4, 2021), BTA No. 2019-264.

the seemingly unavoidable reality of subjectivity is not to condone or encourage it. Quite obviously, there are risks to the credibility of the appraiser and to the validity of her appraisal if it is *too* subjective.[782]

An appraiser's incremental or excessive subjectivity can be a form of bias, transforming otherwise permissible levels of subjectivity into impermissible bias. Indeed, the American Society of Appraisers has acknowledged the risk that appraisers, if not cautious, can sometimes depart from their legitimate and licensed role as unbiased experts and slip into the role of advocate.

> Normally when an appraiser is hired as an expert for an appraisal, there is a value dispute and the client would benefit from either a higher or a lower value, depending upon the situation. Of course, the appraiser is supposed to be impartial and unbiased as an expert witness…but the fact that the appraiser knows what will benefit the client may affect the appraiser's judgment. Human nature is such that it is easy for an appraiser to find that he or she has inadvertently slipped into the role of an advocate for the client without consciously realizing it.[783]

Such advocacy must be avoided because licensed appraisers are bound by ethical rules and professional obligations to issue opinions free of bias.[784]

Given the complexity of the appraisal process, the number of subjective choices that appraisers must make in the preparation of an appraisal, and the ever-present risk of bias, it is no insult to the appraiser if her methods and judgments are subject to questioning, "testing", at the BOR. Indeed, there is no requirement that the BOR believe the appraiser at all as the Supreme Court has long held that the BTA (and presumably the BOR as well) "is not required to adopt the

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[782] In addition to issues of credibility, there may come a point where the BTA's acceptance of an appraisal is viewed as an "abuse of discretion." As stated in *South-Western City Schools Board of Education v. Franklin County Board of Revision*, 2018-Ohio-4622 (10th Dist.), ¶ 20 "…where the parties present competing appraisals, the BTA is vested with wide discretion in determining credibility of witnesses and weighing the evidence before it…The BTA's decision finding one appraisal more probative than another appraisal and adopting a land value in one appraisal over the land value in another appraisal is reviewed for an abuse of discretion…'Abuse of discretion connotes an unreasonable, arbitrary, or unconscionable attitude.'"

[783] See http://www.appraisers.org/docs/default-source/discipline_rp/lifflander-the-appraiser-as-an-expert-witness-part-1.pdf?sfvrsn=2http://www.appraisers.org/docs/default-source/discipline_rp/lifflander-the-appraiser-as-an-expert-witness-part-1.pdf?sfvrsn=2.

[784] See http://www.appraisertom.com/2016-17-eUSPAP+(Final)-bookmarks-retail.pdf *The 2016-2017 Uniform Standards Professional Appraisal Practice* define "bias" as "a preference or inclination that precludes an appraiser's impartiality, independence, or objectivity in an assignment" and states under its Ethics Rules that "An Appraiser must not perform an assignment with bias" and that "An appraiser must not allow the intended use or an assignment or a client's objectives to cause the assignment results to be biased."

appraisal methodology espoused by any expert or witness."[785] As such, the selection of comps, the description and categorization of the subject and the comps, and the type and degree of adjustments made by the appraiser are fair game and present the questioner with an opportunity to "test" the underlying judgments on which the appraiser based her adjustments.

Returning to the real world example above, the determinations made by the appraiser include: (1) a *determination* that the physical condition of each comp and the subject are the same and that no adjustments need be made in that regard; (2) a *determination* that the subject's brick and vinyl exterior is superior to the all-vinyl siding exterior; and (3) a *determination* that the subject's brick/vinyl exterior was worth $2,500 more than each of the comps exteriors. The appraiser's methods and reasoning underlying those *determinations* can be questioned at the BOR. In so doing, the questioner should be mindful that each appraisal is highly dependent upon its individual facts and circumstances. Effective questioning is not done in a vacuum and will incorporate other factual information contained in the appraisal.

With that prelude, then, some questions to test the credibility/accuracy of the appraiser and the appraisal in the real world example above could include the following:

i. Age of Subject and Comps

1. Would you agree that the average condition of an older home is generally different than the average condition of a newer home?
2. In this case, the subject is 41 years old, Comp 1 is 29 years old, Comp 2 is 54 years old, and Comp 3 is 10 years old, correct?
3. Given that the average condition of a home may vary with its age, can you explain why you made no adjustments to these comps to account for the age differences between each of them and the subject?

ii. Meaning of "Average" Condition

4. You describe all of these residences as being in "average" condition, correct?
5. You are required to perform your appraisals in accordance with USPAP, correct?
6. Did you utilize a definition of the word "average" when determining that these properties were all "average"?
7. Is there a definition within USPAP as to the meaning of the word "average"?
8. Is there any kind of mathematical or scientific calculation that you use in determining whether a property's condition is "average"?

[785] See *Hotel Statler v. Cuyahoga County Board of Revision*, 79 Ohio St.3d 229, 303 (1997) cited in *Health Care REIT, Inc. v. Cuyahoga County Board of Revision*, 140 Ohio St.3d 30, 2014-Ohio-2574, ¶ 52.

9. Are there certain features or physical characteristics of a home that must exist in order for you to characterize it as "average"?
10. Would it be correct, then, to say that your determination that these homes were in "average" condition involves subjectivity on your part?

iii. Condition of Exterior

1. You indicated that the exterior of the subject is "brick/vinyl" and that "brick/vinyl" is worth more in the marketplace than a vinyl-only exterior, correct?
2. What is your factual basis for that opinion?
3. In making a determination that a vinyl/brick exterior is worth more than a vinyl-only exterior did you consult any books, treatises, or other resources?

iv. Amount of Adjustments

1. In your appraisal you indicated that the difference in value for a brick/vinyl exterior as opposed to an all vinyl exterior was $2,500, correct?
2. In coming up with that value did you consult Marshall & Swift or any other resources?
3. Where did that number ($2,500) come from?
4. Would you agree that the smaller the amount of the adjustment, the more similar it is to the subject?
5. And if the adjustments get too large, it may indicate that it is not a good comparable sale?

v. Number of Adjustments

1. In general, do you agree that it is better to have a smaller number of adjustments?
2. In general, do you tend to place greater reliance on a comp with fewer adjustments?

Obviously, the above are general kinds of questions that may be asked of the appraiser but ultimately the facts and circumstances of each appraisal will control the type and kind of questions asked.

(1) Variance Between the Comps and the Subject

As discussed above, the comps selected by the appraiser should attempt to replicate the subject as much as possible. After questioning the appraiser, the evidence may show that there are substantial variations between the comps selected by the appraiser and the subject. In general, the

less similar the comps are to the subject, the greater the adjustments to those comps must be to account for the differences between the subject and the comp. Such adjustments, *within reason*, are an expected part of appraisal practice but the BTA has made clear that "The greater the magnitude of the adjustments, the less reliable the appraisal will be."[786]

However, the accumulation of an excessive number or degree of these adjustments may weaken the factual support underlying the appraiser's opinion of value or bring into question the appraiser's judgment in selecting dramatically dissimilar "comparables".[787] As stated by the BTA, "When many adjustments are applied by the appraiser and when their individual and collective amounts are substantial, the appraiser must ask 'Is the comparable property really comparable.?'"[788] In one case, admittedly involving an owner and not an appraiser, the BTA discussed the significance of large-magnitude adjustments.

> We first note the gross adjustments [the owner] made were substantial, one as high as 46%. The magnitude of adjustments is essential to determine how accurate and adjusted value is.[789]

Such excessive variations may threaten the reliability of the appraisal. According to *The ARE*, "The greater the amount of collective adjustment, the more the appraiser may reduce the weight placed on a given comparable, or the appraiser may determine that it is not sufficiently comparable to be used at all."[790]

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[786] See *Al Gammarino v. Hamilton County Board of Revision* (September 30, 2019), BTA Nos. 2018-622, 753, 938 – 946, 972 – 974, 1301.

[787] See *John W. White v. Montgomery County Board of Revision* (May 21, 2019), BTA No. 2018-1406. ("The number of adjustments is also tied to accuracy…[the owner's] analysis contains a high number and high magnitude of adjustments…Because of the number and magnitude of adjustments, we do not find the report to be probative because we cannot determine how accurate it is.").

[788] See *David J. Bohla v. Logan County Board of Revision* (December 28, 2010), BTA No. 2008-1125. See also *Jamestown Development Company v. Cuyahoga County Board of Revision* (October 13, 1995), BTA Nos. 94-90, 94-154 ("While adjustments can be made to these "comparables" for such differences, this Board must question the "comparability" of the complexes at the outset, as well as the propriety of making significant "adjustments" to allegedly "comparable" properties."); *Robert Stone Trustee Robert Stone Trust 7-21-99 v. Cuyahoga County Board of Revision* (August 16, 2021), BTA No. 2021-496 ("…[the appraiser] made large gross adjustments to the comparable properties, which suggests that the properties really were not comparable to the subject property. The gross adjustments ranged from 28.3% to 40.9%. We have previously held that "[t]he greater the magnitude of the adjustments, the less reliable the appraisal will be.").

[789] See *John W. White v. Montgomery County Board of Revision* (May 21, 2019), BTA No. 2018-1406.

[790] 12th Edition at 458 – 459. See also *David J. Bohla v. Logan County Board of Revision* (December 28, 2010), BTA No. 2008-1125;*Cocita Properties, Ltd. V. Cuyahoga County Board of Revision* (October 13, 2020), BTA Nos. 2019-2505, 2019-2508.

By way of example, the URAR below shows net adjustments for the three listed comps of 65.7%, 45.3%, and 69.7% and gross adjustments of 71.5%, 63.7%, and 81.1%. Under most circumstances those adjustment percentages are considered very high and should raise questions about whether the comps are really comparable. Amongst other things, the questioner should inquire about whether other comps were reasonably available and, if so, the reason why those other comps were rejected in favor of comps that had such substantial differences from the subject. This may lead to questioning about whether the selection by the appraiser of such substantially different comps is indicative of bias, or lack of judgment or experience to name just a few areas. It should be noted, however, that neither USPAP nor *The ARE* set a specific adjustment net or gross adjustment percentage that may not be exceeded in utilizing a specific comp.

Uniform Residential Appraisal Report File # 130700090

There are 3 comparable properties currently offered for sale in the subject neighborhood ranging in price from $ 278,900 to $ 539,000

There are 8 comparable sales in the subject neighborhood within the past twelve months ranging in sale price from $ 255,000 to $ 700,000

SALES COMPARISON APPROACH

FEATURE	SUBJECT	COMPARABLE SALE # 1		COMPARABLE SALE # 2		COMPARABLE SALE # 3	
Address	1009 Cobb St Durham, NC 27707	2734 Sevier St Durham, NC 27705		1603 Acadia St Durham, NC 27701		2741 Dogwood Rd Durham, NC 27705	
Proximity to Subject		1.84 miles SW		2.12 miles NE		1.55 miles SW	
Sale Price	$		$ 402,500		$ 255,000		$ 370,000
Sale Price/Gross Liv. Area	$ sq.ft.	$ 234.01 sq.ft.		$ 194.36 sq.ft.		$ 153.02 sq.ft.	
Data Source(s)		TMLS 1891825;DOM 4		TMLS 1869299;DOM 48		TMLS 1843868;DOM 140	
Verification Source(s)		Durham Co Reg of Deeds		Durham Co Reg of Deeds		Durham Co Reg of Deeds	
VALUE ADJUSTMENTS	DESCRIPTION	DESCRIPTION	+(-) $ Adjustment	DESCRIPTION	+(-) $ Adjustment	DESCRIPTION	+(-) $ Adjustment
Sales or Financing Concessions		ArmLth Conv;4000		ArmLth Conv;2500		ArmLth Conv;0	
Date of Sale/Time		s06/13;c05/13		s04/13;c03/13		s02/13;c01/13	
Location	N;Res;	N;Res;		N;Res;		N;Res;	
Leasehold/Fee Simple	Fee Simple	Fee Simple		Fee Simple		Fee Simple	
Site	1.02 ac	23871 sf	-21,600	12632 sf	+13,900	20473 sf	0
View	N;Res;	N;Res;		N;Res;		N;Res;	
Design (Style)	Raised Ranch	Raised Ranch		SpFoyer		Ranch	
Quality of Construction	Q3	Q3		Q3		Q3	
Actual Age	60	52	-8,000	56	-4,000	58	-2,000
Condition	Poor	Average	-200,000	Fair	-125,000	Average	-200,000
Above Grade Room Count (Total / Bdrms. / Baths)	5 / 1 / 1.0	7 / 3 / 2.0	-3,000	5 / 2 / 1.0	0	8 / 4 / 3.0	-6,000
Gross Living Area	1,309 sq.ft.	1,720 sq.ft.	-16,400	1,312 sq.ft.	0	2,418 sq.ft.	-44,400
Basement & Finished Rooms Below Grade	1,309 Sq.Ft. 1rr,1br,1ba,1kit	634sf 1rr,1ba	+10,100 0	1042sf 1rr2br1ba	+4,000 0	0sf None	+19,600 0
Functional Utility	Average	Average		Average		Average	
Heating/Cooling	None	FWA/CAC	-7,000	FWA/CAC	-7,000	EBB/CAC	-4,000
Energy Efficient Items	None	Insul Wdws	-5,000	None		None	
Garage/Carport	2C Att Carport	2C Bl Garage	-5,000	1C Bl Garage	0	1C Att Gar/3C C	-7,500
Porch/Patio/Deck	2Patios,Brzway	Patio,Porch	0	Stoop	+5,000	Deck,SCPrch	0
Fireplace	2FP/3Opens	1 Fireplace	+1,500	2 Fireplaces	+500	1 Fireplace	+1,500
Other Amenities	Bk	Bk		Fence	-3,000	Bk,Fnc,Irrig	-5,000
Kitchen	Minimal	Upgd.Kitchen	-10,000	Minimal		Upgd.Kitchen	-10,000
Net Adjustment (Total)		☐ + ☒ -	$ -264,400	☐ + ☒ -	$ -115,600	☐ + ☒ -	$ -257,800
Adjusted Sale Price of Comparables		Net Adj. 65.7 % Gross Adj. 71.5 %	$ 138,100	Net Adj. 45.3 % Gross Adj. 63.7 %	$ 139,400	Net Adj. 69.7 % Gross Adj. 81.1 %	$ 112,200

Boxes 9, 10, and 11 – Indicated Value

Boxes 9, 10, and 11 on the URAR form are designed to show the appraiser's value conclusion. Box 9 shows the value conclusion based upon the sales comparison approach. Box 10 shows the value conclusion based upon the sales comparison approach, the cost approach, and the income approach. Box 11 shows the appraiser's ultimate value conclusion, presumably after reconciling all approaches. Because in almost all residential appraisals only the sales approach is used, typically the values shown in Box 9, in the first part of Box 10, and in Box 11 are the same. Those eager to find out the appraiser's ultimate value conclusion can simply jump to the highlighted area in Box 11 to determine the appraiser's opinion as of the date listed. Because opinions of value are to speak as of the tax lien date, if the "as of" portion is not completed, the questioner should ask the appraiser the date of her value conclusion.

CHAPTER 13
COMMERCIAL APPRAISALS

Chapter Contents

SALES COMPARISON APPROACH

Commercial Appraisals: Questions for the Appraiser Regarding the Sales Comparison Approach ("Sales Approach") and the Selection of Comparable Sales

(1) Sales Approach – Questions Regarding the Extent and Thoroughness of The Appraiser's Research Into Potential Comp Sales

(2) Sales Approach – Questions Regarding the Extent and Thoroughness of the Appraiser's Verification of Each Sales Comp Transaction

(3) Sales Approach Units of Comparison – Questions Regarding Whether Appropriate Units of Comparison Were Used Between the Subject and the Comps

(4) Sales Approach Differences Between the Subject and Each Comp; Adjustments Made to Correct for These Differences

Questions Regarding Recency
Questions Regarding Restrictions on Use
Questions Regarding Location
Questions Regarding Financing
Questions Regarding Expenditures After Purchase

INCOME CAPITALIZATION APPROACH

The Income Approach: Questioning the Appraiser Regarding the Income Capitalization Approach

The Income Approach: Finding Value Through the "IRV" Formula

The Income Approach: Direct Capitalization vs. Yield Capitalization

The Income Approach: A Sequence to Determine Income and Expenses

Net Operating Income

The Income Approach: Projecting Forward to Determine Net Operating Income (the "I" of IRV)

Net Operating Income: The Sequence of Calculations to Reach a Net Operating Income

Net Operating Income: How to Calculate Each Component of the Net Operating Income Formula – A Six Step Approach

FIRST: **Determine Potential Gross Income** ("PGI")

Net Operating Income: "Market" Income and Expenses Should be Used Over the Subject's Actual Income and Expenses

Net Operating Income: Questions for the Appraiser About How the Comps were Selected

SECOND: **Estimate annual Vacancy and Collection Loss ("VCL") Rates for the subject**.

Net Operating Income: Questions for the Appraiser About VCL

THIRD: **Determine the Effective Rental Income ("ERI") for the subject**.

FOURTH: **Determine if the Subject Generates Income Other than Rent ("Other Income").**

Net Operating Income: Questions for the Appraiser About Other Income

FIFTH: **Calculate Gross Operating Income ("GOI")**

SIXTH: **Determine Operating Expenses ("OE")**

Net Operating Income: Three Categories of Operating Expense ("OE")

Net Operating Income: Questions for the Appraiser About Operating Expenses

Net Operating Income: The Replacement Allowance

Net Operating Income: Questions for the Appraiser About the Replacement Allowance

SEVENTH: **Determine Net Operating Income ("I") By Deducting Operating Expenses ("OE") from GOI**

The Capitalization Rate

The Income Approach: How to Determine the Capitalization Rate (the "R" of IRV)
The Capitalization Rate: The Selection of Cap Rate Comps
The Capitalization Rate: The Tax Additur
The Capitalization Rate: Questions for the Appraiser About the Determination of the Cap Rate

COST APPROACH

The Cost Approach: Overview

The Cost Approach: Procedure

Possible Questions Regarding Selecting Reproduction or Replacement Cost

1. **Estimate the "hard" (direct) and "soft" (indirect) costs**

   Possible Questions Regarding the Determination of Hard and Soft Costs

2. **Estimate the entrepreneurial incentive**

   Possible Questions Regarding the Determination of Entrepreneurial Incentive

3. **Add the Estimate of Hard and Soft Costs to the Estimate of the Entrepreneurial Incentive**

4. **Determine the Depreciation of the Subject**

5. **Subtract Depreciation from RRCC**

6. **Determine the Value of Site *Improvements***

7. **Determine the Value of the Site Itself**

8. **Add the Site Value (to the Depreciated Reproduction and Replacement Cost plus Value of Site Improvements)**

RECONCILING THE DIFFERENT APPROACHES TO VALUE

Possible Questions Regarding the Reconciliation Process and Ultimate Value Conclusion

Commercial Appraisals: Introduction

Commercial real estate appraisals share many common traits with residential appraisals that utilize the URAR. Both types of appraisal are bound by the strictures of USPAP, have a defined scope of work, utilize comparable sales (and occasionally, in the case of the residential appraisals, the other two approaches as well), make adjustments to their comps, and reach an ultimate value conclusion. Where they differ, those differences tend to be more of degree than of kind. For example, commercial appraisals generally do a more in-depth analysis of the highest and best use (Item 10, below) of the subject than in the Uniform Residential Appraisal Report ("URAR"). Other than that, commercial appraisals address all the same areas covered in the URAR.

USPAP Standards Rule 2-2(a) sets forth the contents of a USPAP-compliant appraisal report. In brief, that appraisal must include:

1. The identity of the client and any intended users;
2. The intended use of the appraisal;
3. Information sufficient to identify the real estate involved in the appraisal, including the physical and economic property characteristics relevant to the appraisal assignment;
4. The real property interest to be appraised;
5. The type and definition of value and the source of that definition;
6. The effective date of the appraisal and the date of the appraisal report;
7. The scope of work used to develop the appraisal;
8. The information analyzed, the appraisal methods and techniques employed, and the reasoning that supports the analyses, opinions, and conclusions; if any of the appraisal approaches is excluded in the analysis, the reason for the exclusion must be explained;
9. The use of the real estate existing as of the date of the value conclusion and the use of the real estate reflected in the appraisal;
10. When an opinion of the highest and best use is developed by the appraiser, a summary of the support and rationale for that opinion;
11. A clearly and conspicuous statement of all extraordinary assumptions and hypothetical conditions and a statement that their use might have affected the assignment results; and
12. A signed certification in accordance with Standards Rule 2.3.[791]

[791] See *2018-2019 Uniform Standards of Professional Appraisal Practice (USPAP)* at http://www.uspap.org/#.

Standards Rule 2-2(a) does not, however, require that an appraisal follow a specified format, form, or narrative style. Within the context of complying with the above USPAP requirements, commercial appraisals take a number of forms. Below, for illustrative purposes, is one example of the table of contents for a commercial appraisal. As you can see, while it covers the requirements of USPAP Standards Rule 2-2(a), it goes into greater detail than the mandatory USPAP requirements set forth above.

Exhibit 1
Industrial and Commercial Real Estate Appraisal Report
Illustrative Table of Contents

Item Topic

Many of the twelve requirements of USPAP Standard 2-2(a) require the inclusion of information that does not require subjective choices or analysis by the appraiser. Those "noncontroversial" portions of a commercial appraisal typically receive little attention at BOR hearings. Instead, like a URAR appraisal, the portions of the commercial appraisal that are typically of most interest are those that deal with the appraiser's selection of comps, the adjustments to those comps, and the appraiser's methodology and analysis. Item 8, in the list of USPAP requirements above (information analyzed, appraisal methods, opinions, etc.), contains the areas that are commonly the object of questioning at the BOR. In addition, Item 10 regarding the highest and best use, is an area that may also be subject to questioning at the BOR.

But unlike a residential URAR appraisal, which will almost always use only the sales comparison approach, a commercial appraisal will almost always use at least two approaches, and sometimes three. The result is that when a value conclusion is reached under the sales comp approach and under the income capitalization approach, those two values may not be exactly the same. They will need to be reconciled as will be discussed below.

Commercial Appraisals: Questioning for a Commercial Appraisal

The familiar and structured design of the URAR helps guide the questioner through a logical progression of questions in the residential appraisal context. Not so with commercial appraisals. Like the URAR, commercial appraisals are governed by USPAP requirements but unlike the URAR, commercial appraisals are written in narrative form and do not follow a uniform format or structure. Each individual appraiser determines how his/her commercial appraisals are formatted and presented.

Under the time pressures of BOR hearings, new or inexperienced questioners may find it difficult to absorb the information contained in the appraisal while simultaneously adapting their questioning to those varying formats. For that reason, in questioning a commercial appraiser it may be helpful for the questioner to have a standard questioning sequence, protocol, or format to ensure that essential information is elicited.

Commercial Appraisals: Foundational Questions

In developing a standard questioning protocol, the questioner may wish at the outset of the hearing to elicit certain basic, foundational information from the appraiser. Those foundational questions could include some, or all, of the following:

1. Who hired you to do the appraisal?
2. What was the scope of your assignment?
3. Was the appraisal prepared for tax valuation purposes?
4. What is the effective date of your opinion of value?
5. On what date/dates did you visit the site?
6. Did you view the interior of the property as well as the exterior?
7. On what date/dates did you write the report?

Commercial Appraisals: Some Follow Up Questions

Some or all of the questions above may have been self-evidently addressed in the appraisal, thereby eliminating the need to elicit testimony on those questions. If so, the questioner may want to move on to other basic questions including the following:

8. In viewing the interior of the subject, were you escorted by anyone at that location?
9. Was your access to the entire interior restricted or limited in any manner?
10. Did anyone assist you in gathering data for the appraisal?
11. Did anyone assist you in writing the appraisal?
12. Did anyone review the appraisal before you finalized it?
    a. If so, who?
    b. Did you make any edits or changes to either your opinion of value or any other portion of your appraisal based upon comments or concerns expressed to you by others?
        i. If so, what were those changes?

Commercial Appraisals: Highest and Best Use

After obtaining foundational information, it is common for questioners to direct their questioning of commercial appraisers to three main areas: (1) the appraiser's determination of the property's "highest and best use"; (2) the appraiser's selection of the comparable sales and the adjustments made to those comps; and (3) the appraiser's selection of income (rent) comps and

the capitalization rate. Each of those determinations/selections is a critical component of the appraiser's ultimate valuation conclusion.

Commercial Appraisals: Highest and Best Use – What is It?

What is the meaning of the term "highest and best use"? USPAP Standards Rule 1-3(b) gives some context to the role played by a highest and best use determination.

> When necessary for credible assignment results in developing a market value opinion, an appraiser must: **** (b) develop an opinion of the highest and best use of the real estate.[792]

Taking a definition from the International Association of Assessing Officers ("IAAO"), the Ohio Supreme Court has stated that the highest and best use "is that use which will generate the highest net return to the property over a reasonable period of time."[793] *The ARE* further explains that:

> Market forces create market value, so the analysis of market forces that have a bearing on the determination of highest and best use is crucial to the valuation process. When the purpose of an appraisal is to develop an opinion of market value, highest and best use analysis identifies the most profitable, competitive use to which the property can be put.[794]

The highest and best use of a property "will usually be expressed in terms of the *general type of use* to be made of such property."[795] For example, a highest and best use might be expressed as a "retail store" or "retail" as opposed to "PetSmart" or "Menards". The subject property's present use can be considered in determining its value, but it cannot be the only measure of value.[796] Commercial appraisals always include the appraiser's determination of the subject's

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[792] See *2018-2019 Uniform Standards of Professional Appraisal Practice (USPAP)* at http://www.uspap.org/files/assets/basic-html/page-29.html.

[793] See *Rite Aid of Ohio, Inc. v. Washington County Board of Revision*, 146 Ohio St.3d 173, 2016-Ohio-371, ¶ 34.

[794] *The ARE*, 12th Edition at 305.

[795] See *Rite Aid of Ohio, Inc. v. Washington County Board of Revision*, 146 Ohio St.3d 173, 2016-Ohio-371, ¶ 35.

[796] See *Steel Summit Holdings Inc. v. Hamilton County Board of Revision* (January 7, 2020), BTA No. 2018-1620 ("…[a]lthough present use cannot be the *only* measure of value, in a proper case it may be considered in determining true value for tax purposes.") (italics in original). Indeed, in at least one case the BTA found that the highest and best use of a property would be to redevelop it from its current use. See *City of Cincinnati v. Hamilton County Board of Revision* (December 14, 2020), BTA No. 2019-1227 ("Both appraisers agreed and found redevelopment to be the highest and best use. Both presented evidence that the site should be valued as available for redevelopment. The record is clear the use on tax-lien date was a failed use. Accordingly, the correct method for valuing the property was to consider redevelopment.").

highest and best use and that determination, by itself, significantly influences the rest of the appraisal. In particular, the appraiser's highest and best use determination will drive the selection of the sales comps chosen by the appraiser.[797] In turn, those sales comps will typically be factored into, and have a large influence upon, the appraiser's ultimate value conclusion.

Commercial Appraisals: Highest and Best Use – As Vacant and As Improved

The highest and best use determination is made for the property "as though vacant" as well as "as though improved".[798] As stated in *The ARE*, "In the development of an appraisal, the appraiser must distinguish between the highest and best use of the land as though vacant and the highest and best use of the property as improved."[799] According to the Appraisal Institute, the appraiser should engage in a two-step process in her highest and best use analysis.

1. First, the appraiser should decide the subject property's highest and best use of the site as though vacant; and then

2. The appraiser should consider the highest and best use of the property as improved.

   In the first step, you consider whether the property is worth more without the existing improvements than with them. In the second step, you consider possible modifications and changes to the property. These steps follow the thought processes of knowledgeable real estate buyers and owners.[800]

The ARE states that:

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[797] See *South-Western City Schools Board of Education v. Franklin County Board of Revision*, 2018-Ohio-4622 (10th Dist.), ¶ 43 ("Thus, the appraiser's determination of highest and best use of a subject property typically influences the appraiser's subsequent choice of comparable properties in formulating an opinion of the market-exchange value of a property."). See also *Columbus City Schools Board of Education v. Franklin County Board of Revision* (November 30, 2018), BTA Nos. 2016-561, 2016-562 ("We begin our review with a consideration of each appraiser's highest and best use conclusion, which forms the basis for other subjective judgments made by the appraisers, such as the choice of comparable properties.").

[798] For example, in a 2016 BTA case a well-known appraiser testified regarding the highest and best uses of the subject as though vacant and as though improved, as follows: "Highest and best use analysis in my opinion as vacant would be for a national single tenant user. And as improved, the existing improvements, in my opinion, occupied by a national restaurant contributes value beyond the site as if vacant." Testimony of Thomas D. Sprout, *Dublin City Schools Board of Education v. Franklin County Board of Revision*, BTA Case Nos.2016-425; 2016-426; and 2016-428, Proceedings-Volume II at 270.

[799] *The ARE*, 12th Edition at 306.

[800] See, *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 158.

> Highest and best use of the land or site as though vacant may be the existing use, a projected development, a subdivision, or an assemblage; alternatively, it may involve holding the land as an investment.[801]

In nearly all cases the highest and best use of land, as vacant, will be the use that generates the highest land value.[802]

Commercial Appraisals: Highest and Best Use – Four Elements

Whether appraised as vacant or as improved, it is well established that four criteria must be met to determine the highest and best use of a subject property. The subject must be: [1] legally permissible, [2] physically possible, [3] financially feasible, and [4] maximally productive."[803] There are occasions when the appraiser's determination of the subject's highest and best use is not disputed by the other party or there may be no dispute as to the appraiser's determination of one or more of the above four elements. In those instances, there will typically be little or no questioning on those determinations by the appraiser. For example, in some cases there may not be any dispute that the improvements on the property are legally permissible and physically possible.

Commercial Appraisals: Highest and Best Use – Questioning the Appraiser Regarding Whether the Subject is Legally Permissible and Physically Possible (Elements 1 and 2)

On the other hand, given the critical role that the highest and best use determination plays in the appraiser's ultimate opinion of value, the questioner may wish to develop a general protocol or outline of questions that can be utilized on short notice to question the appraiser about her highest and best use determination. On an element-by-element basis, those questions may include some or all the following:

Questions Regarding Whether the Subject is Legally Permissible

Questions regarding legal permissibility may include the following:

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[801] *The ARE*, 12th Edition at 309.

[802] See, *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 159.

[803] See *The ARE*, 12th Edition at 307. See also *Rite Aid of Ohio, Inc. v. Washington County Board of Revision*, 146 Ohio St.3d 173, 2016-Ohio-371, ¶ 34.

1. In what jurisdiction is the subject located?
2. Does that jurisdiction have zoning laws?
3. What are the applicable zoning regulations regarding the subject?
4. Was it necessary to obtain a variance or conditional use authorization from any applicable government body before the subject could be constructed?
5. Are there any setback requirements or other restrictions on the area of the subject parcel on which a building can be constructed?
6. Is the subject required to comply with any building or other safety code requirements?
7. Is the subject under lease?
8. Are there any restrictions to certain uses under the deed that currently underlies the property?
9. Is the subject required to comply with any easements or restrictions other than utility easements?
10. Are there any other permits or certificates required from the applicable jurisdiction(s) before the subject may be legally occupied?

Questions Regarding Whether the Subject is Physically Possible

Questions regarding whether the subject building is physically possible may include some or all of the following:

1. What is the soil type and can it support the structure?
2. What is the topography (flat, hilly, swampy, floodplain, etc.)?
3. What is the size/shape of the parcel and can it support the proposed use?
4. Where on the parcel is the building located?
5. Is there room for expansion?
6. Do any changes need to be made to the site/building to bring it to its highest and best use?

As stated in *The ARE*:

> …the result of the test of physical possibility are often implicit-i.e., the existing use is obviously physically possible…In these situations, the appraiser would conclude that continuation of the existing use meets the physical possibility test…[804]

[804] *The ARE*, 12th Edition at 318.

Commercial Appraisals: Highest and Best Use – Questioning the Appraiser Regarding Whether the Subject is Financially Feasible (Element 3)

In general, a subject property is considered financially feasible when its use or, in the case of vacant property, potential use is "likely to produce an income (or return) equal to or greater than the amount needed to satisfy operating expenses, financial obligations, and capital amortization of the investment."[805] In determining whether the subject is financially feasible the appraiser is likely to review and/or determine a range of information including the subject's future gross income, rates of vacancy and collection loss, net operating income, and capitalization rate.[806] Those data and conclusions may also be the subject of questioning when the appraiser is questioned about her income approach.

Where property is improved, the test of financial feasibility addresses the market demand for the property in its then-current state.[807] Financial feasibility for improved property is informed by the conclusions of the three approaches to value (cost, sales, and income) as well as the estimate of the land value.[808] When property is appraised "as vacant" an appraisal may often focus on those potential uses likely to produce an income or return equal to or greater than the carrying costs. Commercial appraisals typically devote substantial attention and effort to the question of whether the subject is financially feasible. As a result, many of the sample questions below may have been answered in the written appraisal. In all events, a questioner should review in detail the financial feasibility section of an appraisal.

Questions Regarding Whether the Subject is Financially Feasible

With that as background, questions regarding whether the subject property is financially feasible may include some or all of the following:

1. In determining if the subject is financially feasible, what uses did you look at?

[805] *The ARE*, 12th Edition at 313-314.

[806] *The ARE*, 12th Edition at 314.

[807] *The ARE*, 12th Edition at 318.

[808] *The ARE*, 12th Edition at 318.

2. Did you prepare any proforma net operating income statements for each of these uses?
3. Was the subject financially feasible in all of those uses?
4. In determining financial feasibility, what data did you review?
5. Did you do any calculations based on that data?
    a. Are those calculations in your appraisal?
6. In your analysis, did you prepare any written financial estimates?
7. In determining financial feasibility, would it be useful to know the price of surrounding lots or parcels?
    a. Did you do a review of the prices of the surrounding lots/parcels?
8. Were there any factors or facts that you explored in determining financial feasibility that are not discussed in your discussion of the three valuation approaches in your appraisal?

Commercial Appraisals: Highest and Best Use – Questioning the Appraiser Regarding Whether the Subject is Maximally Productive (Element 4)

The determination as to whether the subject is "maximally productive" comes into play only if the first three elements (physically possible, legally permissible, and financially feasible) have been satisfied.[809] Determining whether a specified use is maximally productive, then, is the last step in determining the subject's "highest and best" use. As explained by the Appraisal Institute, "Not only must the proposed use satisfy all the requirements explained earlier, it must also maximize the return."[810]

To determine whether a property, as though vacant, is maximally productive the appraiser is required to review those uses that were found to be financially feasible. Of those financially feasible uses, the highest and best use for the subject is the one that "produces *the highest residual land value consistent with the market's acceptance of risk* and with *the rate of return warranted by the market for that use*."[811] (italics added). Usually the highest residual value

[809] *The ARE*, 12th Edition at 314 ("The test of maximum productivity is applied to the uses that have passed the first three tests.").

[810] See, *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 160.

[811] *The ARE*, 12th Edition at 314.

means "a long-term land use that is expected to remain on the site for the normal life of the improvements."[812]

Questions Regarding Whether the Subject is Maximally Productive

The italicized language above represents the appraiser's arguably subjective judgments which can be explored with some or all of the following questions:

1. You indicated that the highest and best use for the subject is as a [SPECIFIED USE], correct?
2. And determining that that use is maximally productive is a critical component of your highest-and-best-use determination, correct?
3. Being maximally productive, in turn, produces the highest residual value of the land, correct?
4. Can you specify the data that you reviewed to make the determination that the [SPECIFIED USE] is the one that makes it maximally productive?
5. Can you explain your understanding of the term "highest residual value"?
6. Can you explain your methodology in determining that the use you selected produces the highest residual value?
7. According to *The ARE* the highest residual value must be "consistent with the market's acceptance of risk", correct?[813]
8. How did you determine the market's acceptance of risk in this case?
    a. Did you rely on certain data or reference materials or was this just something based upon your experience?
    b. What were those data/materials and why did you select those as your reference resource?
9. According to *The ARE*, the highest residual value must be consistent with "the rate of return warranted by the market for that use",[814] correct?
10. For the use you selected, did you determine the rate of return warranted by the market?
    a. What was that rate of return?
    b. How did you determine that rate of return?

[812] *The ARE*, 12th Edition at 315.

[813] *The ARE*, 12th Edition at 314.

[814] *The ARE*, 12th Edition at 314.

Where the property is improved, the appraiser may have determined that certain actions need to be taken, and costs thereby incurred, to maximize the value of the subject property. These actions could include things such as addressing deferred maintenance issues or demolishing all or part of a structure on the property. Where the appraiser determines that such actions would bring the property to maximal productivity, they should be set forth in the appraiser's highest and best use conclusion.[815] According to *The ARE*:

> Successful completion of the test of maximum productivity should allow the appraiser to specify exactly what expenditures, if any, would allow the subject property to achieve its highest and best use. These expenditures should be reflected in the conclusion of the highest and best use of the property as improved as well as in the application of each approach to value.[816]

With that in mind, then, some questions that a questioner may wish to ask the appraiser regarding the expenditures, if any, needed to bring the subject property to maximum productivity are as follows:

1. In making your determination of what use would prove maximally productive at the subject property, did you determine whether the subject should undergo any rehabilitation, modernization, or other improvements?
    a. What were those changes?
    b. Were you able to determine how much those changes would cost?
        i. What was that amount?
2. In making your determination of what use would prove maximally productive at the subject property, did you determine that the subject should undergo any maintenance that had been deferred?
    a. What maintenance was that?
    b. Were you able to determine how much that deferred maintenance would cost?
        i. What was that amount?

The questions identified above are starting points only and, depending upon the particular circumstances of the subject property and the methods used and conclusions reached by the appraiser in rendering her opinion, may be highly applicable or have little applicability at all

[815] *The ARE*, 12th Edition at 318 – 319.

[816] *The ARE*, 12th Edition at 319.

in "testing" the appraiser's highest and best use conclusion. With prior preparation, there is certainly nothing wrong with a questioner going into the hearing with a list of questions, or areas of inquiry, for the appraiser. But questioners, particularly those with little experience questioning appraisers, should not be handcuffed to their list of questions. The proper questioning of any witness in a judicial or quasi-judicial proceeding always requires that the questioner simultaneously juggle the information that, by virtue of her pre-hearing preparation, she intends to elicit from the appraiser while also listening carefully to the appraiser's responses in a manner that allows her to ask relevant follow up questions in response to the appraiser's answers.

Commercial Appraisals: The Three Approaches to Value

In residential appraisals, given that most single dwelling residences are owner-occupied and that there is frequently wide availability of comparative sales data for residential units, appraisers typically rely exclusively on the sales comparison approach. Commercial appraisals, on the other hand, typically utilize – and then reconcile - both the sales and income approaches to value. The cost approach is utilized much less frequently in commercial appraisals; typically, in cases involving new construction or circumstances where the property is not income producing and when the sales approach is of limited use due to a lack of comparable transfers.[817]

Commercial Appraisals: Similarities and Differences with the URAR

The selection of sales comps is a critical step in the valuation process and designed to help the appraiser determine the price at which properties comparable to the subject are currently being sold in the subject's marketplace. As defined by the Appraisal Institute, the sales comparison approach is:

> …the process of deriving a value indication for the subject property by comparing sales of similar properties to the property being appraised, identifying appropriate units of comparison, and making adjustments to the sale prices (or unit prices, as appropriate) of the comparable properties based on relevant, market-derived elements of comparison.[818]

[817] *The ARE*, 12th Edition at 63, 353-354. Regarding the use of the three approaches see OAC 5703-25-07(D). See also *Balco Realty L.L.C., Successor to Spirit Master Funding IX, L.L.C.*, 8th Dist. Cuyahoga No. 110207, 2021-Ohio-3349, ¶ 23.

[818] See Appraisal Institute, *The Dictionary of Real Estate Appraisal*, 6th ed. (Chicago: Appraisal Institute, 2015), 207.

By selecting sales comps that are truly comparable to the subject and making appropriate adjustments (for physical and other differences between each comp and the subject) the appraiser is able to determine the sales price at which the subject would likely sell in that marketplace. On the other hand, if an appraiser selects sales comps that are *not* truly comparable to the subject, then the appraiser's opinion of the subject's value will be distorted because it will be based on sales pricing data of previously sold properties that are *not* similar to the subject.

Like with residential appraisals, the proper selection of sales comps is essential in commercial appraisals. Previously, we reviewed the URAR and some of the ways in which an appraiser can be questioned regarding her selection of comparable residential sales. For sure, there are some common considerations when questioning an appraiser about the selection of comparable sales in both residential and commercial contexts. In particular, the questioner's goal in both contexts is to ensure that the appraiser has selected comparable sales that are, in fact, truly comparable to the subject. Further, in both contexts the appraiser will be required to make adjustments in order to "zero out" the differences between the subject and each of the comps so that an appropriate valuation can be placed on the subject.

But there are also significant differences between residential and commercial appraisals. A commercial appraisal will almost always be more detailed than a residential one and in the selection of appropriate sales comps will consider a range of property characteristics that are important for commercial properties but given little consideration in the appraisal of residential properties. These would include the customer demographics of the surrounding area, the availability of customer parking, highway access, the location of the property near other commercial establishments, and the nature of the financing for the commercial property, to name just a few. In the selection of commercial sales comps, an appraiser strives to find comparative sales that contain these and other commercially significant characteristics, not relevant in the selection of residential comps, that most closely replicate the subject commercial property.

SALES COMPARISON APPROACH

Commercial Appraisals: Questions for the Appraiser Regarding the Sales Comparison Approach ("Sales Approach") and the Selection of Comparable Sales

According to the Court of Appeals:

> The sales-comparison approach values the subject property by comparing it with similar, or comparable, properties that have recently sold and that reflect the subject property's market value. The sale price of each comparable property is adjusted for factors like market conditions at the time of sale, building size, location, and quality and condition. Based on the adjusted sales prices, a market price for the subject property is determined.[819]

The ARE states that the sales comparison approach to valuation involves a five step process in which the appraiser should (1) research data about relevant comparable transactions; (2) verify that the data is accurate and that the comparable sales were arm's length; (3) select relevant units of comparison (i.e.: total property price, price per square foot, etc.);[820] (4) determine differences between the subject and the comps and make adjustments to the comps to compensate for these differences; and (5) reconcile the multiple values for the comps into a single value or range of values (i.e.: determining the range of potential values for the subject by using sales values from two or more comps).[821]

Each of these five areas presents the questioner with opportunities to discover the appraiser's methods and reasoning and, in so doing, to potentially uncover weaknesses in either or both. In general, weaknesses in an appraisal are often found in areas that require the greatest amount of subjective judgment by the appraiser. But areas (1) (research), (2) (verification procedures), and (3) (comparison units) involve little subjective judgment, dealing instead with information that is relatively straight forward or readily verifiable. Similarly, area (5) (reconciling to develop a range of values or a single value) entails limited subjective analysis. As such, inquiry into those areas often reveals little about the appraiser's methods or subjective reasoning. On the

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[819] See *West Carrollton City Schools Board of Education v. Montgomery County Board of Revision*, 2nd Dist. Montgomery No. 27679, 2018-Ohio-2322, ¶ 20.

[820] *The ARE*, 12th Edition at 424.

[821] *The ARE*, 12th Edition at 422, 428.

other hand, area (4) (differences between the subject and the comps and adjustments to the comps) is often most revealing about the appraiser's subjective judgment.

Just like an appraiser using a URAR in a residential appraisal is required to determine the subject's "neighborhood", an appraiser in a commercial appraisal is required to determine the subject's geographic market area. But because the potential pool of comparable sales is often smaller for commercial properties than it is for residential properties, an appraiser who is appraising a commercial property may be required to search for and select comps from outside the subject's geographic market area. Differences between the geographic area of the subject and the comps, in turn, present opportunities to question the appraiser regarding the market conditions or demographics of the geographic area in which the comp is located. Those distinctions can be important. As stated by *The ARE*:

> A description of prevalent market conditions helps the reader of an appraisal report understand the motivations of participants in the market for the subject property…Market analysis yields information needed for each of the three traditional approaches to value…In the cost approach, market analysis provides the basis for adjusting the cost of the subject property for depreciation…In the income capitalization approach, all the necessary income, expense, and rate data is evaluated in light of the market forces of supply and demand. In the sales comparison approach, the conclusions of market analysis are used to delineate the market and thereby identify comparable properties.[822]

Most appraisers, of course, will be able to readily identify the physical and other differences between the comp and the subject. Below we will identify certain basic questions that can be asked in each of the five sales comparison appraisal steps identified above, but it is important to note that often the most fruitful avenue of inquiry is to question the appraiser about the percentage or dollar amount of the adjustment she made to each comp and why she hit upon that percentage or amount (i.e. What was the appraiser's reasoning in adjusting one factor 10% instead of 20%?). As stated by the BTA, "There has to be some parity, or some method of establishing parity, between the properties before [comparable] sales prices have any meaning."[823]

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[822] *The ARE*, 12th Edition at 59 – 60.

[823] See *Columbus City Schools Board of Education v. Franklin County Board of Revision* (September 9, 2019), BTA Nos. 2017-615, 2017-616, 2017-668, 2017-669.

While differences between comps and the subject can be "zeroed out" through adjustments, as a general rule the greater the adjustment, the greater the potential for subjectivity.

Sales Approach – Questions Regarding the Extent and Thoroughness of The Appraiser's Research Into Potential Comp Sales

1. How did you locate the sales comps?
2. Did they come from a database contained in your office?
3. How often is the database updated?
4. Is it updated by you or anyone else?
5. Other than the database, did you do any independent research to discover sales comps?
6. Have you used any of these sales comps in other appraisals?
    a. Which ones?
    b. How many times do you estimate you've used those particular sales comps?
7. Did you use any other sources in finding the comps?
8. Did the appraisal go through more than one draft?
    a. Who wrote the first draft of the appraisal?
    b. Who wrote the final draft of the appraisal?
9. Who reviewed it before it was finalized?
10. Did the owner's attorney see the draft before it was finalized?
    a. Did the attorney provide you with written or oral comments
    b. After receiving those comments, did you make any changes to the draft of the appraisal?
11. If changes were made, did you keep a draft of the earlier appraisal?

Sales Approach – Questions Regarding the Extent and Thoroughness of the Appraiser's Verification of Each Sales Comp Transaction

12. As to each comp sale:
    a. How did you verify the sale?[824]

[824] See *Ephraim Fitterman v. Cuyahoga County Board of Revision* (March 29, 2021), BTA No. 2020-26 ("…we do not find the sales comparison approach to be credible. [The appraiser] confirmed that he did not verify the comparable sales with people involved in the respective sales. This Board has previously rejected reliance on unverified sale information. [citations omitted] *The Appraisal of Real Estate* (14th Ed.2013) also comments on the need to verify information regarding the comparable sales 'to make sure that the sale occurred under conditions that meet the definition of value based in the appraisal.'"). See also *Nachi Investments, LLC v. Cuyahoga County Board of Revision* (April 5, 2021), BTA No. 2020-25 ("…[the appraiser] confirmed that he did not verify the comparable sales with people involved in the respective sales. This Board has previously rejected reliance on unverified sale information."); *Robert Stone Trustee Robert Stone Trust 7-21-99 v. Cuyahoga County Board of Revision* (August 16, 2021), BTA No. 2021-496 ("We must reject the…appraisal report…the [appraiser] conceded that he did not verify the comparable sales with people involved in the respective sales and solely relied upon information provided by the Multiple Listing Service (more commonly known as "MLS") to determine the condition of the comparable properties. Because he did not verify the details of the comparable sales and because he did not inspect the comparable sales to determine their condition, it is unclear how [the appraiser] determined that the condition adjustments in his appraisal report were proper. This Board has previously rejected reliance on unverified sale information.").

i. Did you review the records of the county auditor and recorder?
ii. Did you speak with anyone directly involved in the sale to determine if it was an arm's length transaction?
iii. Did you read the sales contract in each case?
iv. Did you speak with the buyer and seller in each of the comp sales?
v. Did he inspect any of the comparable sales?

13. As to market information:
    a. Regarding your market analysis, where did you find your demographic data?
    b. How current is it?
    c. Did you utilize any U.S. Census Data?
        i. Are you familiar with U.S. Census online tools known as Data Profiles?
        ii. Are you aware that the Census data profiles can get you information about demographics down to the census tract level?[825]
    d. Are you familiar with the fact that by using census data you can compare the demographics of certain geographic areas to determine if they are compatible?
    e. Are you aware that you can use census data to compare the household incomes of certain geographic areas?
    f. Any reason why you did not use census data directly?

<u>Sales Approach – Questions Regarding Whether Appropriate Units of Comparison Were Used Between the Subject and the Comps</u>

NOTE: Usually there is little to question here, as most appraisers will use price per square foot or some other generally acceptable measurement in coming to an appropriate conclusion of value.

<u>Sales Approach Differences Between the Subject and Each Comp; Adjustments Made to Correct for These Differences</u>

14. The determination of what is a comp is a matter of your judgment, correct?
15. The selection of comps involves a large degree of subjectivity, correct?[826]

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[825] See https://www.census.gov/data/academy/data-gems/acs-data.html and https://www.census.gov/data/academy/data-gems/neighborhood-areas.html .

[826] See *Columbus City schools Board of Education v. Franklin County Board of Revision* (November 30, 2018), BTA Nos. 2016-561, 2016-562 ("We begin our review with a consideration of each appraiser's highest and best use conclusion, which forms the basis **for other subjective judgments made by the appraisers, such as the choice of comparable properties**.") (bolding added)

16. The adjustments that you make to the comps are largely subjective, correct?
17. Have you ever done an appraisal for the subject property before?
    a. When?
    b. What was valuation at that time?
    c. On any prior appraisal for this property or any earlier draft of the appraisal in the current case, did you reach a valuation that was in any manner different than the value conclusion that is in your final appraisal?

Questions Regarding Recency

18. When were each of the comps last sold?
19. For the time that elapsed from the sale to the effective date of the appraisal, did you make a determination as to whether market or economic conditions had changed in the market in which the comp is located?
20. How was that determination made?

Questions Regarding Restrictions on Use

21. Did you read the zoning ordinance applicable to both the comp and the subject?
    a. Any differences?
    b. If differences, how did you adjust for those differences?
22. Did you review the deed to determine if there were any use restrictions contained within the deeds for the subject and the comps?
23. Did you determine if there were any environmental issues with either the subject or the comps?

Questions Regarding Location[827]

24. Do you agree that for commercial properties location is a key determinant of value?
25. Would it be fair to say that for commercial properties, with all other things being equal, the property with the better vehicular visibility and access is worth more than the property with worse vehicular visibility and access?
26. Are there any differences in type of road or vehicle access between the subject and the comps?

[827] According to *The ARE*, "Location considers time-distance relationships, or linkages, between a property or neighborhood and all possible origins and destinations of residents coming to or going from the property or neighborhood." See *The ARE*, 12th Edition at 46.

27. In comparing the location of the comps to the subject did you attempt to obtain information regarding vehicle counts on the road leading to the subject?
28. In comparing the location of the comps to the subject did you have access to information regarding vehicle counts on the roads leading to the comps?
29. Can disparities in vehicle counts on roads giving access to a property affect the value of that property?
30. Did you make any adjustments between the subject and the comps for location?

Questions Regarding Financing

31. Did the appraiser investigate whether the buyer (current owner) got financing from the then-seller?
    a. Did appraiser investigate whether the financing was more favorable than the market rate at the time?
    b. Are there any differences between the financing terms for the subject and the financing terms for any of the comps?
32. Describe the financing terms of the comps vs. those of the subject
33. In your opinion, did the financing terms of any of the comps affect their value?
    a. Explain.

Questions Regarding the Interests Conveyed

34. What were the interests conveyed in each of the comps?
35. Were any of them encumbered by a lease?
36. Are there any differences between the interests conveyed in the comps and those of the subject?
37. Explain.

Questions Regarding Expenditures After Purchase

38. Did buyer (current owner) make any expenditures after purchase (deferred maintenance, demolition or removal of improvements, petition for zoning changes; costs to remediate environmental contamination
39. Did you determine if any expenditures were incurred by any of the comps, post-sale, for items like deferred maintenance, remediation of environmental issues, demolition or improvements?

INCOME CAPITALIZATION APPROACH

The Income Approach: Questioning the Appraiser Regarding the Income Capitalization Approach

The income capitalization approach ("the income approach") is the least intuitive of the three appraisal approaches and to non-appraiser questioners at the BOR may be the most challenging to understand. Not surprisingly, under the daily time press of back-to-back BOR hearings and in the blur of the numbers and nuance sworn to by appraisers at those hearings, many questioners feel intimidated or incapable of conducting a meaningful examination of the appraiser's income approach methods and conclusions. That is unfortunate because, as with other aspects of appraisal practice, the appraiser's ultimate value conclusion using the income approach incorporates, of necessity, many assumptions and educated guesses. As with the sales approach, it is those judgments, assumptions, and educated guesses that are most susceptible to subjective influences, conscious or not, and that provide the grist for effective questioning of the appraiser at the BOR.

But before we can intelligibly question an appraiser about the income approach it is critical to have at least a basic understanding of its underlying theory and the methods and reasoning used by appraisers in reaching value conclusions under this approach. Under the income approach, the value of a property is based upon its earning power and appraisers "convert periodic (usually annual) expected income into a lump-sum capital value today."[828] That lump-sum value is the current property value under the income approach. As stated by *The ARE:*

> Income-producing real estate is typically purchased as an investment, and from an investor's point of view earning power is the critical element affecting property value…An investor who purchases income-producing real estate is essentially trading present dollars for the expectation of receiving future dollars. The income capitalization approach to value consists of methods, techniques, and mathematical procedures that an appraiser uses to analyze a property's capacity to generate benefits (i.e., usually the monetary benefits of income and reversion) and convert these benefits into an indication of present value.[829]

[828] See also *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 286.

[829] *The ARE*, 12th Edition at 471.

According to the Court of Appeals:

> In the income-capitalization approach, the value of the subject property is the present worth of anticipated future income derived from the property. This is calculated by estimating the property's net annual operating income and then applying a rate of capitalization that reflects the relative certainty of continuing to earn that income and the risks of ownership. The net operating income is based on the lease rates of comparable properties. And the appropriate capitalization rate is determined by looking at the capitalization rates of similar properties.[830]

Like other investors, real estate investors expect both the return *on* the capital they invest (i.e., a monthly or periodic payment as compensation for the borrower's use of the investor's capital), and the return *of* the capital – the actual money invested - itself.[831] The riskier the investment, of course, the higher the return expected by the investor.[832] So, for example, an investment property that is fully rented with long-standing financially secure tenants is a lower risk, and an investor would correspondingly expect a lower rate of return, than an investment in a property that is not fully rented and has fewer established, financially secure tenants. The investment in the second building is more speculative, riskier, and an investor would expect a higher rate of return to compensate for the additional risk she is taking on.[833] Appraisers are aware of those reasonable investor expectations in their selection of an appropriate capitalization rate ("cap rate").[834]

The Income Approach: Finding Value Through the "IRV" Formula

In the income approach a property's current value is typically determined by using the "IRV" formula where the "I" stands for the property's **net operating income**, the "R" stands for

[830] See *West Carrollton City Schools Board of Education v. Montgomery County Board of Revision*, 2nd Dist. Montgomery No. 27679, 2018-Ohio-2322, ¶ 20.

[831] *The ARE*, 12th Edition at 48.

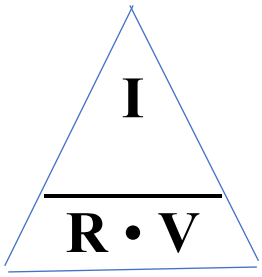
[832] *The ARE*, 12th Edition at 472.

[833] *The ARE*, 12th Edition at 491 ("Generally, higher overall capitalization rates…are associated with less desirable properties, and lower overall capitalization rates with more attractive properties.").

[834] *The ARE*, 12th Edition at 491 – 492.

the **capitalization rate**, and the "V" stands for the **value** of the property.[835] "Net operating income" is defined as "The actual or anticipated net income that remains after all operating expenses are deducted from effective gross income, but before mortgage debt service and book depreciation are deducted…"[836] "Capitalization rate" has been simply defined as "any rate used to convert income into value."[837] The "value" referred to in that definition is the present value of the property.

Graphically, the IRV formula looks like this:



The horizontal line over the "R•V" signifies mathematical division. If an appraiser (or one questioning an appraiser) has any two of the three IRV variables (I, R, or V) she can determine the third variable by using the IRV formula. So, for example, if you know the net operating income of the property ("I") and the value of the property ("V"), you can determine the capitalization rate ("R") using the above formula by dividing the "I" by the "V". That division will yield the capitalization rate for that property. The IRV variables can be manipulated such that if you want to find "I", you multiply R x V. If you want to find "R", you divide I by V.

In most instances, however, the "V" (value of the property) is the missing variable – the one which the appraiser is hired to determine - and in reaching a value opinion for "V", through her research the appraiser will have already determined the property's "I" (net operating income) and

[835] See Ohio Administrative Code Section 5703-25-07(D)(2) ("The income approach - The value is estimated by capitalizing the net income after expenses, including normal vacancies and credit losses. While the contract rental or lease of a given property is to be considered the current economic rent should be given weight. Expenses should be examined for extraordinary items. In making appraisals by the income approach for tax purposes in Ohio provision for expenses for real property taxes should be made by calculating the effective tax rate in the given tax district as defined in paragraph (E) of rule 5703-25-05 of the Administrative Code, and adding the result to the basic interest and capitalization rate. Interest and capitalization rates should be determined from market data allowing for current returns on mortgages and equities. The income approach should be used for any type of property where rental income or income attributed to the real property is a major factor in determining value. The value should consider both the value of the leased fee and the leasehold.").

[836] *The Dictionary of Real Estate Appraisal*, 4th Edition, at 195.

[837] *The Dictionary of Real Estate Appraisal*, 4th Edition, at 41.

its “R” (see below for methods to determine “I” and “R”). The initial steps, then, are for the appraiser to determine both the “I” and the “R”. Once those two variables are determined, they can be plugged into the IRV formula to reach a value conclusion under the income approach.

Using the IRV variables, the formula to determine “V”, when you know “I” and “R”, looks like this:

$$\frac{I}{R} = V$$

But in order to calculate the “I” and “R” variables, the appraiser is required to *make certain assumptions* about future income and expenses and to *use her judgment* as to what is, and is not, a comparable property. Those two mental processes – making assumptions and using judgment – are not quantifiable scientific or mathematical events. Instead, they each involve the appraiser’s subjective thought process. As discussed below, that thought process and the factual and other assumptions on which that thought process is based, provide the questioner with opportunity to explore and test the methods and reasoning of the appraiser.

The Income Approach: Direct Capitalization vs. Yield Capitalization

Within the income approach, there are two income capitalization methods: the direct capitalization method and the yield capitalization method. The direct capitalization approach is the one most commonly seen at the BOR and the one we will discuss below. Under direct capitalization “a single year’s income is divided by an income rate or multiplied by an income

factor to reach an indication of value."[838] The one-year period starts at the date of value (tax lien date) and runs for the next twelve months.[839]

The Income Approach: A Sequence to Determine Income and Expenses

Like the sales approach, in the income approach the appraiser utilizes comparable properties to determine market rates for income and expenses. But the appraiser will also review the historical income and expenses for the subject as well.[840]

As stated by *The ARE*, in the income approach:

> As an initial step both methods [direct and yield] require a comprehensive study of historical income and expenses for the subject property. This study is combined with an analysis of typical income and expense levels for comparable properties…certain steps are essential in applying the income capitalization approach.[841]

The appraiser then follows a sequence of steps, discussed in greater detail below, to find net operating income. The goal, of course, is to determine the dollar amount of "I" (net operating income) so that it can then be plugged into the IRV formula.

[838] *The ARE*, 12th Edition at 493. In yield capitalization, "future benefits are converted into a value indication by discounting them at an appropriate yield…or [by] applying an overall rate that reflects the income pattern, value, change, and yield rate."

[839] *The ARE*, 12th Edition at 493.

[840] See *Westlake Board of Education v. Cuyahoga County Board of Revision* (September 1, 2006), BTA No. 2004-1301 ("To arrive at income expectancy, an appraiser reviews the subject property's historical income and expenses. These are then combined with an analysis of typical income and expense levels found for comparable properties.").

[841] *The ARE*, 12th Edition at 493.

Net Operating Income

Net Operating Income: The Sequence of Calculations to Reach a Net Operating Income (the "I" of IRV)

As mentioned above, the appraiser determines NOI by conducting a sequence of calculations which can be depicted as follows:[842]

STEPS		NET OPERATING INCOME FORMULA
FIRST:		Potential Gross Rental Income (PGI)
SECOND:	Minus	Vacancy and Collection Loss (VCL)
THIRD:	Equals	Effective Rental Income
		Effective Rental Income
FOURTH:	Plus	Other Income (if any) (may or may not be subject to VCL reduction)
FIFTH:	Equals	**Gross Operating Income**
		Gross Operating Income
SIXTH & SEVENTH:	Minus	Operating Expenses (Determine Operating Expenses & then deduct)
	Equals	**NET OPERATING INCOME (NOI)**

An understanding of this sequence, discussed below, and of the factual assumptions that the appraiser must make in calculating NOI under this sequence enables the questioner to focus her questions on the factual and logical basis used by the appraiser to support those assumptions.

Net Operating Income: How to Calculate Each Component of the Net Operating Income Formula – A Seven Step Approach

As shown above, the "Net Operating Income Formula" ("NOI Formula") consists of several component parts (i.e. "Potential Gross Rental Income, Vacancy and Collection Loss, etc.). Each of those components must, in turn, be calculated before they can be plugged into the NOI Formula. The manner in which each of those components is determined and the sequence in which they should be determined are discussed below.

[842] *The ARE*, 12th Edition at 493 – 494. See also, *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 289 – 290; *Dave L. Schroyer (CRA-DA Properties LLC) v. Mercer County Board of Revision* (April 8, 2019), BTA No. 2018-1273.

FIRST: Determine Potential Gross Income ("PGI")

The ARE defines PGI as "The total income attributable to real property at full occupancy before operating expenses and vacancy and collection losses are deducted."[843] Regarding the determination of PGI, USPAP states that "When an income approach is necessary for credible assignment results, an appraiser must: (i) analyze such comparable rental data and/or the potential earnings capacity of the property to estimate the gross income potential of the property; (ii) analyze such comparable operating expense data as are available to estimate the operating expenses of the property."[844] The Comments to that standard state that:

> In developing income and expense statements and cash flow projections, an appraiser must weigh historical information and trends, current supply and demand factors affecting such trends, and anticipated events such as competition from developments under construction.[845]

Net Operating Income: "Market" Income and Expenses Should be Used Over the Subject's Actual Income and Expenses

The USPAP standard and its comment make clear that in determining PGI the income and expenses of "the market," as opposed to the subject's actual income and expenses, should be used; the "market" being the range of income and expenses that comparable properties are generating and incurring. There is, however, an exception to this. Where the subject's actual income and expenses fall within market ranges, the Ohio Supreme Court has allowed that "…[A]n appraiser may employ [the subject's] actual income as reduced by actual expenses if both amounts conform to the market."[846] But if the subject's actual income and expense data are not supported by the market, then they cannot be used. As stated by the BTA:

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[843] *The ARE*, 12th Edition at 483.

[844] See USPAP Standards Rule 1-4(c)(i) and (ii) Similarly, in conducting their appraisals county auditors in Ohio are bound by the Ohio Administrative Code ("OAC") which states that in an income-approach appraisal "While the contract rental or lease of a given property [the subject] is to be considered the current economic rent should be given weight." The phrase "economic rent" means a market rent derived from rent at comparable properties.

[845] See USPAP at http://www.uspap.org/#30..

[846] See *Olmstead Falls Village Assn. v. Cuyahoga County Board of Revision*, 75 Ohio St.3d 552 (1996). See also, *Board of Education of the Columbus City Schools v. Franklin County Board of Revision* (February 27, 2015), BTA No. 2014-2022 ("Under the income approach, Mr. Koon [the appraiser] considered the subject's actual rents as compared to those of six rent

> … the income approach to value [utilized by the appraiser in that case] is not supported by any market data, but rather by the subject's actual performance. Without any evidence to support that the subject's actual rents, vacancies, credit loss, or rental incentives are representative of market conditions, we are unable to find the income approach to be competent and probative evidence of value.[847]

The steps set forth below assume that the appraiser is using direct (as opposed to yield) capitalization and that the time period in question is twelve months commencing on the tax lien date. With that background, then, an appraiser will take the following steps to determine PGI.

1. Determine the "market's" annual dollar amount of PGI by examining the PGI of comparable properties. In doing this, the appraiser will need to examine and select other properties for comparability with the subject.

   PGI for the comps and the subject consists of "Rent for all space in the property – e.g. contract [actual] rent for current leases, market rent for vacant or owner-occupied space percentage and overage rent for retail properties; rent from escalation clauses; reimbursement income [from tenants]; all other forms of income to the real estate – e.g., income from services supplied to the tenants and income from coin-operated equipment and parking fees."[848]

2. Determine the subject's annual PGI by assuming that the subject is 100% occupied at a non-discounted rent.

3. Estimate the *future* percentage increase or decrease in rent for the market ("The Percentage Change"). According to *The ARE* "Assessing the earning power of a property means reaching a conclusion regarding its net

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comparables…Mr. Koon essentially utilized the subject's rental rates, indicating they were reflective of market levels…we find Mr. Koon's estimate of the subject's income…to be based upon more thorough research and, ultimately, then, better supported."); *Graceland Shoppers Limited Partnership v. Franklin County Board of Revision* (October 7, 2008), BTA No. 2006-112 ("To arrive at an income expectancy, an appraiser reviews the subject property's historical income and expenses. These are then combined with an analysis of typical income and expense levels found for comparable properties…To determine an income, Mr. Kaliker [the appraiser] estimated a market rent for the subject by surveying rental rates being asked at five properties, which he considered to be comparable to the subject property, and then weighing those comparable rents against actual rental rates at the subject."). See also *Maria N. Caras v. Montgomery County Board of Revision* (February 12, 2020), BTA No. 2019-1289 (We [BTA] have previously stated that 'the evidence of actual income, while the beginning point of any valuation finding…, is not, in itself determinative of value. The contract [actual] rents must reflect the market in which the [subject] property is found."); *Cloverleaf Local Schools Board of Education v. Medina County Board of Revision* (July 7, 2022), BTA Nos. 2021-1525, 2019-1566.

[847] See *Wentwood Laurel Lakes I LLP v. Franklin County Board of Revision* (April 8, 2008), BTA No. 2006-859. See also, for example, *Pelech, Inc. v. Cuyahoga County Board of Revision* (February 26, 1999), BTA No. 97-342 ("Mr. Racek [the appraiser] identified actual expenses for the property, noted they were high, and then relied upon the expenses derived from the market…we find Mr. Racek's income estimate, expense ratio, and capitalization rate all supported by competent and probative evidence…"

[848] *The ARE*, 12th Edition at 511.

operating income *expectancy*."[849] (italics added). Outside economic forecasts regarding taxes, energy costs, and operating expenses may be consulted.

4. Determine if there is Other Income (See below for manner in which Other Income is handled).

5. Determine the PGI for the twelve month period by multiplying current PGI for market (or subject if within market) by projected increase or decrease. As stated above, PGI for the market should typically be used. The subject's actual PGI may be used if it conforms to the market.

Net Operating Income: Questions for the Appraiser About How the Comps were Selected

1. What process did you use in selecting the comps?

2. Had you ever used any of these comps before?
    a. Were these comps from files maintained in your office or from some other source?
    b. In the preparation of this appraisal, did you personally visit and inspect both the interior and exterior of each of the comps?
        i. Which ones did you visit?
    c. Have you ever done an appraisal for any of the comps that you used here?
        i. When was that appraisal done?
        ii. Has it been updated since then?
        iii. How many times have you used these comps in other appraisals?

3. [If some comps have more than one tenant] Did some of the comps have more than one tenant?
    a. Did those tenants pay different rent per square foot?
    b. Explain the process of how you developed PGI for that property – what steps did you go through.

4. Where did you get the rent rates for the comps?

5. Where did you get the expense amount for the comps?
    a. With whom did you speak to get this information?
    b. Did you verify any of the information yourself?

[849] *The ARE*, 12th Edition at 509.

6. Explain the manner in which you forecast an increase or decrease in PGI for the twelve month period after the tax lien date.
    a. What materials did you rely upon in making that percentage increase/decrease determination?
    b. How current is that information?
    c. Did you study trends regarding increase/decrease of PGI?
    d. How far back?
    e. Did you do a similar review for the comps?

SECOND: Estimate annual Vacancy and Collection Loss ("VCL") Rates for the subject.

PGI is every landlord's dream: it assumes no vacancies all year with all tenants paying full rent. In reality, of course, landlords commonly collect less than the entire PGI because all or part of the property is vacant for all or part of the year. In addition, rental income sometimes falls short because some tenants default on rent which is not recovered by the landlord. Because vacancies and collection losses are common occurrences that every landlord encounters at some point, it is important that these commonplace and expected reductions in PGI be factored into the subject's valuation. Accordingly, in reaching an appropriate valuation in the income approach, it is both prudent and reasonable to reduce PGI by a market-based VCL rate. It would artificially inflate a property's NOI, and therefore its value, if a market-based VCL rate was *not* deducted from PGI.

Appraisers determine rates for both vacancies and collection loss through a review of VCL rates for comparable properties in the subject's market. VCL rates are usually estimated as a percentage of PGI[850] and the appraiser should estimate the VCL over the same future-looking period as the one used for PGI. In other words, the VCL should be based on the appraiser's projection of the market in the future to best reflect investor expectations.[851] Accordingly, to determine an appropriate VCL, the appraiser should:

1. Research vacancy and collection loss rates for comparable properties in the subject's local market in order to reach a market-based VCL.

2. Research the subject's VCL based upon current and historic records.

[850] *The ARE*, 12th Edition at 512.

[851] *The ARE*, 12th Edition at 512.

3. Based on the VCL rate for the market and the subject (if within market ranges), select an appropriate current VCL rate.

4. Project what the VCL rate will be for the market over the same period for which the appraiser estimated PGI.

5. Multiply that projected VCL rate by the estimated dollar amount of the PGI in step one, to reach a dollar amount for the VCL ("the VCL Dollar Amount").

6. **NOTE TO QUESTIONERS**: Often the most effective area of questioning here is to determine (1) if the properties used by the appraiser as comparable properties to develop a VCL rate are, in fact, comparable to the subject: (2) what other resources, if any, did the appraiser consult in determining a VCL rate; (3) how and what methods and resources did the appraiser utilize in projecting a VCL *rate* for the future period;

<u>Net Operating Income: Questions for the Appraiser About VCL</u>

1. In determining a market vacancy rate, what documents or information did you consult? [Regarding comps] How were those comps selected?
    a. How far from subject?
    b. Are there any dissimilarities between any of the comps and the subject?
    c. Are they in similar market from the subject?
        i. How was similarity of market determined?
        ii. What information sources did you consult to determine similarity of market?
2. In determining a vacancy rate did you consult any sources other than comparable properties?
3. Are those resources specific to the geographic area where the subject is located?
4. How current is the information in those resources?
5. In listing vacancy rates, do those resources distinguish between different types of commercial property?
    a. In relying on those resources, did you limit your reliance to information that related only to the subject's type of building?
6. What was the single largest factor in determining the vacancy rate?
7. In determining collection loss, did you consult any sources other than the comparable properties?

a. **NOTE TO QUESTIONERS**: *The ARE* states that "An appraiser should survey the local market to support the vacancy estimate."[852]

8. In determining collection loss for the subject, did you compare the potential gross income with the amount actually collected?
    a. This would have given you an accurate percentage of collection loss for the subject, correct?[853]

THIRD: Determine the Effective Rental Income ("ERI") for the subject.

The next step in determining net operating income is to determine the ERI for the subject. This determination is made as follows:

1. From the dollar amount of the PGI, subtract the VCL Dollar Amount.

2. The result of this subtraction is known as Effective Rental Income ("ERI").

3. **NOTE TO QUESTIONERS**: As this is a mathematical calculation, there is little to question in connection with this step.

FOURTH: Determine if the Subject Generates Income Other than Rent ("Other Income").

Commercial real estate may sometimes generate income from sources other than tenant rent. For example, a property with a good commercial location may generate parking fees from non-tenants, payments from an outdoor advertising company that locates a billboard on the property, and/or fees from vending and (in the case of an apartment building) laundry facilities. On the other hand, there may be Other Income that is tied more closely to occupancy rates, for example, late fees, forfeited security deposits, pet security deposits, and/or damage fees. These different types of fees make clear that while Other Income may be impacted by tenant occupancy rates, it may also in some circumstances generate income independent from the occupancy rates

[852] *The ARE*, 12th Edition at 512.

[853] *The ARE*, 12th Edition at 512. ("Other methods of measuring vacancy and collection loss include comparing potential gross income at market rates against the subject property's actual collected income.").

and rents paid by the subject's tenants. As such, there will be times when Other Income should be reduced by VCL and other times when it should not. As explained by *The ARE*:

> Because service-derived income may or may not be attributable to the real property, an appraiser might find it inappropriate to include this income in the property's potential gross income. The appraiser may treat such income as business income or as personal income, depending on its source. If a form of income is subject to vacancy and collection loss, it should be incorporated into PGI, and the appropriate vacancy and collection charge should be made to reflect effective gross income.[854]

In short, whether Other Income should be subject to reduction through VCL will depend upon the specific facts and circumstances of how it is generated. In some circumstances Other Income generated on a property may be inextricably tied to the occupancy rate and therefore should be included in PGI and subject to VCL. An example of that would be a coin-operated laundry in an area of an apartment complex which may only be used by tenants but not the general public. The income generated from that tenant-only service would likely fluctuate with the occupancy rate of the complex and should therefore be factored into PGI and subject to a VCL adjustment. On the other hand, certain types of Other Income are generated without regard to the occupancy rate. For example, if a property is located near a sports venue and the owner charges parking fees when events are held at that venue, such Other Income will be generated largely based upon the type and frequency of events at the sports venue which is unrelated to whether the apartment complex is filled or empty. In that circumstance the Other Income should *not* be included in PGI or subject to a VCL reduction. The categorization of Other Income as part of PGI or not, then, is subject to the appraiser's professional judgment.[855]

As with PGI and VCL, the appraiser should estimate an amount of Other Income (including an increase or decrease over current amounts of Other Income) over the same future period of time utilized to determine PGI and the VCL rate. Changes in Other Income may not be as predictable as tenant rent and may, in some instances, not be tied to the market forces that affect tenant vacancy

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[854] *The ARE*, 12th Edition at 512.

[855] For an example of where the appraiser added Other Income to PGI *after* the PGI was reduced by VCL (thereby *not* reducing Other Income by a VCL), see *Board of Education of The Columbus City Schools v. Franklin County Board of Revision* (August 29, 2013), BTA No. 2010-3412. For an example of where Other Income *was* added in to GPI *before* it was reduced by VCL (thereby reducing Other Income by the VCL) see, for example, *Ninth Street Euclid Limited Partnership v. Cuyahoga County Board of Revision* (April 12, 2002), BTA No. 2000-380 and *Board of Education of The Kettering City Schools v. Montgomery County Board of Revision* (January 5, 2010), BTA No. 2006-2232 ("To the gross potential income for the apartments, [the appraiser] added reimbursements paid by residents for utilities and other income which included late charges, carport fees, application fees, laundry income and collection income, to arrive at an annual potential rental income of ...").

rates. As such, the particular circumstances of the subject must be taken into account to determine the percentage future increase/decrease of the Other Income amount.

The following steps, then, should be taken in determining Other Income:

1. Estimate the future *percentage increase or decrease* in Other Income for the subject over the same period used to measure PGI ("The Percentage Change").

2. Research (if possible) Other Income generated by similarly situated comps. Because of the unique factual circumstances that sometimes attend the generation of Other Income, it may be difficult or impossible to find good comps. In all events, the appraiser should research the Other Income generated by the subject and comparables (if available) and using that data, determine a dollar amount ("Comparable/Historic Other Income)".

3. Multiply the Comparable/Historic Other Income by the Percentage Change to determine the Other Income amount.

4. **NOTE TO QUESTIONERS**: If the subject generates Other Income, then it may prove productive to question the appraiser about the manner in which the Percentage Change was determined. In addition, if comps are used to determine Other Income, then it may be productive to determine if the comps are, in fact, comparable to the subject and how those comps were selected.

<u>Net Operating Income: Questions for the Appraiser About Other Income</u>

1. Can you identify all of the sources of Other Income at the subject?
    a. What records did you review in finding that Other Income?
    b. How far back in time did you go to review the records for Other Income?
2. Were all sources of Other Income subject to a VCL reduction?
    a. Which ones?
    b. Explain why you did/did not reduce each source of income by VCL.
3. Explain under what circumstances a source of Other Income would be subject to VCL reduction and under what circumstances it would not be subject to VCL reduction.
4. In your analysis of Other Income, did you utilize any comps?
    a. Explain why/why not.
5. At the subject, did you notice any increases or decrease of over 10% year over year?
    a. Can you identify the factors that would have an impact on the amount of Other Income?
6. You projected a ___% increase/decrease in Other Income, correct?
    a. Explain how you made that determination.

b. In making that determination, what resources did you consult?
c. How current are those resources?

FIFTH: Calculate Gross Operating Income ("GOI")

To determine the GOI:

1. Add the Comparable/Historic Other Income amount as determined in FOUR above, to the ERI as determined in the THIRD step above, to reach GOI.

2. **NOTE TO QUESTIONERS**: As this is a mathematical calculation, there is little to question in connection with this step.

SIXTH: Determine Operating Expenses ("OE")

Commercial properties, of course, incur operating expenses which must be deducted from GOI in order to determine the *net* operating income. That net operating income figure is then plugged into the IRV formula to find the property's value.

Net Operating Income: What are Operating Expenses?

The ARE defines operating expenses as "The periodic expenditures necessary to maintain the real property and continue production of the effective gross income, assuming prudent and competent management."[856] Further, in determining whether an item should be characterized as an operating expense, the Appraisal Institute advises that:

> The only expenses that an appraiser should include in their reconstructed operating estimate[857] are those expenses needed to perpetuate the income stream, including all maintenance, replacements, management expenses, and sometimes capital replacements like roof coverings, furnaces, parking lot resurfacing, and similar items.[858]

[856] *The ARE*, 12th Edition at 513.

[857] *The ARE* states that "A reconstructed operating statement represents an opinion of the probable net future operating income of an investment." Further, it indicates that reconstructed operating statements are sometimes known as "pro formas". See *The ARE*, 12th Edition at 521, 522. Similarly, *The Dictionary of Real Estate Appraisal* (4th Edition, at 237) states, in applicable part, that a "reconstructed operating statement" is "…prepared by an appraiser to accurately reflect the future performance of a property based on the historical income and expenses of an investment property."

[858] See also *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 291.

Operating expenses do not include expenses to upgrade or improve the property but, rather, expenses to maintain the status quo. Neither income tax[859] (as distinct from property taxes) nor mortgage interest are considered operating expenses and should not be deducted from gross income in calculating the NOI.[860]

Net Operating Income: Three Categories of Operating Expense ("OE")

As with PGI, the appraiser will determine operating expenses through a review of the operating expenses of both comparable properties as well as the subject. Operating expenses generally fall into one of three categories: fixed expenses, variable expenses, and replacement allowance.[861] Fixed expenses do not vary with occupancy and typically include real property taxes[862] and insurance. Variable expenses, on the other hand, typically *do* increase or decrease with the rate of occupancy and may include amongst other items, management fees, utilities (if owner pays), cleaning, maintenance and repair, decorating, grounds maintenance, building security, trash removal, exterminating, etc.[863] The characterization of an operating expense as either fixed or variable is usually pretty clear and involves relatively little subjective judgment by the appraiser. As such, questions about what constitutes a fixed vs. a variable expense rarely elicit questioning at the BOR.

There are, however, a number of areas that do raise operating expense questions and that are frequently the subject of questions at the BOR. Below I have listed some starting point questions that a questioner may find useful at the BOR.

Net Operating Income: Questions for the Appraiser About Operating Expenses

1. Do you use a checklist or other writing to help you include all of the items that you feel should be included in operating expenses?

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[859] *The ARE*, 12th Edition at 521.

[860] See *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 291.

[861] *The ARE*, 12th Edition at 513.

[862] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 144 Ohio St.3d 324, 2015-Ohio-3633, ¶ 27 ("Property taxes are an expense that offsets income, so the taxes reduce the value of the property under the income approach.").

[863] *The ARE*, 12th Edition at 514.

a. If so, do you have that list with you?
b. If not, can you tell us all of the items that you included in operating expenses?

2. You determined operating expenses for each of the expense comps, correct?
    a. What documents did you review to determine the expenses for each of the comps?
    b. What was the source of those documents or information?
    c. Had you used any of this information for any of the comps before?
    d. How current was the information on expenses from the comps?

3. Tell us the process that you used in selecting the expense comps.

4. Did you find it necessary to make any adjustments to the expense comps?
    a. If so, please explain what adjustments and why they were made.

Net Operating Income: The Replacement Allowance

According to *The ARE*:

> The annual replacement allowance for each component of a property is usually estimated as the anticipated cost of its replacement prorated over its total useful life, provided this does not exceed the total useful life of the structure.[864]

An appraiser's determination of the amount of the replacement allowance entails a number of subjective choices on her behalf. For example, the number and type of components to be covered by the replacement allowance is left to the judgment of the appraiser.[865] In reaching a determination as to how much of a replacement allowance is warranted, the appraiser should consider historical repair and maintenance expenses.[866]

Once the appraiser has determined a market range for operating expenses through the comparable properties and a review of the subject's actual operating expenses, the appraiser will determine the appropriate amount of operating expenses. Typically, this takes the form of stating the amount of operating expense per square foot.

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[864] *The ARE*, 12th Edition at 519.

[865] *The ARE*, 12th Edition at 519 ("The scope of items to be covered in a replacement allowance is a matter of appraisal judgment based on market evidence; however, the magnitude and coverage of the replacement allowance is based on the annual repair and maintenance expenses of the property for the specific components considered in the allowance.").

[866] *The ARE*, 12th Edition at 519.

Net Operating Income: Questions for the Appraiser About the Replacement Allowance

Questions that may be asked about the appraiser's determination of a replacement allowance could include the following:

1. From the tax lien date in question, what is the useful life of the building on the subject?
    a. How did you determine that?
    b. What sources did you use?

2. Can you identify all of the components of the subject property that you took into consideration in developing your replacement allowance?
    a. [NOTE: If certain components that you might expect to be included in the replacement allowance were excluded, ask the appraiser to explain why.]

3. In reaching your replacement allowance figure, did you personally examine each of those components to determine how much useful life was left in each of them?
    a. [NOTE: If not, then have the appraiser explain how she determined the useful life of each component.]

4. Your replacement allowance is a figure that is projected into the future, correct?
    a. Did you do the calculations for the replacement allowance or did someone else do them for you?

5. In reaching a replacement allowance did you consult with contractors in the subject's market area regarding replacement costs for those components?
    a. [NOTE: In *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 311, it states "Reserves for replacement are commonly estimated by obtaining contractors' estimates for the work needed. Some appraisers divide the current cost of the item by the total economic life. Other appraisers adjust the cost to future amounts (usually higher) and then discount that amount back to current dollars using an appropriate discount rate...The future expenditure should be projected out only until the expense is incurred."]

6. In determining the replacement allowance, did you review the records of the subject regarding whether any of the components had previously been replaced?
    a. What records did you look at?

7. In determining the replacement allowance, did you review the records of any comparables regarding their maintenance history?
    a. Explain

8. In determining the replacement allowance, what source(s) did you use to determine how much it would cost to replace each of those components?

9. If you overestimate the amount of operating expenses – in other words, higher than they should be – that would reduce the NOI, correct?
    a. And if the NOI is reduced, then that would reduce the value of the subject property, correct?

In summary, then, the following steps should be taken in determining operating expenses:

1. Research historical fixed and variable operating expenses for the subject and the comparables
2. Determine amount of annual replacement allowance (i.e. confer with contractors, etc.)
3. Calculate the operating expenses by combining the determinations for fixed and variable expenses plus replacement allowance
4. Increase or decrease the amount reached in Step 4, above, by the appropriate percentage (i.e. inflation) for the future period under consideration

SEVENTH: Determine Net Operating Income ("I") By Deducting Operating Expenses ("OE") from GOI

This step is mathematical and involves the simple subtraction of operating expenses from the Gross Operating Income to come to a determination of Net Operating Income.

The Capitalization Rate

The Income Approach: How to Determine the Capitalization Rate (the "R" of IRV)

The preferred method to determine the capitalization rate (the "cap rate") for the subject property is by determining the capitalization rates of comparable sales ("cap rate comps"). This can be done using the IRV formula because the appraiser will know the sale price value (the "V" of IRV) at which each of the comps sold and, through her research on each such comp, will have also determined the net operating income (the "I" of IRV) for each of those comps as well. Using the IRV formula, the appraiser will then determine the cap rate for each comp by dividing its "I" by its "V". This process will yield cap rates (the "R" of IRV) for each of the cap rate comps and allow the appraiser to develop a range of cap rates for the comps. The appraiser will then use her judgment to determine whether the subject's cap rate should fall within, above, or below that

range.[867] As discussed below, the large number of factors considered by the appraiser in her selection of cap rate comps provide a questioner with a number of areas to question the appraiser's methods and judgment.

The Capitalization Rate: The Selection of Cap Rate Comps

The appraiser must research and consider a number of factors before she can safely declare that a specified property is a cap rate comp to the subject.[868] As with the selection of other comps, the selection of cap rate comps by the appraiser entails a number of subjective judgments. According to *The ARE*, in the cap rate comp selection process:

> Data on each [comp] property's sale price, income, expenses, financing terms, and market conditions at the time of [the comp's] sale is needed. In addition, the appraiser must make certain that the net operating income of each comparable property is calculated and estimated in the same way that the net operating income of the subject property is estimated; often the operating data available for comparable sale properties is from the year that ended just prior to the date of value, so the appraiser may have to explain (or adjust for) the time difference.[869]

Beyond that, the cap rate comps should have income and expense data similar to the subject as well as a similar replacement allowance structure. The appraiser must also examine the cap rate comps to ensure that the price at which the comp was sold was not impacted by financing terms or other market conditions that did not also affect the subject.

If the subject is being leased, as is often the case, the appraiser should attempt to find leased-fee comps as well. Those leased-fee comps should contain similar terms (i.e.: triple net lease, gross lease, etc.) that are similar to the subject. Further, the appraiser should insure that the overall level of investment risk is similar for the subject and the prospective comp. She can do that by analyzing the credit rating of each of the tenants of both the subject and the prospective comps.[870] If there are differences between these characteristics of the subject and the proposed

[867] *The ARE*, 12th Edition at 532.

[868] *The ARE*, 12th Edition at 531.

[869] *The ARE*, 12th Edition at 531.

[870] *The ARE*, 12th Edition at 531.

comps, then the appraiser must make appropriate and supportable adjustments. Given the substantial number of factors that the appraiser should consider in selecting cap rate comps, the appraiser's judgments and selections should be tested through rigorous questioning.

The Capitalization Rate: The Tax Additur

But that is not the end of the cap rate calculation. We must also deal with something called a "tax additur". According to the Supreme Court, a tax additur "is a component of the capitalization rate" and its purpose is to "account[s] for the negative effect that property taxes have on the value of the property."[871] It "reflects the 'effective tax rate'[872] for the subject property."[873] The tax additur is added to the previously determined capitalization rate,[874] and the result of that addition is the "R" percentage to be plugged into the IRV formula. Thus, the tax additur increases the capitalization rate. This is important because mathematically, assuming "I" stays the same, the higher the capitalization rate, the lower the value of the property.[875] It is worth noting that when a tax additur analysis is used, the real estate taxes are removed from the net operating income calculation.[876]

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[871] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 144 Ohio St.3d 324, 2015-Ohio-3633, ¶ 26.

[872] The "effective tax rate" is defined in OAC 5703-25-05(E) as follows:
(E) "Effective tax rate" - Real property taxes actually paid expressed as a percentage rate in terms of actual true or market value rather than the statutory rate expressed as mills levied on taxable or assessed value. In Ohio four factors must be considered in arriving at the effective tax rate:
(1) The statutory rate in mills;
(2) The composite tax reduction factor as calculated and applied under section 319.301 of the Revised Code;
(3) The percentage rollback prescribed by section 319.302 of the Revised Code;
(4) The prescribed assessment level of thirty-five per cent of true or market value.

[873] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 144 Ohio St.3d 324, 2015-Ohio-3633, ¶ 28.

[874] See OAC 5703-25-07(D)(2). In discussing the requirements of the income capitalization approach, the Ohio Administrative Code ("OAC") states that: "In making appraisals by the income approach…provision for expenses for real property taxes should be made by calculating the effective tax rate in the given tax district as defined in paragraph (E) of rule 5703-25-05 of the Administrative Code, *and adding the result to the basic interest and capitalization rate*." (italics added).

[875] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 144 Ohio St.3d 324, 2015-Ohio-3633, ¶ 28 ("…once the net income figure – the market rate less allowable expenses – is divided by the capitalization rate to arrive at the estimate of value, that value is lower because the capitalization rate has been increased by the amount of the effective tax rate.").

[876] See *West Carrollton City Schools Board of Education v. Montgomery County Board of Revision*, 2nd Dist. Montgomery No. 27679, 2018-Ohio-2322, ¶ 20.

The tax additur is calculated in one of two ways:

$$\frac{\text{Taxes Paid}}{\text{Assessed Value}} \times 35\%[877] = \text{Tax Additur}$$

Or

$$\frac{\text{Effective Millage Rate}}{1{,}000} \times 35\% = \text{Tax Additur}$$

The rate that results from that mathematical calculation is the "tax additur".[878]

As an example of the impact that the addition of the tax additur to the cap rate can have in lowering the value of a property (the "V" of IRV), assume that the "I" of the subject is $100,000 and the cap rate, before the tax additur is 8%. In that case the value of the property is

$$\frac{\$100{,}000}{.08}$$

which under the IRV formula produces a value ("V") of $1,250,000. If a .02 tax additur is added to the .08 cap rate, we get an overall cap rate of .10. With the addition of that .02 tax additur the IRV formula now looks like this:

$$\frac{\$100{,}000}{.10\ (.08 + .02)}$$

which under the IRV formula produces a value ("V") of $1,000,000 or $250,000 less than before the tax additur was added to the cap rate. By adding the tax additur to the cap rate, then, the value

[877] Under Ohio law, the taxable value of a property for real property taxation purposes is 35% of its market value, except for agricultural land in the CAUV program. See RC 5715.01(B) ("The taxable value shall be that per cent of true value in money, or current agricultural use value in the case of land valued in accordance with section 5713.31 of the Revised Code, the commissioner by rule establishes, but it shall not exceed thirty-five per cent.").

[878] See *Board of Education of the Worthington City Schools v. Franklin County Board of Revision* (August 31, 2007), BTA No. 2006-32.

of the property is reduced by taking into account the negative impact that property taxes have on the value of the subject.[879]

There is a further factor that must be considered in calculating the appropriate tax additur where the subject property is encumbered by a commercial lease: whether the lease is a triple net lease or a gross lease. As explained by the Supreme Court:

> The income approach to valuing property envisions a purchaser figuring out how much she is willing to pay for a property based on a particular stream of income that she might expect to realize from the property. Property taxes are an expense that offsets income, so the taxes reduce the value of the property under the income approach. On the other hand, if the lessee pays the taxes under a "net lease" arrangement, then the purchaser might not need to reduce the expected lease income by the amount of property-tax payments.[880]

Under a triple net lease, common with commercial rentals, the tenant is responsible for paying all of the subject property's utilities, maintenance costs, real property taxes, and insurance.[881] Accordingly, where the lessee pays the property taxes, or a negotiated portion of the property taxes, the owner does not have to reduce its income stream by the amount of property tax being borne by the lessee. This allows the owner to keep more of the income stream generated by the property and, thereby, makes the property a more attractive investment. A more attractive parcel of investment property, of course, is one that will typically bring a higher price than a less attractive parcel and, therefore, one which will typically have a lower capitalization rate.

A "fully-loaded" tax additur is one where the full amount of the real property taxes is factored into the tax additur calculation. In other words, a "fully-loaded" tax additur *assumes* that the owner pays the full amount of the property taxes. But in triple-net leases, where the tenant pays the property taxes, that is not the case. As a result, where the tenant pays all or part of the taxes, the amount of the tax-additur should be *reduced* to reflect that the owner (and any future purchaser who buys the property with the tenant still in place) does not pay the tenant's portion of

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[879] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 144 Ohio St.3d 324, 2015-Ohio-3633, ¶ 27 ("Property taxes are an expense that offsets income, so the taxes reduce the value of the property under the income approach.").

[880] See *Columbus City Schools Board of Education v. Franklin County Board of Revision*, 144 Ohio St.3d 324, 2015-Ohio-3633, ¶ 27.

[881] *Strongsville Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 112 Ohio St.3d 309, 2007-Ohio-6, 859 N.E.2d 540, ¶ 3, fn. 1, citing Appraisal Institute, *The Appraisal of Real Estate* 477 (12th Ed.2001).

the taxes. This makes the investment more attractive and, as a result, should lower the capitalization rate.

Let's use the above example to see how this works. In the example above, the net operating income is $100,000 and the cap rate before adding in the tax additur is 8%. Let's assume that there isn't a total net lease but, rather, that the owner and tenant agree to evenly split the property tax. As such, instead of having a tax additur of .02%, as shown above, there is a tax additur of .01% to account for the fact that the landlord is only paying fifty percent, and not the full amount, of the property tax. In that case, the IRV equation would look like this:

$$\frac{\$100,000}{.09\ (.08 + .01)\ \text{[instead of .02 as above]}}$$

Under the IRV formula, the $100,000 of net income is divided by .09 (instead of .10) and, as a result we get a value of $1,111,111 instead of the above value of $1,000,000. The lower tax additur, reflecting lower expenses by the owner, has resulted in a higher value of the property. This is important in reaching a value under the income approach, because if the property is subject to a triple net lease where the owner is not paying the taxes (thereby making the property more attractive), the valuation of the property should reflect that higher value through an adjusted (a smaller) tax additur.

On the other hand, an owner sometimes enters into a "gross lease" with the lessee where the lessee pays the owner a flat monthly amount and the owner then pays the taxes and other expenses from that flat amount. This, of course, reduces the amount of income derived by the owner and makes the investment in the property less attractive. In those circumstances, then, the tax additur should be "fully loaded" to reflect that the owner (and any future purchaser of the property) is bearing the entire burden of the property taxes.

The Capitalization Rate: Questions for the Appraiser About the Determination of the Cap Rate

Some questions that may be asked about the manner in which the appraiser determined the cap rate could include the following:

1. In your selection of cap rate comps, did you personally examine documents that showed the sale price, income, expenses, and financing terms for each of the comps?
    a. If not, who did?

b. If not, explain why you did not personally review.

2. In your selection of cap rate comps, did you undertake an examination of the market for sales at the time that each comp was sold?
    a. What resources did you consult in making that determination?
    b. How are you able to determine that the market conditions for each of the cap rate comps at the time they were sold is similar to that for the subject?

3. Explain basis on which comps were selected.
    a. Comps should have the same overall level of risk or be adjusted to make them have the same overall level of risk as the subject, correct?
        i. Risk is affected by creditworthiness of tenants, correct?
        ii. Did Appraiser investigate the creditworthiness of the tenant of the subject property; what are the credit ratings of the tenant at the comps and the tenant at the subject?

4. [If the subject has one or more tenants] In making your selection of cap rate comps, did you determine whether the creditworthiness of the tenants at each cap rate comp was similar to the creditworthiness of the tenants at the subject?
    a. What sources did you consult?
    b. Do you have that information in your work file?
    c. Can you give us an example of how you went through that process and determined whether a cap rate comp was similar to the subject?

5. Explain the process through which you determined that the financing terms for each cap rate comp was similar to the financing terms of the subject.

6. How did you verify the information for each of the cap rate comps?

<u>Valuing Owner-Occupied and Owner-Leased Properties</u>

It is worth noting that under the income approach there are instances in which the subject commercial property is a "big box" or other retail establishment that is owner-occupied and not under lease. Because R.C. 5713.03 requires that the fee simple estate of the property be valued "as if unencumbered," some owners have argued that it is *mandatory* in owner-occupied cases that those properties be valued as if they were vacant on the tax lien date. The Supreme Court has rejected that argument. As stated by the Court:

> We addressed the propriety of appraising owner-occupied property as if it were leased in *Meijer Stores Ltd. Partnership v. Franklin Cty. Bd. of Revision* [citation

> omitted]. After recognizing that a property owner may be able to realize the value of its property by encumbering it with a lease, we concluded that an appraiser may take that possibility into account when valuing it. Appraising property in this way is consistent with R.C. 5713.03's directive to determine "the true value of the fee simple estate, as if unencumbered," so long as the appraisal assumes a lease that reflects the relevant real-estate market.[882]

As explained further by the Court of Appeals:

> In essence, [the owner] would value an owner-occupied property like the subject in this case as if it were vacant on the tax lien date, rather than occupied at market occupancy and rented at market rent. The Supreme Court has rejected this view… In other words, "as if unencumbered," means that if the subject property is encumbered, the appraiser adjusts for the effects of those encumbrances. It does not mean, however, that the appraiser must assume that the property is vacant or ignore the fact that the property could be leased at a market rent. Thus, such adjustments are adjustments to account for market rent and occupancy levels, not adjustments to simulate vacancy.[883]

The BTA has also found that there was no error where the appraiser valued "an owner-occupied property as if it were generating market income under a hypothetical lease."[884]

The Supreme Court has similarly recently ruled that where the property's owner does not occupy the property, but rather leases it to another party, that the language of R.C. 5713.03 requiring that a property:

> …be valued "as if unencumbered" at the time of an appraisal means that the property must be valued as if it were free of an encumbrance such as a lease, not that the property is vacant at the time of transfer…[885]

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[882] See *Harrah's Ohio Acquisition Company, L.L.C. v. Cuyahoga County Board of Revision*, 154 Ohio St.3d 340, 2018-Ohio-4370, ⁋ 27. See also *Harrah's Ohio Acquisition Company, L.L.C. v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No. 108765, 2020-Ohio-4214, ⁋ 32.

[883] See *Lowe's Home Centers, LLC v. Brooklyn City Schools Board of Education*, 10th Dist. Franklin No. 19AP-179, 2020-Ohio-464, ⁋ 22. See also *Lowe's Home Centers, LLC v. Washington County Board of Revision* (March 9, 2020), BTA No. 2018-598 ("Lowe's argues in this case…that R.C. 5713.03 requires us to value property as if vacant on tax-lien date. We have rejected that argument in several cases.").

[884] See *Lowe's Home Centers, LLC v. Lorain County Board of Revision* (August 12, 2019), BTA No. 2017-1023. See also *Lowe's Home Centers, LLC v. Lorain County Board of Revision* (February 26, 12019), BTA No. 2017-39 ("Under this valuation standard, Lowe's argues, a property must be assumed to be vacant on tax lien date…The Supreme Court specifically rejected such argument…").

[885] See *Rancho Cincinnati Rivers, L.L.C v. Warren County Board of Revision*, 165 Ohio St.3d 227, 2021-Ohio-2798, 177 N.E.3d 256, affirming the Court of Appeals decision in *Rancho Cincinnati Rivers, L.L.C. v. Warren County Board of Revision*, 12th Dist. Warren No. CA2019-07-075, 2020-Ohio-1319, ⁋ 29 where the Court of Appeals stated that "In other words, "as if unencumbered," means that if the subject property is encumbered, the appraiser adjusts for the effects of those encumbrances. It does not mean, however, that the appraiser must assume that the property is vacant or ignore the fact that the property is leased at a market rate." See also *Sheffield Crossing Station, L.L.C. v. Lorain County Board of Revision*, 10th Dist. Franklin No. 19AP-687,

Thus, where property is either owner-occupied or leased by the owner to a third party, the Court has now made clear that the words "fee simple estate, as if unencumbered" do *not* mean that the property should be valued by the auditor or an appraiser as if it were vacant on the tax lien date. Instead, by inserting those words in its 2012 amendment to R.C. 5713.03, "…the legislature codified its agreement with the requirement that property should be valued using market rent rather than the actual rent from an existing lease encumbering the property at the time of a sale or transfer."[886] Following the Supreme Court's ruling, the Ninth District Court of Appeals further explained that that "the Supreme Court reiterated that a recent arm's length sale constitutes the best evidence of value and establishes the presumptive value of the subject* * *" and that "an appraisal that relies on the vacant-at-transfer rule does not automatically rebut the presumption of value established by a recent arm's length sale as a matter of law."[887]

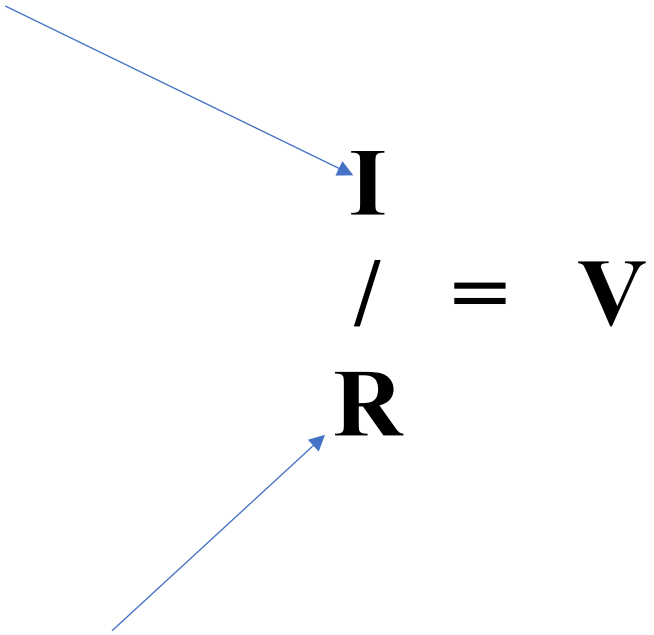
2020-Ohio-6938, ¶ 6; *Amherst Marketplace Station, LLC v. Lorain County Board of Revision*, 9th Dist. Lorain Case No. C.A. No. 20CA011623, 2021-Ohio-3866, ¶ 12, discussing *Rancho Cincinnati*, where the Court of Appeals said "The Supreme Court rejected the owner's argument that the express terms of R.C. 5713.03 required a vacant-at-transfer approach" and further stated, at ¶ 13, "The Court also explained a second aspect of the market-lease rule: property may be valued with consideration for income generated by a hypothetical lease, provided that the lease reflects current market rates…As a consequence, the Court concluded that "R.C. 5713.03 does not as a matter of law require adjustments to leased-fee sales used as sales comparables; instead, adjustments should be made based on the appraiser's expert analysis of the market for the property."; *New Albany-Plain Local Schools Board of Education v. Franklin County Board of Revision* (July 12, 2023), BTA No. 2020-1929 ("Due to [the appraiser's] assumption that the subject property was vacant as of the tax lien date, we are unable to determine whether [the appraiser's] analysis included all relevant comparable properties and formed an accurate value indication. Since [the appraiser] testified that he valued the property as if it was vacant, this undermines his entire appraisal.").; *Lowe's Home Centers, LLC v. Lorain County Board of Revision* (November 27, 2023), BTA No. 2019-1671 ("Previously, in *Lorain I* and *Lorain II*, Racek appraised the properties under a "vacant-at-transfer" theory. But the Ohio Supreme Court expressly rejected using that theory in *Rancho Cincinnati* …. We thus find that Racek's "available to be occupied" method merely recycles and repackages his former "vacant-at-transfer" theory.").

[886] See *Rancho Cincinnati Rivers, L.L.C v. Warren County Board of Revision*, Slip Opinion No. 2021-Ohio-2798, ¶ 28. See also *Spirit Master Funding LLC v. Lorain County Board of Revision* (August 21, 2023), BTA No. 2020-959 ("We note that the Court has expressly rejected the type of "vacant at transfer" limitation that [the appraiser] employed as he researched potential sales in the market.").

[887] See Amherst Marketplace Station, LLC v. Lorain Cty. Bd. of Revision, 9th Dist. Lorain C.A. No. 20CA011623, 2021-Ohio-3866, ¶ 22. See also *Sheffield Crossing Station, LLC v. Lorain County Board of Revision* (August 4, 2023), BTA No. 2018-926.

The "I" is determined through the seven step net operating income formula:

1. Determine Potential Gross Income (PGI)
2. Estimate Annual Vacancy & Collection Loss (VCL)
3. Determine Effective Rental Income (EFI): PGI minus VCL = EFI
4. Determine if Subject Generates "Other Income"; Determine if "Other Income" is subject to VCL reduction
5. Calculate Gross Operating Income (GOI) (PGI plus "Other Income" (if applicable)
6. Determine Operating Expenses (OE)
7. Subtract OE from GOI (plus Other Income if applicable) to get Net Operating Income ("I")



The "R" is determined as follows:

1. Review properties that have previously sold, for possible inclusion as cap rate comps.
2. Determine sales price and net operating income for each comp.
3. Using the IRV formula, determine the cap rate for each comp and develop a range of cap rates.
4. Using the comps, select an appropriate cap rate (usually within the range of cap rates)
5. Determine Tax Additur (where the real estate taxes have not been included in the NOI calculation)
6. Add tax additur to the previously selected cap rate for the subject to determine "R"

COST APPROACH

The Cost Approach: Overview

Of the three approaches to value, the cost approach is the least utilized at the BOR. While some appraisers utilize the cost approach with some frequency, "Many appraisers do not use the cost approach regularly because it requires current knowledge of construction techniques and costs, and it can be difficult to apply."[888] In general, the cost approach is viewed as most applicable where the subject is considered "new construction" or a special purpose building or structure[889] for which there are no, or an insufficient number of, comps.

According to *The ARE* the cost approach is:

> A set of procedures through which a value indication is derived for the fee simple interest in a property by estimating the current cost to construct a reproduction of, or replacement for, the existing structure plus any profit or incentive; deducting depreciation from the total cost; and adding the estimated land value. Other adjustments may then be made to the indicated fee simple value of the subject to reflect the value of the property interest being appraised.[890]

The Ohio Administrative Code explains that under the cost approach:

> The value is estimated by adding to the land value, as determined by the market data or other approach, the depreciated cost of the improvements to land. In some types of special purpose properties where there is a lack of comparable sales or income information this is the only approach. Due to the difficulties in estimating accrued depreciation, older or obsolete buildings value estimates often vary from the market indications.[891]

The Cost Approach: Procedure

Perhaps the appraiser's first decision in utilizing the cost approach is to determine whether the cost will be determined for *reproduction* or *replacement* of the subject. Those terms have different meanings in this context. *Reproduction* of the subject is the estimated cost "to

[888] See, *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 245.

[889] *The ARE*, 12th Edition at 354.

[890] *The ARE*, 12th Edition at 349.

[891] See OAC 5703-25-07(D)(3).

construct, as of the effective appraisal date, an exact duplicate or replica of the building being appraised, insofar as possible using the same materials, construction standards….",[892] etc. *Replacement* of the subject, on the other hand, is the estimated cost "to construct, as of the effective date, a building with utility equivalent to the building being appraised, using contemporary materials, standards…",[893] etc. Either replacement or reproduction costs can be used based on the appraiser's judgment, with costs typically running lower for replacement than reproduction. Especially with older buildings, the materials and design used may no longer be available or even legally permissible under modern building and zoning codes. In that circumstance, it would be more difficult to use reproduction costs than replacement costs.

Appraisers may not be familiar with local construction costs, materials, and related expenses. If so, they may turn to recognized cost-estimating services like Marshall & Swift[894] which collects building cost data and has an online building-cost estimator. Even here, however, the appraiser may not know the basis for the data or whether it is sufficiently reliable.

[NOTE TO QUESTIONERS: Even if the appraiser has utilized Marshall & Swift, it may still be worth questioning the appraiser about whether that data is recent, localized to the area of the subject, etc.]

Possible Questions Regarding Selecting Reproduction or Replacement Cost

1. Is your cost approach opinion based on reproduction or replacement?
2. Explain your reasoning in selecting reproduction/replacement.
3. In selecting reproduction/replacement did you do an analysis as to which of those would cost more/less?
    a. If not, why not?
    b. If so, which of those (reproduction/replacement) cost less?

Having selected either reproduction or replacement as the determinant of the costs, an appraiser would follow the steps below to reach a value opinion in the cost approach.

1. **Estimate the "hard" (direct) and "soft" (indirect) costs**. Hard costs include things like materials and equipment, building permits, the cost of labor, site security during construction, performance

[892] *The ARE*, 12th Edition at 357.

[893] *The ARE*, 12th Edition at 357.

[894] See Marshall & Swift website at https://www.corelogic.com/solutions/marshall-swift.aspx.

bonds, and any other items that are used in the construction of the improvements.[895] Soft costs include things other than labor and materials that are not typically part of the construction contract like, for example, architectural and engineering fees, appraisal and consulting fees, insurance, marketing costs, and other administrative expenses.[896]

[NOTE TO QUESTIONERS: Because both hard and soft costs are included in costs, their categorization as either hard/direct or soft/indirect does not have an impact on the appraiser's ultimate value conclusion.[897] However, there may be substantial room for questioning the appraiser on whether all appropriate expenses were included and/or whether the amounts of the costs listed were appropriate.]

Possible Questions Regarding the Determination of Hard and Soft Costs

1. What items did you include in hard costs?
2. What items did you include in soft costs?
3. Do you use a checklist or other document to ensure that you cover all hard and soft costs?
    a. Do you have that list with you?
    b. Is it in your work file?
    c. For this appraisal assignment did you add any items not contained on the list?
    d. For this appraisal assignment did you delete or remove any items that are contained on the list?
4. Did you do an item-by-item breakdown or listing of both the hard and soft costs?
5. Do you have training or a background in the construction industry?
6. Are you familiar with the costs of construction materials and labor?
    a. If not, what source or sources did you consult to obtain that information?
    b. Is the information that you obtained from that source localized to the neighborhood of the subject?
    c. How recent is that cost information?
7. Do you have personal knowledge of how that information was gathered?
8. Do you have personal knowledge of how that information was verified?
9. Do you have personal knowledge of the sources that were utilized by that source to obtain that information?
10. Do you have knowledge about the competitive conditions between construction companies in the neighborhood of the subject?

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[895] *The ARE*, 12th Edition at 359 – 360.

[896] *The ARE*, 12th Edition at 359. See also *Medina City Schools Board of Education v. Medina County Board of Revision* (August 31, 2020), BTA No. 2018-665 ("The property owner failed to provide information that would allow [the BTA] to confirm that the list of costs provided by the property owner included all relevant direct and indirect costs associated with constructing the hotel property. For example, there is no information about the costs of building permits, equipment (and depreciation of such equipment) and/or carrying costs. Generally, a cost approach should include these costs.").

[897] See, *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 250 ("Direct costs and indirect costs are only labels, and misclassifying items should not affect the quality of the value estimate because all direct and indirect costs are accounted for in the cost approach.".

a. Where was that information obtained?
b. Would you agree that the competitive conditions for construction work would have an impact on the cost of a building?

11. Do you know what the architectural fees were for the subject?
12. Do you know what the legal fees were for the subject?
13. Do you know the costs of the performance bond?
14. Do you know what the cost of financing is for the subject?

2. **Estimate the entrepreneurial incentive**. Entrepreneurial incentive is defined as "A market-derived figure that represents the amount an entrepreneur expects to receive for his or her contribution to a project and risk."[898] The entrepreneurial incentive will vary from locale to locale, depending upon its traditions, building costs, and investment expectations. The entrepreneurial incentive will be realized when the property is sold and, accordingly, is appropriately included in the cost of the subject.[899]

[NOTE TO QUESTIONERS: Because the entrepreneurial incentive is closely tied to industry standards and local customs, as well as local market competition, costs, and profit expectations, the appraiser is called upon to make a number of subjective judgments. This presents the questioner with a wide array of subjects through which to question the appraiser.]

Possible Questions Regarding the Determination of Entrepreneurial Incentive

1. You determined that there would be an entrepreneurial incentive of X%, correct?
2. How did you determine that percentage?
    a. Did you consult outside sources in reaching that percentage?
    b. If so, are you personally familiar with how those sources gathered the information?
    c. If so, are you personally familiar with how those sources verified that information?
    d. Do you know if that source material was localized to the market area of the subject?
        i. Explain how you know.
    e. Do you know how frequently that source material is updated?
    f. Do you know how recent the source material was that you relied upon?

[898] *The ARE*, 12th Edition at 360. See also *MDC Coast I, LLC v. Union County Board of Revision* (June 12, 2021), BTA No. 2016-2088 (on remand from 10th District Court of Appeals) ("Without the anticipation of some economic "reward," a developer would have no incentive to undertake a new building project. [The Appraisal of Real Estate 573 (14th Ed.2013).]").

[899] See, *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 250. See also *The ARE*, 12th Edition at 361.

3. In reaching your determination of entrepreneurial incentive, were you personally familiar with the competitive conditions for construction work in the subject's market area?
4. In reaching your determination of entrepreneurial incentive, were you personally familiar with the profit expectations of the local construction companies for work of this type?
5. In reaching your determination of entrepreneurial incentive, did you consult with any builders or construction companies in the subject's market area?
    a. List and identify.
    b. Why did you select those builders over others?
6. Would you agree that the amount of expected profit is tied to the amount of risk involved in the project?
    a. How would you characterize the level of risk for this subject property?
    b. Did the level of risk involved in the subject property play a factor in your determining the percentage of entrepreneurial incentive?[900]
        i. If so, explain how you factored that in and what impact that had on your determination of the entrepreneurial incentive percentage.

3. **Add the Estimate of Hard and Soft Costs to the Estimate of the Entrepreneurial Incentive.** This is a matter of simple addition and will result in the Reproduction or Replacement Cost of Construction ("RRCC").
4. **Determine the Depreciation of the Subject**. Depreciation is the difference, at the time of the appraisal, between the reproduction or replacement cost of an improvement and its then-market value.[901] Depreciation results from one or more of three reasons: physical deterioration, functional obsolescence – essentially, incompatibility with current market requirements – and external obsolescence, a loss in value due to external sources (i.e.: an interstate highway built across the front yard of a home).[902] Depreciation consists of the sum of the loss of value due to all three reasons.

   [NOTE TO QUESTIONERS: In determining the subject's depreciation, the appraiser will have to make a number of judgment calls.]

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[900] According to *The ARE*, "The range of profit will vary for different types of structures and with the nature or scale for a given project. For example, the entrepreneurial incentive for a proposed development may be higher where creative concepts, greater risk, or unique opportunities are found to have market acceptance. Less risky, more standard competitive projects may merit a lower measure of profit." See *The ARE*, 12th Edition at 361

[901] *The ARE*, 12th Edition at 363. See also *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 250 – 251.

[902] *The ARE*, 12th Edition at 363. See also *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 250 – 251.

Possible Questions Regarding the Determination of Depreciation

1. Is the depreciation amount effected by the length of the "economic life"[903] of the subject?
2. Did you determine the "useful life"[904] of the subject?
    a. Explain.
    b. How did you make that determination?
3. Describe the manner in which you determined depreciation.
4. Do you agree that breaking down depreciation into physical deterioration, functional obsolescence, and external obsolescence is the most comprehensive and detailed way to measure depreciation?[905]
5. Did you break down depreciation into physical and functional depreciation and external obsolescence?
    a. If so, describe your process in reaching that breakdown.
    b. If not, why not?
6. In determining depreciation, did you consult any outside sources?
    a. What sources?
    b. Do you have personal knowledge of the manner in which those sources gathered or confirmed their data?

5. **Subtract Depreciation from RRCC.** This is a matter of simple subtraction and results in the Depreciated Reproduction and Replacement Cost.

6. **Determine the Value of Site *Improvements.*** Site improvements include improvements to the land like, for example, sidewalks, driveways, landscaping, trees and shrubs.[906] They are different from the land itself and are valued at their *contributory value* (minus depreciation) to the site (the land).[907]

[NOTE TO QUESTIONERS: In determining the contributory value of the site improvements the appraiser will have to consider a number of factors and make a number of judgment calls.]

Possible Questions Regarding the Determination of Site Improvements

[903] *The ARE*, 12th Edition at 386 defines "economic life" as "The period over which improvements to real property contribute to property value; the term relates to the market extraction and age-life methods of estimating depreciation." "Useful life" is defined as "The period of time over which a structure may reasonably be expected to perform the function for which it was designed."

[904] *The ARE*, 12th Edition at 387 defines "Useful life" as "The period of time over which a structure may reasonably be expected to perform the function for which it was designed."

[905] *The ARE*, 12th Edition at 395 ("The breakdown method is the most comprehensive and detailed way to measure depreciation.")

[906] See *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 249.

[907] *The ARE*, 12th Edition at 356.

1. In reaching your valuation, did you determine the contributory value of site improvements?
2. What were the site improvements that you reviewed?
    a. Were there any site improvements that you did not include?
    b. Can you tell us the contributory value that you put on each of those site improvements?
3. Can you explain how you reached those particular values?
4. In reaching those values did you consult any outside sources?
    a. Identify those sources.
5. Were those sources localized to the market area of the subject?
6. In reaching an opinion of the contributory value of the site improvements did you consult with any construction, landscape, gardening, or other companies or individuals?
    a. Which ones?
    b. With whom did you speak?
    c. Discuss the nature of your conversations.
    d. Did they give you values for certain site features?
7. In reaching the contributory value for those site improvements did you simply add together the cost of construction and materials for those improvements?
    a. If so, is it correct that the value contributed by a site improvement to the overall value of the subject may be more or less than the dollars cost of that site improvement?
    b. In other words, is it correct that improvements to a site do not necessarily add a dollar of value for a dollar of cost?

7. **Determine the Value of the Site Itself**. The value of the site is for its highest and best use as though vacant. Improvements on the site are not included in the site value.

    [NOTE TO QUESTIONERS: To determine this, the appraiser may look at comparable properties. That process will raise similar questions regarding the selection of the comps, etc. and the appraiser will have to consider a number of factors and make a number of judgment calls.]

    <u>Possible Questions Regarding the Determination of the Value of the Site</u>

    1. In determining the value of the land itself you were required to find its highest and best use, correct?
        a. What is the highest and best use of the land?
        b. And is that highest and best use as vacant land?[908]
    2. Explain the process that you utilized to determine site value.
        a. Did you use comps?

[908] See *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 249 ("Site value is always estimated as if the land were vacant and available to be put to its highest and best use."

b. What criteria did you use in selecting the comps?

3. How many comps did you ultimately use?
    a. How many comps did you initially consider?
    b. Were all comps in the subject's market area?
4. Did you make any adjustments to the comps?
    a. Why make adjustments?
    b. Degree of adjustment.
    c. Explain.

8. **Add the Site Value (to the Depreciated Reproduction and Replacement Cost plus Value of Site Improvements).** This is a matter of simple addition and will result in the opinion of value using the cost approach.

RECONCILING THE DIFFERENT APPROACHES TO VALUE

In almost all commercial cases an appraiser will use at least two, and sometimes three, of the valuation approaches in reaching a value conclusion for the subject. The use of multiple approaches imposes a measure of quality control over the appraiser's value determination. If, for example, a second approach reaches significantly different results than the first, then this brings into question the value conclusions of *both* approaches, signals to the appraiser that something may be amiss, and indicates that she may wish to revisit the valuation methodology she utilized in each approach. Conversely, if the different valuation approaches reach reasonably similar value conclusions, then the appraiser can have a higher degree of confidence in her valuation and can reasonably assume that it is supported and correct.

But while differing approaches serve a quality control function, they also usually produce different dollar valuations - even if those valuations are within a narrow range - which need to be reconciled. Under some circumstances it may be permissible for an appraiser to state her ultimate value conclusions as a *range* of values, but that does not hold true for valuations done for real estate assessment and taxation purposes where a definite dollar point is required. As a result, the appraiser has to reconcile those differing dollar values to reach a single, dollar-specific, final value conclusion.

The reconciliation process involves more than the mere mathematical averaging of the value conclusions reached under the differing approaches. According to *The ARE*:

> The final value opinion does not simply represent the average of the different value indications derived. No mechanical formula is used to select one [value] indication over the others, rather, final reconciliation relies on the proper application of appraisal techniques and the appraiser's judgment and experience.[909]

Ultimately, in reaching a final value conclusion the appraiser will need to choose which of the three approaches is *most* applicable and should be given the *most* weight. The type of property being appraised, and its surrounding circumstances will dictate which approach is most applicable.

[909] *The ARE*, 12th Edition at 597-598.

> The three approaches to value rarely have equal relevance in a specific [appraisal] assignment. The income capitalization approach is less significant in the valuation of one-unit homes, but it is probably the most significant approach in the valuation of a multitenant office building. The cost approach means very little in an appraisal of a 40-year-old home in an urban setting, but it may be the best approach available in the valuation of a 40-year-old office building in an urban setting. The sales comparison approach is usually applicable in all markets, but it may suffer in some markets where data is hard to find…[910]

The appraiser is not strictly limited to the value conclusion of the most appropriate approach.

> Although the final value opinion is based on the approach or approaches that are most applicable, the final value opinion need not be identical to the value produced by the most applicable approach. If two approaches are applicable, the final opinion of value may be closer to one value indication than to the other.[911]

In other words, in reaching an ultimate reconciled value conclusion, the appraiser should engage in a balancing of the relative weight to be accorded one approach versus the other(s) based upon her professional experience and judgment. Indeed, *The ARE* makes clear that non-objective factors come strongly into play in the reconciliation process. "An appraiser relies more on professional experience and judgment in reconciliation than in any other part of the valuation process."[912] The risk of such reliance, of course, is that the appraiser's experience and judgment may be freighted with subjectivity. That provides questioners with a number of areas in which to inquire.

Possible Questions Regarding the Reconciliation Process and Ultimate Value Conclusion

1. In your reconciliation, which approach was given the greatest weight?
    a. Explain why you gave it the greatest weight.
2. [Where appraiser has an ultimate conclusion between the values reached in two or more approaches]
    a. In reaching your value conclusion, did you ascribe certain percentage weights to the values you determined for those different approaches?
    b. Your dollar value for the income approach was X; your dollar value for the sales comparison approach was Y; explain how you ultimately determined a dollar value different than X and Y.

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[910] See *The Student Handbook to The Appraisal of Real Estate*, 13th Edition, at 362.

[911] *The ARE*, 12th Edition at 600.

[912] *The ARE*, 12th Edition at 600.

PART 2

THE BOR AND NON-VALUATION PROCEEDINGS

INTRODUCTION TO PART 2
THE BOR AND NON-VALUATION PROCEEDINGS

While the work of the BORs across the State overwhelmingly deals with challenges to a property's valuation under R.C. 5715.19, the Revised Code also assigns a range of duties to the BOR that do not – or only tangentially - deal with a property's valuation. Most of these "other" tasks are seen less commonly at the BOR and some of them may involve proceedings that are *never* encountered in some counties.[913]

As shown in the following chapters, these non-valuation proceedings are mandated to the BOR by several sections of the Revised Code and require the BOR to address a broad range of real estate-related determinations made by specified county officials. In most, but not all, of these non-valuation cases the BOR is reviewing actions of the county auditor.[914] In some of these proceedings, the BOR sits like a more traditional court[915] while in others its mandate is quite narrow. Its decisions in some of these non-valuation proceedings can impact the payment of tens or even hundreds of thousands of (otherwise) public dollars while in others it addresses the payment of otherwise trivial amounts.[916]

Part 2 addresses the following proceedings:

[913] See, for example, the chapter below on challenges to the penalty for failing to file information in connection with residential rental property, which only applies to counties with a population of 200,000 or more, or the chapter on challenges to PILOT payments in connection with publicly funded sports facilities or the chapter on the BOR's role in coastal management which deals with properties that front on Lake Erie.

[914] See, for example, the chapter below on uncollectible taxes where the BOR reviews determinations made by the county treasurer and/or the county prosecutor.

[915] See, for example, the chapter below on foreclosure actions filed at the BOR.

[916] See, for example, the chapter below on reporting information in connection with the ownership of residential rental property.

CHAPTER 14
THE CLASSIFICATION OF PROPERTY

CHAPTER SUMMARY

- Certain reductions in property taxation may apply to a parcel of real property, dependent upon certain classifications and determinations made by the county auditor.
- Among other determinations, the auditor is required to classify real property as "residential/agricultural" (Class 1) or "non-residential/agricultural" (Class 2).
- Challenges to those determinations by the auditor may be made at the BOR pursuant to R.C. sections 5715.19(A)(1)(a) and 5715.19(A)(1)(f).

Overview

Under the Revised Code certain tax reductions may be available to reduce the amount of property tax owed and assessed against a parcel of real property. But whether those tax reductions apply to a specific property depends upon determinations made by the county auditor. Where a property owner disagrees with those determinations – typically where the reduction has been denied or is for less than the owner believes is warranted – the owner may file a complaint at the BOR challenging the auditor's determinations. Unlike most BOR complaints, such complaints do not challenge the valuation of the particular parcel. Instead, they challenge the *classification* of the property. R.C. 5715.19(A)(1)(a) (hereafter "(A)(1)(a)") and 5715.19(A)(1)(f) (hereafter "(A)(1)(f)") are the sections that deal with complaints challenging those classifications and determinations by the auditor.

R.C. 5715.19(A)(1)(a) – Challenges Relating to R.C. 5713.041 – Tax Reduction Factors

In applicable part, (A)(1)(a) states that "…a complaint against any of the following determinations for the current tax year shall be filed with the county auditor…(a) Any

classification made under section 5713.041 of the Revised Code." In turn, R.C. 5713.041[917] is entitled "Classifying property for purposes of tax reduction" and states that:

> Each separate parcel of real property shall be classified by the county auditor according to its principal, current use… For purposes of this section, lands and improvements thereon used for residential or agricultural purposes shall be classified as residential/agricultural real property, and all other lands and improvements thereon and minerals or rights to minerals shall be classified as nonresidential/agricultural real property.

As discussed below, "residential/agricultural" property is classified as "Class 1" (or sometimes "Class I") property, and "non-residential/agricultural" property is classified as "Class 2" (or sometimes "Class II") property.[918] Different tax rates are allowed for properties classified as either Class 1 or Class 2.[919]

R.C. 5713.041 further states, in applicable part, that:

> …the classification required by this section is solely for the purpose of making the reductions in taxes required by section 319.301 of the Revised Code, and this section shall not apply for purposes of classifying real property for any other purpose…[920]

In turn, R.C. 319.301 - the section referenced above in R.C. 5713.041 - is entitled "Determining and certifying tax reduction percentage for carryover property." R.C. 319.301 requires that Ohio's Tax Commissioner annually calculate[921] what are sometimes called "the tax reduction factors." As stated by the BTA, "R.C. 319.301 requires a reduction in the amount levied

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[917] See R.C. 5713.041. The statute further requires that each year the auditor "… reclassify each parcel of real property whose principal, current use has changed from the preceding year to a use appropriate to classification in the other class."

[918] See *Board of Education of the Springfield Local School District v. Lucas County Budget Commission* (June 30, 1993), BTA Nos. 90-G-87, 90-G-401, 91-G-26, 91-G-293, fn. 2 ("All real property is classified as either residential/agricultural (Class I) or non-residential/agricultural (Class II) pursuant to R.C. 5713.041.").

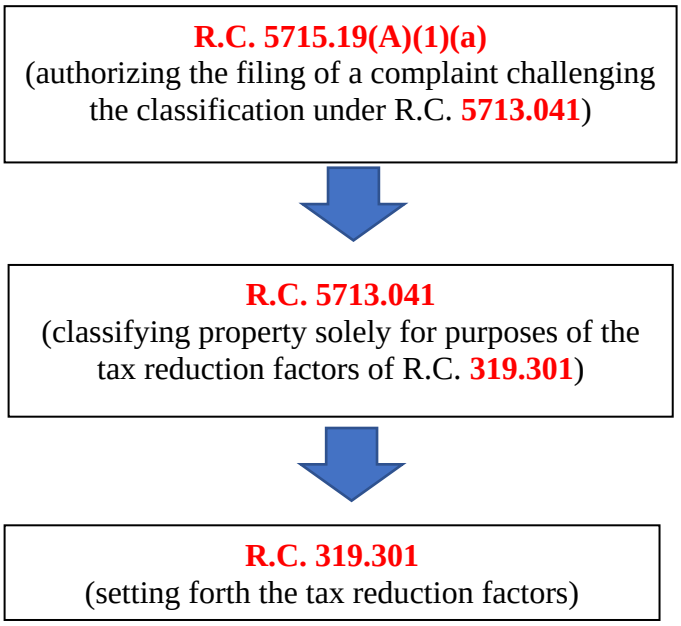
[919] See *Ohio County Commissioners Handbook*, Chapter 14, page 37 discussing the different rates of taxation allowed by the amendment to the Ohio Constitution found in Article XII, Section 2a ("The amendment added a Section 2a to Article XII of the Constitution by modifying the "uniform rule" provision of Section 2 by allowing different rates for Class 1 property (agricultural and residential) and Class 2 property (all other including commercial, industrial, railroad, public utility real, and mineral). The net effect of this amendment was that tax reduction factors are calculated separately for Class 1 and Class 2 property, thus eliminating some of the tax burden shift between commercial and industrial real estate to homeowners."). See also Article XII, Section 2a(C) of the Ohio Constitution.

[920] See R.C. 5713.041.

[921] See R.C. 319.301(C).

on voted [taxation] rates to ensure that the same amount of money is collected in any given year"[922] rather than allowing tax proceeds to increase over time due to inflation.[923] It's a complex calculation, and the Ohio County Commissioners Association has lamented that "Probably no single element of Ohio's property tax system is harder to understand than property tax reduction factors."[924]

Diagrammatically, then, the statutory scheme looks like this:



It is beyond the scope of this volume to discuss tax reduction factors in any depth. For our purposes it is sufficient to simply understand that different tax reduction rates apply to different classes (categories) of property, and that the auditor is required to, first, determine each property's class, and then reduce the amount to be levied against each parcel dependent upon that class

[922] See *The Governing Board of the Gallia County Educational Service Center v. The Gallia County Budget Commission* (June 19, 1998), BTA Nos. 96-T-1200, 97-T-248.

[923] See OAG 2005-043. See also *Ohio County Commissioners Handbook*, Chapter 14, page 7 ("A tax reduction factor is calculated on each voted tax levy. Its purpose is to eliminate inflationary revenue growth that would result from increased property values due to reappraisals. Tax reduction factors are applied to millage rates for real property, but not to the millage rates on public utility tangible personal property. Tax reduction factors also do not apply to inside millage and to fixed-sum levies such as bond levies and emergency school levies.")

[924] See *Ohio County Commissioners Handbook*, Chapter 14, page 36.

determination.[925] Article XII, Section 2a(C)(1)[926] of the Ohio Constitution creates two classes of land and improvements for purposes of the tax reduction: (1) residential and agricultural land and improvements ("Class 1 Property"), and (2) all other land and improvements ("Class 2 Property"), which would include "commercial, industrial, mineral and public utility land and improvements."[927] The Ohio Administrative Code ("OAC") provides more detailed criteria to be used by the auditor in deciding the appropriate class for each parcel.[928]

As such, the auditor's categorization of a property to one or the other of those classes – and the application of the tax reduction rate applicable to the class in which the auditor places the subject property - will affect the property taxes paid by the property owner. It is that classification by the auditor that is subject to challenge under R.C. 5715.19(A)(1)(a). An owner challenging the auditor's classification of the property may allege, for example, that the auditor misapplied the classification criteria set forth in the OAC's definitions and, in so doing, misclassified the property. As with valuation complaints, the complainant bears the burden to prove that the auditor's classification of the property to one class or the other was erroneous.

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[925] See *Ohio County Commissioners Handbook*, Chapter 14, Page 37, discussing how the Ohio Constitution allows "different rates for Class 1 property (agricultural and residential) and Class 2 property (all other including commercial, industrial, railroad, public utility real, and mineral). The net effect of this amendment was that tax reduction factors are calculated separately for Class 1 and Class 2 property, thus eliminating some of the tax burden shift between commercial and industrial real estate to homeowners." See also R.C. 319.301(D)(2) ("(D) With respect to each tax authorized to be levied by each taxing district, the tax commissioner, annually, shall do both of the following:… (2) Certify each percentage determined in division (D)(1) of this section…*and the class of property to which that percentage applies* to the auditor of each county in which the district has territory. The auditor… shall reduce the sum to be levied by such tax against each parcel of real property in the district by the percentage so certified *for its class*."). (italics added).

[926] See Ohio State Constitution, Article XII, Section 2a(C)(1).

[927] See OAC 5703-25-10(A)(2). See also *Ohio County Commissioners Handbook*, Chapter 14, Page 8.

[928] See OAC 5703-25-10(B)(1) – (5). ("The following definitions shall be used by the county auditor to determine the proper classification of each such parcel of real property: (1) "Agricultural land and improvements" - The land and improvements to land used for agricultural purposes, including, but not limited to, general crop farming, dairying, animal and poultry husbandry, market and vegetable gardening, floriculture, nurseries, fruit and nut orchards, vineyards and forestry. (2) "Mineral land and improvement" - Land, and the buildings and improvements thereon, used for mining coal and other minerals as well as the production of oil and gas including the rights to mine and produce such minerals whether separated from the fee or not.(3) "Industrial land and improvements" - The land and improvements to land used for manufacturing, processing, or refining foods and materials, and warehouses used in connection therewith. (4) "Commercial land and improvements" - The land and improvements to land which are owned or occupied for general commercial and income producing purposes and where production of income is a factor to be considered in arriving at true value, including, but not limited to, apartment houses, hotels, motels, theaters, office buildings, warehouses, retail and wholesale stores, bank buildings, commercial garages, commercial parking lots, and shopping centers. (5) "Residential land and improvements" - The land and improvements to the land used and occupied by one, two, or three families."

Review of (A)(1)(f) – Challenges Relating to R.C. 319.302(A) – Ten Percent Partial Exemption

R.C. 5715.19(A)(1)(f) allows complaints to be filed at the BOR where an owner challenges a determination made by the auditor under R.C. 319.302(A)[929] (hereafter "302(A)") concerning whether a property qualifies for the ten percent (10%) tax credit of *that* section. This is a different tax reduction, involving a different statutory section, than the one just discussed above regarding the tax reduction factors under R.C. 319.301. Targeted to assist residential and agricultural property, the credit under 302(A) is sometimes referred to as the "non-business credit."[930]

Under 302(A):

> Real property that is not intended primarily for use in a business activity shall qualify for a partial exemption from real property taxation.

The statute goes on to define "business activity," primarily by saying what it is *not*. In applicable part, it reads:

> For purposes of this partial exemption, "business activity" includes all uses of real property, *except* farming; leasing property for farming; occupying or holding property improved with single-family, two-family, or three-family dwellings; leasing property improved with single-family, two-family, or three-family dwellings; or holding vacant land that the county auditor determines will be used for farming or to develop single-family, two-family, or three-family dwellings. (italics added).

302(A)(2) imposes a duty upon the county auditor to annually "review each parcel of real property to determine whether it qualifies for the partial exemption provided for by this section as of the first day of January of the current tax year."[931] Under R.C. 319.302(B) ("302(B)"), after applying the tax reduction factors discussed above, "the county auditor shall reduce the remaining sums to be levied by qualifying levies[932] against each parcel of real property that is listed on the

[929] See R.C. 319.302(A)(1).

[930] See *Ohio County Commissioners Handbook*, Chapter 14, Pages 39 - 42.

[931] See R.C. 319.302(A)(2).

[932] See R.C. 319.302(B)(1) and (2) for the definition of "qualifying levy."

general tax list and duplicate of real and public utility property for the current tax year and that qualifies for partial exemption under division (A) of this section…"[933]

Whereas under R.C. 5715.19(A)(1)(a), only the auditor's *classification* of a property (as residential/agricultural or non-residential/agricultural) may be challenged, under R.C. 5715.19(A)(1)(f) *any* determination made by the auditor under 302(A) is subject to challenge by filing a complaint at the BOR. Under the language of 302(A), such challenges could include, for example, whether the auditor incorrectly determined that the property was intended primarily for use in business activity or, under 302(B), whether it qualified as of January 1 of the current tax year.

In addition, OAC 5703-25-18 – the administrative regulation that serves to implement R.C. 319.302 – identifies a number of decisions that must be made by the auditor in complying with 302(A). Those decisions include: (1) the auditor's decision which classifies each separate parcel according to its principal and current use; (2) for vacant land, the auditor's decision classifying it in accordance with its location and its highest and best use; and (3) where a single parcel has multiple uses, the auditor's decision as to the use to which the greatest percentage of the value of the parcel is devoted.[934] Further that OAC section states that in determining whether a property qualifies for the partial exemption, the auditor "shall be guided by the property record of taxable real property coded in accordance with the code groups provided for in paragraph (C) of rule 5703-25-10 of the Administrative Code."[935] Each of the above directives is a "determination" made under R.C. 319.302, as identified in R.C. 5715.19(A)(1)(f) and, as such, presents a possible avenue of challenge for one who wishes to reverse an auditor's denial of the partial exemption at the BOR. As with all BOR challenges, however, the complainant bears the burden of showing that any determination made by the auditor was incorrect.

[933] See R.C. 319.302(B).

[934] See OAC 5703-25-18(C).

[935] See OAC 5703-25-18(D).

CHAPTER 15
THE HOMESTEAD EXEMPTION AND OWNER-OCCUPANCY REDUCTION

CHAPTER SUMMARY

- R.C. 323.152 allows for those who own and occupy their home to obtain reductions in their property taxes through (1) a "Homestead Exemption" and/or (2) an owner-occupancy property tax reduction. Those reductions are only available to owners who apply for them and meet the qualifications set forth in the statute. Those applications are approved or denied by the county auditor and the auditor's decision may be challenged at the BOR

- The Homestead Exemption applies to senior and disabled citizens, disabled veterans, and the surviving spouses of public service officers who are killed in the line of duty. Different requirements are applicable to obtain the Homestead Exemption based upon which of those categories applies.

- The Homestead Exemption "exempts" a specified amount of the home's true value from property taxation and is subject to an income-based means test for all applicants other than disabled veterans and the surviving spouse of a public safety officer.

- The owner-occupancy reduction is applicable to the primary residence of all owner-occupants who apply and reduces by 2 1/2 % the amount of taxes to be levied on qualifying levies. It is not subject to a means test.

Overview of R.C. 323.152

R.C. 323.152 allows for two different, but related,[936] reductions in real property taxation: the Homestead Exemption under R.C. 323.152(A) and the owner-occupancy property tax reduction under R.C. 323.152(B). Those tax reductions apply only to those who own and occupy their homes, known as their "homestead".[937] Both reductions require approval by the county auditor before they take effect[938] and the BOR handles appeals from the auditor's decision to grant

[936] See *Gilman v. Hamilton County Board of Revision*, 127 Ohio St.3d 154, 2010-Ohio-4992, fn. 2, where the Supreme Court described the owner-occupancy tax reduction as "parallel to but distinguishable from the homestead exemption…"

[937] See R.C. 323.151(A)(1)(a) ("'Homestead' means…(a) dwelling…owned and occupied as a home by an individual whose domicile is in this state…").

[938] See R.C. 323.153(A).

or deny those reductions.[939] Once approved, however, both the Homestead Exemption application and the owner-occupancy reduction application are "continuing applications" and continue in effect unless, as discussed below, circumstances change and disqualify the owner from those reductions.[940]

Overview - R.C. 323.152(A) – Senior Citizens, the Disabled, Disabled Veterans, and the Surviving Spouses of Public Service Officers Killed in the Line of Duty

Three subsections of R.C. 323.152(A) address eligibility for the Homestead Exemption.[941]

- R.C 323.152(A)(1) provides for a reduction in property taxes to owner-occupant senior citizens and disabled persons (as well as their surviving spouses) who qualify under its terms (hereafter, "senior/disabled').

- R.C. 323.152(A)(2) provides the reduction to owner-occupant disabled veterans (and their surviving spouses) who qualify under its terms (hereafter, "disabled veterans").

- Effective January 15, 2021, the Homestead Exemption was extended in new subsection R.C. 323.152(A)(3)[942] to "the surviving spouse of a public service officer[943] who has either been killed in the line of duty or died from a fatal injury or illness sustained in the line of duty."[944]

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[939] The appeal to the BOR is typically made on DTE Form 106B at https://tax.ohio.gov/static/forms/real_property/dte_106b.pdf.

[940] As to the Homestead Exemption application, see R.C. 323.153(A)(1) ("An application for a reduction under division (A) of section 323.152…constitutes a continuing application for reduction in taxes for each year in which the dwelling is the applicant's homestead" and as to the Owner-Occupancy Reduction, see R.C. 323.153(A)(2) ("An application for reduction in taxes under division (B) of section 323.152…shall be filed only if the homestead…was transferred in the preceding tax year…Such an application constitutes a continuing application for a reduction in taxes for each year in which the dwelling is the applicant's homestead.").

[941] See generally https://tax.ohio.gov/static/government/Bulletin23Rev10-2019.pdf.

[942] See https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA133-HB-17.

[943] Under R.C. 323.152(G) "'Public service officer' means a peace officer, firefighter, first responder, EMT-basic, EMT-I, or paramedic, or an individual holding any equivalent position in another state.

[944] See https://www.legislature.ohio.gov/download?key=14606&format=pdf.

Overview - R.C. 323.152(B) – Owner-Occupancy Reduction

R.C. 323.152(B) is a related property tax reduction sometimes known as the "rollback exemption"[945] or the owner-occupancy tax reduction (hereafter, "Owner-Occupancy Reduction").[946] Like R.C. 323.152(A), it applies to those who own and occupy their homes. The Owner-Occupancy Reduction serves to reduce real property tax on owner-occupied property by two and one-half percent (2 ½%) "of the amount of taxes to be levied by qualifying levies[947] on the homestead." Unlike the Homestead Exemption, however, the Owner-Occupancy Reduction does not impose any age, income, disability, or familial relationship requirements on the owner-occupant of the home.

As explained by the BTA:

> Generally, R.C. 323.152 provides for reduction in the taxes levied on any homestead, defined as any dwelling "owned and occupied as a home by an individual whose domicile is in this state..." [citation omitted]. To receive the full reduction under R.C. 323.152(A) (commonly, the homestead exemption), the owner of a "homestead" must meet certain *additional* requirements, and will also receive a partial exemption (commonly, the owner-occupancy reduction). In order to obtain these tax reductions, an owner is required to affirmatively file an application with the appropriate county auditor and may also submit a late application for the preceding year. R.C. 323.153(A).[948] (italics added)

Thus, an owner may qualify for the Owner-Occupancy Reduction under R.C. 323.152(B) as an owner who lives in her home, while *not* qualifying for the senior/disabled, disabled veterans, or public service surviving spouses Homestead Exemption of R.C. 323.152(A)(1), (2), and (3), which have additional requirements. It follows that an applicant seeking a senior/disabled, disabled veterans, or public service surviving spouses Homestead Exemption will not qualify for

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[945] See *City of Oakwood v. Harrison Township*, 2nd Dist. Montgomery No. 25278, 2013-Ohio-298, ¶ 3.

[946] See *William S. Johnson v. Clark County Board of Revision* (October 24, 2018), BTA No. 2018-74 ("…R.C. 323.152(B), commonly known as the owner-occupancy tax reduction…").

[947] Under R.C. 319.302 a "qualifying levy means "(1) a levy approved at an election held before September 29, 2013; a levy within the ten-mill limitation; a levy provided for by the charter of a municipal corporation that was levied on the tax list for tax year 2013; a subsequent renewal of any such levy; or a subsequent substitute for such a levy under section 5705.199 of the Revised Code. (2) "Qualifying levy" does not include any replacement imposed under section 5705.192 of the Revised Code of any levy described in division (B)(1) of this section."

[948] See *William S. Johnson v. Clark County Board of Revision* (October 24, 2018), BTA No. 2018-74.

that exemption unless she first qualifies as an owner and occupant under the Owner-Occupancy reduction of R.C. 323.152(B).[949]

A review of the statutes will help us identify the decisions that the BOR must make, and the law applicable to those decisions, when appeals are filed at the BOR regarding the Homestead Exemption and the Owner-Occupancy Reduction.

The Homestead Exemption – R.C. 323.152(A)(1), (2), and (3)

R.C. 323.152(A)(1) – Senior/Disabled

R.C. 323.152 is entitled "Reductions in taxable value," and the requirements to take advantage of its Homestead Exemption are found primarily in its three subsections, (A)(1), (A)(2), and (A)(3). The Homestead Exemption of R.C. 323.152(A)(1) (hereafter "(A)(1)"), R.C. 323.152(A)(2) (hereafter, "(A)(2)"), and R.C. 323.152(A)(3) applies only to a dwelling that is owned[950] and occupied[951] by an individual domiciled in Ohio.[952] In general (A)(1) provides to those who qualify, a reduction in property taxes by reducing the true value of their dwelling by twenty-five thousand dollars ($25,000).[953] So, for example, an owner of a home whose true value

[949] See *Charles W. Zindle v. Summit County Board of Revision* (February 18, 2016), BTA Nos. 2015-1317, 2015-1346. In that case where the owner appealed the fiscal officer's removal of the Homestead Exemption, the BTA affirmed the BOR's decision to remove the Homestead Exemption. In so doing, the BTA made clear that the Homestead Exemption is dependent upon the owner's occupancy of the properly. "In the instant appeal there is no challenge as to whether the appellant meets the age or ownership requirements. The issue is whether appellant proved that the subject property is a dwelling *that he occupies as a home*." (italics added).

[950] See R.C. 323.151(A)(2) ("An owner includes a holder of one of the several estates in fee, a vendee in possession under a purchase agreement or a land contract, a mortgagor, a life tenant, one or more tenants with a right of survivorship, tenants in common, and a settlor of a revocable or irrevocable inter vivos trust holding the title to a homestead occupied by the settlor as of right under the trust.").

[951] See *Dugan v. Franklin County Board of Revision*, 10th Dist. Franklin No. 14 AP-351, 2014-Ohio-4491, ¶ 23 ("…the statutes governing the procedures for administering the homestead exemption program clearly contemplate application of the tax reduction to a particular homestead owned and occupied by a qualified applicant…").

[952] See R.C. 323.151(A)(a). See also *Gilman v. Hamilton County Board of Revision*, 127 Ohio St.3d 154, 2010-Ohio-4992, ¶ 11 ("The dwelling must be 'owned and occupied as a home by an individual whose domicile is in this state.'"). See also https://tax.ohio.gov/static/government/Bulletin23Rev10-2019.pdf ("To qualify for the real property homestead exemption, the applicant must own the occupied property.").

[953] See R.C. 323.152(A)(1)(c)(i) which sets forth a reduction calculation starting with a reduction in the true value of the dwelling. ("The amount of the reduction…equals the product of the following: (i) Twenty-five thousand dollars of the true value of the property in money…").

is one hundred thousand dollars ($100,000) will only be taxed on a value of seventy-five thousand dollars ($75,000), thereby reducing her tax payment.

But that reduction in value is not available to all owners and, in addition to owning and occupying the dwelling, (A)(1) specifies that its reduction applies only to someone who meets one or more of the following criteria:

> (i) A person who is permanently and totally disabled;
>
> (ii) A person who is sixty-five years of age or older; and
>
> (iii) A person who is the surviving spouse of a deceased person who was permanently and totally disabled or sixty-five years of age or older and who applied and qualified for a reduction in taxes under this division in the year of death, provided the surviving spouse is at least fifty-nine but not sixty-five or more years of age on the date the deceased spouse dies.

(A)(1) also contains a means test and its tax reduction is not available if the applicant's total income[954] exceeds the amount specified in the statute. Initially that total amount was thirty thousand ($30,000) dollars[955] but, because under the statute that amount is adjusted annually by the tax commissioner,[956] for 2020 the total income limit was increased to thirty three thousand six hundred dollars ($33,600) for 2021 it was raised to thirty four thousand two hundred dollars ($34,200), and for 2022 it was raised to thirty four thousand six hundred dollars ($34,600).[957] It

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[954]See *Robert Richard Vanderkam v. Montgomery County Board of Revision* (December 9, 2020), BTA No. 2020-689 (""Income" for purposes of the exemption means adjusted gross income of the owner *and* the owner's spouse for the year preceding the year in which the application is made. See 323.152(A); R.C. 323.151(C) (defining "total income").") See also https://tax.ohio.gov/static/forms/real_property/dte_105a.pdf containing instructions as to how to determine "total income" for purposes of the Homestead Exemption application. In applicable part it states that "Beginning tax year 2020 for real property and tax year 2021 for manufactured homes, "total income" is defined as "modified adjusted gross income," which is comprised of Ohio adjusted gross income plus any business income deducted on Schedule A, line 11 of your Ohio IT 1040. "Total Income" is that of the owner and the owner's spouse for the year preceding the year for which you are applying. If you do not file an Ohio income tax return, you will be asked to produce a federal income tax return for you and your spouse. If you do not file a federal income tax return, you will be asked to produce evidence of income and deductions allowable under Ohio law so that the auditor may estimate Ohio modified adjusted gross income."

[955] See R.C. 323.152(A)(1)(b)(iii) ("…(iii)…the person's total income does not exceed thirty thousand dollars, as adjusted under division (A)(1)(d) of this section, the amount computed under division (A)(1)(c) of this section.").

[956] See R.C. 323.152(A)(1)(d) ("Each calendar year, the tax commissioner shall adjust the total income threshold described in division (A)(1)(b)(iii) of this section by completing the following calculations in September of each year…"). See *also* *Robert Richard Vanderkam v. Montgomery County Board of Revision* (December 9, 2020), BTA No. 2020-689 ("To gain the exemption, the property owner must show she or he is a qualified owner whose income does not exceed a statutory amount adjusted for inflation.").

[957] See https://tax.ohio.gov/wps/portal/gov/tax/help-center/faqs/real-property-tax-homestead-means-testing/real-property-tax--homestead-means-testing.

should be noted that those individuals who received this homestead exemption before 2014 are not subject to the income limit.[958] Those seeking the Homestead Exemption must apply for it to the county auditor[959] and the requested tax reduction is only granted if the applicant meets the statutory criteria.[960]

R.C. 323.152(A)(2) – Disabled Veterans

Unlike the means tested provisions of (A)(1), the Homestead Exemption for disabled veterans under (A)(2) is applicable without regard to the veteran's income[961] and increases the reduction of true value on the applicant's dwelling from the twenty-five thousand dollars ($25,000)

[958] See https://www.legislature.ohio.gov/download?key=21327&format=pdf.

[959] See R.C. 323.153(A) ("To obtain a reduction in real property taxes under division (A) or (B) of section 323.152 of the Revised Code or in manufactured home taxes under division (B) of section 323.152 of the Revised Code, the owner shall file an application with the county auditor of the county in which the owner's homestead is located."). The application is typically done on DTE Form 105A, at https://tax.ohio.gov/static/forms/real_property/dte_105a.pdf.

[960] Since originally enacted in 1971, the qualifying criteria for the Homestead Exemption have changed, as it has been amended a number of times including the amendments for public service surviving spouses effective January 15, 2021. Those amendments have expanded the categories of owners who may be benefited while also including an amendment that limits its benefits only to those who fall below a specified income level. As described by the Court of Appeals in *DeVan v. Cuyahoga County Board of Revision*, 8th Dist. Cuyahoga No. 102945, 2015-Ohio-4279, ¶¶ 11 – 13, prior to the amendment effective 2021:

> Beginning in 1971, the General Assembly provided real property tax relief to residential property owned and occupied by persons 65 and over…This tax reduction was originally available only because of the age of the owner-occupants; however, the General Assembly later extended the tax reduction to permanently and totally disabled homeowners, certain surviving spouses who did not independently qualify for the reduction, mobile and manufactured homes, and units in a housing cooperative**.** (citations omitted).
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> In September 2013, Am. Sub. H.B. 59 was enacted, effective for the tax year 2014. This new law amended the homestead exemption by limiting future homestead exemptions to applicants whose income did not exceed $30,000.00...

Other amendments expanded the categories of those who could be benefited. "In 1999, the General Assembly extended the tax break to mobile and manufactured homes, and in 2001, the credit was extended to units in a housing cooperative." Effective September 2014, the law was again amended to provide the Homestead Exemption to anyone who qualified as a "disabled veteran", defined under R.C. 323.151(F) in applicable part as "a person who is a veteran of the armed forces of the United States, including reserve components thereof, or of the national guard, who has been discharged or released from active duty in the armed forces under honorable conditions, and who has received a total disability rating or a total disability rating for compensation based on individual unemployability for a service-connected disability or combination of service-connected disabilities."

[961] See http://archives.legislature.state.oh.us/bills.cfm?ID=130_HB_85 at 16 ("Note: income information is not required for disabled veterans (and their spouses)."

of (A)(1) to fifty thousand dollars ($50,000).[962] Like those seeking the exemption under (A)(1),[963] those disabled veterans applying under (A)(2) may be required to provide proof that they meet its criteria.[964] Effective October 27, 2023 the law was amended to allow "a surviving spouse to claim the exemption if the veteran dies *before* (italics in original) receiving a total disability rating." [965] The "total disability rating" referred to in the statute is obtained pursuant to federal law.[966] A parallel provision applies with respect to manufactured homes occupied by the surviving spouse of a disabled veteran who dies before receiving a total disability rating.[967]

R.C. 323.152(A)(3) – Public Service Surviving Spouses

The public service surviving spouses' Homestead Exemption parallels the exemption for disabled veterans. Like for disabled veterans, in the Homestead Exemption for public service surviving spouses there is a fifty-thousand dollar reduction of true value from the applicant's dwelling and there is no means testing required.[968] Like those seeking the exemption under (A)(1) and (A)(2), those public service surviving spouses applying under (A)(3) are required to provide proof that they meet its criteria.[969]

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[962] See https://www.lsc.ohio.gov/documents/gaDocuments/analyses130/14-hb85-130.pdf ("The act [amendment] increases, from $25,000 to $50,000, the amount of the homestead exemption that is available to qualified homeowners who are disabled veterans. The act also exempts disabled veterans from the exemption's income limit….The act exempts disabled veterans from H.B. 59's income limit. Consequently, a disabled veteran who first qualifies for the exemption for the 2014 tax year (or 2015 tax year for disabled veterans who pay the manufactured home tax), or thereafter, may receive the exemption even if the veteran's income exceeds $30,000.").

[963] See, for example, R.C. 323.153(A)(1) ("(1) An application for reduction based upon a physical disability shall be accompanied by a certificate signed by a physician, and an application for reduction based upon a mental disability shall be accompanied by a certificate signed by a physician or psychologist licensed to practice in this state, attesting to the fact that the applicant is permanently and totally disabled…An application for reduction based upon a disability certified as permanent and total by a state or federal agency having the function of so classifying persons shall be accompanied by a certificate from that agency."

[964] See, for example, R.C. 323.153(A)(1) ("An application by a disabled veteran for the reduction under division (A)(2) of section 323.152 of the Revised Code shall be accompanied by a letter or other written confirmation from the United States department of veterans affairs, or its predecessor or successor agency, showing that the veteran qualifies as a disabled veteran.").

[965] See https://www.legislature.ohio.gov/download?key=21317&format=pdf.

[966] See R.C. 353.151(F) for the definition of "Disabled veteran."

[967] See R.C. 4503.064(H)(2)(a).

[968] See https://www.legislature.ohio.gov/download?key=14606&format=pdf, at 2 ("Similar to the homestead exemption for disabled veterans, the credit equals the tax on 50,000 of the true value of a homestead owned and occupied by the public service officer's surviving spouse and no income limit applies."

[969] See R.C. 323.153(A)(1) ("An application by the surviving spouse of a public service officer killed in the line of duty for the

H.B. 33, the State's biennium budget bill effective October 3, 2023, amended R.C. 323.152 and its manufactured home corollary, R.C. 4503.065, to index "the amount of the property tax homestead exemption for a homeowner who is elderly or disabled, a disabled veteran, or the surviving spouse of a public service officer killed in the line of duty so that the exemption amounts – and therefore the tax savings – increase according to increases in the prices of all goods and services composing the national gross domestic product (GDP)."[970] The amendments require that each homestead exemption be adjusted for inflation each year, with the adjustments are to be "made in the same manner as inflationary adjustments are made to the income limit for the twenty-five thousand dollar ($25,000) homestead exemption," as set forth in R.C. 323.152(A)(1), discussed above.[971]

Appeals to the Board of Revision for the Homestead Exemption

When Homestead Exemption cases are appealed to the BOR it is typically because the county auditor denied the owner's Homestead Exemption application. R.C. 323.153 addresses the application process for a property tax reduction under R.C. 323.152.

> To obtain a reduction in real property taxes under division (A) or (B) of section 323.152…or in manufactured home taxes under division (B) of section 323.152…, the owner shall file an application with the county auditor of the county in which the owner's homestead is located.

The statute then sets forth the mechanics of how such an application is filed. Thereafter, the county auditor is required to either approve or deny the application and to notify the applicant of the auditor's decision.[972]

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reduction under (A)(3) of section 323.152 of the Revised Code shall be accompanied by a letter or other written confirmation from an employee or officer of the board of trustees of a retirement or pension fund in this state or another state or from the chief or other chief executive of the department, agency, or other employer for which the public service officer served when killed in the line of duty affirming that the public service officer was killed in the line of duty.").

[970] See https://www.legislature.ohio.gov/download?key=21327&format=pdf at 590.

[971] See https://www.legislature.ohio.gov/download?key=21327&format=pdf at 590 which states that the adjustment for inflation is made "by multiplying the current' year's exemption by the percentage increase in the GDP deflator over the preceding year and adding that result to the current exemption amount. An adjustment would not be made for any year the GDP deflator does not increase."

[972] See R.C. 353.154 ("The county auditor shall approve or deny an application for reduction under section 323.152 of the Revised Code and shall so notify the applicant within thirty days after the application is approved or denied…If the application is approved, upon issuance of the notification the county auditor shall record the amount of reduction in taxes in the appropriate column on the

Where the auditor denies the application for a Homestead Exemption, or grants a reduction in an amount less than the applicant believes is required, the applicant may appeal the auditor's decision to the BOR. According to R.C. 323.154:

> If an applicant believes that the application for reduction has been improperly denied or that the reduction is for less than that to which the applicant is entitled, the applicant may file an appeal with the county board of revision not later than sixty days after the notification was issued under this section. The appeal shall be treated in the same manner as a complaint relating to the valuation or assessment of real property under Chapter 5715. of the Revised Code.[973]

The filing of the application with the auditor and its subsequent denial (or incorrect reduction calculation) are required before the BOR's jurisdiction may be invoked.[974] The BTA has ruled that an appeal under this section "refers to the approval or denial of a *new* application."[975] (italics added).

The BOR Hearing after the Denial of the Homestead Exemption – R.C. 323.154

The language of R.C. 323.154, then, makes clear that there are only two issues that may be appealed under that statute: (1) whether the application was improperly denied or (2), if granted, whether the reduction is for less than the applicant was entitled under the law. Those are the two issues to be decided by the BOR. Because the appeal to the BOR is to be treated "in the same manner as a complaint relating to the valuation or assessment of real property under Chapter 5715," the auditor's determination is presumed to be correct and the complainant-owner bears the burden of proof as it normally would at the BOR.[976]

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general tax list and duplicate of real and public utility property and on the manufactured home tax list. If the application is denied, the notification shall inform the applicant of the reasons for the denial."). The denial is typically done on DTE Form 106A at https://tax.ohio.gov/static/forms/real_property/DTE_106A.pdf.

[973] See R.C. 323.154.

[974] See *Kathleen A. Butera v. Lake County Board of Revision* (September 13, 2017), BTA No. 2017-382 ("R.C. 323.154 provides that a denial by an auditor of an application for the owner-occupancy tax reduction may be appealed to the county board of revision…Consequently, the filing of an application and subsequent denial by the auditor are requisites to invoke the BOR's jurisdiction under R.C. 323.154.").

[975] See *Charles W. Zindle v. Summit County Board of Revision* (February 18, 2016), BTA Nos. 2015-1317, 2015-1346 ("[The owner] cited to R.C. 323.154…This section, however, refers to the approval or denial of a new application.").

[976] See *Robert Richard Vanderkam v. Montgomery County Board of Revision* (December 9, 2020), BTA No. 2020-689 ("The property owner bears the burden of showing he or she qualifies for the exemption… The property owner had the burden of proving he met all the elements for the exemption."). See also *Kathleen A. Butera v. Lake County Board of Revision* (September 13, 2017), BTA No. 2017-382 ("… the auditor is presumed to have acted consisted with those duties imposed upon him. "'The rule is generally

A Second Homestead Exemption Basis for Appeal to the BOR – R.C. 323.153(C)(1)

While the appeal to the BOR under R.C. 323.154 relates to a new application for the Homestead Exemption, there is a second separate basis for a BOR appeal. This second basis deals with changes in the owner's circumstances since the original reduction application was filed and is found in R.C. 323.153(C)(1) (hereafter "(C)(1)"), which reads:

> If, in any year *after* an application has been filed under division (A)(1) [the Homestead Exemption] or (2) [the Owner-Occupancy Reduction] of this section, the owner does not qualify for a reduction in taxes on the homestead or on the manufactured or mobile home set forth on such application, the owner shall notify the county auditor that the owner is not qualified for a reduction in taxes.[977] (italics added)

This self-reporting has the effect of causing the auditor to remove that reduction from the owner's property, thereby increasing the valuation on the property and, correspondingly, increasing its property taxes. This could occur, for example under (A)(1), if in a year after the original application was granted the owner were to exceed the statute's income limit.[978]

Under (C)(1) the owner is only required to report changes that would disqualify her "…in any year *after* an application has been filed under (A)(1) and (2) of this section…" (italics added). As stated by the BTA in a case where the reduction application was filed in 2010:

> As we review the plain language of the statute [R.C. 323.153(C)(1)], [the owner] was under an ongoing duty to notify the county if he did not qualify for the reduction as set forth on his application for any hear *after* it was filed (such as change in residence).[979]

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accepted that, in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner. All legal intendments are in favor of the administrative action. [citations omitted]. In the present appeal, [the owner] has provided no evidence to show that the auditor did not act consistent with law."); *New Day Realty LLC v. Summit County Board of Revision* (March 6, 2023), BTA No. 2021-1879.

[977] See R.C. 323.153(C)(1).

[978] See R.C. 323.152(A)(b)(iii).

[979] See *William S. Johnson v. Clark County Board of Revision* (October 24, 2018), BTA No. 2018-74.

No Recoupment of the Homestead Exemption

A similar reporting requirement is imposed upon those taking advantage of the Owner-Occupancy Reduction under R.C. 323.152(B). The *effect and monetary impact* of the failure to report disqualifying circumstances, however, is treated differently between the Homestead Exemption and the Owner-Occupancy Reduction. Under the Owner-Occupancy Reduction, where the owner fails to report disqualifying circumstances, the auditor may recoup the benefits wrongfully retained by the owner. That is *not* the case for the Homestead Exemption, however, where the BTA has ruled that the auditor may *not* recoup from the owner the monetary benefit of the exemption where the auditor later learns that there were changed circumstances that would have disqualified the owner from the Homestead Exemption had the owner reported them. As stated by the BTA, "…there is no remedy in the statute to recoup the full reduction under R.C. 323.152(A), i.e., the homestead exemption."[980]

> Although the statute provides for the recoupment of the owner-occupancy reduction if the auditor later discovers that the owner was not entitled to the reduction and failed to notify the auditor, R.C. 323.153(C)(3), there is no similar recoupment of a homestead reduction. Nor is there any reference to an auditor's ability to retroactively invalidate a prior year's application or continuing application.[981]

Appeals to the BOR for the Owner-Occupancy Reduction

Appeal of the Denial of the Owner-Occupancy Reduction to the BOR – R.C. 323.154

As mentioned above, an owner must apply to the auditor to obtain the Owner-Occupancy Reduction.[982] Thereafter, the auditor is required to notify the applicant of the approval or denial of the application.[983] As with an appeal from a denial of the Homestead Exemption, the appeal

[980] See *William S. Johnson v. Clark County Board of Revision* (October 24, 2018), BTA No. 2018-74.

[981] See *William S. Johnson v. Clark County Board of Revision* (October 4, 2018), BTA No. 2017-828.

[982] See R.C. 323.153(A) ("To obtain a reduction in real property taxes under division…(B) of section 323.152…the owner shall file an application with the county auditor of the county in which the homestead is located."). See *also* *Jody Placek v. Cuyahoga County Board of Revision* (September 10, 2018), BTA No. 2018-84.

[983] See R.C. 323.154.

procedures of R.C. 323.154 apply to applicants dissatisfied with the auditor's decision regarding the application for the Owner-Occupancy Reduction.[984] Like the appeal of a denial of the Homestead Exemption, once an Owner-Occupancy Reduction is appealed, the BOR has two possible decisions to make under R.C. 323.154: (1) whether the application was improperly denied or (2) whether, if granted, the reduction was for less than that to which the applicant is entitled. As with other BOR hearings, the applicant-claimant has the burden of proof to show that the denial was improper.[985]

A Second Owner-Occupancy Basis for Appeal to the BOR – R.C. 323.153(C)(3) ("(C)(3)")

There is a second basis where an appeal can be made to the BOR regarding the Owner-Occupancy Reduction. Like with the Homestead Exemption, an owner obtaining the Owner-Occupancy Reduction is also required to notify the auditor when she no longer qualifies. Further:

> If the county auditor or county treasurer discovers that the owner of property not entitled to [the Owner-Occupancy Reduction] … *failed to notify the county auditor as required by division (C)(1) of this section*, a charge shall be imposed against the property…[986] (italics added)

As mentioned above, unlike the Homestead Exemption - where the auditor may *not* recoup the unpaid taxes for prior years where they were incorrectly received by the owner[987] - (C)(3) *allows* such recoupment for prior years where the Owner-Occupancy Reduction was incorrectly received.[988] According to the BTA, "In order to recoup the reduction in taxes, the auditor must

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[984] See R.C. 323.154.

[985] See *Kathleen A. Butera v. Lake County Board of Revision* (September 13, 2017), BTA No. 2017-382.

[986] See R.C. 323.153(C)(3).

[987] See *William S. Johnson v. Greene County Board of Revision* (July 23, 2019), BTA No. 2018-852 ("…regardless of the owner's intent in so doing, if the auditor discovers that the recipient of a homestead exemption failed to notify the auditor that he or she was no longer qualified, there is no mechanism for the auditor to recoup the reduction in taxes from a homestead exemption.").

[988] *See William S. Johnson v. Greene County Board of Revision* (July 23, 2019), BTA No. 2018-852 ("We now consider the $114.24 that the auditor has attempted to recoup for the owner-occupancy reduction he claims that [the owner] improperly received for tax years 2015 and 2016…Due to the [owner's] failure to [report that he was no longer eligible for the Owner-Occupancy Reduction], the auditor is now able to recoup the reduction in taxes for the owner-occupancy reduction for tax years 2015 and 2016, which based on the evidence submitted at the hearing before this board [BTA], totaled $114.24."). See also *William S. Johnson v. Clark County Board of Revision* (October 24, 2018), BTA No. 2018-74 ("The statute provides a mechanism for the recoupment of the partial reduction for an owner-occupant if the auditor discovers that the owner was not entitled to the reduction and failed to notify the auditor…but there is no similar reference to recoupment of a homestead exemption….we again highlight that there is no remedy in the statute to recoup the full reduction under R.C. 323.152(A), i.e., the homestead exemption").

show two things: (1) that the owner of a property was not entitled to the owner-occupancy reduction, and (2) that the owner failed to notify the auditor as required by R.C. 323.152(C)(1)."[989] Where the auditor finds that those two elements exist, then under (C)(3):

> …a charge shall be imposed against the property in the amount by which taxes were reduced under that division for each tax year the county auditor ascertains that the property was not entitled to the reduction and was owned by the current owner. Interest shall accrue…on the amount by which taxes were reduced for each such tax year as if the reduction became delinquent taxes at the close of the last day the second installment of taxes for that tax year could be paid without penalty.[990]

As an example, the removal of a previously granted Owner-Occupancy Reduction may arise where an owner has established a domicile in County A, where she is getting the Owner-Occupancy Reduction, while maintaining a second home in County B, where she is also getting an Owner-Occupancy Reduction.[991] Under those circumstances, the auditor in the non-domicile county (County B in the above example), has the ability under the Revised Code to recoup the tax benefit improperly granted in her non-domicile county.

The auditor is required to notify the owner of the imposition of the charges and of the right to appeal the auditor's determination. Thereafter,

> The owner may appeal *the imposition of the charge and interest* by filing an appeal with the county board of revision …The appeal shall be treated in the same manner as a complaint relating to the valuation or assessment of real property under Chapter 5715. of the Revised Code. The charge and any interest shall be collected as other delinquent taxes.[992] (italics added)

But while a recoupment is not possible under those circumstances, failure to comply with the reporting requirements may have criminal consequences. Under R.C. 323.153(D) "No person shall knowingly make a false statement for the purpose of obtaining a reduction in the person's real property or manufactured home taxes under section 323.152 of the Revised Code"; under R.C. 323.153(E), "No person shall knowingly fail to notify the county auditor of changes required by division (C) of this section that have the effect of maintaining or securing a reduction in taxes under section 323.152 of the Revised Code"; and under R.C. 323.153(F) , "No person shall knowingly make a false statement or certification attesting to any person's physical or mental condition for purposes of qualifying such person for tax relief pursuant to sections 323.151 to 323.159 of the Revised Code." R.C. 323.99 provides that whoever violates any of those sections "is guilty of a misdemeanor of the fourth degree."

[989] See *William S. Johnson v. Greene County Board of Revision* (July 23, 2019), BTA No. 2018-852.

[990] See R.C. 323.153(C)(3).

[991] See, for example, *William S. Johnson v. Clark County Board of Revision* (October 24, 2018), BTA No. 2018-74.

[992] See R.C. 323.153(C)(3).

This second avenue of appeal under R.C. 323.153(C)(3), then, relates only to the "imposition of the charge and interest" and, pursuant to normal BOR practice, the owner-appellant has the burden of proof to show that the auditor's decision was incorrect regarding the imposition of the charge and interest.

SEE FOLLOWING PAGE FOR CHART

Category of Exemption/Reduction	Appealed to BOR Pursuant to Revised Code Section	Issues to Be Decided by BOR on Appeal
HOMESTEAD EXEMPTION R.C. 323.152(A)(1) & (2)		
323.152(A)(1) – Senior/Disabled (new application)	R.C. 323.154[993]	(1) whether the application was improperly denied or (2), if granted, whether the reduction is for less than the applicant was entitled.
323.152(A)(2) - Disabled Veterans (new application)	R.C. 323.154	(1) whether the application was improperly denied or (2), if granted, whether the reduction is for less than the applicant was entitled.
Termination of Improperly Granted Homestead Exemption (for continuing application, subsequent to a new application)	R.C. 323.154[994]	(1) whether the application was improperly denied or (2), if granted, whether the reduction is for less than the applicant was entitled.
323.152(A)(1) & (2) – Recoupment of Taxes for Improperly Granted Homestead Exemption	No appeal to BOR. Recoupment not allowed.[995]	No appeal to BOR. Recoupment not allowed.
OWNER-OCCUPANCY EXEMPTION R.C. 323.152(B)		
323.152(B) – Owner-Occupancy Reduction (new application)	R.C. 323.154	(1) whether the application was improperly denied or (2), if granted, whether the reduction is for less than the applicant was entitled.
323.153(C)(3) – Recoupment of Charge and Interest on the Owner-Occupancy Reduction	R.C. 323.153(C)(3)[996]	(1) whether the owner was not entitled to the owner occupancy reduction and (2) whether the owner failed to notify the auditor as required by R.C. 323.152(C)(1).[997]

[993] See R.C. 323.154 ("The county auditor shall approve or deny an application for reduction under section 323.152 of the Revised Code and shall so notify the applicant within thirty days after the application is approved or denied…If the application is denied, the notification shall inform the applicant of the reasons for the denial. If an applicant believes that *the application for reduction has been improperly denied* or *that the reduction is for less than that to which the applicant is entitled*, the applicant may file an appeal with the county board of revision not later than sixty days after the notification was issued under this section. The appeal shall be treated in the same manner as a complaint relating to the valuation or assessment of real property under Chapter 5715. of the Revised Code."). (italics added).

[994] See *William S. Johnson v. Clark County Board of Revision* (October 4, 2018), BTA No. 2017-828 ("Thus, regardless of the intent of the owner, the only way for an auditor to 'terminate' a continuing application [subsequent to a new application] for the homestead exemption is to issue a proper denial pursuant to R.C. 323.154.").

[995] See *William S. Johnson v. Clark County Board of Revision* (October 4, 2018), BTA No. 2017-828 ("Although the statute provides for the recoupment of the owner-occupancy reduction if the auditor later discovers that the owner was not entitled to the reduction and failed to notify the auditor, R.C. 323.153(C)(3), there is no similar reference to recoupment of a homestead exemption.").

[996] See R.C. 323.153(C)(3) ("The owner may appeal the imposition of the charge and interest by filing an appeal with the county board of revision…The appeal shall be treated in the same manner as a complaint relating to the valuation or assessment of real property under Chapter 5715. of the Revised Code. The charge and any interest shall be collected as other delinquent taxes.").

[997] See *William S. Johnson v. Greene County Board of Revision* (July 23, 2019), BTA No. 2018-852 ("In order to recoup the reduction in taxes, the auditor must show two things: (1) that the owner of a property was not entitled to the owner-occupancy reduction, and (2) that the owner failed to notify the auditor as required by R.C. 323.152(C)(1).").

CHAPTER 16
REMISSION OF PENALTY – RC 5715.39

CHAPTER SUMMARY

- Property owners who do not timely pay their property taxes are subject to a late payment penalty. Owners who claim the penalty was improper can seek to recover it by filing a remission of penalty application with the county treasurer.

- The county treasurer considers whether the owner is entitled to remission of the penalty under any of five late payment exceptions set forth in R.C. 5715.39(B). After completing that review, the treasurer forwards to the auditor the treasurer's determination as to whether any of the exceptions apply and the treasurer's recommendation as to whether remission should be granted.

- If the auditor determines that none of the exceptions apply and that remission of the penalty should be denied, then the auditor is to present the application to the BOR for its consideration.

- The BOR is to determine whether any of the five exceptions apply but additionally is to consider whether the owner's untimely payment was due to "reasonable cause and not willful neglect." If so, then the penalty is to be remitted.

Overview – Penalty for Late Payment

Under the Revised Code property owners are subject to a penalty if they fail to pay their property taxes on time. The BOR has the authority to adjudicate whether a property owner had a valid reason for untimely payment and to determine whether the imposed late-payment penalty should be remitted back to the taxpayer.

Real property taxes in Ohio can be paid either annually in one lump sum or in two payments. According to Revised Code 323.12(A):

> Each person charged with [property] taxes shall pay to the county treasurer the full amount of such taxes on or before the thirty-first day of December or shall pay one-half of the current taxes together with the full amount of any delinquent taxes before such date, and the remaining half on or before the twentieth day of June next ensuing.[998]

[998] R.C. 323.12.

If the taxes are not timely paid, then "a penalty of ten per cent shall be charged against the unpaid balance of such half of the current taxes."[999]

Remission of Penalty Application and Review

Those who claim that the penalty was improperly imposed and seek to have it remitted may file a remission-of-late-payment-penalty application (Form DTE 23A) with the county treasurer.[1000] As with valuation cases, one who files an application for remission of penalty must have standing to do so and the BTA has ruled that "a subsequent owner does not have standing to request penalty remission for penalties accrued before the applicant owned the property."[1001] In addition, the BTA has found that where a property is owned by a limited liability company, but the application for remission is filed by a person associated with that entity in his personal capacity, that such individual applicant does not have standing to file the application.[1002]

Upon review, the county treasurer determines whether the taxpayer's remission application shows that any of the five late payment exceptions set forth in R.C. 5715.39(B) ("the late payment exceptions") apply. Those exceptions are:

> (1) The taxpayer could not make timely payment of the tax because of the negligence or error of the county auditor or county treasurer in the performance of a statutory duty relating to the levy or collection of such tax. [R.C. 5715.39(B)(1)]
>
> (2) In cases other than those described in division (B)(1) of this section, and except as provided in division (B)(5) of this section, the taxpayer failed to receive a tax bill or a correct tax bill, and the taxpayer made a good faith effort to obtain such

[999] R.C. 323.121(A)(1). It should also be noted that under Revised Code 323.121(B)(2), in counties which have a land reutilization corporation ("land bank") organized under Revised Code Chapter 1724, that the penalty can be raised to twelve percent "upon the written order of the county treasurer."

[1000] Form DTE 23A instructs those seeking penalty remission to file the form with the county treasurer, attach a copy of all evidence to the form, and send the completed form to the county treasurer in the county in which the real property is located. See https://www.tax.ohio.gov/portals/0/forms/real_property/DTE_DTE23A.pdf.

[1001] See *Paul and Sandra Pannell v. Cuyahoga County Board of Revision* (September 28, 2021), BTA Nos. 2021-984 through 2021-991, 2021-996.

[1002] See *Ryan Devins v. Cuyahoga County Board of Revision* (March 7, 2022), BTA No. 2021-1722("Standing to file an application under R.C. 5717.39 is limited to the taxpayer, i.e., the owner when the penalty accrued. [citations omitted]. In this case, it is undisputed that the subject property is owned by LHFB Properties, LLC, but the application was filed by Devins in his individual capacity. Accordingly, we agree with the county appellees and find that the BOR lacked jurisdiction to consider the underlying application.").

bill within thirty days after the last day for payment of the tax. [R.C. 5715.39(B)(2)][1003]

(3) The tax was not timely paid because of the death or serious injury of the taxpayer, or the taxpayer's confinement in a hospital within sixty days preceding the last day for payment of the tax if, in any case, the tax was subsequently paid within sixty days after the last day for payment of such tax. [R.C. 5715.39(B)(3)]

(4) The taxpayer demonstrates that the full payment was properly deposited in the mail in sufficient time for the envelope to be postmarked by the United States postal service on or before the last day for payment of such tax…[R.C. 5715.39(B)(4)]

(5) With respect to the first payment due after a taxpayer fully satisfies a mortgage against a parcel of real property, the mortgagee failed to notify the treasurer of the satisfaction of the mortgage, and the tax bill was not sent to the taxpayer.[1004] [R.C. 5715.39(B)(5)]

After completing its review, the treasurer is required to forward to the auditor its determination as to whether any of the late payment exceptions have been shown, along with its recommendation as to whether the remission should be granted or denied.[1005] In addition, the treasurer may include other comments, including whether the taxpayer had a late payment history within the preceding three years.

Upon receipt of the treasurer's recommendation, the auditor is required to consider – as did the treasurer - whether the taxpayer has met any of the five late payment exceptions, even ones that were not asserted by the taxpayer.[1006] If the auditor "upon consultation with the county

[1003] See also R.C. 323.13 ("Failure to receive any [tax] bill…does not excuse failure or delay to pay any taxes shown on such bill or, except as provided in division (B)(1) of section 5715.39 of the Revised Code, avoid any penalty, interest, or charge for such delay."); *Cameron Woods v. Hamilton County Board of Revision* (August 4, 2023), BTA No. 2023-159 ("We also find R.C. 5715.39(B)(2) inapplicable. Even if [the taxpayer] did not receive a bill, he was under an obligation to obtain a bill within thirty days after the bill was due. He did not."); *Michele and Marion Victor Phillips v. Hamilton County Board of Revision* (August 4, 2023), BTA No. 2021-1701 ("R.C. 5715.39(B)(2) cannot apply because [the taxpayer] did not attempt to obtain a bill within thirty days.").

[1004] R.C. 5715.39(B)(1 – 5).

[1005] Form DTE 23A instructs the county treasurer to "Review the form for completeness and verify the accuracy of the penalty amount and date that taxes were due and paid**. If the taxpayer has a late payment history, include the amount(s) and tax period(s) for the preceding three years**. [bold in original] Retain a copy of the application for your records. Forward the completed application with any attachments to the county auditor." See https://www.tax.ohio.gov/portals/0/forms/real_property/DTE_DTE23A.pdf.

[1006] Form DTE 23A instructs the county auditor as follows: "**The auditor must consider each of the first five reasons on the form to remit the penalty *even if the taxpayer has not checked the corresponding box*. [italics added] The auditor cannot use reasonable cause to remit a late payment penalty. If the auditor does not grant remission, the auditor must deliver the application to the Board of Revision for consideration. If the auditor grants remission, the auditor must notify the taxpayer**

treasurer" determines that any of those exceptions have been met, then the auditor is required to remit the late payment penalty.[1007] If, however, the auditor determines that the taxpayer's remission application has not established any of those five exceptions, then the auditor is required to present the application to the BOR.[1008]

The BOR's Review after Denial of the Application

There is no provision in the Revised Code that requires that the taxpayer be notified of the auditor's denial nor that the application is being forwarded to the BOR. The forwarding to the BOR is automatic and requires no taxpayer action. Rather, it is only after the BOR has decided whether the remission is warranted that the taxpayer is notified of the *BOR*'s decision,[1009] as opposed to the earlier decisions of the treasurer and auditor. As stated in the Form DTE 23A:

> If the auditor forwards the application to the Board of Revision [upon the auditor's denial of the remission request], the board must review whether the request for remission was due to the first five reasons on the form [the five exceptions] or reasonable cause and not the willful neglect of the taxpayer. **The board must notify the applicant and the property owner (if the applicant is not the owner) of its decision by completing the section below and returning a copy of the completed form to the taxpayer by certified mail**. (bolding in original).

Once forwarded, the BOR's review is broader than the one undertaken by the auditor. As did the auditor, the BOR is required to review whether the owner has met any of the five exceptions discussed above. But in addition, the BOR is also required to determine whether "the taxpayer's

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of its decision by completing the section below and returning a copy of the form to the taxpayer." [bold in original] See https://www.tax.ohio.gov/portals/0/forms/real_property/DTE_DTE23A.pdf.

[1007] R.C. 5715.39(B). See also *Kathryn A. Monnin v. Franklin County Board of Revision* (April 30, 2019), BTA No. 2018-1995 ("Remission is mandatory if a taxpayer qualifies under R.C. 5715.39(B).").

[1008] R.C. 5715.39(C). ("If the auditor determines that remission is not required under division (B) of this section [the five exceptions], the auditor shall present the application to the board of revision."). See instructions to DTE Form 23A.

[1009] See R.C. 5715.20(A) ("Whenever a county board of revision renders a decision on…an application for remission under section 5715.39 of the Revised Code, it shall give notice of its action to the person in whose name the property is listed or sought to be listed …The notice shall be given either by certified mail or, if the board has record of an internet identifier of record associated with a person, by ordinary mail and by that internet identifier of record as defined in section 9.312 of the Revised Code.").

failure to make timely payment of the tax is due to reasonable cause and not willful neglect;"[1010] justifications for late payment that the auditor is not permitted to consider.[1011]

Appeal to the BTA – The Late Payment Exceptions

If the BOR concurs with the auditor and ultimately denies the application for remission, and if the taxpayer appeals that decision to the BTA, the taxpayer bears the burden of proof at the BTA to show that the BOR's decision was incorrect. As stated by the BTA, "On appeal, the burden is on the appellant to demonstrate that the BOR improperly denied the requests for remission of the real property tax late payments."[1012]

The BTA cases make clear that remission of penalty is not easily obtained and many of the late payment exceptions present hurdles for a taxpayer to overcome. Because the burden of proof at the BTA rests with the appellant taxpayer,[1013] as a practical matter many of them are simply unable to provide the competent and probative evidence necessary to show that they are entitled to remission under any of the late payment exceptions. For example, a taxpayer seeking remission under R.C. 5715.39(B)(2) (the second late payment exception, "the taxpayer failed to receive a tax bill or a correct tax bill") must first prove that they "made a good faith effort to obtain such bill within thirty days after the last day for payment of the tax."[1014] Failing that, the taxpayer cannot take advantage of that exception.[1015] A taxpayer seeking to take advantage of the third exception

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[1010] R.C. 5715.39(C).

[1011] See Form DTE 23A, which states "The auditor cannot use reasonable cause to remit a late payment penalty."

[1012] See *Scott Holthaus v. Franklin County Board of Revision* (July 9, 2019), BTA No. 2018-2160. See also *Steve & Karen Knight v. Brown County Board of Revision* (January 7, 2020), BTA No. 2019-517 ("On appeal [to the BTA], the burden is on the appellant to demonstrate that the BOR improperly denied the request for remission of the real property, late payment penalty."); *Yi Chou Kou v. Butler County Board of Revision* (March 11, 2020), BTA No. 2019-1557; *Masoumea Aslanpour v. Franklin County Board of Revision* (March 24, 2020), BTA No. 2019-1588; *Sheila Graham v. Hamilton County Board of Revision* (April 2, 2020), BTA Nos. 2019-2348, 2019-2349, 2019-2394; *Colerain Holdings, LLC v. Hamilton County Board of Revision* (April 7, 2021), BTA No. 2020-1853 ("On appeal, the burden is on the appellant to demonstrate that the BOR improperly denied the request for remission of the real property late-payment penalty.").

[1013] See *1277 West Sixth LLC v. Cuyahoga County Board of Revision* (December 8, 2022), BTA Nos. 2021-394, 2021-395, 2021-397, 2021-298, 2021-399 ("As the appellants, the taxpayers have the burden to show that their requests [for remission of penalty] were improperly denied by the BOR.").

[1014] R.C. 5715.39(B)(2). *James Edward Barnhart v. Franklin County Board of Revision* (May 4, 2020), BTA No. 2019-2515. See also *Sharron L. Busse & Joyce E. Whiting (Crouch) v. Hamilton County Board of Revision* (May 16, 2022), BTA No. 2021-168.

[1015] See *Joseph and Nancy Schmitt v. Butler County Board of Revision* (January 29, 2020), BTA No. 2019-1064 ("Even if they did not receive a bill, appellants did not attempt to obtain a bill within thirty days after the taxes were due.").

under R.C. 5715.39(B)(3) ("The tax was not timely paid because of the death or serious injury of the taxpayer, or the taxpayer's confinement in a hospital…") must prove that the taxpayer herself, and not a family member, was hospitalized.[1016] The third exception also does not apply to a corporate taxpayer.[1017]

A taxpayer's application seeking remission under the fourth exception (R.C. 5715.39(B)(4) - "The taxpayer demonstrates that the full payment was properly deposited in the mail in sufficient time for the envelope to be postmarked by the United States postal service on or before the last day for payment of such tax…") will be denied where the proof of the date of mailing is a private meter postmark[1018] or where the proof consists of an entry on the memo line of the payment check indicating the date of a timely postmark[1019] or where the payment was mailed after the payment's due date.[1020]

[1016] See *David T. Walters & Patricia M. Walters v. Cuyahoga County Board of Revision* (April 23, 2018), BTA No. 2017-1926 ("[The taxpayer"] asserted that the payment was made one day past the due date because she was with her father who had been hospitalized…Initially, we find that the taxpayers have failed to show that the circumstances enumerated in R.C. 5715.39(B)(3) apply, because it refers to death, serious injury, or hospitalization *of the taxpayer*, not simply a member of the taxpayer's family." [italics in original]. But seemingly contrary to this see *Mitali Ghatak v. Franklin County Board of Revision* (February 8, 2019), BTA No. 2018-1148 where, although the taxpayer sought relief under the "reasonable cause and not willful neglect" provision of R.C. 5715.39(C), the BTA found that she "meets the requirements of R.C. 5715.39(B)…when 'The tax was not timely paid because of the death or serious injury of the taxpayer, or the taxpayer's confinement in a hospital'…In this case, we find that *the condition of her husband* constitutes a serious injury and the payment was made well within the sixty-day deadline…").(italics added). See also *Timothy P. Wing and Cynthia A. Wing v. Ashtabula County Board of Revision* (February 10, 2023), BTA No. 2022-1416 ("Upon review, the record is clear that the appellant exited the hospital eight days prior to the bill being due. To the extent that the appellant asserted that his serious health issues prohibited him from timely paying the property tax bill, we note that he did not provide probative and credible evidence that his facts and circumstances fit within the parameters of R.C. 5715.39(B)(3)…While we sympathize with the appellant and his health issues, we cannot grant him the relief that he seeks."). But see *Donald Guilliams v. Franklin County Board of Revision* (April 10, 2023), BTA No. 2022-1570 where remission of penalty was granted because the taxpayer proved that "his health issues and hospitalization were the cause [of late payment]. The record states that the appellant was hospitalized from December 1, 2021, through May 6, 2022, "for sepsis, kidney failure, severe liver disease, and partial leg amputation." Upon review, this Board finds that the taxpayer has demonstrated that he qualifies for remission under R.C. 5715.39(B)(3)."

[1017] See *United Dairy Farmers Inc. v. Franklin County Board of Revision* (April 15, 2019), BTA No. 2018-1919 ("UDF [owner] is a corporate taxpayer so R.C. 5715.39(B)(3) does not apply.").

[1018] See *Michelle Wasserman v. Athens County Board of Revision* (October 4, 2018), BTA No. 2018-334 ("A private meter postmark on an envelope is not a valid postmark for purpose of establishing the date of payment of such tax.").

[1019] See *Leo D'Souza v. Adams County Board of Revision* (October 3, 2018), BTA No. 2018-382 ("We [BTA] find that reliance on the memo line on the check does not meet [the taxpayer's] burden because it is unclear as to the origin of this text and whether it reflects the true postmark date or simply a statement by [the taxpayer].").

[1020] See *Patricia P. Normile v. Hamilton County Board of Revision* (March 16, 2021), BTA No. 2020-2012 ("…the record contains the envelope appellant used. It is postmarked February 15, 2020, weeks after payment was due…Because the payment was not mailed until after the tax was due and because we have no other evidence of good cause, we affirm the BOR. The application is denied.").

Finally, where a taxpayer seeks remission under the fifth exception (R.C. 5715.39(B)(5) - "With respect to the first payment due after a taxpayer fully satisfies a mortgage against a parcel of real property, the mortgagee failed to notify the treasurer of the satisfaction of the mortgage, and the tax bill was not sent to the taxpayer."), the BTA has made clear that the exception applies only to the first payment due and not to any following payments.[1021] Further, the BTA does not have the authority to enlarge or expand the exception.[1022]

Appeal to the BTA – The Reasonable Cause Exception

R.C. 5715.39(C) sets forth the "reasonable cause" exception and states that:

> If the auditor determines that remission is not required under division (B) of this section, the auditor shall present the application to the board of revision. The board of revision shall review the auditor's determination and remit a penalty for late payment of any real property taxes or manufactured homes taxes if the board determines that any of divisions (B)(1) to (5) of this section applies or if it determines that the taxpayer's failure to make timely payment of the tax is due to *reasonable cause and not willful neglect*. (emphasis added).[1023]

As with the late payment exceptions under R.C. 5715.39(B), there are also difficulties encountered by the taxpayer where she seeks remission under the reasonable-cause-and-not-willful-neglect exception (the "reasonable cause exception") under R.C. 5715.39(C). At the outset, a taxpayer's lack of knowledge about the tax payment process is no excuse for failure to timely pay. According to the BTA:

> Upon review, we find that the taxpayer has failed to provide sufficient evidence to support this appeal. The taxpayer alleged that he failed to timely pay

[1021] See *Jerry L. & Vanessa A. Melson v. Franklin County Board of Revision* (June 4, 2018), BTA No. 2017-1906 ("Because the provision in R.C. 5715.39(B)(5) applies to only the first payment due, remission of a second penalty was not permitted."). See also *Michelle Edwards v. Cuyahoga County Board of Revision* (October 28, 2019), BTA No. 2019-1225 ("…R.C. 5715.39(B)(5)…only permits remission for the *first* [italicized in original] missed payment after a mortgage is satisfied…The payment at issue here is a later missed payment meaning R.C. 5715.30(B)(5) does not apply.").

[1022] See *Kathryn A. Monnin v. Franklin County Board of Revision* (April 30, 2019), BTA No. 2018-1995 ("Here, appellants satisfied the mortgage in August 2017; so, remission is only available for the next tax bill, i.e., the first half of tax year 2017. While we are sympathetic, this board is duty-bound to apply a statute as written. This board lacks authority to "add to, enlarge, supply, expand, extend, or improve the provisions of [a] statute to meet a situation not provided for. [citation omitted]").

[1023] See R.C. 5715.39(C). See also *Nadia Kortas v. Cuyahoga County Board of Revision* (August 16, 2023), BTA No. 2023-422 where the BTA ruled that where the taxpayer "… sought remission only under R.C. 5715.39(C)…the Fiscal Officer did not have the authority to consider the application and should have forwarded the application directly to the BOR."

> the property tax bill for the second half of tax year 2017 because he was unfamiliar with the property tax payment process in Ohio, as a recent transplant from Texas. Though we recognize that the taxpayer may have been unfamiliar with the property tax payment cycle in Ohio, failure to educate oneself about this process was unreasonable and no excuse for failing to timely pay the property tax bill.[1024]

In addition, except where the failure to make timely payment is due to the negligence or error of the county auditor or treasurer,[1025] the failure to receive a tax bill is no excuse under the Revised Code for the delay or failure to make payment.[1026]

Further, the law does not permit the grant of a reasonable cause exception by the BTA out of a sense of fairness to the taxpayer. According to the BTA, "As an administrative agency whose authority is strictly provided for in statute, this board is without equitable jurisdiction."[1027] Following Supreme Court precedent, the BTA has found unpersuasive a taxpayer's argument that late payment was based upon misleading or incorrect advice provided by an employee of the government.[1028] Even one late prior tax payment may be sufficient to constitute a taxpayer's "habitual lateness" and thereby deprive the taxpayer of the ability to be granted a reasonable cause exception. As stated by the BTA:

> We conclude our consideration by determining whether remission of the late payment penalties would be appropriate under R.C. 5715.39(C), which provides that the late payment penalty shall be remitted if the "failure to make

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[1024] See *Jeffrey J. Kimmell v. Hamilton County Board of Revision* (February 12, 2020), BTA No. 2019-1430.

[1025] See R.C. 5715.39(B)(1).

[1026] See R.C. 323.13 ("Failure to receive any bill required by this section does not excuse failure or delay to pay any taxes shown on such bill or, except as provided in division (B)(1) of section 5715.39 of the Revised Code, avoid any penalty, interest, or charge for such delay."). See also *Colerain Holdings, LLC v. Hamilton County Board of Revision* (April 7, 2021), BTA No. 2020-1853 ("R.C. 323.13 provides that "…[f]ailure to receive any bill *** does not excuse failure or delay to pay any taxes shown on such bill or, except as provided in division (B)(1) of section 5715.39 of the Revised Code, avoid any penalty, interest, or charge for such delay.").

[1027] See *Gary W. Ramsey & Bobbie Simmerman v. Cuyahoga County Board of Revision* (December 23, 2019), BTA No. 2019-512. See also *M A Kaplan Living Trust v. Cuyahoga County Board of Revision* (February 12, 2021), BTA No. 2019-1333; *Spitzer Lakes Ltd, Company v. Lorain County Board of Revision* (January 13, 2023), BTA Nos. 2022-1304, 2022-1305 ("As an administrative agency, a board of revision may only perform those functions expressly authorized by statute…").; *Springfield Local Schools Board of Education v. Lucas County Board of Revision* (May 23, 2023), BTA No. 2021-2265 ("…as a creature of statute, this Board only has the jurisdiction, power, and duties expressly given by the General Assembly. [citation omitted*]* We, therefore, do not have equitable jurisdiction and cannot grant the taxpayer the relief it seeks out of a sense of fairness or equity.").; *Joseph Matthew Hittner v. Hamilton County Board of Revision* (September 18, 2023), BTA No. 2021-1811.

[1028] See *Victoria Verlie v. Cuyahoga County Board of Revision* (July 24, 2023), BTA Nos. 2023-448, 2023-450 ("…the Ohio Supreme Court has long held that estoppel does not apply against the state, even where an employee makes a misleading or confusing statement. *Amer. Handling Equip. Co. v. Kosydar*, 42 Ohio St.2d 150, 326 N.E.2d 660 (1975); *Recording Devices, Inc. v. Bowers*, 174 Ohio St. 518, 190 N.E.2d 258 (1963).").

> timely payment of the tax is due to reasonable cause and not willful neglect." Habitual lateness in meeting tax obligations may constitute willful neglect, and not reasonable cause, even when only one prior incidence of late payment occurred.[1029]

A few examples make clear some of the difficulties faced by taxpayers in obtaining remission. For instance, remission was denied by both the BOR and BTA where the taxpayer asserted that "they had timely paid their property tax bills over the seven prior years and a parent was hospitalized." The BTA found that the taxpayers did not qualify for remission under R.C. 5715.39(C) because they had at least one late property tax payment in the past three years.[1030] According to the BTA, "Penalties can be assessed for a single missed payment."[1031] In another case, remission was denied to a land installment contract vendor who asserted that she was unaware that the occupants of the land – the land contract vendees – had failed to pay the property taxes. In denying remission to the land contract vendor, the BTA stated that "although we sympathize with the [vendor's] plight, even if she was unaware of the property tax bills, she was not excused from their timely payment."[1032]

In still another case, remission was denied where the taxpayer purchased a property on which delinquent taxes were owed. Those back taxes were not paid off at the closing of the sale and the taxpayers asserted that they were not aware that the back taxes had been levied against the property and that they had not received any tax bills for the prior years for which the back taxes were owed. Despite that, the BTA denied remission.

> The taxpayers maintain that they should not be responsible for penalties incurred prior to their purchase of the property and that they should not be responsible for penalties where late payment occurred due to their failure to receive the tax bill. First, we reject the taxpayers' request to remit those penalties that were imposed prior to the taxpayer's purchase of the property...Although it may be custom that real estate taxes are paid by the seller on the date of closing out of the sale proceeds in an ordinary real estate transaction, real property taxes and related penalties are

[1029] See *Scott Holthaus v. Franklin County Board of Revision* (July 9, 2019), BTA No. 2018-2160.

[1030] See *Steve & Karen Knight v. Brown County Board of Revision* (January 7, 2020), BTA No. 2019-517. See also *Joseph Little – MMRC LLC v. Cuyahoga County Board of Revision* (July 5, 2019), BTA Nos. 2018-2190, 2018-2192; *Fred Green v. Wood County Board of Revision* (May 20, 2019), BTA No. 2018-2054 ("We also find R.C. 5715.39(C) does not apply because penalties can be imposed on a single missed payment, let alone two missed payments as is the case here.").

[1031] See *Joseph and Nancy Schmitt v. Butler County Board of Revision* (January 29, 2020), BTA No. 2019-1064. *Meddah & Stacy Hadjar v. Warren County Board of Revision* (August 30, 2021), BTA No. 2020-2389 ("This Board [BTA] has held that failure to meet tax obligations suggests willful neglect, not reasonable cause.").

[1032] See *Elizabeth Ann Harnist v. Butler County Board of Revision* (April 8, 2019), BTA No. 2018-1777.

> levied upon the land and not upon the ownership of the property....Thus, a change in ownership generally does not forgive taxes or fees assessed on a property unless such taxes, including any penalties, interest, or other charges accruing thereon, are paid in full. The simple fact that these fees were incurred prior to the taxpayers' ownership of the subject property, therefore, does not eliminate the penalties' attachment to the real property and the taxpayers' responsibility to pay them in order to avoid additional costs associated with the county's sale of the lien or potential foreclosure action.[1033]

In still other cases, the BTA denied reasonable cause remissions where it recognized that the taxpayer "was financially strained, chose to meet other financial obligations, and was therefore unable to timely pay the real property tax…"[1034] and where the taxpayer failed to timely pay on the advice of his legal counsel.[1035] These cases highlight some of the difficulties that taxpayers encounter when seeking remission.

Despite the seeming harshness of some of the above BTA decisions, there have been others where the BTA appeared to take a less rigid approach and granted the remission application based upon reasonable cause and not willful neglect. In one case, for example, the BTA found that despite having made a late tax payment one time in the past, late payment was justified where the taxpayer proved that "she was caring for the needs of her hospitalized brother…[and] included a funeral program indicating her brother died on March 31, 2019. [The taxpayer] paid the bill shortly thereafter."[1036] In a second case, the BTA found reasonable cause and ordered remission of the penalty where the taxpayer had a history of timely payment and claimed that "she was unable to timely pay based on a misunderstanding with her bank about the policy concerning overdraft forgiveness. [The owner] claims that she believed the check would be covered…"[1037] In a third case, the BTA found reasonable cause and ordered remission of the penalty where the taxpayer "purchased the property in April 2021 and was informed taxes

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[1033] See *David and Jennifer Wloch v. Cuyahoga County Board of Revision* (November 30, 2018), BTA No. 2018-415.

[1034] See *Kozmon v. Cuyahoga County Board of Revision* (December 21, 2018), BTA No. 2018-868. See also *Lisa Gross v. Hamilton County Board of Revision* (September 15, 2020), BTA No. 2020-115 ("To the extent that the taxpayer requests that we grant her remission based upon her financial circumstances, we are unable to do so. The Ohio Supreme Court has long held this board is a creature of statute and has no power to act unless specifically authorized by statute.").

[1035] See *Haines Real Properties LLC v. Hamilton County Board of Revision* (July 25, 2019), BTA No. 2019-191.

[1036] See *Marilyn M. Schumick v. Franklin County Board of Revision* (December 31, 2019), BTA No. 2019-619.

[1037] See *Sheila Graham v. Hamilton County Board of Revision* (April 2, 2020), BTA Nos. 2019-2348, 2019-2349, 2019-2394.

had been paid for the first half of 2021. The taxpayer asserted that he carefully watched his mail for the bill but did not receive one and maintained that when he realized that it was July and he had not yet received one, he reached out to obtain a copy and then paid it."[1038] In another case the BTA reversed the BOR and granted remission where the taxpayer did not have a history of late payments and was "out of state but the postal service did not properly forward appellant's tax bill…[the taxpayer] found the bill when he returned home and paid the tax two days after the bill was due.."[1039]

In still another case, remission of penalty was granted by the BTA where the taxpayer timely paid the taxes for multiple parcels on a single check, with the correct parcel number listed on the check, but the payment was applied to the wrong parcel. The taxpayer provided proof that this type of payment had previously been accepted by the county. Despite the fact that the taxpayer had a late payment in her payment history, the BTA found that "where she had successfully used the same [payment] procedure for prior years, and the previous late payment was due to other circumstances, it did not constitute willful neglect" and found that her late payments were a result of reasonable cause.[1040] These cases seem to indicate that a close reading of the facts of each case may be required before forecasting whether the BTA is likely to approve a remission of penalty.

Finally, it should be noted that the remission of penalty statute does not grant the county auditor, county treasurer, or the BOR the authority to remit any *interest* that is assessed in connection with the late payment. While R.C. 5715.39(B)[1041] grants the county treasurer upon consultation with the county treasurer the authority to remit "a *penalty* for late payment" it makes no mention of the remission of interest. Instead, R.C. 5715.39(A),[1042] grants to the Tax Commissioner the authority to "remit real property taxes, manufactured home taxes, penalties and

[1038] See *John Sterne Slaven v. Hamilton County Board of Revision* (October 24, 2022), BTA No. 2021-2518.

[1039] See *Steven Skibo v. Hamilton County Board of Revision* (June 7, 2023), BTA No. 2021-1725.

[1040] See *Susan Heilman v. Cuyahoga County Board of Revision* (August 21, 2023), BTA Nos. 2023-482, 2023-483.

[1041] See R.C. 5715.39(B).

[1042] See R.C. 5715.39(A).

interest found by the commissioner to have been illegally assessed." (italics added). As stated by the BTA:

> Though the taxpayer requested remission of interest assessed on the property-tax delinquencies, we note that the taxpayer did not raise this issue in the proper venue. Nothing in R.C. 5715.39(B) vests jurisdiction in county auditors/fiscal officers, treasurers, or boards of revisions to remit interest assessed on delinquent property-tax bills; that section only provides such officials the ability to consider remission of late-payment penalties associated with delinquent property tax bills. However, R.C. 5715.39(A) provides in relevant part that "[t]he Tax Commissioner may remit real property taxes, manufactured home taxes, penalties, *and interest* [italics in original] found by the Commissioner to have been illegally assessed." Because the taxpayer requested remission of assessed interest from the officials other than the Tax Commissioner, it appears that the taxpayer failed to raise the issue in the proper venue.[1043]

The courts, it would appear, are the proper venue for the taxpayer to seek recovery of interest.

[1043] See *Batra Hospitality Group v. Franklin County Board of Revision* (March 16, 2021), BTA No. 2020-1223. See also *Paula Horsfall v. Brown County Board of Revision* (March 16, 2021), BTA No. 2020-1280.

CHAPTER 17
CLERICAL AND FUNDAMENTAL ERRORS

CHAPTER SUMMARY

- R.C. 319.35 divides errors made by the county auditor into two categories: clerical and fundamental.

- Under R.C. 319.35 clerical errors are those that can be corrected by the county auditor from the inspection or examination of documents (1) in the auditor's office or (2) presented to the auditor and recorded by the county recorder. Fundamental errors are those errors other than clerical errors.

- The auditor, on its own, can correct clerical errors for the current year without the BOR's involvement. Clerical errors for previous years can only be corrected by the BOR after being presented by the auditor.

- The auditor has no authority to correct fundamental errors. Fundamental errors for the current year may only be corrected by the BOR. While the law is unsettled, and there is no case law directly on point, it is argued that neither the BOR nor the auditor have the authority to correct fundamental errors for previous years.

- R.C. 319.36 deals only with clerical errors and the circumstances in which a clerical error results in a tax overcharge to the taxpayer.

It is plain from the preceding chapters that in fulfilling their statutory duties county auditors create and sort through mountains of data and make a host of determinations based on that data. Those determinations include, for example, the classification of each parcel in the county according to its principal current use[1044] and a description of each such parcel.[1045] That data and the determinations based thereon are memorialized in records created and maintained by each auditor's office.[1046]

[1044] See R.C. 5713.041.

[1045] See R.C. 5713.02.

[1046] See R.C. 5713.01(D) ("The auditor shall make the necessary abstracts from books of the auditor's office containing descriptions of real estate in such county, together with such platbooks and lists of transfers of title to land as the auditor deems necessary in the performance of the auditor's duties in valuing such property for taxation. Such abstracts, platbooks, and lists shall be in such form and detail as the tax commissioner prescribes.").

Overall, land in Ohio is divided into more than five and a half million separate parcels,[1047] and it is not an exaggeration to say that within any given county the updating and maintenance of the auditor's real estate records may involve inputting millions of bits of data on an ongoing basis. It is a daunting task and one in which, given the voluminous amount of data that must be sorted, reviewed, and input by each county, human error is inevitable. The Revised Code anticipates such errors and, through its sections 319.35 and 319.36, requires that the BOR along with the auditor play a role in correcting some of them.

R.C. 319.35 - Correction of Clerical Errors by the Auditor

The Revised Code divides errors made by the auditor's office into two categories - clerical and fundamental - and imposes a mandatory duty on the auditor to correct any *clerical* errors she discovers. Under R.C. 319.35 the auditor has no authority to correct a *fundamental* error, the correction of which can only be authorized by the BOR.[1048] According to the Supreme Court, "…the nature of the alleged error that the auditor sought to correct [clerical vs. fundamental] is crucial to his [the auditor's] jurisdiction to make the correction at all."[1049] Distinguishing a clerical from a fundamental error, then, is critical in determining (1) whether in making a correction the auditor acted within her authority to correct *only* clerical errors, as well as (2) whether the BOR should be involved in the correction process.

As set forth in R.C. 319.35:

> From time to time the county auditor shall correct all clerical errors the auditor discovers in the tax lists and duplicates…the description of lands or other property, the valuation or assessment of property or when property exempt from taxation has been charged with tax, or in the amount of such taxes or assessment, and shall correct the valuations or assessments on the tax lists and duplicates agreeably to amended, supplementary, or final assessment certificates.[1050]

[1047] https://caao.org/real-estate/#:~:text=The%20State%20of%20Ohio%20has,and%20assessed%20for%20tax%20purposes.

[1048] See *State ex rel. Newpart Limited Partnership v. Donofrio*, 9th Dist. Summit No. C.A. No. 25009, 2020-Ohio-2199, ¶ 11 ("Thus, a plain reading of the statute reveals that the county auditor is imbued with the discretionary authority to correct clerical errors in his records, whereas fundamental errors are correctable only by the board of revision.").

[1049] See *Sheldon Road Associates, L.L.C. v. Cuyahoga County Board of Revision*, 131 Ohio St.3d 201, 2012-Ohio-581, fn. 2.

[1050] See R.C. 319.35.

R.C. 319.35 - The Meaning of "Clerical Error" and "Fundamental Error"

What, then, is a "clerical error"? R.C. 319.35 defines it as:

> … an error that can be corrected by the county auditor from the inspection or examination of documents in the county auditor's office or from the inspection or examination of documents that have been presented to the county auditor and have been recorded by the county recorder.

It then goes on to "define" a fundamental error.

> Except as otherwise provided by law, any error in the listing, valuation, assessment, or taxation of real property other than a clerical error constitutes a fundamental error and is subject to correction only by the county board of revision as provided by law.[1051 & 1052]

Thus under R.C. 319.35 a "fundamental error" is defined only by what it is *not*: it is an error that is *not* a clerical error. The lack of a clear affirmative statutory definition of "fundamental error," however, has sometimes proved problematic and left county auditors searching for guidance. Unfortunately, neither R.C. 319.35 nor R.C. 319.36 provide clarity as to the meaning of "fundamental error."

Distinguishing "Clerical Error" from "Fundamental Error"

While the Ohio Attorney General has stated that "The term 'clerical error' is not susceptible of precise definition,"[1053] Ohio's courts *have* provided some guidance as to how to distinguish it

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[1051] See R.C. 319.35.

[1052] In addition to the above, "R.C. Chapter 5713 provides a statutory scheme for the correction of errors made on the county list and duplicate. Specifically, R.C. 5713.19 mandates that a county auditor must correct an error discovered on the tax list. R.C. 5713.20 provides that if a county auditor discovers that "any building, structure, tract of land or any lot of either" has been omitted, the auditor must determine the taxes for every preceding year, not to exceed five years, and order the county treasurer to collect them. R.C. 5713.21 provides that where the auditor has made a mistake in the valuation of an improvement, or where the value of said improvement has been omitted, the auditor must correct the tax list. Moreover, R.C. 319.40 provides that where lots or land on the tax list or duplicate have not been charged tax, the auditor must charge all omitted tax for the preceding years, not to exceed five years." See *Robert J. & Mary T. Sidman v. Roger W. Tracy, Tax Commissioner* (September 29, 1995), BTA No. 94-T-790. See *Sheldon Road Associates, L.L.C. v. Cuyahoga County Board of Revision*, 131 Ohio St.3d 201, 2012-Ohio-581, ¶ 31 where the Supreme Court stated that "Omitting property from the assessment typically qualifies as a clerical error that the statutes require the auditor to correct. R.C. 5713.20(A) and 5713.21…" However, neither section 5713.19, 5713.20, nor 5713.21 specifically mention the board of revision as do sections 319.35 and 319.36. Accordingly, we address in this chapter only the BOR's role in sections 319.35 and 319.36.

[1053] See 1983 Ohio Op. Atty. Gen. No. 1983-045.

from a fundamental error. According to the Supreme Court, "clerical errors may encompass errors concerning the owner's name, the valuation, the description, or the 'quantity of any tract or lot'."[1054] In discussing the auditor's authority to correct clerical errors, the Supreme Court has stated that:

> …a purported 'correction' [by the auditor] might be considered illegal [a fundamental error which the auditor has no power to correct] if it consisted of an outright reappraisal of the property rather than adding omitted property or fixing a computational error *[citation omitted]*.[1055]

The Court cited to one of its earlier decisions where it characterized "as 'clerical' a 'curable omission in valuation' " which arises, for example, "from an erroneous computation that omits property from the assessment". In so stating, the Court distinguished a clerical error "from a 'change of valuation,' which is fundamental and therefore not a 'corrected' value but a 'new' one."[1056] Further, the Court of Appeals has indicated that "Clerical errors are those which are computational in nature and do not involve the exercise of discretion or judgment"[1057] and "are those of the bookkeeping or copying genre while fundamental errors are those committed in the exercise of the subject administrative officer's judgment and discretion."[1058]

Errors which can only be corrected by field inspections would appear to be fundamental, as opposed to clerical, errors. For example, the BTA found a fundamental error where "the auditor was required to physically inspect the subject property to determine the percentage completion of construction, and assess the value of said construction" because the auditor's office "was required to look beyond the documents at its disposal to assign a value to the new improvements."[1059] In other words, the error could not be corrected "from the inspection or examination of documents in

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[1054] See *Sheldon Road Associates, L.L.C. v. Cuyahoga County Board of Revision*, 131 Ohio St.3d 201, 2012-Ohio-581, ¶ 31. See also *Appalachian Grouting Services, Inc. v. Belmont County Board of Revision* (August 6, 2018), BTA No. 2017-1281.

[1055] See *Sheldon Road Associates, L.L.C. v. Cuyahoga County Board of Revision*, 131 Ohio St.3d 201, 2012-Ohio-581, ¶ 31.

[1056] See *Sheldon Road Associates, L.L.C. v. Cuyahoga County Board of Revision*, 131 Ohio St.3d 201, 2012-Ohio-581, ¶ 31, quoting from *Heuck v. Cincinnati Model Homes Co*., 130 Ohio St. 378 (1936).

[1057] See *State ex. rel. Ney v. DeCourcy*, 81 Ohio App.3d 775, 780 (1st Dist. 1992).

[1058] See *State ex rel. Newpart Limited Partnership v. Donofrio*, 9th Dist. Summit No. C.A. No. 25009, 2020-Ohio-2199, ¶ 10, quoting from *Ryan v. Tracy* (1983), 6 Ohio St.3d 363, 366, fn. 4.

[1059] See *Board of Education of the Columbus City Schools v. Franklin County Board of Revision* (September 14, 2014), BTA No. 2013-335.

the county auditor's office" as required by R.C. 319.35. As such, action by the BOR was required to affect the correction.

By way of examples, over the years Ohio's courts have found the following to be clerical errors:

> (1) an error traceable to an improper deduction made in determining the value of property; (2) the act of the county auditor in making too low a computation of additions required by the board of revision; (3) the act of the assessor in valuing a lot at so much per front foot, but miscalculating the frontage so that the valuation is excessive; and (4) the omission of part of a building as a result of omitting a cipher from the measurement of the structure.[1060]

Because those are clerical errors, the BOR would not be involved in their correction.

On the other hand, fundamental errors - requiring that the BOR be involved in their correction - have been found in the following:

> (1) Negligence in placing a person's name on the tax duplicate as owner of land that did not belong to him but upon which he paid taxes for a long period; (2) an erroneous determination as to whether property is taxable or exempt; (3) the intentional adding of illegal taxes; (4) an error in the number of new buildings upon a tract of land; (5) an erroneous valuation; (6) the dishonest omission of property from the tax duplicate; (7) an error resulting from the taxpayer's mistake, not the auditors; and (6) taxation of property in the wrong county.[1061]

Finally, actions taken to correct clerical errors are not reviewable by the BTA. The BTA has ruled that where actions to correct clerical errors were taken by the auditor and the BOR pursuant to R.C. 319.35 and 319.36, that "These acts are not adjudicative in nature. These acts are ministerial acts accorded to the auditor and the board of revision to correct clerical errors."[1062] The Ohio Attorney General has opined that an auditor's duty to correct clerical errors under R.C. 319.35 is "remedial in nature and impose[s] ministerial obligations upon the county auditor to correct errors made in the performance of his statutory duties."[1063] Because these duties are ministerial and not adjudicative, they are not appealable to the BTA.

[1060] See *86 Ohio Jur. 3d Taxation § 580.*

[1061] See *86 Ohio Jur. 3d Taxation § 580.*

[1062] See *Robert and Mary Lou Blommel v. Greene County Board of Revision* (March 18, 1999), BTA No. 98-G-636.

[1063] See 2016 Ohio Op. Atty. Gen. No. 2016-012, 13. See also *Sidman v. Tracy* (Sept. 29, 1995), BTA No. 94-T-790.

> These are ministerial acts accorded to the auditor and the board of revision to correct clerical errors. Neither section [R.C. 319.35 and 319.36] expressly provides for an appeal to [the BTA] or any other tribunal.[1064]

Accordingly, those ministerial acts cannot be appealed to the BTA.[1065] Further, it should be noted that the language of R.C. 319.35 does not impose a time limit on the auditor's duty to correct a clerical error,[1066] with the Ohio Attorney General having opined that a county auditor had a duty to correct a clerical error even after the lapse of forty-one years.[1067]

The Method of Correcting Clerical Errors Depends Upon the Year in Which They Occurred

While R.C. 319.35 defines "clerical error," R.C. 319.36 discusses whether those clerical errors are to be corrected by the auditor alone or by the BOR. Whether the correction is made by the auditor alone or by the BOR depends upon whether the discovered error was for the current tax year or for previous years. In applicable part, R.C. 319.36 states that:

> If, *after having delivered a duplicate to the county treasurer for collection*, the county auditor is satisfied that any tax…has been erroneously charged as a result *of a clerical error*…the county auditor shall give the person so charged a certificate to that effect to be presented to the treasurer, who shall deduct the amount from such tax, assessment, or charge.[1068] (italics added).

Because the tax duplicate is delivered to the county treasurer *for the current tax year*[1069] and because the remedy proposed by R.C. 319.36 deals with the refund, crediting, or removal of

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[1064] See *Robert and Mary Lou Blommel v. Greene County Board of Revision* (March 18, 1999), BTA No. 98-G-636.

[1065] See Liberty West, LLC v. Butler County Board of Revision (June 23, 2009), BTA No. 2007-1361 where the BTA cited *Blommel*, supra, in stating that "We have held in the past that a correction of a clerical error is not property reviewable by this board…"

[1066] See *86 Ohio Jur. 3d Taxation § 580.*

[1067] See 1960 Ohio Op. Atty. Gen. No. 1960-1876 ("There is no limitation in Section 319.35, supra, or in Section 5713.19, supra, on the time in which the county auditor shall correct clerical errors he discovers in the duplicates in the description of lands. In the absence of a statutory limitation, mere lapse of time (in this case forty-one years which seems like an unusually long time under the circumstances) would not relieve the county auditor of his positive duty under Sections 319.35 and 5713.19, supra.").

[1068] See R.C. 319.36.

[1069] See R.C. 319.28 (In applicable part: "…on or before the first Monday of August, ***annually***, the county auditor shall compile and make up a general tax list of real and public utility property in the county…On or before the first Monday of September ***in each year***, the auditor shall correct such lists…and on the first day of October deliver one copy thereof to the county treasurer. The

overcharged taxes *for the current year*, R.C. 319.36 makes clear that the auditor alone – without the intervention of the BOR – can correct a clerical error for *the current tax year*. This is done through the auditor's unilateral delivery of a certificate to the taxpayer which the taxpayer can present to the county treasurer.

But that differs from where the auditor discovers a clerical error for a *previous* tax year. As set forth in applicable part in R.C. 319.36:

> If, at any time, the auditor discovers that erroneous taxes…have been charged or collected *in previous years* as a result of *a clerical error*…the auditor shall call the attention of the county board of revision to such charge or collection…If the board finds that taxes…have been erroneously charged or collected, as a result of a clerical error, it shall certify that finding to the county auditor. Upon receipt of the board's certification…the auditor shall do one of the following…[1070]

Under that language, the BOR's corrective involvement for clerical errors is limited to those circumstances where the erroneous tax, etc. was charged or collected in *previous years* and, by implication, *not* for the current tax year.[1071] Once involved, the BOR is required to determine whether or not the taxes, etc. were (1) erroneously charged or collected and (2) whether such erroneous charge or collection was due to clerical error. If it makes those determinations, then under the statute it is required to certify that finding to the auditor who shall take further action to correct the erroneous tax, assessment, etc., in accordance with sections (B) through (F) of R.C. 319.36. R.C. 319.36(A) and (B) then go on to provide the auditor with the mechanism to recompense the taxpayer for those overcharges.

In summary then, clerical errors for the current year can be corrected by the auditor alone and do not involve the BOR. Clerical errors for previous tax years must be reviewed and corrected by the BOR.

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copies prepared by the auditor shall constitute the auditor's general tax list and treasurer's general duplicate of real and public utility property ***for the current year***."). (italics and bolding added).

[1070] See R.C. 319.36.

[1071] It should also be noted that while the language of R.C. 319.36 first quoted above has a temporal limitation on the auditor ("If, *after having delivered a duplicate* to the county treasurer…"), no such temporal limitation on the auditor is found in the language that follows which initiates the BOR's involvement in the correction process ("If, *at any time*,").

R.C. 319.35 – Correction of Fundamental Errors

While R.C. 319.35 allows the correction of fundamental errors for the current year[1072] it is silent as to whether the BOR can correct fundamental errors from previous years. The statute's silence has sometimes proved confusing to county auditors and their staffs in addressing the correction of fundamental errors from earlier years.

While the law is unsettled, with no case law directly on point, it is argued here that the BOR does *not* have the authority to correct fundamental errors for previous years. In support of that view, at the outset it is noteworthy that under R.C. 319.36, after the auditor calls the attention of the BOR to *clerical* errors for *previous years*, that "If the board finds that taxes…have been erroneously charged or collected as a result of clerical error, it shall certify that finding to the county auditor."[1073] There is no similar authorization given to the BOR under either R.C. 319.35 or 319.36 for fundamental errors in previous years.

In addition, R.C. 319.35 concludes by stating that fundamental errors are "subject to correction only by the county board of revision *as provided by law*." (italics added). As a creature of statute, the BOR "is limited to the powers conferred upon it by statute."[1074] As mentioned above, there is no specific statutory authorization for the BOR to correct fundamental errors for previous years. Because under the law the BOR is limited to hearing complaints "relating to the valuation or assessment of real property as the same appears upon the tax duplicate *of the then current year*"[1075] and because the BOR may only correct fundamental errors "as provided by law", it would appear that the BOR may only correct fundamental errors alleged for the then current tax year. In support of that view, the BTA has stated that:

> We acknowledge that once the tax list and duplicate are certified, the BOR has sole authority to correct a fundamental error, i.e., "any error in the listing, valuation, assessment, or taxation of real property other than a clerical error." R.C. 319.35. *As discussed earlier, however, the BOR's jurisdiction is limited to only those years for*

[1072] See R.C. 319.35 ("…any error in the listing, valuation, assessment, or taxation of real property other than a clerical error constitutes a fundamental error and is subject to correction only by the county board of revision as provided by law.").

[1073] See R.C. 319.36. After that certification, under R.C. 319.36 the auditor is then required to make recompense to the taxpayer.

[1074] See *Cincinnati School District Board of Education v. Hamilton County Board of Revision*, 87 Ohio St.3d 363, 367, 2000-Ohio-452.

[1075] See R.C. 5715.11.

> *which a valid complaint is filed.* [italics added] *[citation omitted]*. Therefore, the BOR in this case lacks authority to make the changes requested by Hess and CNX because no complaint was filed for those earlier tax years and the time for the BOR's review of the tax list for those years has passed. R.C. 5715.16. Accordingly, this board agrees with the BOR's finding that it lacked jurisdiction to consider *any aspect* [italics added] of the auditor's assessment for prior tax years.[1076]

Because the Supreme Court has found that "a change of valuation…is fundamental"[1077] and because under R.C. 5715.19 a change in valuation may only be sought at the BOR for the current tax year,[1078] it makes sense that the BOR only has jurisdiction to make a change of a fundamental error for the then current tax year. To assert otherwise would appear to undercut the language of R.C. 5715.19 allowing a filing only for the current tax year.

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[1076] See *Hess Ohio Developments LLC v. Belmont County Board of Revision* (June 6, 2019), BTA Nos. 2016-2673, et seq., vacated on other grounds in *Hess Ohio Developments, LLC v. Belmont County Board of Revision*, 7th Dist. Belmont Nos. 19 BE 0029, 19 BE 0030, 19 BE 0031, 2020-Ohio-4729, ¶ 3 ("Because the subsurface owners do not challenge the auditor's calculation of the value or assessment of the parcels, but, instead, seek a determination of their ownership rights in the real property, we find that the BOR was without statutory authority to render a decision in the administrative appeals.").

[1077] See *Sheldon Road Associates, L.L.C. v. Cuyahoga County Board of Revision*, 131 Ohio St.3d 201, 2012-Ohio-581, ¶ 31.

[1078] See R.C. 5715.19(A)(1)(d) ("(A) … (1) a complaint against any of the following determinations *for the current tax year* shall be filed with the county auditor on or before the thirty-first day of March *of the ensuing tax year*… d) The determination of the total valuation or assessment of any parcel that appears on the tax list…") (italics added).

In conclusion, the authorization of both the county auditor and the BOR to correct errors under R.C. sections 319.35 and 319.36 is depicted in the following table.

	CURRENT YEAR	PREVIOUS YEAR(S)
CLERICAL ERROR	Fixed by Auditor alone, under RC 319.36[1079]	Fixed by BOR after Auditor brings it to BOR's attention under RC 319.36[1080]
FUNDAMENTAL ERROR	Fixed by BOR alone, under RC 319.35[1081]	Fixable by Neither Auditor nor BOR under RC 319.35 or 319.36.[1082]

[1079] Under R.C. 319.36 "If, after having delivered a duplicate to the county treasurer for collection, the county auditor is satisfied that any tax, assessment, recoupment charge, or any part thereof has been erroneously charged **as a result of a clerical error**…, the county auditor shall give the person so charged a certificate to that effect to be presented to the treasurer, who shall deduct the amount from such tax, assessment, or charge."

[1080] Under R.C. 319.36 "If, at any time, the auditor discovers that erroneous taxes, assessments, or charges have been charged or collected **in previous years as a result of a clerical error**,…the auditor shall call the attention of the county board of revision to such charge or collection at a regular or special session of the board. If the board finds that taxes, assessments, or charges have been erroneously charged or collected, as a result of a clerical error, it shall certify that finding to the county auditor. Upon receipt of the board's certification,…the auditor shall do one of the following:…"

[1081] Under R.C. 319.35: "… any error in the listing, valuation, assessment, or taxation of real property other than a clerical error constitutes a fundamental error and is **subject to correction only by the county board of revision as provided by law**."

[1082] See *Hess Ohio Developments LLC v. Belmont County Board of Revision* (June 6, 2019), BTA Nos. 2016-2673, et seq., ("We acknowledge that once the tax list and duplicate are certified, the BOR has sole authority to correct a fundamental error…however, the BOR's jurisdiction is limited to only those years for which a valid complaint is filed. ***[citation omitted].*** Therefore, the BOR in this case lacks authority to make the changes requested …because no complaint was filed for those earlier tax years and the time for the BOR's review of the tax list for those years has passed. R.C. 5715.16. Accordingly, this board [BTA} agrees with the BOR's finding that it lacked jurisdiction to consider any aspect of the auditor's assessment for prior tax years."), vacated on other grounds in *Hess Ohio Developments, LLC v. Belmont County Board of Revision*, 7th Dist. Belmont Nos. 19 BE 0029, 19 BE 0030, 19 BE 0031, 2020-Ohio-4729, ¶ 3.

CHAPTER 18
ERRORS AND OMISSIONS DISCOVERED BY THE BOR

CHAPTER SUMMARY

- The BOR may, on its own and independent of the auditor, discover errors or omissions in the auditor's records. Those BOR-discovered errors are handled under R.C. sections 5715.15 and 5715.16 and not under R.C. 319.35 and 319.36, which address auditor-discovered errors.

- Under R.C. 5715.15, where the BOR discovers that land has either (1) escaped taxation or (2) been taxed at less than its taxable value in a current year or in any of the five preceding years, it may investigate and report those findings to the auditor. Those corrections are made by the auditor and not the BOR.

- Under R.C. 5715.16, after the auditor presents to the BOR her assessment of property for the current year, if the BOR finds that any property has been improperly listed, improperly valued, or omitted and not valued, it shall make the necessary corrections.

The prior chapter discussed the handling of errors – both clerical and fundamental - in the auditor's records under R.C. 319.35 and 319.36 when those errors are discovered *by the county auditor*.[1083] But the BOR may *on its own* discover errors or omissions in the auditor's records. Those BOR-discovered errors are handled differently than auditor-discovered errors under R.C. 319.35 and 319.36. Depending upon the circumstances in which the BOR discovered them, these BOR-discovered errors are handled under either R.C. 5715.15[1084] or 5715.16. As discussed below, while the BOR does not have the authority to correct errors on its own under the circumstances described in R.C. 5715.15, it does have that authority under the circumstances contemplated by R.C. 5715.16.

[1083] See R.C. 319.35 ("From time to time the county auditor shall correct all clerical errors *the auditor discovers*…") and R.C. 319.36 ("If…the *county auditor is satisfied* that any tax…has been erroneously charged as a result of clerical error…" and "If, at any time, *the auditor discovers* that erroneous taxes…have been charged….). (italics added).

[1084] See *Board of Education of the Dublin City School District v. Franklin County Board of Revision* (January 14, 2000), BTA Nos. 97-M-960, 97-M-961 ("R.C. 5715.15 makes provision for the discovery by the board of revision that taxable property has escaped taxation or has been listed at less than taxable value." See also Board of Education for the Orange City School District and Olympic Steel, Inc. v. Cuyahoga County Board of Revision (August 5, 2005), BTA Nos. 2004-A-738, 739, 740, 741, 742, 743, 746, 747, 748.

R.C. 5715.15 – No BOR Authority to Correct

Section 5715.15 is entitled "Omissions or incorrect valuation reported to county auditor – corrections." Under that section, certain errors discovered by the BOR may be reported to the county auditor, but the BOR does not have the authority to correct them. Once notified by the BOR, the auditor is under a duty to inquire and make any corrections the auditor is authorized to make under the law. As set forth in R.C. 5715.15:

> When *the county board of revision discovers* that any taxable land, building, structure, improvement, minerals, or mineral rights have escaped taxation or been listed for taxation at less than their taxable value in a current year or in any year during the five years next preceding, the board may investigate the same and report to the county auditor all the facts and information in its possession which relate to the same. The auditor shall make the inquiries and corrections which he is authorized and required by law to make in other cases in which real property has escaped taxation or has been improperly listed or valued for taxation.[1085] (italics added).

Under R.C. 5715.15 the BOR's authority is limited to its discovery and reporting of errors in just two areas: those involving parcels, improvements, etc. that "have escaped taxation" and those that have been "listed for taxation at less than their taxable value." In other words, the BOR is given its authority under this statute to report errors to the auditor when the owner has paid no, or lower, property taxes than the owner should have paid had she been properly taxed. On its face the statute does not give the BOR similar authority where the parcel is taxed at a higher rate than is proper. In stating that the BOR "*may* [italics added] investigate the same [the errors] and report to the county auditor…" the statute makes clear that the BOR has the discretion to investigate and report but is not under a mandatory duty to do so.

Further, the BOR's authority under R.C. 5715.15 is limited to the "current tax year or in any year during the five years next preceding…"[1086] Thus, any property that escaped taxation or

[1085] See R.C. 5715.15.

[1086] This five-year limitation covers a period similar to the period the auditor has to recover uncharged taxes for prior years. Under R.C. 319.40, entitled "Omitted taxes shall be charged": "When the county auditor is satisfied that lots or lands *on the tax list or duplicate* have not been charged with either the county, township, municipal corporation, or school district tax, he shall charge against it all such omitted tax for the preceding years, not exceeding five years, unless in the meantime such lands or lots have changed ownership, in which case only the taxes chargeable since the last change of ownership shall be so charged." (italics added). As such, the five-year period of R.C. 319.40 addresses the situation where the lots or lands are already "on the tax list or duplicate" but "have not been charged" with the applicable taxes. A similar five year "reach back" period also appears in R.C. 5713.20(A), entitled "Adding omitted property to tax list," where "the county auditor discovers that any building…or tract of land…*has been*

was listed for taxation at less than its taxable value for a year occurring earlier than "the five years next preceding" the current tax year is beyond the BOR's reach under the statute.

R.C. 5715.16 – BOR Authority to Correct

The BOR's authority under R.C. 5715.16, entitled "County board of revision to make necessary corrections in assessments," is different than its authority under 5715.15. R.C. 5715.16 only deals with the BOR's responsibilities *after it receives from the auditor* the returns of the auditor's assessment of real property for the current year. While under 5715.15 the BOR has the authority to act (to investigate and report errors to the auditor) without any initial input from, or triggering event by, the auditor, under 5715.16 the BOR's ability to act is only available where it is first triggered by the auditor's actions. As set forth in the statute:

> On the second Monday of June, annually, the county auditor shall lay before the county board of revision the returns of his assessment of real property for the current year, and such board shall forthwith proceed to revise the assessment and returns of such real property. If the board finds that any tract, lot, or parcel of land, or any buildings, structures, or improvements thereon, or any minerals therein, or rights thereto have been improperly listed either as to the name of the owner or the description or quantity thereof, or have been incorrectly valued, or have been omitted and not yet valued, it shall make the necessary corrections and give to each such incorrectly valued or omitted tract, lot, or parcel of land, or any buildings, structures, or improvements thereon, or any minerals therein or rights thereto, their corrected taxable value.
>
> The auditor shall not make up his tax list and duplicate nor advertise as provided in section 5715.17 of the Revised Code until the board has completed its work under this section and returned to the auditor all the returns laid before it with the revisions thereof.[1087]

Once triggered by the auditor's presentation of the assessment of property for the current tax year, R.C. 5715.16 grants broad corrective powers to the BOR. After receiving the auditor's

omitted from the list…" [italics added]. In that circumstance, in language similar to that of R.C. 319.40, R.C. 5713.20(A) states that "The county auditor shall compute the sum of the simple taxes for the preceding years in which the property was omitted from the list of real property, *not exceeding five years*, unless in the meantime the property has changed ownership, in which case only the taxes chargeable since the last change of ownership shall be computed..." [italics added]. The primary difference between those statutes would appear to be that R.C. 319.40 deals with property *on the tax list* in which taxes have erroneously not been charged, whereas R.C. 5713.20(A) deals with property erroneously *omitted from the tax list* altogether where, as a result of that omission, taxes have also not been charged.

[1087] See R.C. 5715.16.

real property assessment, the statute requires that the BOR "shall forthwith proceed to revise the assessment and returns of such real property." Beyond that, however, the statute gives the BOR the power to make corrections to the auditor's assessment. This is a broader grant of authority than the BOR has under 5715.15, where it did not have the authority to make corrections on its own, independent of the auditor, and where it was limited in its review to just two categories: parcels that had "escaped taxation" or were "listed for taxation at less than their taxable value." Under 5715.16, the BOR has the ability to correct improper listings, incorrect values and omitted properties. But all of those BOR powers are dependent upon the triggering event: the auditor's presentation of the property assessment for the current tax year.

CHAPTER 19
THE BOR'S ROLE IN EXPEDITED TAX FORECLOSURES OF ABANDONED LAND

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Overview - R.C. 323.65 – R.C. 323.79

In 2006 Ohio enacted legislation creating new procedures, found in R.C. sections 323.65 through 323.79,[1088] to expedite "the foreclosure of abandoned land upon which delinquent taxes remain unpaid."[1089] It sought to address "the negative impact of abandoned buildings on a neighborhood, the inefficiencies of an overburdened judicial system, and the need for a quick and efficient way for a jurisdiction to be able to gain control of abandoned properties."[1090] Under the legislation, those expedited foreclosure proceedings are conducted at the board of revision.[1091]

Prior to the 2006 legislation, tax foreclosures were performed through the judicial process under R.C. sections 323.25 through 323.28[1092] and were conducted in a manner similar to mortgage foreclosures. In particular, the prior version of R.C. 323.25 stated that "… the county treasurer shall enforce the lien for such taxes by civil action…in the court of common pleas of the county in the same way mortgage liens are enforced."[1093] With some modifications from earlier law to address changes enacted in the new BOR foreclosure legislation, the provisions of R.C. 323.25 through 324.28 continue in effect and tax foreclosures may proceed under those older foreclosure provisions or the newer BOR legislation.

BOR tax foreclosures differ from both lender-initiated mortgage foreclosures and the more traditional judicial tax foreclosure actions filed in court.

> Traditional tax foreclosures in Ohio follow the same basic procedure as routine mortgage foreclosures. The county treasurer files a lawsuit in the common pleas court, a judgment of foreclosure is rendered, and the property is sold at public auction…The sales proceeds are then distributed among the various interest holders, starting with the county treasurer who holds a first lien position for real estate taxes…In other words, the treasurer commences a traditional tax foreclosure

[1088] See R.C. 323.65 – 323.79.

[1089] See http://archives.legislature.state.oh.us/analysis.cfm?ID=126_HB_294&ACT=As%20Enrolled&hf=analyses126/06-hb294-126.htm.

[1090] See William Weber, *Tax Foreclosure: A Drag on Community Vitality or a Tool for Economic Growth*, 81 U. Cin. L. Rev. 1615, 1620 - 1621 (2013) at: https://scholarship.law.uc.edu/uclr/vol81/iss4/10.

[1091] See R.C. 323.65, et seq.

[1092] See R.C. Sections 323.25 to 323.28.

[1093] See 125th General Assembly, Substitute House Bill Number 127.

> as an effort to collect tax dollars and, by the end of the process, actually collects delinquent real estate taxes. In the process, the property is offered for sale at public auction where the property owner may, through the competitive bidding process, realize on the equity she possesses in the property. The statute's expedited [BOR] tax foreclosure process is different.[1094]

The traditional judicial foreclosure route, constrained by crowded dockets and the discovery process, was often time consuming and inefficient in returning tax delinquent parcels to a more productive status. The 2006 legislation sought to streamline that process and was "designed to be an expeditious alternative to conventional judicial foreclosures."[1095] Indeed, at its outset, the statute makes clear that the administrative foreclosure proceedings at the BOR are "[i]n lieu of utilizing the foreclosure proceedings and other remedies"[1096] available in other sections of the Revised Code.[1097] Those other sections all deal with lands that, in general, are no longer productive or paying taxes.[1098] The hope behind the legislation was that "[b]y allowing these cases to be heard administratively [instead of through the judicial process], the foreclosure process could be expedited to take less than half a year, as opposed to the two or three years that such a proceeding could take under the previous law."[1099] As discussed in greater detail below, in general the statute seeks to return distressed parcels to productivity through either (1) a direct transfer to a Public Entity[1100] (as defined below), without an appraisal or sale, (2) a public auction of the property,[1101] or (3) a transfer to a Public Entity after a public auction was unsuccessful in selling the property.[1102]

[1094] See *Harrison v. Montgomery County*, 482 F.Supp.3d 652, 655 - 656 (S.D. Ohio 2020).

[1095] See *State ex rel. Feltner v. Cuyahoga County Board of Revision*, 160 Ohio St.3d 359, 2020-Ohio-3080, ¶ 2.

[1096] See R.C. 323.66(A).

[1097] See R.C. 323.66(A) which makes specific reference to those other sections as "sections 323.25 to 323.28 or under Chapter 5721., 5722., or 5723. of the Revised Code…"

[1098] For example, R.C. 323.25 deals with the enforcement of tax liens on delinquent lands; R.C. Chapter 5721 deals with delinquent lands; R.C. Chapter 5722 deals with land banks powers in addressing nonproductive land (See R.C. 5722.02(A) "Any municipal corporation, county, or township may elect to adopt and implement the procedures set forth in sections 5722.02 to 5722.15 of the Revised Code to facilitate the effective reutilization of nonproductive land situated within its boundaries."); and R.C. Chapter 5723 deals with forfeited lands.

[1099] See William Weber, *Tax Foreclosure: A Drag on Community Vitality or a Tool for Economic Growth*, 81 U. Cin. L. Rev. 1615, 1620 (2013) at: https://scholarship.law.uc.edu/uclr/vol81/iss4/10.

[1100] See R.C. 323.73(G) and R.C. 323.78.

[1101] See R.C. 323.73.

[1102] See R.C. 323.74 and R.C. 323.77.

(See Methods of Transfer chart at the end of this chapter).

In 2009 the law was amended to allow for the creation, and to establish the rights, of County Land Reutilization Corporations (referred to hereafter as "land banks").[1103] Land banks are non-profit "community improvement corporations"[1104] organized, in applicable part, for the purposes of:

> (a) Facilitating the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property within the county for whose benefit the corporation is being organized…;
>
> (b) Efficiently holding and managing vacant, abandoned, or tax-foreclosed real property pending its reclamation, rehabilitation, and reutilization;
>
> (c) Assisting governmental entities and other nonprofit or for-profit persons to assemble, clear, and clear the title of property described in this division in a coordinated manner; or
>
> (d) Promoting economic and housing development in the county or region.[1105]

The Supreme Court identified one of the benefits of the land bank legislation as allowing the BOR "…under certain circumstances, to order the sheriff to transfer property directly to a county land-reutilization corporation (or some other statutorily eligible political subdivision), without the need for an appraisal and public auction."[1106]

[1103] See http://archives.legislature.state.oh.us/analysis.cfm?ID=127_SB_353&ACT=As%20Enrolled&hf=analyses127/08-sb353-127.htm. As originally enacted, the role of land banks in these expedited tax foreclosures was limited to counties with a population of more than one million two hundred thousand. That limitation was subsequently changed. See http://archives.legislature.state.oh.us/bills.cfm?ID=128_HB_313.

[1104] See R.C. Chapter 1724.

[1105] See R.C. 1724.01(B).

[1106] See *State ex rel. Feltner v. Cuyahoga County Board of Revision*, 160 Ohio St.3d 359, 2020-Ohio-3080, ⁋ 2 ("*Feltner*"). It should be noted that in *Feltner* the constitutionality of the statutory BOR foreclosure process was challenged under the separation of powers or due process clauses of the United States and Ohio Constitutions through an action seeking a writ of prohibition. The Court's majority opinion denied the writ, but rests on the procedural law applicable to writs of prohibition and did not reach the constitutional arguments raised by Feltner ("…at the time of its judgment, the BOR acted with apparent…statutory authority. We cannot conclude that the BOR patently and unambiguously lacked jurisdiction…We therefore have no authority to undo the BOR's final judgment and need not consider the merit of Feltner's constitutional challenge."). After that decision, on October 23, 2020 Feltner filed a petition for a writ of certiorari with the United States Supreme Court asserting that the question presented was "When confiscating property to satisfy a delinquent debt, does it violate the Takings Clause for government to take property worth far more than what is owed, keeping the surplus value of that property as a windfall for the public?" On March 29, 2021 the Supreme Court declined to hear the case. See https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-567.html.

While the legislation contemplates that in its foreclosure proceedings the BOR may – and frequently will - interact with its county's land bank, neither counties nor other political subdivisions are mandated to establish one.[1107] Instead, the law grants those entities the option to create one.[1108] Since 2009, experience has shown that the better portion of the BOR foreclosure actions ultimately seek a transfer of the property to a land bank or other political subdivision.

Limited to Abandoned/Unoccupied Land - R.C. 323.66(A)

The BOR's foreclosure proceedings are limited to the foreclosure of "the state's lien for real estate taxes, upon *abandoned land* in the county…"[1109] (italics added). Under the statute "Abandoned land," is defined as:

> … delinquent lands or delinquent vacant lands,[1110] including any improvements on the lands, that are *unoccupied* and that first appeared on the list compiled under division (C) of section 323.67[1111] of the Revised Code, or the delinquent tax list or

[1107] As of this writing, the Ohio Land Bank Association reports that 56 of Ohio's 88 counties have land banks. See http://ohiolandbanks.org/about/.

[1108] See R.C. 5722.02(A) and (B) ("(A) Any municipal corporation, county, or township *may elect* (italics added) to adopt and implement the procedures set forth in sections 5722.02 to 5722.15 of the Revised Code to facilitate the effective reutilization of nonproductive land situated within its boundaries…The ordinance or resolution shall state that the existence of nonproductive land within its boundaries is such as to necessitate the implementation of a land reutilization program to foster either the return of such nonproductive land to tax revenue generating status or the devotion thereof to public use. (B) Any county adopting a resolution under division (A) of this section *may direct in the resolution that a county land reutilization corporation be organized* under Chapter 1724. of the Revised Code to act on behalf of and cooperate with the county in exercising the powers and performing the duties of the county under this chapter. (italics added).

[1109] See R.C. 323.66(A).

[1110] Under R.C. 5721.01(A)(1) " 'Delinquent lands' means all lands, including lands that are unimproved by any dwelling, upon which delinquent taxes, as defined in section 323.01 of the Revised Code, remain unpaid at the time a settlement is made between the county treasurer and auditor pursuant to division (C) of section 321.24 of the Revised Code." Under R.C. 5721.01(A)(2) "'Delinquent vacant lands" means all lands that have been delinquent lands for at least one year and that are unimproved by any dwelling."

[1111] See R.C. 323.67(C) ("For purposes of sections 323.65 to 323.79 of the Revised Code, the county auditor or county treasurer may compile or certify a list of abandoned lands in any manner and at such times as will give effect to the expedited foreclosure of abandoned land.").

delinquent vacant land tax list under section 5721.03[1112] of the Revised Code…[1113] (italics added)

What is "Unoccupied" Land? - R.C. 323.65(F)

As shown above, the BOR only has jurisdiction to foreclose on "abandoned land,"[1114] but to be considered "abandoned" the land must be "unoccupied." If it is not "unoccupied," then, by definition, it is not "abandoned" and the BOR does not have the statutory authority to foreclose upon it. But when is land considered to be "unoccupied"? Fortunately, the statute provides a detailed definition.

(1) "Unoccupied," with respect to a parcel of land, means any of the following:

> (a) No building, structure, land, or other improvement that is subject to taxation and that is located on the parcel is physically inhabited as a dwelling;
>
> (b) No trade or business is actively being conducted on the parcel by the owner, a tenant, or another party occupying the parcel pursuant to a lease or other legal authority, or in a building, structure, or other improvement that is subject to taxation and that is located on the parcel;
>
> (c) The parcel is uninhabited and there are no signs that it is undergoing a change in tenancy and remains legally habitable, or that it is undergoing improvements, as indicated by an application for a building permit or other facts indicating that the parcel is experiencing ongoing improvements.[1115]

Helpfully, the statute goes beyond those definitions by creating rebuttable presumptions that describe the facts demonstrating when a property is considered "unoccupied."

[1112] See R.C. 5721.03(A) (" At the time of making the delinquent land list, as provided in section 5721.011 of the Revised Code [this being immediately after the August settlement], the county auditor shall compile a delinquent tax list consisting of all lands on the delinquent land list on which taxes have become delinquent at the close of the collection period immediately preceding the making of the delinquent land list. The auditor shall also compile a delinquent vacant land tax list of all delinquent vacant lands prior to the institution of any foreclosure and forfeiture actions against delinquent vacant lands under section 5721.14 of the Revised Code or any foreclosure actions against delinquent vacant lands under section 5721.18 of the Revised Code.").

[1113] See R.C. 323.65(A).

[1114] See Op. Atty Gen. No. 2015-005, fn. 7 ("R.C. 323.66 gives a county board of revision jurisdiction to govern the foreclosure of 'abandoned land'…"

[1115] See R.C. 323.65(F)(1) (a – c).

> … it is prima-facie evidence and a rebuttable presumption that may be rebutted to the county board of revision that a parcel of land is unoccupied if…the parcel is not agricultural land, and two or more of the following apply:
>
> > (a) At the time of the inspection of the parcel by a county, municipal corporation, or township in which the parcel is located, no person, trade, or business inhabits, or is visibly present from an exterior inspection of, the parcel.
> >
> > (b) No utility connections, including, but not limited to, water, sewer, natural gas, or electric connections, service the parcel, or no such utility connections are actively being billed by any utility provider regarding the parcel.
> >
> > (c) The parcel or any improvement thereon is boarded up or otherwise sealed because, immediately prior to being boarded up or sealed, it was deemed by a political subdivision pursuant to its municipal, county, state, or federal authority to be open, vacant, or vandalized.
> >
> > (d) The parcel or any improvement thereon is, upon visible inspection, insecure, vacant, or vandalized.[1116]

After determining that the property is abandoned/unoccupied and taking other preliminary steps like conducting a title search,[1117] the complainant is in position to start the BOR foreclosure process by filing a complaint.[1118]

Filing and Notice of the Complaint – R.C. 323.69

The BOR acts in a role similar to that of a common pleas court handling a foreclosure action,[1119] and BOR foreclosures incorporate elements common to judicial foreclosure actions. For example, under the BOR foreclosure procedures in Chapter 323:

[1116] See R.C. 323.65(F)(2) (a – d).

[1117] See R.C. 323.69(A) ("Upon the completion of the title search the prosecuting attorney, representing the county treasurer, the county land reutilization corporation, or the certificate holder may file with the clerk of court a complaint…").

[1118] See R.C. 323.69(A) ("…"the prosecuting attorney, representing the county treasurer, the county land reutilization corporation, or the certificate holder may file with the clerk of court a complaint for the foreclosure of each parcel of abandoned land appearing on the abandoned land list…").

[1119] See William Weber, *Tax Foreclosure: A Drag on Community Vitality or a Tool for Economic Growth*, 81 U. Cin. L. Rev. 1615, 1624 (2013) at: https://scholarship.law.uc.edu/uclr/vol81/iss4/10 ("The hearing process is very similar to a judicial foreclosure."). Indeed, many

> The foreclosure begins with a title search to identify all persons holding an interest in the property subject to foreclosure.[1120] The foreclosing party files a complaint with the local clerk of courts,[1121] who then serves all interest holders with the notice and complaint in the same method employed for judicial proceedings.[1122] No sooner than thirty days after the perfection of service, a board of revision will have a final hearing on the merits of the complaint.[1123] The owner or any other interest holder may only plead that the *impositions* shown in the complaint have been paid in full, the amount is invalid, service was insufficient, or the land is not abandoned.[1124] Property foreclosed under this process can be disposed of by sale or through direct transfer without sale. [1125] (italics added).

The "impositions" mentioned above are defined by statute as the "delinquent taxes, assessments, penalties, interest, costs, reasonable attorney's fees of a certificate holder, applicable and permissible costs of the prosecuting attorney of a county, and other permissible charges against

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of the procedures set forth in R.C. Chapter 5721 apply to proceedings under that chapter as well as proceedings under R.C. 323.66, et. seq.

[1120] See R.C. 323.68. This is comparable to R.C. 5721.18(B) ("Prior to filing such an action in rem, the prosecuting attorney shall cause a title search to be conducted for the purpose of identifying any lienholders or other persons with interests in the property subject to foreclosure.")

[1121] See R.C. 323.69(A). The complaint is required to "name all parties having any interest of record in the abandoned land." This is comparable to R.C. 5721.18(B) ("Following the title search, the action in rem shall be instituted by filing in the office of the clerk of a court… A complaint shall contain…the name and address of the last known owner of the parcel if they appear on the general tax list, the name and address of each lienholder and other person with an interest in the parcel identified in the title search relating to the parcel …").

[1122] See R.C. 323.69(B)(1) which makes specific reference to the provisions of the Ohio Rules of Civil Procedure regarding service of the summons and complaint ("In accordance with Civil Rule 4, the clerk of court promptly shall serve notice of the summons and the complaint filed under division (A) of this section to the last known address of the record owner of the abandoned land and to the last known address of each lienholder or other person having a legal or equitable ownership interest or security interest of record identified by the title search.").

[1123] See R.C. 323.70(A).

[1124] See R.C. 323.72(A)(1) ("At any time after a complaint is filed under section 323.69 of the Revised Code, and before a decree of foreclosure is entered, the record owner or another person having a legal or equitable ownership interest in the abandoned land *may plead only that the impositions shown by the notice to be due and outstanding have been paid in full or are invalid or inapplicable in whole or in part*, and may raise issues pertaining to service of process and the parcel's status as abandoned land."). This is to be contrasted with foreclosures under R.C. Chapter 5721, specifically R.C. 5721.14(D)(1) where a broader range of defenses may be asserted in the answer ("The answer shall set forth the nature and amount of interest claimed in the parcel and *any defense or objection* to the foreclosure of the lien of the state for delinquent taxes, assessments, charges, penalties, and interest, as shown in the complaint."). (italics added).

[1125] See William Weber, *Tax Foreclosure: A Drag on Community Vitality or a Tool for Economic Growth*, 81 U. Cin. L. Rev. 1615, 1624 (2013) at: https://scholarship.law.uc.edu/uclr/vol81/iss4/10.

abandoned land."[1126] In short, they are parcel-related sums that are primarily owed to the government, not a private lender. As discussed below, the amount of these impositions figures prominently in certain of the BOR's foreclosure proceedings; particularly those under R.C. 323.73(G).[1127]

The complaint may be filed by either the county prosecuting attorney, a certificate holder,[1128] or a land bank and is required to name "all parties having any interest of record in the abandoned land that was discovered in the title search."[1129] Notice of the summons and complaint is required to be served on those parties and the notice is required, in applicable part, to:

> …inform the addressee that delinquent taxes stand charged against the abandoned land; that the land will be sold at public auction or otherwise disposed of if not redeemed by the owner or other addressee; that the sale or transfer will occur at a date, time, and place, and in the manner prescribed in sections 323.65 to 323.79 of the Revised Code; that the owner or other addressee may redeem the land by paying the total of the impositions against the land at any time before confirmation of sale or transfer of the parcel…or before the expiration of the alternative redemption period, as may be applicable to the proceeding…[1130]

The notice is also required to inform the addressees of the BOR's contact information, the BOR case number, that all subsequent pleadings must be filed with the clerk of court,[1131] and of their ability to transfer the case to the common pleas court (see below).[1132] The notice and service requirements of the Ohio Rules of Civil Procedure are applicable to these BOR proceedings, but

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[1126] See R.C. 323.65(E).

[1127] See R.C. 323.73(G).

[1128] See Op. Atty Gen. No. 2015-005, fn. 12 ("A certificate holder is "a person, including a [CLRC], that purchases or otherwise acquires a tax certificate under [R.C. 5721.32], [R.C. 5721.33], or [R.C. 5721.42], or a person to whom a tax certificate has been transferred pursuant to [R.C. 5721.36]." R.C. 5721.30(C)…A tax certificate is a certificate issued by the county treasurer in an effort to transfer the lien against certain delinquent land in lieu of foreclosure proceedings. See R.C. 5721.31(A)(1) ("the county treasurer may select from the [delinquent land] list parcels of delinquent land the lien against which the county treasurer may attempt to transfer by the sale of tax certificates under [R.C. 5721.30-.43]"); R.C. 5721.30(A) (defining "tax certificate")."

[1129] See R.C. 323.69(A).

[1130] See R.C. 323.69(B)(1).

[1131] See R.C. 323.69(B)(1).

[1132] See R.C. 323.69(B)(2).

"Other than the notice and service provisions contained in Civil Rules 4 and 5, the Rules of Civil Procedure shall not be applicable to the proceedings of the board."[1133]

Challenge to Service of Process – R.C. 323.72(A)(1) and R.C. 323.69(C)

In addition to potential other defenses, those who have a legal or equitable ownership interest in the property (an "Owner") as well as lienholders or others having a security interest in the property (a "Security Holder") may "[a]t any time after a complaint is filed…and before a decree of foreclosure is entered raise issues pertaining to service of process and the parcel's status as abandoned land."[1134] The statute provides that "The county board of revision may conduct evidentiary hearings on the sufficiency of process, service of process, or sufficiency of service of papers in any proceeding arising from a complaint filed under this section."[1135]

Default – R.C. 323.69(D)

Once a party has been properly served, a default judgment may be available in some circumstances. Under the statute, a party is deemed to be in default if "the party fails to appear at any hearing after being served with notice of the summons and complaint by certified or ordinary mail" or "For a party upon whom notice of summons and complaint is required by publication…the party fails to appear, move, or plead to the complaint within twenty-eight days after service by publication is completed."[1136] If the party is deemed to be in default, then no further service of any subsequent pleadings, papers, or proceedings is required to be made on the defaulting party.[1137]

[1133] See R.C. 323.69(C).

[1134] See R.C. 323.72(A)(1).

[1135] See R.C. 323.69(C).

[1136] See R.C. 323.69(D)(1)(a) and (b).

[1137] See R.C. 323.69(D)(2).

The Owner's Opportunity to Transfer the Proceedings - R.C. 323.69 and R.C. 323.691

Prior to proceeding at the BOR, however, both Owners and Security Holders are provided with an opportunity to transfer the foreclosure case to the applicable common pleas or municipal court. Before the fourteenth day after service of process is perfected, any owner of record may file a pleading with the clerk requesting that the BOR transfer the case to a court of competent jurisdiction.[1138] If such a filing is made, then " the board *shall*, without conducting a hearing on the matter, promptly transfer the case for foreclosure of that land to a court pursuant to section 323.691[1139] of the Revised Code to be conducted in accordance with the applicable laws."[1140] (italics added). The record owner's right to transfer is automatic upon its request.[1141]

The Security Holder's Opportunity to Transfer the Proceedings – R.C. 323.72

Security Holders can also request that the BOR foreclosure case be transferred to a court. "…[A] lienholder or another person having a security interest of record in the abandoned land…" also has a right "[a]t any time before a decree of foreclosure is filed"[1142] to request a transfer of the BOR's foreclosure case to either the common pleas or municipal court. That right, however, is not automatic for the Security Holder as it is for the Owner and may require a hearing and findings by the BOR before the transfer is allowed. As set forth in R.C. 323.72(C):

> If a [Security Holder],…timely files a pleading…requesting that the abandoned land not be disposed of [at the BOR]…and the complaint be transferred to a court pursuant to section 323.691…in order to preserve the [Security Holder's] security interest, the county board of revision may approve the request if the board finds

[1138] See R.C. 323.69(B)(2).

[1139] See R.C. 323.691(A)(1) which reads, in applicable part, that "A county board of revision may order that a proceeding arising from a complaint filed under section 323.69 of the Revised Code be transferred to the court of common pleas or to a municipal court with jurisdiction. The board may order such a transfer upon the motion of the record owner of the parcel or the county prosecuting attorney, representing the county treasurer, or upon its own motion." But note that R.C. 323.70(B) says that upon filing a motion to transfer "the board ***shall***…promptly transfer the case for foreclosure of that land to a court pursuant to section 323.691 of the Revised Code…" whereas, R.C. 323.691(A)(1) says that the BOR "***may*** order that a proceeding arising from a complaint under section 323.69…be transferred…The board ***may*** order such a transfer upon the motion of the record owner…of the parcel or the county prosecuting attorney, representing the treasurer, or upon its own motion." (italics and bolding added).

[1140] See R.C. 323.70(B).

[1141] See *Harrison v. Montgomery County*, 482 F.Supp.3d 652, 657 (S.D. Ohio 2020).

[1142] See R.C. 323.72(A)(2).

> that the sale or other conveyance of the parcel of land under sections 323.65 to 323.79 of the Revised Code would unreasonably jeopardize the [Security Holder's] ability to enforce the security interest or to otherwise preserve the [Security Holder's] security interest. The board may conduct a hearing on the request and make a ruling based on the available and submitted evidence of the parties.[1143]

Thus, under the statute the BOR "may" approve the transfer if it "finds that the sale or other conveyance of the parcel of land…would *unreasonably jeopardize* the lienholder's or other person's ability to enforce the security interest or to otherwise preserve the [Security Holder's] security interest."[1144] (italics added). Unfortunately, the phrase "unreasonably jeopardize," which is central to the Security Holder's request for a transfer regarding its ability to protect its security interest, is not defined in the statutory scheme and the BOR is left to use its best judgment on the meaning of that phrase.

The BOR may, but is not required, to hold a hearing to consider the transfer request.[1145] Whether or not a hearing is held, the Security Holder requesting the transfer "must first make a minimum showing by a preponderance of the evidence pursuant to section 323.71…that the impositions against the parcel of abandoned land do not exceed the fair market value of the abandoned land as determined by the auditor's then-current valuation of that parcel, which valuation is presumed, subject to rebuttal, to be the fair market value of the land. …"[1146] If the Security Holder makes that minimum showing, then the BOR "may consider the request and make a ruling based on the available and submitted evidence of the parties."[1147] If, however, "… the [Security Holder] fails to make the minimum showing, the board of revision shall deny the request."[1148]

Further, at any time and on its own motion, the BOR may transfer the case to the court of common pleas or to a municipal court with jurisdiction "if it determines that, given the complexity

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[1143] See R.C. 323.72(C).

[1144] See R.C. 323.72(C) .

[1145] See R.C. 323.72(C) ("If the board approves the request *without a hearing*, the board shall …") (italics added).

[1146] See R.C. 323.72(C) .

[1147] See R.C. 323.72(C) .

[1148] See R.C. 323.72(C) .

of the case or other circumstances, a court would be a more appropriate forum for the action."[1149] It may also do so upon the motion of the record owner of the parcel or the county prosecuting attorney on behalf of the treasurer.[1150] Conversely, where the county treasurer has filed the tax foreclosure in the common pleas or municipal courts (instead of at the BOR),[1151] the court may order it to be transferred to the BOR if it determines that the real property is abandoned land.[1152]

Three Potential Hearings – R.C. 323.70, R.C. 323.71, and R.C. 323.72

Assuming the case remains at the BOR, the statutory scheme *technically* allows for three potential hearings although in practice the hearings are commonly consolidated into a single hearing. Those hearings are: (1) a hearing under R.C. 323.71 which addresses whether the impositions exceed the fair market value of the property and, dependent upon that determination, directs how the parcel may be disposed of upon an order of foreclosure; (2) a hearing under R.C. 323.72[1153] where both an Owner and a Security Holder may assert various defenses to the foreclosure or seek a transfer of the BOR foreclosure case to the common pleas or municipal courts; and (3) the final hearing on the merits under R.C. 323.70.

Hearing Regarding Whether the Impositions Exceed the Fair Market Value of the Property - R.C. 323.71

The BOR may hold a hearing to determine whether the amount of impositions exceed the fair market value ("FMV") of the property ("the Impositions Hearing"). If the BOR ultimately orders a foreclosure, the outcome of this hearing directs the manner in which a property will be disposed of. In applicable part, the statute reads:

[1149] See R.C. 323.69(E).

[1150] See R.C. 323.691(A)(1).

[1151] See R.C. Sections 323.25 to 323.28.

[1152] See R.C. 323.691(A)(2).

[1153] Pursuant to R.C. 323.70, as discussed in greater detail below, the hearing under R.C. 323.72 may be consolidated with the final hearing under R.C. 323.70.

> If the county board of revision…determines that the impositions against a parcel of abandoned land…exceed the fair market value of that parcel…then the board may proceed to hear and adjudicate the case as provided under sections 323.70 and 323.72…Upon entry of an order of foreclosure, the parcel may be disposed of as prescribed by division (G) of section 323.73 of the Revised Code.[1154]

The Impositions Hearing may be held upon the BOR's own motion[1155] or pursuant to a motion filed by an Owner or Security Holder.[1156]

The provisions of R.C. 323.73(G) may be of particular importance to an Owner or Security Holder because under its provisions:

> If the county board of revision finds that the total of the impositions against the abandoned land are greater than the fair market value of the abandoned land…the board, at any final hearing…may order the property foreclosed and, *without an appraisal or public auction,* order the sheriff to execute a deed to the certificate holder or county land reutilization corporation that filed a complaint…or to a community development organization, school district, municipal corporation, county, or township, [singularly or collectively, hereafter, referred to as "a Public Entity"] whichever is applicable, as provided in section 323.74 of the Revised Code.[1157] (italics added)

If the property is transferred to a Public Entity without appraisal or auction, then the Owner or Security Holder is unable to receive any value for its interests. Obviously, many Owners or Security Holders want to avoid that outcome, hoping instead to recover at least some value by sale to the highest bidder after a public auction.

But in order to preclude the possibility of a transfer to a Public Entity without a public auction, the Owner or Security Holder must show that that the impositions do not exceed the FMV. Procedurally, to do *that*, it must file a motion seeking a hearing "not later than seven days before a final hearing."[1158] According to the statute, an Owner or Security Holder:

> …may file with the county board of revision a good faith appraisal of the parcel from a licensed professional appraiser and request a hearing to determine whether the impositions…exceed or do not exceed the fair market value of that parcel…If

[1154] See R.C. 323.71(A)(1).

[1155] See R.C. 323.71(A)(1).

[1156] See R.C. 323.71(A)(2).

[1157] See R.C. 323,73(G).

[1158] See R.C. 323.71(A)(2).

> the motion is timely filed, the board of revision shall conduct a hearing and shall make a factual finding as to whether the impositions against the parcel exceed or do not exceed the fair market value of that parcel as shown by the auditor's then-current valuation of that parcel. An owner or lienholder must show by a preponderance of the evidence that the impositions against the parcel do not exceed the auditor's then-current valuation of the parcel in order to preclude the application of division (G) of section 323.73 of the Revised Code.[1159]

The statute states that "it is prima-facie evidence and a rebuttable presumption that may be rebutted to the county board of revision that the auditor's then-current valuation…is the fair market value of the land, regardless of whether an independent appraisal has been performed."[1160] Accordingly, where it appears that the impositions exceed the property's FMV, the only way for the Owner or Security Holder to preclude the applicability of R.C. 323.73(G) (in the event of a foreclosure order) is for it to carry the burden of proof at the hearing and show that the impositions do not exceed the FMV of the property.

If, however, the BOR determines that the impositions do not exceed the county auditor's then-current FMV of the property, then the property may not be disposed of under R.C. 323.73(G) (allowing a direct transfer to a Public Entity) but may still be disposed of under R.C. sections 323.73, 323.74, 323.75, 323.77 and 323.78. In general, with the exception of R.C. 323.78 (the alternative redemption period statute, discussed below) those other statutes provide greater opportunities for a public auction and/or the recovery of some monetary value for the land than does R.C. 323.73(G).[1161]

Hearings - R.C. 323.72 and 323.70

In addition to the Impositions Hearing,[1162] the statutory scheme technically allows for two other hearings: (1) one under R.C. 323.72 through which an Owner or Security Holder can raise

[1159] See R.C. 323.71(A)(2).

[1160] See R.C. 323.71(B).

[1161] For example, R.C. 323.73 requires disposal at a public auction; R.C. 323.74 allows for disposal in "any usual and customary manner by the sheriff as otherwise provided by law" if the property is not first purchased at a public auction held under R.C. 323.73; R.C. 323.75 deals with the apportion of the costs at a public auction; R.C. 323.77 deals with the ability of a political subdivision to acquire the parcel if it is not sold at a public auction for want of a minimum bid; and R.C. 323.78 deals with the ability of the county treasurer to invoke the alternative redemption period.

[1162] See R.C. 323.71(A).

certain defenses and transfer requests and (2) the final hearing on the merits under R.C. 323.70. While the statute makes clear that these two types of hearings are distinct one from the other, under the authority of R.C. 323.72(B), "A hearing under this division may be consolidated with any final hearing on the matter under section 323.70…"[1163] And as a practical matter, for purposes of greater efficiency, hearings under those sections are commonly consolidated and held as a single hearing where all issues can be addressed.

Defenses[1164] by the Owner and/or the Security Holder - R.C. 323.72

As with regular court proceedings, the BOR foreclosure statutes provide Owners and Security Holders with certain due process protections to appear and be heard. Defenses may be asserted by an owner pursuant to R.C. 323.72(A)**(1)** and by a Security Holder under R.C. 323.72(A)**(2)**. These defenses are heard at a hearing held under R.C. 323.72(B)[1165] (hereafter, a ".72(B) Hearing"). Hearings held under .72(B) address two categories of defenses: (1) those defenses relating to the impositions, which may be raised by either an Owner or a Security Holder[1166] and (2) all other defenses allowed under the statute, which may be raised only by an Owner[1167] and not by a Security Holder. Those defenses are discussed below.

[1163] See R.C. 323.72(B).

[1164] R.C. 323.72 does not use the word "defenses", instead stating that the Owner or Security Holder "may plead…" Despite that difference in terminology, the "pleadings" are effectively "defenses".

[1165] See R.C. 323.72(B).

[1166] See R.C. 323.72(B) ("If **[an Owner]** files a pleading with the county board of revision under division (A)(1) of this section, or if a **[Security Holder]** files a pleading with the board under division (A)(2) of this section that asserts that the impositions have been paid in full, the board shall schedule a hearing…The only questions to be considered at the hearing are the amount and validity of all or a portion of the impositions, whether those impositions have in fact been paid in full…").

[1167] See R.C. 323.72(B) which states that in addition to the impositions-related defenses, questions to be considered at the .72(B) Hearing under (A)(1), which can only be filed by the Owner, are "…whether valid issues pertaining to service of process and the parcel's status as abandoned land have been raised. If the record owner, lienholder, or other person shows by a preponderance of the evidence that all impositions against the parcel have been paid, the board shall dismiss the complaint and remove the parcel of abandoned land from the abandoned land list, and that land shall not be offered for sale or otherwise conveyed…").

An Owner's Defenses - R.C. 323.72(A)(1) [hereafter "(A)(1)"]

While procedural protections are provided for the interests of both Owners as well as Security Holders,[1168] the statute makes clear that a party may only plead a limited number of issues in hearings held under R.C. 323.72. In particular, under (A)(1) the record owner or another person having a legal or equitable interest in the property may only plead the following: (1) *that the impositions shown by the notice to be due and outstanding have been paid in full*; (2) that the impositions are invalid or inapplicable in whole or in part; (3) issues pertaining to service of process; and (4) issues regarding the parcel's status as abandoned land. Those defenses may be pled at any time after a complaint is filed and before a decree of foreclosure is entered[1169] and the BOR may consider only those questions.[1170] (italics added)

A Security Holder's Defenses - R.C. 323.72(A)(2) [hereafter "(A)(2)"]

Security Holders, on the other hand, are more limited than Owners in the issues they may plead[1171] and under (A)(2) a Security Holder may plead either (1) *that the impositions shown by the notice to be due and outstanding have been paid in full*, or (2) request that in order to protect its security interest, the abandoned land should not be disposed of under the BOR's foreclosure procedures but, instead, "the case should be transferred to a court pursuant to section 323.691 of

[1168] See *Harrison v. Montgomery County*, 482 F.Supp.3d 652, 656 (S.D. Ohio 2020). ("In creating this expedited foreclosure procedure for abandoned, tax delinquent lands, the General Assembly implemented a number of procedural safeguards to protect the rights of affected property owners who want to contest the foreclosure or pay their delinquent taxes.)"

[1169] See R.C. 323.72(A)(1) ("At any time after a complaint is filed…and before a decree of foreclosure is entered, the record owner or another person having a legal or equitable ownership interest in the abandoned land may plead *only* that the impositions shown by the notice to be due and outstanding have been paid in full or are invalid or inapplicable in whole or in part, and may raise issues pertaining to service of process and the parcel's status as abandoned land." (italics added).

[1170] See R.C. 323.72(B) ("The *only* questions to be considered [by the BOR] at the hearing are the amount and validity of all or a portion of the impositions, whether those impositions have in fact been paid in full, and, under division (A)(1) of this section, whether valid issues pertaining to service of process and the parcel's status as abandoned land have been raised." (italics added). If the hearings under R.C. 323.72 and 323.70 are consolidated, presumably the Owner and/or Security Holder could also challenge the sufficiency of the complainant's evidence and whether the complainant met its burden of proof.

[1171] In (A)(1), relating to the defenses that an Owner may plead, the statute uses the limiting word "only" in limiting the defenses that an Owner may plead. (A)(2) does not use the word "only" to limit what a Security Holder may plead. Instead, (A)(2) states that a Security Holder "may plead either of the following." It would appear that those words of limitation have the same practical limiting effect as the use of the word "only" relating to an Owner.

the Revised Code."[1172] Security Holders may raise those issues at any time before a decree of foreclosure is filed.[1173]

Decision Regarding Defenses by an owner and/or A Security Holder that All Impositions Have Been Paid - R.C. 323.72(B)

As seen above, there is one defense that applies to both Owners and Security Holders. Under both (A)(1) and (A)(2) if either an Owner or a Security Holder files a pleading "*that the impositions shown by the notice to be due and outstanding have been paid in full*" then the BOR is required to schedule a hearing to be held under .72(B) no less than thirty nor more than ninety days after it receives the pleading.[1174]

At that hearing, "The only questions to be considered…are the amount and validity of all or a portion of the impositions, [and] whether those impositions have in fact been paid in full…"[1175] If the Owner or Security Holder shows by a preponderance of the evidence that "all impositions against the parcel have been paid" then the BOR "shall dismiss the complaint and remove the parcel of abandoned land from the abandoned land list, and that land shall not be offered for sale or otherwise conveyed under sections 323.65 to 323.79 of the Revised Code."[1176] In addition, "[i]f the board determines that the impositions have been paid, then the board, on its own motion, may dismiss the case without a hearing."[1177] On the other hand, if "the record owner, lienholder, or other person fails to appear, or appears and fails to show by a preponderance of the evidence that all impositions against the parcel have been paid, the board shall proceed in the manner prescribed in section 323.73 [Disposal of abandoned land at public auction] of the Revised Code."[1178]

[1172] See R.C 323.72(A)(2)(a & b).

[1173] See R.C. 323.72(A)(2).

[1174] See R.C. 323.72(B).

[1175] See R.C. 323.72(B).

[1176] See R.C. 323.72(B).

[1177] See R.C. 323.72(B).

[1178] See R.C. 323.72(B).

The other Owner defenses (discussed above) besides those relating to the impositions may also be heard at the .72(B) Hearing. These additional defenses, however, apply only to an Owner and may not be raised at that hearing by a Security Holder.

Decision to Dismiss or Transfer the Case - R.C. 323.72(D)

The statute addresses what happens if the BOR decides that one or more of the asserted defenses or the request for a transfer are well taken. In such event, "the board shall dismiss the complaint in the case of pleadings described in [323.72(B)] or transfer the complaint to a court in the case of pleadings described in [323.72(C)]."[1179] Either of those actions, of course, would clear the case from the BOR's foreclosure docket.

That statute goes on to direct, however, what happens if the BOR does not grant either a dismissal or a transfer.

> If the county board of revision does not dismiss the complaint…or does not approve a…transfer…after conducting a hearing, [then] the board shall proceed with the final hearing prescribed in section 323.70…and file its decision on the complaint for foreclosure with the clerk of court.[1180]

The Final Hearing – R.C. 323.70

R.C. 323.70 requires that the BOR hold a final hearing on the merits "[s]ubject to this section and to sections 323.71 and 323.72 of the Revised Code."[1181] If the BOR has not disposed of the case through either dismissal or transfer to the courts pursuant to those sections, then "…the board shall proceed with the final hearing [on the merits] prescribed in section 323.70..."[1182] That final hearing shall take place no sooner than thirty days after service of the summons and complaint has been perfected.[1183]

[1179] See R.C. 323.72(D).

[1180] See R.C. 323.72(D).

[1181] See R.C. 323.70(A). See also Op. Atty Gen. No. 2015-005 ("The county board of revision hears and adjudicates a complaint filed under R.C. 323.69(A) in accordance with R.C. 323.70 - .72. R.C. 323.70(A).").

[1182] See R.C. 323.72(D).

[1183] See R.C. 323.70(A).

What Rules Apply to the Conduct of the Final Hearing – R.C. 323.66(B) and R.C. 323.69(C)

As noted above, while the BOR must comply with the notice and service requirements of Rules 4 and 5 of the Ohio Rules of Civil Procedure, it is not required to follow any other provisions of the Civil Rules.[1184] This differs, of course, from non-BOR foreclosures which are bound by those rules. Nonetheless, the statute gives the BOR the discretion to follow the Civil Rules in other procedural areas if it desires. "The board of revision *may* utilize procedures contained in the Rules of Civil Procedure to the extent that such use facilitates the needs of the proceedings, such as vacating orders, correcting clerical mistakes, and providing notice to parties." [1185] (italics added).

Beyond that, the BOR has the authority to adopt its own rules regarding "hearing procedure, the scheduling and location of proceedings, case management, and practice forms," provided they are "consistent with the rules adopted by the Tax Commissioner under R.C. Chapter 5715"[1186] and "not inconsistent with sections 323.65 to 323.79 of the Revised Code."[1187] The BOR is also granted the authority, in accordance with the Civil Rules, to "…issue subpoenas compelling the attendance of witnesses and the production of papers, books, accounts, and testimony as necessary to conduct a hearing under this section or to otherwise adjudicate a case under sections 323.65 to 323.79..."[1188]

The Burden of Proof and Procedure at the Final Hearing – R.C. 323.70(A)

[1184] See R.C. 323.69(C) ("Other than the notice and service provisions contained in Civil Rules 4 and 5, the Rules of Civil Procedure shall not be applicable to the proceedings of the board.").

[1185] See R.C. 323.69(C).

[1186] See R.C. 323.66(B)(1) ("A county board of revision may adopt rules as are necessary to administer cases subject to its jurisdiction … under sections 323.65 to 323.79 of the Revised Code, as long as the rules are consistent with rules adopted by the tax commissioner under Chapter 5715…Rules adopted by a board shall be limited to rules relating to hearing procedure, the scheduling and location of proceedings, case management, and practice forms.").

[1187] See R.C. 323.69(C) ("Board practice shall be in accordance with the practice and rules, if any, of the board that are promulgated by the board under section 323.66 of the Revised Code and are not inconsistent with sections 323.65 to 323.79 of the Revised Code."). An example of rules applicable to BOR foreclosure proceedings as adopted by the Montgomery County Board of Revision can be found in Section 15 at https://www.mcohio.org/BOR_Practices_and_Procedures.pdf.

[1188] See R.C. 323.70(C).

Experience has shown that the Owners and/or Security Holders of the subject property often do not appear at the final hearing, meaning that the complainant's evidence is often uncontested. At the hearing, the complainant – often the county treasurer[1189] – must prove the allegations in its complaint by a preponderance of the evidence pursuant to normal BOR requirements.[1190] In addition, the statute itself mandates that the preponderance standard be used and requires that the final hearing include "the validity or amount of the impositions alleged in the complaint." As stated in the statute, if:

> …after a hearing, the board finds that the validity or amount of all or a portion of the impositions is not supported by a preponderance of the evidence, the board may order the county auditor to remove from the tax list and duplicate amounts the board finds invalid or not supported by a preponderance of the evidence. The auditor shall remove all such amounts from the tax list and duplicate as ordered by the board of revision….[1191]

If the hearings under 323.71 or 323.72 have been held prior to a final-merits hearing then the case may have already been disposed of and a final hearing may not be needed. Most typically, however, as mentioned above, all proceedings are consolidated with the final merits hearing under R.C. 323.70; in part because many of the issues to be addressed under R.C. 323.71 and 323.72 overlap with issues to be determined in the final hearing under R.C. 323.70.

Assuming such consolidation, the question arises as to the order in which the evidence should be received. Neither the Tax Commissioner's Rules nor the statutes discuss the order or manner in which the BOR is to receive evidence at its foreclosure hearings.[1192] As context, however, the Tax Commissioner's Rules require that the Board of Tax Appeals, in *its* hearings, "proceed in similar manner to a civil action, with witnesses to be sworn and subject to cross-

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[1189] See R.C. 323.69(A). In addition to complaints filed by the prosecuting attorney on the county treasurer's behalf, complaints may also be filed by "… the county land reutilization corporation, or the certificate holder… for the foreclosure of each parcel of abandoned land appearing on the abandoned land list…"

[1190] See *Friendly's v. Franklin County Board of Revision* (February 18, 1994), BTA No. 92-K-1399, 1994 WL 62973 ("It is fundamental that a complainant has the burden of proof to establish by a preponderance of the evidence, the value which is asserted in the complaint."). See also *Davis v. Bd. of Revision of Ashtabula Cty.* (Nov. 5, 1993), BTA No. 91-N-611 ("In an administrative hearing, such as the one held by the Board of Revision, the property owner [complainant] need only prove his case by a preponderance of the evidence, not by clear, convincing evidence…").

[1191] See R.C. 323.70(A).

[1192] Tax Commissioner Rules that mention the "board of revision" are found in Ohio Administrative Code Chapters 5703-25 and 5717-1.

examination. The nature, scope, and length of examination of witnesses is within the discretion of the presiding attorney examiner or board member(s)."[1193] In practice, BOR hearings generally proceed in a similar manner with the board having similar discretion regarding the length and scope of the witness examinations.

At the final hearing, the complainant bears the burden of proof[1194] to show, amongst other things, that the subject property is unoccupied,[1195] abandoned land.[1196] Because R.C. 323.72(A)(1) states that the defenses identified in that section ("…that the impositions…have been paid in full or are invalid or inapplicable in whole or in part, and may raise issues pertaining to service of process and the parcel's status as abandoned land") may be raised "[a]t any time after a complaint is filed…and before a decree of foreclosure is entered…," an Owner may raise them at the final hearing. At the conclusion of the final hearing, the BOR is required to "file its decision on the complaint for foreclosure with the clerk of court" who, in turn, is required to send written notice of the decision to the parties.[1197] If the BOR orders a foreclosure, the question then arises as to how the property will be disposed of.

Disposal of the Property - R.C. 323.78 - Invocation by County Treasurer of the Alternative Redemption Period

R.C. sections 323.73 through 323.78 describe how the abandoned property is dealt with after the BOR renders an adjudication of foreclosure. In general, upon the BOR's order of foreclosure the property can be sold at auction – a process that looks similar to the traditional foreclosure/sale process – or it can be transferred to a Public Entity.[1198] We will discuss the sale

[1193] See OAC 5717-1-16(G).

[1194] *See Zingale v. Ohio Casino Control Commission*, 8th Dist. Cuyahoga No. 101381, 2014-Ohio-4937, ¶ 33 (""[I]t is fundamental to administrative law and procedure that the party asserting the affirmative issues also bears the burden of proof.").

[1195] See R.C. 323.65(F).

[1196] See R.C. 323.65(A).

[1197] See R.C. 323.72(D).

[1198] Under sections 323.65 through 323.79, the Revised Code authorizes land adjudicated as abandoned to be transferred to a Public Entity through a few different methods. Those methods, discussed in further detail below, are found in the following Revised Code sections: R.C. 323.73(G) ("If the county board of revision finds that the total of the impositions against the abandoned land are greater than the fair market value of the abandoned…the board…may order the property foreclosed and, without an appraisal or public auction, order the sheriff to execute a deed to [a Public Entity]…"); R.C. 323.74(C) ("Upon certification from the sheriff

process in the sections below. While abandoned property can transfer to a Public Entity under several sections of the Revised Code,[1199] for the moment we turn our attention to one of them: the transfer process under R.C. 323.78.

Under R.C. 323.78, without regard to the other provisions of R.C. Chapter 323,[1200] property can be transferred to a Public Entity without the necessity of an appraisal or a sale. That process is initiated by the county treasurer through the invocation of the "alternative redemption period" ("ARP"). That invocation, or the lack thereof, is critical in determining how the foreclosure will proceed. As described by the U.S. District Court in a case involving the ARP:

> …although an expedited foreclosure [at the BOR] starts in the usual way, the process soon comes to a fork in the road. Before any final action is taken on the complaint, the county treasurer—as plaintiff—must make a choice whether to collect the delinquent taxes owed through a judicial sale or to invoke the alternative redemption period of Ohio Rev. Code § 323.78 and waive all taxes and assessments owed on the parcel…Because Ohio Rev. Code § 323.78(A) gives the county treasurer the sole discretion to ask the board of revision to directly transfer the property to an electing subdivision instead of ordering a judicial sale and the treasurer's decision to invoke Ohio Rev. Code § 323.78, the county treasurer controls whether the statute's foreclosure process results in the collection of tax dollars or provides inventory for an electing subdivision's Land Reutilization Program.[1201]

But what is the ARP? Under the Revised Code:

> "Alternative redemption period," in any action to foreclose the state's lien for unpaid delinquent taxes, assessments, charges, penalties, interest, and costs on a parcel of real property pursuant to…sections 323.65 to 323.79…means twenty-

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that abandoned land was offered for sale at a public auction…but was not purchased, a [Public Entity] may request that title to the land be transferred to the [Public Entity])"; R.C. 323.74(D) ("The county board of revision, upon any adjudication of foreclosure and forfeiture against the abandoned land, may order the sheriff to dispose of the abandoned land as prescribed in sections 323.65 to 323.79 of the Revised Code . The order by the board shall include instructions to the sheriff to transfer the land to the specified [Public Entity] after payment of the costs of disposing of the abandoned land..."); or R.C. 323.78 (" If a county treasurer invokes the alternative redemption period…and if a [Public Entity] has requested title to the parcel, then upon adjudication of foreclosure of the parcel, the court or board of revision shall order…that the equity of redemption and any statutory or common law right of redemption…shall be forever terminated after the expiration of the alternative redemption period and that the parcel shall be transferred by deed directly to the requesting [Public Entity] without a sale…").

[1199] See the chart at end of this chapter for the statutes relating to the transfer of property to a Public Entity.

[1200] See R.C. 323.78(A) ("Notwithstanding anything in Chapters 323., 5721., and 5723. of the Revised Code, a county treasurer may elect to invoke the alternative redemption period in any petition for foreclosure of abandoned lands under section 323.25, sections 323.65 to 323.79, or section 5721.18 of the Revised Code.").

[1201] See *Harrison v. Montgomery County*, 482 F.Supp.3d 652, 656 (S.D. Ohio 2020).

> eight days after an adjudication of foreclosure of the parcel is journalized by a…county board of revision…[1202]

The statute addresses what happens after the county treasurer invokes the ARP:

> If a county treasurer invokes the alternative redemption period…and if a [Public Entity] has requested title to the parcel, then upon adjudication of foreclosure of the parcel, the…board of revision shall order…that the equity of redemption and any statutory or common law right of redemption in the parcel by its owner shall be forever terminated after the expiration of the alternative redemption period…[1203]

Thus, the treasurer's invocation of the ARP under R.C. 323.78 bestows a potential benefit – a longer redemption period than under the judicial foreclosure process – upon an Owner. But at the same time, it imposes a potential detriment by allowing for a direct transfer (no appraisal or sale) to a Public Entity. As stated in the statute, where there has been an adjudication of foreclosure by the BOR and the treasurer has invoked the ARP:

> …the parcel shall be transferred by deed directly to the [Public Entity] *without appraisal and without a sale*, free and clear of all impositions and any other liens on the property, which shall be deemed forever satisfied and discharged. The…board of revision shall order such a transfer regardless of whether the value of the taxes, assessments, penalties, interest, and other charges due on the parcel, and the costs of the action, exceed the fair market value of the parcel. No further act of confirmation or other order shall be required for such a transfer, or for the

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[1202] See R.C. 323.65(J).

[1203] See R.C. 323.78(B). Extending the equity of redemption until "the expiration of the alternative redemption period" is a change from longstanding foreclosure law. See *Hillard M. Abroms v. Synergy Building Systems*, 2nd Dist. Montgomery No. 23944, 2011-Ohio-2180, ¶ 49 ("A homeowner's equity of redemption is foreclosed when a decree of foreclosure is issued, although courts typically provide a three-day grace period following the decree to exercise the equity of redemption."). Under that law, however, the right of redemption is only available until the court's confirmation of the sale of the property. See R.C. 2329.33 ("…in sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale by depositing in the hands of the clerk of the court of common pleas to which such execution or order is returnable, the amount of the judgment or decree upon which such lands were sold, with all costs, including poundage, and interest at the rate of eight per cent per annum on the purchase money from the day of sale to the time of such deposit…"). See also *Aurora Bank F.S.B. v. Gordon*, 8th Dist. Cuyahoga No. 103138, 2016-Ohio-938, ¶ 24 ("Under foreclosure law, mortgagors have an equitable right of redemption, which allows the mortgagor to pay the debt, interest, and court costs to prevent the sale of the property. [citation omitted] A homeowner's equity of redemption, however, is typically cut off when a decree of foreclosure is issued. [citation omitted] Courts generally provide a three-day grace period following the decree to exercise the equity of redemption. *Id*. Additionally, Ohio law provides for a statutory right of redemption under R.C. 2329.33, which exists independently of the equitable right and allows a mortgagor, at any time prior to the confirmation of the sale, to redeem the property by depositing the "amount of the judgment" with all costs in the common pleas court [citation omitted] If a mortgagor exercises the statutory right of redemption prior to the confirmation of the sale, the court must set aside the sale, apply the deposit to the judgment, and award the interest to the purchaser. [citation omitted]; *Hembree v. Mid-America Federal Savings & Loan Association*, 64 Ohio App.3d 144, 152 (2nd Dist. 1989).

> extinguishment of any statutory or common law right of redemption.[1204] (italics added).

All rights of redemption by the owner are forever extinguished upon the termination of the alternative redemption period.[1205]

Because upon the expiration of the ARP the property is directly transferred to a Public Entity without auction or appraisal, rather than through the traditional foreclosure and public auction process, the property can be more quickly returned to a productive status. But under that process the Owner is precluded from obtaining any financial recovery through an auction and sale of the property, and this has been challenged by some owners.[1206] A sample of a complaint, adjudication of foreclosure, and transfer order in an R.C. 323.78 case where the ARP was invoked can be found at Appendix 337 – 354.

Finally, if the treasurer invokes the ARP but no Public Entity requests title to the property "then upon adjudication of foreclosure…the…board of revision shall order the property sold as otherwise provided in Chapters 323. and 5721." The statute states that "failing any bid at any such sale, the parcel shall be forfeited to the state and otherwise disposed of pursuant to Chapter 4723."[1207]

Disposal of the Property – R.C. 323.73 – ARP Not Invoked - Sale at Public Auction

Where the BOR orders a foreclosure and the ARP is *not* invoked, the initial attempt to dispose of the property is through a public auction pursuant to R.C. 323.73. "If the board renders a decision ordering the foreclosure and forfeiture of the parcel of abandoned land, the parcel shall

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[1204] See R.C. 323.78(B).

[1205] See R.C. 323.76(C)(2).

[1206] A challenge was raised in *Harrison v. Montgomery County*, 482 F.Supp.3d 652, 655 (S.D. Ohio 2020) where the "Plaintiffs allege that the value of their property exceeded the taxes owed and that Defendant Montgomery County violated the federal and state Takings Clauses when the County transferred that property without providing compensation for the value that exceeded the tax liabilities." The Court dismissed the plaintiff's case largely on procedural grounds ("Because ***res judicata*** bars re-adjudication of Plaintiff's claims, and because Plaintiff's asserted Ohio Constitution claims need to be pursued via mandamus, Motion to Dismiss for Lack of Jurisdiction and Failure to State a Claim by Defendant Montgomery County Ohio, (ECF 17), is **GRANTED**. The instant case is **TERMINATED** from the dockets of the United States District Court, Western Division at Dayton.") and the plaintiff appealed to the Sixth Circuit Court of Appeal, Case No. 20-4051. On appeal, the Sixth Circuit reversed the District Court's decision and remanded the case back to the District Court for it to consider the case on the merits. See *Harrison v. Montgomery County*, 6th Circuit No. 20-4051, (May 11, 2021).

[1207] See R.C. 323.78(C).

be disposed of under section 323.73 of the Revised Code."[1208] If that attempt to sell the property is unsuccessful, then an attempt may be made to dispose of the property pursuant to R.C. 323.74,[1209] discussed below.

Under the language of R.C. 323.73, with the exception of its subsection (G), the property is to be sold at public auction and the statute sets forth how the auction is to be advertised and conducted by the sheriff.[1210] At the auction the bidding is to begin "at an amount equal to the total of the impositions against the abandoned land, plus the costs apportioned to the land under section 323.75 of the Revised Code"[1211] and "The abandoned land shall be sold to the highest bidder." Under the statute, the sheriff may "reject any and all bids not meeting the minimum bid requirements."[1212]

If the property is sold or transferred, then "Upon the confirmation of sale[1213] or transfer…the owner's fee simple interest in the land shall be conveyed to the purchaser" and such conveyance "…is free and clear of any liens and encumbrances of the parties named in the complaint for foreclosure attaching before the sale or transfer, and free and clear of any liens for taxes, except for federal tax liens and covenants and easements of record attaching before the

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[1208] See R.C. 323.72(D).

[1209] See R.C. 323.74(A) ("If a public auction is held for abandoned land pursuant to section 323.73 of the Revised Code, but the land is not sold at the public auction, the county board of revision may order the disposition of the abandoned land in accordance with division (B) or (C) of this section.").

[1210] See R.C. 323.73.

[1211] This differs from standard foreclosure law where, with some exceptions, "…no tract of [foreclosed] land shall be sold for less than two-thirds of the amount of the appraised value…" See R.C. 2329.20.

[1212] See R.C. 323.73(B).

[1213] Confirmations of sale are governed by R.C. 2329.31 which reads, in applicable part under its subsection (A) that " Upon the return of any writ of execution for the satisfaction of which lands and tenements have been sold, on careful examination of the proceedings of the officer making the sale, if the court of common pleas finds that the sale was made, in all respects, in conformity with sections 2329.01 to 2329.61 of the Revised Code, it shall, within thirty days of the return of the writ, direct the clerk of the court of common pleas to make an entry on the journal that the court is satisfied of the legality of such sale. Nothing in this section prevents the court of common pleas from staying the confirmation of the sale to permit a property owner time to redeem the property or for any other reason that it determines is appropriate. In those instances, the sale shall be confirmed within thirty days after the termination of any stay of confirmation." See also *Ohio Savings Bank v. Ambrose*, 56 Ohio St.3d 53, 55 (1990) (" If the court, after examining the proceedings taken by the officers, finds the sale was made in conformance with R.C. 2329.01 to 2329.61, inclusive, it shall confirm the sale. R.C. 2329.31.") Further, "…when a sale is confirmed, 'all irregularities are cured after the sale is made and confirmed,' including 'all such irregularities, misconduct, and unfairness in the making of the sale, departures from the provisions of the decree of sale, and errors in the decree and the proceedings under it.'"). See *U.S. Bank, National Association, Successor by Merger of Firstar Bank, N.A. v. Sharon Sanders A.K.A. Sharon D. Sanders, et al*., 8th Dist. Cuyahoga No. 104607, 2017-Ohio-1160, ¶ 22.

sale."[1214] In addition, upon confirmation a spouse of the party charged with the delinquent taxes or assessments is barred from the spouse's dower rights in the property even though the spouse was not a party to the action.[1215] All rights of redemption are forever extinguished "upon the order of confirmation of the sale by the county board of revision and the filing of such order with the clerk of court…"[1216]

Disposal of the Property – R.C. 323.73(G) – Exception to the Public Auction Requirement - Transfer to a Public Entity

As noted above, there is an exception to R.C. 323.73's public auction requirement under its subsection (G). This exception allows a transfer to a Public Entity, without appraisal or sale, contingent upon the amount of the impositions. Although it is similar to R.C. 323.78 (the ARP statute) in allowing a direct transfer to a Public Entity without appraisal or sale, subsection (G) functions differently and independent of the ARP statute.

Under subsection (G), if the BOR finds:

> …that the total of the impositions against the abandoned land are greater than the fair market value of the abandoned land…the board, at any final hearing…may order the property foreclosed and, without an appraisal or public auction, order the sheriff to execute a deed to the certificate holder or county land reutilization corporation that filed a complaint…or to a [Public Entity]...[1217]

But how is the "the fair market value" of the property determined? R.C. 323.71(B) resolves that question by presuming that the county auditor's then-current valuation is the property's fair market value.

> …for purposes of determining…whether the total of the impositions against the abandoned land exceed the fair market value of the abandoned land, it is prima-facie evidence and a rebuttable presumption that may be rebutted to the county board of revision that the auditor's then-current valuation of that abandoned land is

[1214] See R.C. 323.73(D).

[1215] See R.C. 5721.19(F)(1).

[1216] See R.C. 323.76(A).

[1217] See R.C. 323.73(G).

> the fair market value of the land, regardless of whether an independent appraisal has been performed.[1218]

If the BOR orders the property foreclosed and the sheriff to execute a deed under subsection (G), then:

> Upon a transfer…all liens for taxes due at the time the deed of the property is transferred to the certificate holder [or Public Entity] following the conveyance, and liens subordinate to liens for taxes, shall be deemed satisfied and discharged.[1219]

Where a transfer is made under subsection (G) to a land bank or a certificate holder, any common law or statutory right of redemption is forever terminated when the BOR's order to the sheriff to execute the deed is filed with the clerk of courts.[1220]

Transfers under subsection (G), like those under the ARP of R.C. 323.78, help to eliminate the delays caused by the appraisal and public auction process. As such, they can expedite the process of moving the property into a more productive status but have also been subject to constitutional challenge.[1221] A sample of a complaint, adjudication of foreclosure, and transfer order in an R.C. 323.73(G) case can be found at Appendix 328 – 336.

[1218] See R.C. 323.71(B).

[1219] See R.C. 323.73(G).

[1220] See R.C. 323.76(C)(1).

[1221] It should be noted that on February 4, 2021 an original action in mandamus was filed in the Lucas County Court of Appeals, Sixth Appellate District [at https://lcapps.co.lucas.oh.us/PublicAccess/PublicAccessProvider.ashx?action=ViewDocument&overrideFormat=PDF] asserting amongst other things that the direct transfers to a land bank under the provisions of R.C. 323.73(G) [transfer without public auction] and R.C. 323.78(B) [invocation of alternative redemption period] without compensation to the mortgage holder for the value of the mortgage constituted "a taking of private property under Art. 1 Sec. 19 of the Ohio Constitution and the Fifth and Fourteenth Amendments to the Constitution of the United States of America." (Complaint at paragraph 23). By Decision and Judgment dated March 17, 2021, [at https://lcapps.co.lucas.oh.us/PublicAccess/PublicAccessProvider.ashx?action=ViewDocument&overrideFormat=PDF] the Court of Appeals dismissed the case for the failure of the complaint to name a proper party respondent. Despite that dismissal, it is possible that as this 2nd Edition is being finalized, the mandamus action will be re-filed and the merits of the complaint adjudicated.

Disposal of the Property – R.C. 323.74 – Failure to Sell at the Public Auction – Second Attempted Sale or Transfer to a Public Entity

If the property is not sold at the public auction under R.C. 323.73, then under R.C. 323.74 the land can be disposed of in one of two ways: either through an attempted second sale or through a transfer to a Public Entity.[1222] The second sale provision states that after a first unsuccessful auction, the land "may be offered for sale in any usual and customary manner by the sheriff as otherwise provided by law."[1223] The minimum bid at the second sale "shall be the lesser of fifty per cent of fair market value of the abandoned land…or the sum of the impositions against the abandoned land plus the costs apportioned to the land..."[1224] This differs from the minimum bid required for a sale under R.C. 323.73 of "an amount equal to the total of the impositions…plus the [apportioned] costs…"[1225] Upon the sale of abandoned land at public auction under either R.C 323.73 or 323.74 "…any common law or statutory right of redemption shall forever terminate…upon the order of confirmation of the sale by the county board of revision and the filing of such order with the clerk of court, who shall enter it upon the journal of the court or a separate journal…"[1226]

The other method under R.C. 323.74 to dispose of land which was first unsuccessfully publicly auctioned under R.C. 323.73, is to transfer it to a Public Entity. For this to occur, the sheriff must certify that the property was offered for sale but not purchased at a public auction and the Public Entity must deliver a request to the BOR "…that title to the land be transferred to the community development organization, school district, municipal corporation, county, or township…"[1227] The statute does *not* require that a second auction be attempted under R.C. 323.74(B) before the transfer to the Public Entity can be made under R.C. 323.74(C).

[1222] See R.C. 323.74(A) ("If a public auction is held for abandoned land pursuant to section 323.73 of the Revised Code, but the land is not sold at the public auction, the county board of revision may order the disposition of the abandoned land in accordance with division (B) or (C) of this section.").

[1223] See R.C. 323.74(B).

[1224] See R.C. 323.74(B).

[1225] See R.C. 323.73(B).

[1226] See R.C. 323.76(A).

[1227] See R.C. 323.74(C).

The Public Entity's request must be filed with the BOR at any time after the complaint is filed but no later than sixty days after the date the property is first offered for sale. In addition:

> The request shall include a representation that the [Public Entity], not later than thirty days after receiving legal title to the abandoned land, will begin basic exterior improvements that will protect the land from further unreasonable deterioration. The improvements shall include, but are not limited to, the removal of trash and refuse from the exterior of the premises and the securing of open, vacant, or vandalized areas on the exterior of the premises.[1228]

If the property is to be transferred to a Public Entity, the sheriff will do so upon the BOR's order.[1229] Upon the transfer, "…all liens for taxes due at the time the deed of the property is…transferred to a [Public Entity] and liens subordinate to liens for taxes, shall be deemed satisfied and discharged."[1230] Further, "…upon the county board of revision's order to the sheriff to transfer abandoned land to a [Public Entity] under section 323.74…, any common law or statutory right of redemption shall forever terminate…upon the filing with the clerk of court an order to transfer the parcel…by the county board of revision ordering the sheriff to transfer the land in fee simple to the [Public Entity]…"[1231]

Finally, it should be noted that where a parcel has been offered for sale pursuant to foreclosure proceedings and either has not sold for want of bidders or was not transferred under R.C. sections 323.65 to 323.79, it "shall be forfeited or otherwise disposed of in the same manner as under section 323.25[1232] or 5721.18[1233] or Chapter 5723[1234] of the Revised Code."[1235] A sample

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[1228] See R.C. 323.74(C).

[1229] See R.C. 323.74(D).

[1230] See R.C. 323.74(F).

[1231] See R.C. 323.76(B).

[1232] See R.C. 323.25 which deals with the enforcement of tax liens on delinquent lands.

[1233] See R.C. 5721.18 which deals with foreclosure proceedings on the lien of the state.

[1234] See R.C. Chapter 5723 which deals with forfeited lands and R.C. 5723.01(A), in particular, which states that "Every tract of land and town lot, which, pursuant to foreclosure proceedings under section 323.25, sections 323.65 to 323.79, or section 5721.18 of the Revised Code, has been advertised and offered for sale on two separate occasions, not less than two weeks apart, and not sold for want of bidders, shall be forfeited to the state or to a political subdivision, school district, or county land reutilization corporation pursuant to division (A)(3) of this section."

[1235] See R.C. 323.74(G).

of a complaint and related documents relating to an attempted sale of abandoned land and subsequent forfeiture to the state can be found at Appendix 355 – 373.

Disposal of the Property – R.C. 323.77 – Notice by Electing Subdivision of Desire to Acquire Land

Another way in which a Public Entity can obtain ownership to abandoned land is where an "electing subdivision" [1236] requests it under R.C. 323.77. Under that statute an electing subdivision or a land bank may, at any time after the complaint is filed but not later than sixty days after the date on which the abandoned land is first offered for sale, notify in writing either the county treasurer, prosecuting attorney, or the BOR "that it seeks to acquire any parcel of abandoned land, identified by parcel number, from the abandoned land list."[1237] If that property is offered for sale but not sold due to lack of a minimum bid, then the electing subdivision or land bank:

> …shall be deemed to have appeared at the sale and submitted the winning bid at the auction, and the parcel of abandoned land shall be sold to the electing subdivision or [land bank] for no consideration other than the costs prescribed in section 323.75[1238] of the Revised Code or those costs to which the electing subdivision [land bank] and the county treasurer mutually agree.[1239]

Thereafter,

> The conveyance shall be confirmed, and any common law or statutory right of redemption forever terminated, upon the filing with the clerk of court the order of confirmation based on the adjudication of foreclosure by the county board of

[1236] R.C. 323.77(A) incorporates the definition of "electing subdivision" appearing in R.C. 5722.01(A) which defines it as "a municipal corporation that has enacted an ordinance or a township or county that has adopted a resolution pursuant to section 5722.02 of the Revised Code for purposes of adopting and implementing the procedures set forth in sections 5722.02 to 5722.15 of the Revised Code. A county land reutilization corporation organized by a county and designated to act on behalf of the county pursuant to division (B) of section 5722.02 of the Revised Code shall be deemed the electing subdivision for all purposes of this chapter, except as otherwise expressly provided in this chapter."

[1237] See R.C. 323.77(B).

[1238] See R.C. 323.75(A) ("The county treasurer or county prosecuting attorney shall apportion the costs of the proceedings with respect to abandoned lands offered for sale at a public auction held pursuant to section 323.73 or 323.74…according to actual identified costs, equally, or in proportion to the fair market values of the lands. The costs of the proceedings include the costs of conducting the title search, notifying record owners or other persons required to be notified of the pending sale, advertising the sale, and any other costs incurred by the county board of revision, county treasurer, county auditor, clerk of court, prosecuting attorney, or county sheriff in performing their duties under sections 323.65 to 323.79 of the Revised Code.").

[1239] See R.C. 323.77(B).

> revision, which the clerk shall enter upon the journal of the court or a separate journal.[1240]

The statute also addresses the situation where both an electing subdivision and a land bank want to acquire the property.

> If a county land reutilization corporation and an electing subdivision both request to acquire the parcel, the electing subdivision shall have priority to acquire the parcel. Notwithstanding its prior notice to the county treasurer under this section that it seeks to acquire the parcel of abandoned land, if a county land reutilization corporation has also requested to acquire the parcel, the electing subdivision may withdraw the notice before confirmation of the conveyance, in which case the parcel shall be conveyed to the county land reutilization corporation.[1241]

Appeal of BOR Decision – R.C. 323.79

Under R.C. 323.79, any party to the BOR's foreclosure proceedings "who is aggrieved in any of the proceedings of the county board of revision…may file an appeal in the court of common pleas pursuant to Chapters 2505. and 2506. of the Revised Code upon a final order of foreclosure and forfeiture by the board."[1242] Under that statute, "A final order of foreclosure and forfeiture occurs upon confirmation of any sale or upon confirmation of any conveyance or transfer to a certificate holder, community development organization, county land reutilization corporation organized…, municipal corporation, county, or township…"[1243]

The appeal is an "appeal de novo" and in the common pleas proceedings the issues to be addressed "may include issues raised or adjudicated in the proceedings before the county board of revision, as well as other issues that are raised for the first time on appeal and that are pertinent to the abandoned land that is the subject of those proceedings."[1244] The appeal may only be taken to the common pleas court and not to the BTA. As stated by the BTA:

> R.C. 323.79 states that an appeal from a county board of revision's proceedings under these provisions may be taken by an aggrieved party in the court of common

[1240] See R.C. 323.77(B).

[1241] See R.C. 323.77(B).

[1242] See R.C. 323.79.

[1243] See R.C. 323.79.

[1244] See R.C. 323.79.

pleas. In contrast, [the BTA's] jurisdiction is limited to board of revision decisions emanating from complaints filed under R.C. 5715.19…When a statute confers the right of appeal, adherence to the terms and conditions set forth in the statute is essential to the enjoyment of the right conferred...The county's motion is well taken, as it appears this board [the BTA] lacks jurisdiction over the actions of the BOR in foreclosure proceedings.[1245]

[1245] See *Eric Freeman v. Cuyahoga County Board of Revision* (April 5, 2016), BTA Nos. 2017-2305, 2017-2306, 2017-2307.

METHODS OF TRANSFER
AFTER AN ADJUDICATION OF FORECLOSURE BY THE BOR

	R.C. 323.73 [EXCEPT 323.73(G)]	**R.C. 323.73(G)**	**R.C. 323.74**		**R.C. 323.77**	**R.C. 323.78**
DISPOSED OF BY →	Public Auction [323.72(A)]	Direct Transfer to Public Entity without Appraisal or Sale [323.73(G)]	Second Attempted Sale [323.74(B)] Or Transfer to Public Entity [323.74(C)]		Transfer to Public Entity [323.77(B)]	Direct Transfer to Public Entity without Appraisal or Sale After Expiration of ARP [323.78]
SATISFACTION OF OTHER LIENS AND ENCUMBRANCES	Upon confirmation of sale, as to all parties named in complaint, transfer is free and clear of all liens and encumbrances attaching before the sale or transfer and free and clear of any liens for taxes except federal tax liens and covenants and easements of record attaching before sale [323.73(D)]	Upon transfer, all liens for taxes due at time of transfer to the certificate holder or the Public Entity following the conveyance, and liens subordinate to liens for taxes, are deemed satisfied and discharged [323.73(G)]	Upon transfer, all liens for taxes due at the time the deed is conveyed to a purchaser or transferred to a Public Entity and liens subordinate to liens for taxes, shall be deemed satisfied and discharged. [323.74(F)]		(Public Entity deemed to have appeared at sale and submitted winning bid) Upon confirmation of sale as to all parties named in complaint, xfer is free and clear of all and free and clear of all taxes except federal tax liens and covenants and easements of record attaching before sale [323.73(D)]	Upon order of BOR that parcel transfer directly to the Public Entity free and clear of all impositions and other liens which are deemed satisfied and discharged. No further act of confirmation or other order is required [323.78(B)]
			If by Sale	**If by Transfer to Public Entity**		
TERMINATION OF EQUITY OF REDEMPTION	Upon confirmation of sale by BOR and filing of BOR's order with clerk of courts [323.76(A)]	If transfer is to land bank or certificate holder, upon the filing with the court clerk of the BOR's order to the sheriff to execute a deed [323.76(C)]	Upon the order of confirmation of the sale by the BOR and the filing of such order with the clerk of court [323.76(A)]	Upon filing with court clerk an order to transfer ordering the sheriff to transfer the land in fee simple to the Public Entity [323.76(B)]	The conveyance to be confirmed, and any right of redemption terminated, upon filing with court clerk the order of confirmation [323.77(B)]	Upon order of BOR that the equity of redemption and any statutory or common law right of redemption is terminated after the expiration of ARP [323.78(B)]

STATUTES REGARDING TRANSFER TO A PUBLIC ENTITY

		Public Entities Listed Under Each Statute to Which Transfer Can Be Made						
Is An Attempt at a Sale Required to Transfer Property to Public Entity?	**STATUTE AUTHORIZING THE TRANSFER TO A PUBLIC ENTITY**	municipal corporation	township	county	school district	community development organization	county land reutilization corporation	certificate holder
NO[1246]	**R.C. 323.78(B) – INVOCATION OF ALTERNATIVE REDEMPTION PERIOD**	YES	YES	YES	YES	YES	YES	**NO**
NO[1247]	**R.C. 323.73(G) – IMPOSITIONS EXCEED FAIR MARKET VALUE OF THE LAND**	YES	YES	YES	YES	YES	YES	YES
YES[1248]	**R.C. 323.74(C) – FAILURE OF SALE UNDER RC 323.73 AND REQUEST BY PUBLIC ENTITY**[1249]	YES	YES	YES	YES	YES	**NO**	**NO**
YES[1250]	**R.C. 323.77(B) – ELECTING SUBDIVISION WHERE LAND NOT SOLD DUE TO LACK OF MINIMUM BID**	YES	YES	YES	**NO**	**NO**	YES	**NO**

[1246] See R.C. 323.78(B) ("If a county treasurer invokes the alternative redemption period … and if a [Public Entity] has requested title to the parcel, then upon adjudication of foreclosure…the…board of revision shall order…that the equity of redemption…be forever terminated after the expiration of the alternative redemption period and that the parcel shall be transferred by deed directly to the requesting [Public Entity] **without appraisal and without a sale**…").

[1247] See R.C. 323.73(G) ("If the county board of revision finds that the total of the impositions … are greater than the fair market value of the abandoned land…the board…may order the property foreclosed and, **without an appraisal or public auction**, order the sheriff to execute a deed to the certificate holder or county land reutilization corporation…").

[1248] See R.C. 323.74(C) ("Upon certification from the sheriff **that abandoned land was offered for sale at a public auction**…but was not purchased, a [Public Entity]may request that title to the land be transferred to the [Public Entity].").

[1249] Under R.C. 323.74(C) ("The request shall include a representation that the organization, district, or political subdivision, not later than thirty days after receiving legal title to the abandoned land, will begin basic exterior improvements that will protect the land from further unreasonable deterioration.").

[1250] See R.C. 323.77(B) ("…an electing subdivision or a [land bank] may give the county treasurer, prosecuting attorney, or board of revision notice in writing that it seeks to acquire any parcel of abandoned land…**If any such parcel of abandoned land**…**is offered for sale**…**but is not sold for want of a minimum bid**, the electing subdivision or [land bank] shall be deemed to have appeared at the sale and submitted the winning bid at the auction...").

CHAPTER 20
THE BOR'S ROLE IN DEFICIENCY JUDGMENTS

CHAPTER SUMMARY

- Tax foreclosure proceedings seek to recover delinquent property taxes and related sums owed to the government. Under R.C. Chapter 5721 those proceedings seek such recovery regarding delinquent lands while under R.C. Chapter 5723 such proceedings seek such recovery regarding forfeited lands.

- Where the sale of collateral in the foreclosure process does not produce sufficient funds to cover all taxes and related amounts owed, a court may enter a "deficiency judgment" for the balance owed beyond the proceeds of the tax foreclosure sale.

- Under R.C. 5721.192(B), before the court may enter a deficiency judgment for a tax foreclosure, it must obtain a recommendation from the BOR as to whether the deficiency judgment should be entered along with the reasons why it should or should not be entered.

- Under R.C. 5721.192(C), the BOR may hold hearings and is required to consider several factors in making that recommendation. The court is not bound to follow the recommendation of the BOR.

Overview

The goal of a tax foreclosure proceeding[1251] – relating to the foreclosure of the state's lien for unpaid real property taxes - is for the proceeds from the sale of the collateral at the foreclosure sale to produce sufficient funds to pay off all outstanding taxes, assessments, charges, penalties, and interest owed to the government in connection with the subject property (collectively, all such amounts referred to hereafter as "the Full Debt"). There are occasions, however, where the sale proceeds are insufficient to cover the Full Debt. In those cases, the court may enter a "deficiency judgment;" a judgment for the portion of the Full Debt that remains unpaid after the sale of the

[1251] There are different types of foreclosure proceedings under the Revised Code, governed by different statutory sections. For example, foreclosure proceedings where a judgment creditor, like a bank or other lender, seeks to foreclose on the debtor's property are covered by R.C. Chapter 2329. Those foreclosure proceedings differ from the *tax* foreclosure proceedings discussed in this chapter, where the government seeks to recover unpaid taxes and related amounts owed to the government on real property.

collateral. Before it may do so, however, under the Revised Code the BOR is required to make certain recommendations to the court.

The BOR is involved in deficiency judgments towards the end of the tax foreclosure process. For tax foreclosure proceedings brought under Revised Code Chapters 5721 (regarding delinquent lands) or 5723 (regarding forfeited lands),[1252] the BOR is brought into that process through R.C. 5721.192, entitled "Deficiency judgment." That statute reads, in applicable part, that:

> If the proceeds from a sale of a parcel under section 5721.19[1253] [delinquent lands] or 5723.06[1254] [forfeited lands] of the Revised Code are insufficient to pay in full the amount of the taxes, assessments, charges, penalties, and interest which are due and unpaid; the costs incurred in the foreclosure proceeding, the foreclosure and forfeiture proceeding, or both foreclosure and forfeiture proceedings which are due and unpaid…the court *may* enter a deficiency judgment for the unpaid amount…[1255] (italics added).

The use of the term "the court *may*," makes clear that the court's entry of the deficiency judgment is "optional, permissive, or discretionary…"[1256]

The language of R.C. 5721.192 is limited in its application to the proceeds of sales from tax lien foreclosure proceedings under R.C. 5721.19[1257] and 5723.06.[1258] Foreclosure proceedings under R.C. 5721.19[1259] are those initiated by the county prosecutor on behalf of the county

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[1252] As discussed elsewhere in this volume, the BOR is also involved in foreclosure proceedings brought pursuant to R.C. 323.65, et seq. Those BOR proceedings are not discussed in this chapter.

[1253] See R.C. 5721.19, referencing R.C. 5721.18 regarding foreclosure proceedings on "delinquent land" or "delinquent vacant land."

[1254] See R.C. 5723.06, referencing R.C. 5723.04, regarding the sale of "forfeited lands."

[1255] See R.C. 5721.192(A). It should be noted that R.C. 5721.192 also addresses deficiency judgments where "if division (B)(1) or (2) of section 5721.17…is applicable" (primarily relating to a receivership) there remain unpaid, after the sale, "any notes issued by a receiver pursuant to division (F) of section 3767.41 of the Revised Code and any receiver's lien as defined in division (C)(4) of section 5721.18 of the Revised Code…" Sections (B)(1) and(B)(2) of R.C. 5721.17 refer to foreclosure sales for "any property on which is located a building subject to a receivership under section 3767.41 of the Revised Code," relating to properties that are a nuisance. This chapter will not deal specifically with the BOR's role in deficiency judgments regarding these nuisance properties.

[1256] See *Wood v. Simmers*, 10th Dist. Franklin App. No. 19AP-275, 2019-Ohio-4440, ¶ 17 ("…the Supreme Court of Ohio emphasized that "statutory use of the word 'may' is generally construed to make the provision in which it is contained optional, permissive, or discretionary, at least where there is nothing in the language or in the sense or policy of the provision to require an unusual interpretation.").

[1257] See R.C. 5721.192(A).

[1258] See R.C. 5723.06.

[1259] R.C. 5721.19 has further limiting language and says that it applies to judgments of foreclosure "… rendered with respect to

treasurer to foreclose the state's lien for taxes and related costs, etc. against "delinquent land" and "delinquent vacant land."[1260] Under R.C. 5721.19(E):

> If the proceeds from the sale of a parcel are insufficient to pay in full the amount of the taxes, assessments, charges, penalties, and interest which are due and unpaid; the costs incurred in the foreclosure proceeding instituted against it which are due and unpaid…the court, pursuant to section 5721.192 of the Revised Code, may enter a deficiency judgment against the owner of record of the parcel for the unpaid amount. If that owner of record is a corporation, the court may enter the deficiency judgment against the stockholder holding a majority of that corporation's stock.[1261]

The second type of proceeding to which R.C. 5721.192 applies - foreclosure proceedings under R.C. 5723.06 - also relates to the foreclosure of the state's lien, but deals with unsold "forfeited lands," which are those lands that under previously conducted foreclosure proceedings have "been advertised and offered for sale on two separate occasions, not less than two weeks apart, and not sold for want of bidders…"[1262] R.C. 5723.18(B) addresses deficiency judgments in the context of those unsold "forfeited lands" in a manner similar to R.C. 5721.19(E), discussed above. In applicable part, R.C. 5723.18(B) reads as follows:

> If the proceeds from the sale of forfeited land are insufficient to pay in full the amount of the taxes, assessments, charges, penalties, and interest…the court may enter a deficiency judgment against the last owner of record of the land before its forfeiture to the state, for the unpaid amount. The court shall enter the judgment pursuant to section 5721.192 of the Revised Code.[1263]

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actions filed pursuant to section 5721.18 of the Revised Code…" In those proceedings under R.C. 5721.18 the court (or the BOR if it is a foreclosure proceeding under R.C. 323.66) "shall enter a finding with respect to each parcel of the amount of the taxes, assessments, charges, penalties, and interest, and the costs incurred in the foreclosure proceeding instituted against it, that are due and unpaid." In turn, R.C. 5721.18, entitled "Foreclosure proceedings on lien of state" is limited to foreclosure actions filed "in the name of the county treasurer to foreclose the lien of the state… unless the taxes, assessments, charges, penalties, and interest are paid prior to the time a complaint is filed…"

[1260] See R.C. 5721.01 which defines "delinquent land", in applicable part, as "… upon which delinquent taxes…remain unpaid at the time a settlement is made between the county treasurer and auditor…" and "Delinquent *vacant* lands", as "all lands that have been delinquent lands for at least one year and that are unimproved by any dwelling." (italics added).

[1261] See R.C. 5721.19(E).

[1262] See R.C. 5723.01(A)(1). Forfeited lands are "forfeited to the state or to a political subdivision, school district, or county land reutilization corporation…" [See R.C. 5723.01(A)(1)]. After such forfeiture, the county auditor is required to maintain a list of the forfeited properties in that county and "shall offer such lands for sale annually, or more frequently…" [See R.C. 5723.04(A)].

[1263] See R.C. 5723.18(B).

The Role of the Board of Revision

Under R.C. 5721.192(B), however, before the court can enter a deficiency judgment it must:

> … notify the board of revision of the county in which the parcel is located, of its intention to enter the judgment, and request the board to make a recommendation with respect to whether the judgment should be entered and to specify the reasons why it should or should not be entered.

The statute requires that the court's:

> …notification [to the BOR] shall list and shall require the board to consider in making its recommendation, the factors that the court is required to consider under divisions (C)(1) to (3) of this section, but, in making its recommendation, the board also may consider other relevant factors.[1264]

In turn, the factors to be considered by the BOR under (C)(1) to (3) of R.C. 5721.192 state that:

> In determining whether to enter the deficiency judgment, the court shall consider all relevant factors, including, but not limited to, the following:
>
> (1) Whether the owner of record or, in the case of forfeited lands, the last owner of record, appears to have owned the parcel only for speculative purposes, and had the means to pay, but purposely did not pay, the taxes, assessments, charges, penalties, and interest due;
>
> (2) Whether the owner of record or, in the case of forfeited lands, the last owner of record purposely failed to pay the delinquent taxes, assessments, charges, penalties, and interest, although he had the means to do so;
>
> (3) Whether there are other circumstances that would make it inequitable to enter the deficiency judgment.

The language of subsections (C)(1) and (C)(2), which require consideration as to whether the owner had the means to pay but "purposely did not pay" [under (C)(1)] or "purposely failed to pay" [under (C)(2)] the amounts owed, seemingly injects into consideration by both the BOR and the court whether it would be equitable to burden the owner with a deficiency judgment.

[1264] See R.C. 5721.192(B).

Presumably, the BOR and the court would be more inclined to do so where the owner had the means to pay and purposely refused.

The language of (C)(3), which asks the BOR and the court to consider "other circumstances that would make it inequitable" to impose the deficiency judgment on the owner, makes it clear that considerations of fairness are of significant concern under R.C. 5721.192(C)[1265] and that in its considerations the BOR may go beyond the factors set forth in subsections (C)(1) and (C)(2) to more broadly consider "other circumstances." Further, because R.C. 5721.192 requires that the BOR consider and make a recommendation as to whether (1) the owner had the means to pay and (2) the owner's purposefulness, or lack thereof, in failing to pay, this would appear to enable the BOR to examine financial and other records that might otherwise be beyond its reach.

In addition to the above, R.C. 5721.192(B) goes on to state that:

> Additionally, if a corporate owner of record of foreclosed lands or a corporate last owner of record of forfeited lands is involved, the court shall specify in its notification whether the judgment is proposed to be made against the corporation or the majority stockholder of the corporation.[1266]

The statute provides the BOR with tools to assist it in making its recommendation.

> To assist the board in making its recommendation, the board may invite the person against whom the judgment would be entered to appear before it. The board shall make a recommendation to the court within thirty days from the date that the court notified it under this division.[1267]

Given that the statutory language requires the BOR to make a "recommendation," and that the court has the discretion as to whether or not to enter a deficiency judgment, there is no indication that the court is required to follow the BOR's recommendations. In that regard, the role

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[1265] This is in contrast with the general rule that the BOR does not have equitable jurisdiction. See *Dean Casapis v. Lorain County Board of Revision* (December 3, 2019), BTA No. 2019-802 ("We [the BTA] sympathize with the property owner, however this board does not have equitable jurisdiction and, therefore, cannot grant the property owner the relief that he seeks out of a sense of fairness.").

[1266] See R.C. 5721.192(B). The imposition of a corporation's liability on its shareholders, except in limited circumstances, is a departure from the general rule of Ohio corporate law. See *Belvedere Condominium Unit Owners' Association v. R.E. Roark Companies, Inc.*, 67 Ohio St.3d 274, 287 (1993) ("A fundamental rule of corporate law is that, normally, shareholders, officers, and directors are not liable for the debts of the corporation.").

[1267] See R.C. 5721.192(B).

played by the BOR under R.C. 5721.192 would appear to be solely advisory.[1268] Other than requiring that the BOR consider the factors set forth in its sections (C)(1) through (C)(3), the statute offers no guidance as to the manner in which the BOR is to consider those factors or conduct any hearing thereon, or as to the format of its recommendations.

Finally, if the court ultimately proposes to enter a deficiency judgment, it is required to notify the person against whom the judgment is proposed of the proposed judgment, its amount, and that the person may file a motion with the court "protesting the proposed entry of judgment and requesting an opportunity to appear and show cause why the judgment should not be entered." A similar notice is to be sent to the majority shareholder if the proposed judgment is to be against that shareholder.[1269]

[1268] This would appear to be similar to a recommendation or decision made by a magistrate, where under Rule 53(D)(4)(a) of The Ohio Rules of Civil Procedure "A magistrate's decision is not effective unless adopted by the court."

[1269] See R.C. 5721.19(D).

CHAPTER 21
THE BOR'S ROLE IN UNCOLLECTIBLE TAXES

CHAPTER SUMMARY

- The BOR plays a limited role in helping to strike uncollectible taxes from the delinquent tax lists that are prepared by the auditor.

- Where the county treasurer determines that delinquent taxes for a parcel have not been paid for at least five years and are most likely uncollectible except through foreclosure and forfeiture, the treasurer may certify that determination to the BOR and the prosecuting attorney. If both agree with the treasurer, then they shall certify their determination to the auditor who shall place the tract on the real property tax suspension list.

- R.C. 4503.06 contains a procedure allowing the BOR to certify to the auditor that taxes owed on the delinquent manufactured home tax list are uncollectible, after the treasurer and prosecuting attorney have first agreed that they are uncollectible. After that certification the auditor is to strike them from that list.

- A BOR-involved process is also allowed for the striking of delinquent uncollectible taxes on minerals and mineral rights and for uncollectible taxes on the lease, use, or occupancy of public real property that is not used for public purposes.

Collection of Taxes

The BOR also serves a function in helping to strike uncollectible taxes from the delinquent tax lists prepared by the county auditor. For purposes of understanding the BOR's role in that process, we will briefly review the relevant duties of the county auditor and county treasurer in tax collection.

Under the Revised Code, the county auditor is required to compile a general tax list and a duplicate of that general tax list of all real property and public utility parcels in the county. The duplicate is sent to the county treasurer. The tax list is required to contain the name of the

property's owner as well as other descriptive and identifying information about the parcel.[1270] Similarly, the county auditor is also required to prepare a general tax list and duplicate of personal property.[1271]

Property taxes in Ohio are owed annually and are collected by, and paid to, the county treasurer either in one full or two partial payments.[1272] After collecting the taxes listed on the tax duplicate the treasurer is, twice a year, required to settle with the auditor for the taxes collected.[1273] After the second settlement, the auditor compiles a delinquent *lands* list which identifies all of the delinquent lands in the county.[1274] Simultaneously with the creation of the delinquent *lands* list, the Revised Code requires that the auditor create a separate delinquent *tax* list.[1275]

[1270] See R.C. 319.28(A). ("…the county auditor shall compile and make up a general tax list of real and public utility property in the county…containing the names of the several persons, companies, firms, partnerships, associations, and corporations in whose names real property has been listed …and of the names of the several public utilities whose property, subject to taxation on the general tax list and duplicate, has been apportioned by the department of taxation to the county, and the amount so apportioned to each township, municipal corporation, special district, or separate school district or part of either in the auditor's county… Such lists shall be prepared in duplicate…The copies prepared by the auditor shall constitute the auditor's general tax list and treasurer's general duplicate of real and public utility property for the current year."). (underlining added).

[1271] See R.C. 319.29 ("…the county auditor shall compile…separate lists of the names of the several persons, companies, firms, partnerships, associations, and corporations in whose names personal property required to be entered on the general tax list and duplicate has been listed and assessed as shown on the returns and in the preliminary and final assessment certificates in the hands of the auditor…the auditor…shall certify and deliver one copy of such corrected lists to the county treasurer. The copies prepared by the auditor shall constitute the auditor's general tax list and treasurer's general duplicate of personal property for the current year.").

[1272] See R.C. 323.12(A) ("Each person charged with taxes shall pay to the county treasurer the full amount of such taxes on or before the thirty-first day of December, or shall pay one-half of the current taxes together with the full amount of any delinquent taxes before such date, and the remaining half on or before the twentieth day of June next ensuing.").

[1273] See R.C. 321.24(A) ("On or before the fifteenth day of February, in each year, the county treasurer shall settle with the county auditor for all taxes and assessments that the treasurer has collected on the general duplicate of real and public utility property at the time of making the settlement.") and R.C. 321.24(C) ("On or before the tenth day of August, in each year, the treasurer shall settle with the auditor for all taxes and assessments that the treasurer has collected on the general duplicates of real and public utility property at the time of making such settlement, not included in the preceding February settlement."). See also R.C. 319.43(A). ("On or before the fifteenth day of February and on or before the tenth day of August of each year, the county auditor shall…make settlement with the county treasurer and ascertain the amount of real property taxes and assessments and public utility property taxes with which such treasurer is to stand charged. At each August settlement the auditor shall take from the duplicate previously put into the hands of the treasurer for collection a list of all such taxes and assessments as the treasurer has been unable to collect, describing in such list the property on which the delinquent taxes and assessments are charged…").

[1274] See R.C. 5721.011 ("…each county auditor shall compile, in substantially the same form as the list and duplicate a list and duplicate of all delinquent *lands* in the auditor's county."). (italics added).

[1275] See R.C. 5721.03(A) ("At the time of making the delinquent land list…the county auditor shall compile a delinquent *tax* list consisting of all lands on the delinquent land list on which taxes have become delinquent at the close of the collection period immediately preceding the making of the delinquent land list. The auditor shall also compile a delinquent vacant land tax list of all delinquent vacant lands prior to the institution of any foreclosure and forfeiture actions against delinquent vacant lands under section 5721.14 of the Revised Code or any foreclosure actions against delinquent vacant lands under section 5721.18 of the Revised Code."). (italics added).

The delinquent tax list contains all of the information on the delinquent land list[1276] and consists "of all lands on the delinquent land list on which taxes have become delinquent at the close of the collection period immediately preceding the making of the delinquent land list."[1277] If the taxes remain unpaid, then the auditor creates a "delinquent land tax certificate" which contains information similar to the delinquent land tax list, including the amount of taxes, assessments, charges, interest, and penalties which are due and unpaid and "stating that the amount has been certified to the county prosecuting attorney as delinquent."[1278] Upon receipt of the certificate, the prosecuting attorney is required to institute foreclosure proceedings in the name of the county treasurer.[1279]

The BOR's Duties Regarding Uncollectible Taxes

There are a number of circumstances involving traditional real property, as well as other types of property, where delinquent taxes may be uncollectible. In those circumstances, as

[1276] There is one potential difference between the two. Under R.C. 5721.03(A) "…[I[f the auditor's records show that the name of the person in whose name the property currently is listed is not the name that appears on the delinquent land list, the name used in the delinquent tax list or the delinquent vacant land tax list shall be the name of the person the auditor's records show as the person in whose name the property currently is listed."

[1277] See R.C. 5721.03(A). R.C. 5721.01(A)(1) incorporates the definition of "Delinquent taxes" as used in R.C. 323.01(E) which states that "delinquent taxes" are: "(1) Any taxes charged against an entry on the general tax list and duplicate of real and public utility property that were charged against an entry on such list and duplicate for a prior tax year and any penalties and interest charged against such taxes. (2) Any current taxes charged on the general tax list and duplicate of real and public utility property that remain unpaid after the last day prescribed for payment of the second installment of such taxes without penalty, whether or not they have been certified delinquent, and any penalties and interest charged against such taxes."

[1278] See R.C. 5721.03(A) and (B) which, respectively, set out similar procedures for both the "delinquent land tax certificate" and the "delinquent vacant land tax certificate."

[1279] See R.C. 5721.18 ("The county prosecuting attorney, upon the delivery to the prosecuting attorney by the county auditor of a delinquent land or delinquent vacant land tax certificate, or of a master list of delinquent or delinquent vacant tracts, *shall* institute a foreclosure proceeding under this section in the name of the county treasurer to foreclose the lien of the state…"). But see R.C. 5721.18, regarding delinquent taxes on minerals or mineral rights which states, in applicable part, "…If the delinquent land or delinquent vacant land tax certificate or the master list of delinquent or delinquent vacant tracts lists minerals or rights to minerals listed pursuant to sections 5713.04, 5713.05, and 5713.06 of the Revised Code, the county prosecuting attorney may institute a foreclosure proceeding in the name of the county treasurer, in any court with jurisdiction, to foreclose the lien of the state against such minerals or rights to minerals…" (italics added).

discussed below, the Revised Code assigns a role to the BOR – although a limited one - in removing the uncollectible delinquent taxes from the tax lists.

Uncollectible Taxes on Real Property

Although delinquent taxes on real property can typically be recovered from the proceeds of the foreclosure and sale[1280] of the delinquent property, the Revised Code provides a process for dealing with those less common circumstances where the taxes on real property are considered uncollectible. Pursuant to R.C. 323.33:

> If a county treasurer determines, for a tract or lot of real property on the delinquent land list and duplicate on which no taxes have been paid for at least five years, that the delinquent amounts are most likely uncollectible except through foreclosure or through foreclosure and forfeiture, he may certify that determination together with his reasons for it to the county board of revision and the prosecuting attorney. If the board of revision and the prosecuting attorney determine that the delinquent amounts are most likely uncollectible except through foreclosure or through foreclosure and forfeiture, they shall certify that determination to the county auditor. Upon receipt of the determination, the county auditor shall place the tract or lot on the real property tax suspension list maintained under section 319.48 of the Revised Code.[1281]

Prior to sending the matter to the BOR, the county treasurer will have already determined that the delinquent amounts are "most likely uncollectable" except through the foreclosure/forfeiture process. Despite that determination by the county treasurer, the Code also calls for a similar, but separate, determination by both the prosecuting attorney and the BOR. While arguably duplicative of what the treasurer has already concluded, at a minimum this process ensures that three independent bodies – the treasurer, the prosecuting attorney, and the BOR – have

[1280] See R.C. 323.28(B) ("From the proceeds of the sale the costs shall be first paid, next the amount found due for taxes, then the amount of any taxes accruing after the entry of the finding and before the deed of the property is transferred to the purchaser following the sale…").

[1281] See R.C. 323.33. In turn, R.C. 319.48 states, in applicable part, that "(A) The county auditor shall maintain a real property tax suspension list of tracts and lots certified to him under section 323.33…Tracts and lots on the list shall be listed in the same form and order or sequence as on the general tax list of real and public utility property. The list also shall include a description of the tract or lot and the name of the person under whom it is listed. (B) …the county auditor … shall enter against a tract or lot that is on the suspension list only the current taxes levied against the tract or lot; he shall not enter on the general tax list and duplicate the delinquent taxes, penalties, and interest charged against the tract or lot. Instead, he shall indicate on the general tax list and duplicate with an asterisk or other marking that the tract or lot appears on the real property tax suspension list, that delinquent taxes, penalties, and interest stand charged against it, and that the amount of the delinquency may be obtained through the county auditor or treasurer."

reached the same conclusion before striking delinquent taxes from the tax list. If the BOR (or the prosecuting attorney) does not agree with the treasurer that the taxes are "most likely uncollectible", then they cannot be placed on the tax suspension list. It should be noted, however, that if the property is "foreclosed upon or foreclosed upon and forfeited for payment of delinquent taxes….or is redeemed by the owner or another authorized taxpayer, the county auditor shall immediately strike the tract or lot from the real property tax suspension list."[1282]

Uncollectible Taxes on Manufactured Homes

The BOR also plays a role in striking taxes from the delinquent tax list for manufactured homes under R.C. 4503.06. In addition to delinquent tax lists for real and public utility property, and general personal and classified property,[1283] the county auditor is also required to prepare a delinquent tax list for property taxed under the manufactured home tax. As mentioned above, the Revised Code sets forth the time within which the manufactured home tax must be paid[1284] and, if not timely paid, provides for the imposition of penalties and interest.[1285]

Under R.C. 4503.06(H)(1), the county auditor is required to:

> … compile annually a "delinquent manufactured home tax list" consisting of homes the county treasurer's records indicate have taxes that were not paid within the time prescribed by divisions (D)(3) and (F) of [R.C. 4503.06], have taxes that remain unpaid from prior years, or have unpaid tax penalties or interest that have been assessed.[1286]

[1282] See R.C. 319.48(C).

[1283] See R.C. 5719.04(A).

[1284] See R.C. 4503.06(F).

[1285] See R.C. 4503.06(G).

[1286] See R.C. 4503.06(H)(1). Under R.C. 4503.06(N)(3), "Delinquent taxes" means: (a) Any manufactured home taxes that were charged against a manufactured or mobile home for a prior year, including any penalties or interest charged for a prior year and the costs of publication under division (H)(2) of this section, and that remain unpaid; (b) Any current manufactured home taxes charged against a manufactured or mobile home that remain unpaid after the last day prescribed for payment of the second installment of current taxes without penalty, whether or not they have been certified delinquent, including any penalties or interest and the costs of publication under division (H)(2) of this section.

The auditor is required to "update and publish the delinquent manufactured home tax list annually in the same manner as delinquent real property tax lists are published."[1287]

After compiling the delinquent manufactured home tax list, the county auditor is required to deliver a copy of it to the county treasurer.[1288] If the taxes, penalties, or interest are not paid "within sixty days after the list is delivered to the treasurer" then:

> …the county treasurer *shall*…enforce collection of such taxes, penalties, and interest by civil action in the name of the treasurer against the owner for the recovery of the unpaid taxes…The action may be brought in municipal or county court, provided the amount charged does not exceed the monetary limitations for original jurisdiction for civil actions in those courts.[1289] (italics added).

After obtaining a judgment against the taxpayer, however, there may be circumstances where the judgment is found to be uncollectible. At that point the BOR becomes involved. Under the statute:

> If the county treasurer and the county prosecuting attorney agree that an item charged on the delinquent manufactured home tax list is uncollectible, they shall certify that determination and the reasons to the county board of revision. If the board determines the amount is uncollectible, it shall certify its determination to the county auditor, who shall strike the item from the list.[1290]

Like with uncollectible real property taxes, the BOR plays a limited role here but similarly provides an additional layer of scrutiny before amounts owed by a taxpayer may be stricken from the delinquent manufactured home tax list. If it agrees with the treasurer and the prosecuting attorney that the amount is uncollectible, its certification of that decision to the auditor will cause the item to be removed from the delinquent manufactured home tax list.

Uncollectible Taxes on Minerals and Mineral Rights

Like its role with uncollectible taxes on the real property tax suspension and delinquent manufactured home tax lists, the BOR also plays a role in striking from the delinquent tax list

[1287] See R.C. 4503.06(H)(2).

[1288] See R.C. 4503.06(H)(2).

[1289] See R.C. 4503.06(H)(3).

[1290] See R.C. 4503.06(K).

delinquent taxes owed on mineral rights. First, some context regarding the taxation of mineral rights.

As the assessor of real property values in his/her county,[1291] the county auditor is required to assess and include on the tax list[1292] the value of minerals and mineral rights (hereafter collectively referred to as "mineral rights") which lie under the ground.[1293] Mineral rights are considered real property,[1294] are valued in a manner similar to the way that surface real property is valued[1295] and, like other real property, are given a real property classification[1296] and a taxable real property code for administrative use.[1297] Like traditional real property on which delinquent taxes are owed, there are times when delinquent taxes on mineral rights may become uncollectible.

In addition, because mineral rights can be severed from surface rights, for taxation purposes the Revised Code makes provision for situations where the ownership of underground mineral

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[1291] See R.C. 5713.01(A).

[1292] See http://lsc.state.oh.us/coderev/fnla122.nsf/All%20Bills%20and%20Resolutions/162B56A6098073B185256598006664C3 ("Mineral rights appear separately from land on the tax list.").

[1293] See R.C. 5713.04.

[1294] See *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, ¶ 21 ("Ohio has long recognized that minerals underlying the surface, including oil and gas, are part of the realty."). See also *Sue Ellen Timmons v. Harrison County Board of Revision* (July 12, 2019), BTA No. 2018-2121 ("Because these mineral rights are considered real property, they are subject to the auditor's duty to determine the true value of the fee simple estate as if unencumbered but subject to any effects from the exercise of police powers or from other governmental actions.").

[1295] See OAC 5703-25-11(I). ("Coal, mineral deposits, oil and gas - Coal and minerals shall be valued in the same manner and on the same price level as other real property. Some of the factors that shall be considered in valuing coal and mineral deposits are the quality and extent of the deposit, the active working area which at current production will be mined within five years, active reserves that will not be worked for five to ten years, inactive reserves that will not be worked until after ten years, and mined out or depleted areas."). See also R.C. 5713.051(B) ("The true value in money of oil reserves constituting real property on tax lien dates January 1, 2007, and thereafter with respect to a developed and producing well that has not been the subject of a recent arm's length sale, exclusive of personal property necessary to recover the oil, shall be determined under division (B)(1) or (2) of this section.") and R.C. 5713.051(C) ("The true value in money of gas reserves constituting real property on tax lien dates January 1, 2007, and thereafter with respect to a developed and producing well that has not been the subject of a recent arm's length sale, exclusive of personal property necessary to recover the gas, shall be determined under division (C)(1) or (2) of this section.").

[1296] See R.C. 5713.041. ("In the case of lands containing or producing minerals, the minerals or any rights to the minerals that are listed and taxed separately from such lands shall be separately classified if the lands are also used for agricultural purposes, whether or not the fee of the soil and the right to the minerals are owned by and assessed for taxation against the same person. For purposes of this section, lands and improvements thereon used for residential or agricultural purposes shall be classified as residential/agricultural real property, and all other lands and improvements thereon and minerals or rights to minerals shall be classified as nonresidential/agricultural real property.").

[1297] See OAC 5703-25-10(C) ("Each property record of taxable real property shall be coded in accordance with the code groups provided for in this paragraph..."). Under that OAC section, "Taxable mineral lands and rights" are designated a code number between 200 and 299.

rights has been split from the ownership of the surface soil, placing ownership of the surface soil and ownership of the mineral rights in different owners.

> If the fee of the soil of a tract, parcel, or lot of land is in any person, natural or artificial, and the right to minerals therein in another, the land shall be valued and listed in accordance with such ownership in separate entries, specifying the interest listed, and be taxed to the parties owning the different interests.[1298]

If there is a split in ownership of soil and mineral rights, the auditor is required to determine and apportion the value between the different owners.[1299]

In general, delinquent taxes may be collected by the county treasurer through the foreclosure process; either the traditional foreclosure process or, in more recent years, the expedited BOR foreclosure process.[1300] Those processes apply to both traditional realty and to mineral rights. But in addition to the foreclosure process, the Revised Code provides a second option to address delinquent taxes that is specific to mineral rights.

> If the delinquent land duplicate lists minerals or rights to minerals…the county treasurer may enforce the lien for taxes against such minerals or rights to minerals by civil action, in the treasurer's official capacity as treasurer, in the manner prescribed by this section, or proceed as provided under section 5721.46 of the Revised Code.[1301] (underlining added).

The first option - the foreclosure process - does not address the circumstance where the delinquent taxes on mineral rights are deemed uncollectible. But the second option, under R.C. 5721.46 in which the BOR is involved, does.

In applicable part R.C. 5721.46 states:

[1298] See R.C. 5713.04.

[1299] See R.C. 5713.06 ("Where the fee of the soil and the minerals, or part of either…has been previously assessed for taxation in the name of the same person, but the title to the fee of the soil is in one or more persons and the title to such minerals, or any right to the minerals, is in another person, the county auditor shall ascertain the aggregate value of such lot or parcel of land and the minerals or rights thereto, and shall equitably divide and apportion such aggregate valuation between the owner of the fee of the soil and the owner of such minerals and rights thereto, according to the relative value of the interests held by such owners of the fee of the soil and such minerals or rights thereto.").

[1300] See R.C. 323.25 ("When taxes charged against an entry on the tax duplicate, or any part of those taxes, are not paid within sixty days after delivery of the delinquent land duplicate to the county treasurer…the county treasurer shall enforce the lien for the taxes by civil action in the treasurer's official capacity as treasurer, for the sale of such premises in the same way mortgage liens are enforced…in the court of common pleas of the county, in a municipal court with jurisdiction, or in the county board of revision with jurisdiction pursuant to section 323.66 of the Revised Code...").

[1301] See R.C. 323.25.

> If the county treasurer…determines that delinquent lands containing or producing minerals or any rights to minerals, as separately listed and taxed from the fee of the soil…have appeared on the delinquent land list and duplicate for five years and that taxes charged against those minerals or rights to minerals have become uncollectible, the county treasurer shall certify that determination, together with the reasons for the determination, to the county board of revision and the prosecuting attorney.[1302]

After the treasurer's determination is certified to the BOR and the prosecuting attorney, R.C. 5721.46 goes on to state that:

> If the board of revision and the prosecuting attorney determine that the taxes are uncollectible, the board of revision and the prosecuting attorney shall certify their finding to the county auditor, who shall cause the taxes to be stricken from the general tax list and duplicate of real and public utility property and from the delinquent tax list and duplicate.

Thus, while there are some initial differences in the processes used to determine uncollectibility between delinquent taxes on manufactured homes and those on mineral rights,[1303] both processes are similar in that they ultimately require BOR concurrence before the delinquent taxes are certified to the auditor and stricken. Striking the taxes from the delinquent tax list "would have the effect of clearing mineral rights of the delinquency and stopping the accrual of interest on the delinquent taxes."[1304]

Uncollectible Personal Property Taxes

Although virtually all of the BOR's duties relate to real property, it also plays a part in striking uncollectible taxes from the *personal* property delinquent tax list. This component of the BOR's obligations should become less relevant over time because, commencing in 2005, the Ohio

[1302] See R.C. 5721.46.

[1303] For example, R.C. 4503.06(K) on delinquent manufactured home taxes does not require a five year period on the delinquent tax list prior to initiating the BOR process to strike those delinquent taxes from the delinquent manufactured home tax list, whereas R.C. 5721.46 does. In addition, under R.C. 4503.06(K) both the county treasurer and the prosecuting attorney must initially agree that the delinquent manufactured home tax in question is uncollectible before referring it to the BOR ("If the county treasurer and the county prosecuting attorney agree..."), whereas under R.C. 5721.46, the county treasurer may make that determination on his or her own before referring it to the BOR ("If the county treasurer…determines that delinquent lands containing or producing minerals or any rights to minerals, as separately listed and taxed from the fee of the soil…have become uncollectible…"). The prosecuting attorney will *then* be required to agree to the uncollectibility along with the BOR. ("If the board of revision and the prosecuting attorney determine that the taxes are uncollectible…").

[1304] See http://lsc.state.oh.us/coderev/fnla122.nsf/All%20Bills%20and%20Resolutions/162B56A6098073B185256598006664C3.

tax on personal property was gradually phased out such that the last personal property tax returns were due in 2008.[1305] Nonetheless, there may be situations where delinquent personal property taxes remain outstanding even though the tax itself is no longer imposed on current personal property.

By way of background, the personal property tax was a tax on "[a]ll personal property located and used in business in this state"[1306] and typically included business "machinery, equipment, and inventories."[1307] The tax was paid annually either in one or two installments.[1308] After the taxes were collected and settled between the auditor and the treasurer, the auditor was required to "make a tax list and duplicates thereof of all general personal and classified property taxes remaining unpaid, as shown by the county treasurer's books and the list of taxes returned as delinquent by the treasurer to the auditor at such settlement…"[1309] The statute called for the imposition of a penalty for late payment[1310] and the accrual of interest on delinquent amounts that remained outstanding.[1311]

The Revised Code requires that the delinquent personal property tax list and duplicate "be cumulatively kept so that the amount of delinquent taxes and penalties charged against each person may be shown on the latest delinquent list and duplicate."[1312] Thus, personal property taxes can

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[1305] See https://www.tax.ohio.gov/communications/news_releases/news_release_042408.aspx.

[1306] See R.C, 5709.01(B).

[1307] See https://www.tax.ohio.gov/portals/0/communications/publications/annual_reports/2007_annual_report/tangible_personal_propoerty_tax_07.pdf

[1308] See https://www.tax.ohio.gov/communications/news_releases/news_release_042408.aspx ("When taxes are paid also depends upon the location of the business. For a business with property in only one county, one-half of their tax liability is due with their April 30 return and the balance is due by Sept. 20. If a business has property in more than one county, the total tax liability is due by Sept. 20.").

[1309] See R.C. 5719.04(A).

[1310] See R.C. 5719.03(D). ("When an installment of taxes is not paid within the time prescribed by this section…a penalty of ten per cent of the amount due and unpaid shall accrue when the county treasurer closes the treasurer's office for business on the last day so prescribed, but if the taxes are paid within ten days subsequent to the last day prescribed, the treasurer shall waive the collection of, and the auditor shall remit one-half of, the penalty.").

[1311] See R.C. 5719.041. ("If the payment of a general personal property or classified property tax is not made on or before the last day prescribed by section 5719.03 or 5719.031 of the Revised Code, an interest charge shall begin to accrue and shall continue until all charges are paid…").

[1312] See R.C. 5719.06.

continue to be owed, and remain on the delinquent personal property tax list, even though the current collection of personal property tax has long since been phased out.

Where personal property taxes are not paid, the Revised Code permits the personal property that is the subject of the tax to be seized and sold to satisfy those taxes.[1313] But unlike delinquent real property taxes where there is an immovable parcel of real estate that can be foreclosed upon, the collection of delinquent personal property taxes from a recalcitrant taxpayer may be problematic, in part because personal property is movable. Given the potential difficulties in seizing movable (and concealable) personal property to satisfy delinquent taxes, the Revised Code allows for another collection tool.

"[Personal property] [t]axes charged on any tax duplicate, except those upon real estate, shall be a lien on real property of the person charged therewith from the date of the filing of a notice of such lien as provided by law"[1314] and allows the auditor to file the delinquent personal property tax duplicate with the county recorder. The filing of that duplicate "shall constitute a notice of lien and operate as of the date of delivery as a lien on the lands and tenements, vested legal interests therein, and permanent leasehold estates of each person named therein having such real estate in such county."[1315] That collection tool, too, might be of limited utility if the delinquent taxpayer does not own any real property in the county.

What, then, can be done if (1) the delinquent taxpayer's personal property cannot be found – or if found, has been damaged or destroyed – so that it cannot be sold at auction to satisfy the delinquency, and if (2) the delinquent taxpayer does not also own any real property in the county against which the personal property tax lien can be satisfied? Must the personal property tax delinquency remain on the auditor's delinquent list forever? Must the treasurer "throw good money after bad" in a futile attempt to collect taxes that appear to be uncollectible?

Anticipating those circumstances, the Revised Code provides a way out of that problem that requires the participation of the BOR. Under R.C. 5719.06:

[1313] See R.C. 5719.01 ("All personal property subject to taxation shall be liable to be seized and sold for taxes.").

[1314] See R.C. 5719.01.

[1315] See R.C. 5719.04.

> Whenever the treasurer shall, by means of the remedies provided by law or otherwise, determine that any item which has appeared on the cumulative tax list and duplicate of taxes provided for in this section for a period of five years is uncollectible, he shall forthwith certify such determination, together with his reasons therefor, to the county board of revision and the prosecuting attorney. If such board and the prosecuting attorney determine any such item is uncollectible, they shall certify such finding to the auditor who shall cause said item to be stricken from the cumulative tax list and duplicate.[1316]

Like the above-discussed process regarding delinquent mineral rights and real property placed on the suspension list, and unlike the delinquent tax processes for manufactured homes before a delinquent personal property matter is deemed uncollectible, it must first remain on the cumulative tax list and duplicate for five years.

Uncollectible Taxes on a Lease, Use, or Occupancy of Public Real Property That is Not Used for Public Purposes

Well-settled Ohio law makes clear that "[p]ossessing a leasehold interest, even under a long-term lease, is not ownership"[1317] and that "real-property taxes are imposed on the owner rather than the lessee."[1318] Thus, under the law, those holding a leasehold interest in real property are not required to pay property tax on their leasehold. There is, however, one modification to that rule.[1319] R.C. 5705.61, in applicable part, states that:

> Any interest…to use, lease, or occupy real property not otherwise subject to taxation and belonging to the state, a political subdivision, or the United States … and used, leased, or occupied for other than a public purpose…is subject to an annual tax, payable by the holder of the interest, *for the privilege of* so using, leasing, or occupying such property. Such tax is for the purpose of supplementing

[1316] See R.C. 5719.06.

[1317] See *ShadoArt Productions, Inc. v. Testa*, 146 Ohio St.3d 263, 55 N.E.3d 1065, 2016-Ohio-511, ¶ 34.

[1318] See *Equity Dublin Associates v. Testa*, 142 Ohio St.3d 152, 2014-Ohio-5243, ¶ 7.

[1319] See *Visicon, Inc. v. Tracy*, 83 Ohio St.3d 211 (1998) ("…we held that the lessees interest was not subject to the Ohio real property tax because "[t]he present law of Ohio does not provide for a tax on leaseholds." [citation omitted]. With one exception, R.C. 5705.61…Ohio law still does not impose a real property tax on leaseholds. Thus, no real property tax can be assessed against Visicon's leasehold interest…"). (emphasis added).

> the general revenue funds of the taxing districts in which the real property is located…[1320] (emphasis added).

While this may be more of a tax for the *privilege* of using the land, as opposed to a true property tax, this "privilege" tax on the lessee is calculated in a manner that resembles the calculation of property tax.

> The tax shall be assessed by the county auditor…and computed by multiplying the taxable value of the interest therein by the effective tax rate of each taxing district in which the real property is located. The tax shall equal the sum of the products thus obtained.

The tax owed under R.C. 5705.61 is paid to the treasurer of the county in which the property that is subject to the use, lease, etc. is held and "… is due and payable on the dates for the payment of real property taxes as provided under section 323.12 of the Revised Code."[1321] As with the other taxes discussed above, some taxpayers will be delinquent in their payment of the taxes owed under R.C. 5705.61 and the statute calls for the imposition of a penalty if the taxes are not paid when due.[1322] The process used to strike these taxes from the delinquent tax list is the same one used to strike personal property taxes under R.C. 5719.06, discussed above. As set forth, in applicable part, in R.C. 5705.63:

> Taxes charged on the delinquent lists of the county auditor and county treasurer for five consecutive years may be removed by the county board of revision in the manner provided in section 5719.06 of the Revised Code if the board deems such taxes uncollectible.[1323]

The chart below summarizes the various taxes where, once deemed to be uncollectible by the county treasurer and/or the prosecuting attorney, the BOR is required to decide whether those taxes are, in fact, uncollectible and therefore to be stricken from the delinquent tax list.

[1320] See R.C. 5705.61.

[1321] See R.C. 5705.62. R.C. 323.12(A), in turn, states that "Each person charged with taxes shall pay to the county treasurer the full amount of such taxes on or before the thirty-first day of December, or shall pay one-half of the current taxes together with the full amount of any delinquent taxes before such date, and the remaining half on or before the twentieth day of June next ensuing."

[1322] See R.C. 5705.62.

[1323] See R.C. 5705.63.

	Real Estate – Tax Suspension List[1324]	Manufactured Home[1325]	Mineral Rights[1326]	Personal Property[1327]	Tax on Use, Leasehold, Etc.[1328]
WAITING PERIOD	At least 5 years from time placed on delinquent land list and duplicate	60 days after the delinquent manufactured home tax list is delivered by the auditor to the county treasurer	At least 5 years from time placed on delinquent land list and duplicate	At least 5 years from time placed on delinquent tax list and duplicate	At least 5 years from time placed on delinquent tax list and duplicate
INITIAL DETERMINATION MADE BY	County Treasurer	County Treasurer and Prosecuting Attorney[1329]	County Treasurer	County Treasurer	County Treasurer
NATURE OF THAT INITIAL DETERMINATION	That the delinquent amounts most likely uncollectible	That an item charged on the delinquent manufactured home tax list is uncollectible[1330]	That taxes charged against minerals/mineral rights (as separately listed and taxed from the fee of the soil) on delinquent lands have become uncollectible	That the item on the delinquent tax list and duplicate is uncollectible	That the item on the delinquent tax list and duplicate is uncollectible
SENT TO	BOR and prosecuting attorney	BOR	BOR and prosecuting attorney	BOR and prosecuting attorney	BOR and prosecuting attorney
DECISION MADE BY	BOR and prosecuting attorney	BOR	BOR and prosecuting attorney	BOR and prosecuting attorney	BOR and prosecuting attorney
NATURE OF THE DECISION	That the delinquent amounts most likely uncollectible	That the amount is uncollectible	That the taxes are uncollectible	That any such item is uncollectible	That any such item is uncollectible

[1324] See R.C. 323.33
[1325] See R.C. 4503.06(H)(3)
[1326] See R.C. 5721.46
[1327] See R.C. 5719.06
[1328] R.C. 5705.63
[1329] See R.C. 4503.06(K)
[1330] See R.C. 4503.06(K)

CHAPTER 22
THE BOR'S ROLE IN COASTAL MANAGEMENT ISSUES

CHAPTER SUMMARY

- Under R.C. 1506.48, the BOR plays a role in removing from the tax duplicate lakefront property which has been damaged or destroyed by shore erosion. Although there is no judicial interpretation directly on point, the statute appears to apply primarily, if not exclusively, to the Lake Erie shorefront.

- Where the auditor finds that ninety percent or more of such parcel has been eroded and lies within the natural boundaries of Lake Erie and that the remainder of the parcel (if any) has no taxable value, then the auditor may certify that finding to the BOR which may then authorize the removal of the parcel from the tax list and duplicate and the cancellation of delinquent taxes and related sums.

Overview

Revised Code section 1506.48[1331] is a short two-paragraph statute entitled "Reappraising real property damaged or destroyed by shore erosion" and applies to lands fronting on Lake Erie.[1332] Under the statute, the BOR becomes engaged where the county auditor seeks to remove parcels from the tax duplicate which have been significantly damaged or destroyed by shore erosion. But before we can understand the BOR's role under the statute – and what it must consider and decide - we must first understand the role of R.C. 1506.48 within the statutory scheme in which it is located.

[1331] See R.C. 1506.48.

[1332] The second paragraph of R.C. 1506.48 applies specifically to "littoral parcels" on Lake Erie. While the first paragraph of the statute does not specifically reference "Lake Erie" or limit its application only to "Lake Erie" and its adjacent properties, contextually it would appear that R.C. 1506.48 was intended to apply only to Lake Erie and not to other bodies of water in the State. This is evidenced by the fact that: (1) R.C. Chapter 1506 is addressed to the "coastal area" and the "coastal area" is defined under R.C. 1506.01(A) as relating only to Lake Erie and its adjacent properties; (2) R.C. 1506.06 directs the Director of the Ohio Department of Natural Resources ("ODNR") to make a "preliminary identification of Lake Erie coastal erosion areas"; (3) and several other sections of Chapter 1506 apply only to Lake Erie and its environs (see in addition to R.C. 1506.06, for example, R.C. sections, 1506.05, 1506.07, 1506.10, 1506.11, 1506.31, 1506.38, 1506.40, 1506.41, 1506.42, 1506.43, 1506.44, and 1506.47). It should be noted, however, that there is no case law indicating whether other bodies of water are covered by the first paragraph of R.C. 1506.48, and that legal question has not been definitively addressed by the courts.

The Lake Erie shoreline is subject to continuing change and erosion due to a variety of natural forces.[1333] Some of those changes can negatively impact the business, residential, and recreational properties that front on the Lake. R.C. Chapter 1506 is designed, at least in part, to help manage Lake Erie's shoreline and to mitigate some of the negative impacts caused by erosion to its "coastal area."[1334] It is in that context that R.C. 1506.48, addressing property damaged by erosion, is placed within R.C. Chapter 1506.

Because only eight Ohio counties front on Lake Erie,[1335] it is unlikely that R.C. 1506.48 will ever be encountered by the other eighty counties in the state. Nonetheless, for the eight effected lakefront counties, the BOR can play a significant part in addressing potential inequities in the valuation of lakefront properties damaged or destroyed by erosion by enabling the BOR to remove such properties from the property tax duplicate.

The BOR's Duties Under R.C. 1506.48

The first paragraph of the statute, which does not mention the BOR, requires that upon the application of "an owner of real property damaged or destroyed by shore erosion," the auditor is required to reappraise the property and place its true value on the tax list.[1336] Under the Ohio

[1333] See https://ohiodnr.gov/wps/portal/gov/odnr/discover-and-learn/land-water/lake-erie-watershed/le-coastal-erosion ("The Lake Erie shore is a very dynamic area with waves, water, ice and gravity continually reshaping the land-water interface. Erosion – the wearing away of rock, soil and other material – is a natural process that continually occurs in coastal areas when sediment is moved downdrift and, in some cases, is not replaced by other sediments.").

[1334] R.C. 1506.01(A) ("'Coastal area" means the waters of Lake Erie, the islands in the lake, and the lands under and adjacent to the lake, including transitional areas, wetlands, and beaches. The coastal area extends in Lake Erie to the international boundary line between the United States and Canada and landward only to the extent necessary to include shorelands, the uses of which have a direct and significant impact on coastal waters as determined by the director of natural resources.").

In furtherance of the State's stewardship over the Lake Erie coast, R.C. 1506.02(A) mandates that the State's Department of Natural Resources ("ODNR") develop a coastal management program for Lake Erie and its environs. Under R.C. 1506.01(B), the "Coastal management program" is limited to the "coastal area" (" 'Coastal management program' means the comprehensive action of the state…to preserve…the resources of the coastal area and to ensure the wise use of the land and water resources of the coastal area…"). The coastal management program is overseen by Ohio's Office of Coastal Management, housed within ODNR. See https://ohiodnr.gov/wps/portal/gov/odnr/discover-and-learn/safety-conservation/about-ODNR/coastal-management/division-of-coastal-management/office-of-coastal-management.

[1335] Those eight are Lucas County, Ottawa County, Sandusky County, Erie County, Lorain County, Cuyahoga County, Lake County, and Ashtabula County.

[1336] See R.C. 1506.48 ("Upon application of any owner of real property damaged or destroyed by shore erosion, the county auditor of the county in which the real property is situated shall cause a reappraisal to be made and shall place the property on the tax list at its true value in money.").

Administrative Code, "erosion" is defined as "the loss or displacement of land along the lakeshore due to wave attack, ice scour, mass wasting, or other related erosion processes."[1337] Presumably, a party disagreeing with the valuation established by the auditor's reappraisal can file a complaint at the BOR under the regular procedures set forth in R.C. 5715.19.

The BOR *is* specifically mentioned and involved, however, in the circumstances described in the second paragraph, which states:

> Whenever the county auditor finds that ninety per cent or more of the area of any littoral parcel of land appearing upon the tax duplicate has been eroded and lies within the natural boundaries of Lake Erie and that the remainder of the parcel, if any, has no taxable value, the auditor may certify that finding to the county board of revision. Upon consideration thereof, the board may authorize removal of the parcel from the tax duplicate and cancellation of all current and delinquent taxes, assessments, interest, and penalties charged against the parcel.[1338]

Thus, before removing a parcel from the tax duplicate, the statute requires that three elements be met.

1. The property must be a "littoral parcel" appearing on the tax duplicate; and

2. Ninety per cent or more of the property's area must have been eroded and lie "within the natural boundaries of Lake Erie"; and

3. If any of the land remains, it must have no taxable value.

If the above three elements are found by the auditor, then under the statute the auditor may certify her no-taxable-value finding to the BOR. After considering that certification, the BOR "may authorize removal of the parcel from the tax duplicate" as well as "cancellation of all current and delinquent taxes, assessments, interest, and penalties."[1339]

[1337] See OAC 1501-6-10(L). OAC Chapter 1501-6 is entitled "Chapter 1501-6 Lease of Lake Erie Submerged Lands."

[1338] See R.C. 1506.48. The language of the statute does not appear to make the auditor's "ninety per cent" finding contingent upon the filing of an application by the owner. Whereas the auditor's action in causing a reappraisal is only triggered "upon application of any owner…", the use of the word "whenever" in the second paragraph ("Whenever the county auditor finds…") seems to indicate that an application need not be filed in order for the auditor to make the requisite "ninety per cent finding." Indeed, the Cambridge Dictionary defines the word "whenever" as "every or any time."

[1339] See R.C. 1506.48.

Element 1: What is a "Littoral Parcel"?

At a minimum, it appears that the BOR should consider whether the three elements have been met before it "may authorize removal" of the property from the duplicate. Looking at the first element, then, what is a "littoral parcel"? While the Revised Code does not define that term, appellate cases have provided some related guidance. In discussing the meaning of "littoral rights" (as opposed to "littoral parcel"), two courts of appeals have stated that "littoral rights" are "those ownership rights of a property owner *whose land abuts a lake*…"[1340] (italics added). In addition, the Ohio Attorney General has opined that "A littoral owner's property, by definition, borders an ocean, sea, or lake."[1341] A "littoral parcel" as used in R.C. 1506.48, then, is one which abuts Lake Erie.

Element 2:

What is "eroded" Land?

What are "the natural boundaries of Lake Erie"?

What does it mean to "lie within" the natural boundaries of Lake Erie?

In addition to determining that the land in question is a "littoral parcel", presumably an easy task, the BOR must also consider whether "ninety per cent or more of [its] area…has been eroded." The "ninety per cent" determination would likely include a review of the accuracy and way such percentage, and its area, was measured or otherwise determined.

But perhaps more importantly, once it has been determined that the subject land is a "littoral parcel," the second element also requires that before the BOR may remove it from the tax duplicate it must consider whether the land was *both* "eroded" *and* "lies within the natural boundaries of Lake Erie." Determining whether the reduction in the littoral parcel's area was "eroded" through

[1340] See *Lemley v. Stevenson*, 104 Ohio App.3d 126, 133 (6th Dist. 1995); *Bay Point Properties, L.L.C. v. Northlake Estates Condominium Association*, 183 Ohio App.3d 311, ¶ 5 (3rd Dist. 2009).

[1341] See 1993 Op. Att'y Gen. No. 93-255, at 2-130.

one or more of the natural forces identified in the Ohio Administrative Code (discussed above)[1342] is a factual matter to be reviewed and considered by the BOR based on the evidence presented.[1343]

As to the second component of this element, the BOR must determine the meaning of the term "the natural boundaries of Lake Erie" as used in R.C. 1506.48. Unfortunately, neither Revised Code Chapter 1506, the Ohio Administrative Code, nor any appellate or BTA decisions define that specific term within the context of Chapter 1506.

While not defining the term "natural boundaries" as used in R.C. 1506.48, the Supreme Court has, however, defined the term "natural shoreline" in connection with Lake Erie.[1344] As stated by the Court, "…the territory of Lake Erie held in trust by the state of Ohio for the people of the state extends to the natural shoreline, *which is the line at which the water usually stands when free from disturbing causes*."[1345] (italics added). Further, the Court has made clear that "littoral owners of the upland [shoreline property] have no title beyond the natural shoreline..."[1346]

This makes clear that property that is *lake*ward of the "natural shoreline" is public trust property while property that is *land*ward of the natural shoreline is (in our context) private property. Because the state holds title to the land under the waters of Lake Erie, and because littoral landowners cannot own title "beyond the natural shoreline" (*lake*ward of the natural shoreline), it follows that littoral owners may only own - and therefore be taxed on - property that is *land*ward of "the natural shoreline." Logically, then, only property that is *land*ward from the natural shoreline is subject to removal from the tax duplicate.[1347]

[1342] See OAC 1501-6-10(L).

[1343] Among other things, probative evidence of that erosion might include weather reports, tide reports, recession maps and determinations, as well as before-and-after photos of the eroded land.

[1344] Contextually it is important to note that under R.C. 1506.10 "…the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state…"

[1345] See *State ex rel. Merrill v. Ohio Department of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, ¶ 59.

[1346] See *State ex rel. Merrill v. Ohio Department of Natural Resources*, 130 Ohio St.3d 30, 2011-Ohio-4612, ¶ 54.

[1347] Despite that, given the Lake's natural forces acting upon the land, the shoreline can change over time. As stated by the Ohio Attorney General, "Naturally, the shoreline of a body of water is in a constant state of change. Accordingly, it is impossible to fix a permanent boundary line for a littoral owner whose property is bounded by the natural shoreline, except where the shoreline has been permanently altered by artificial means." See *Faulkner v. City of Bay Village*, 8th Dist. 2002 No. 79349, 2002-Ohio-16 quoting Ohio Attorney General Opinion 1993 Op. Att'y Gen. No. 93-255, at 2-130.

But what is the relationship between the terms "the natural boundaries of Lake Erie" as used in R.C. 1506.48 and the "natural shoreline" as defined by the Supreme Court?" Do they have the same meaning (i.e., "the line at which water usually stands when free from disturbing causes")? And if they are the same, how does that inform the BOR's determination as to whether littoral property that has eroded "lies within" the natural boundaries of Lake Erie, as required by the statute before the parcel can be removed from the tax duplicate?

Logically, it would appear that the "natural boundaries" of Lake Erie (or any lake, for that matter) cannot extend beyond its physical limits. As a practical matter, then, it seems that the Lake's "natural boundaries" and its physical limits are one and the same. The Court's definition of Lake Erie's "natural shoreline" as "the line at which [its] water usually stands when free from disturbing causes" appears to establish those physical limits. As relates to any specific parcel, a determination of those physical limits (which could include a delineation of "the line at which the water usually stands") will be based upon the quantifiable facts relevant to the specific littoral parcel under consideration.

This, then, brings us to the ultimate question regarding Element 2 to be resolved by the BOR before it can remove a damaged/destroyed parcel from the tax duplicate. If (as we have concluded, above), the "natural boundaries" of Lake Erie go *land*ward only as far as "the line at which the water usually stands when free from disturbing causes," then what does the statute mean when it states that such eroded land must "lie[s] within" those natural boundaries before it can be removed from the duplicate?

The phrase "lies within" is not defined by Chapter 1506 nor by applicable case law. Because there is no applicable definition of that phrase, we turn to the rules of Ohio statutory construction which state that "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."[1348] Here, that term does not appear to have any technical or particular meaning in the statutory scheme of Chapter 1506 apart from its common usage. Accordingly, we turn to the

[1348] See R.C. 1.42. Sometimes known as "the plain meaning doctrine," it establishes that "courts have no authority to bypass or modify the plain meaning of unambiguous legislative language." See State v. Hoselton, 6th Dist. Lucas No. L-09-1150, 2011-Ohio-1396, ¶ 9.

dictionary for the common usage of those words. The dictionary definition of the verb to "lie" is "to occupy a certain relative place or position"[1349] and the dictionary definition of the preposition "within" is "to indicate enclosure or containment."[1350] In our context, combining those common usages indicates that before the BOR can remove a damaged/destroyed parcel from the tax duplicate, it must occupy a position or place in an enclosed or contained area; in this case, that area being the natural (physical) boundaries of Lake Erie.

Although there has been no judicial or other guidance on this point, based upon the above it would appear that before the BOR could remove the eroded parcel from the tax duplicate it would have to lie within the physical boundaries of Lake Erie; meaning, as a practical matter, it would have to have eroded and fallen or collapsed *lake*ward of the natural shoreline ("the line at which the water [of Lake Erie] usually stands when free from disturbing causes"). That makes sense because if the land has essentially eroded into the Lake, it has been transformed through natural forces from privately owned property (*land*ward of the "natural boundaries") to public trust property (*lake*ward of the "natural boundaries"). The land that was once privately owned, truly no longer exists – it is now under the waters of Lake Erie - and has no value on the tax rolls.

But is such an interpretation fair to those owners whose lakefront parcels have eroded and been either (1) only partially destroyed (less than 90%), or (2) totally destroyed but on the *landward* side of the natural shoreline? Arguably it is, because such eroded land is literally not under water, is not part of the public trust, and may still have some nominal or limited economic value.[1351] Indeed, the BTA has made clear that it "has historically rejected the argument that a property is worthless or has zero value."[1352] Even eroded lakefront property on which a structure

[1349] See https://www.merriam-webster.com/dictionary/lie.

[1350] See https://www.merriam-webster.com/dictionary/within.

[1351] Citing decisions from other states, the BTA has even stated that *contaminated* sites can have nominal value. See *Robert C. Alder v. Licking County Board of Revision* (April 22, 1994), BTA No. 92-R-976 ("Several cases have found contaminated property to have only nominal value. *Monroe Cty. Bd. of Assessment Appeals v. Miller* (Mar. 1, 1990), 131 Pa.Commw. 538; *Community Consultants, Inc. v. Bedford Two*. (July 3, 1985), Mich. Tax Tribunal Case No. 86388, unreported; *Comerica Bank–Detroit v. Metamora Twp*. (May 12, 1989), Mich. Tax Tribunal Case. Nos. 103325, 110482, and 112529, unreported. In *Miller*, the subject property was so severely contaminated that the property owner was forced to abandon it. In addition, it was proven that the contaminated property could not be sold or rented, even for a commercial venture. In Community Consultants, the subject property was determined to have a nominal value even though it ranked as the number one contaminated site in the State of Michigan. Further, there was considerable evidence that the property was a known health hazard.").

[1352] See *Bainbrook/Laurel Springs Homeowners Association, Inc. v. Geauga County Board of Revision* (September 30, 2019), BTA No. 2018-1444. See also *Stevens Preservations LLC v. Lake County Board of Revision* (February 17, 2021), BTA Nos. 2019-2429, 2019-2430, 2019-2431, 2019-2432; *Lorain County Landfill, LLC v. Lorain County Board of Revision* (November 18, 2022), BTA

cannot be built or maintained can have value because it provides access to the lakefront or has some other use to which a value can be ascribed. This comports with common appraisal practice where it is rare for land, even small remnants, to have *no* taxable value whatsoever and where appraisers will typically ascribe some minimal value to seemingly "worthless" land.[1353] Further, an owner whose littoral parcel has eroded but fallen *land*ward of the natural shoreline still has a remedy for erosion damage, because that owner may apply under the first paragraph of R.C. 1506.48 to obtain a reduction in valuation (albeit, not the elimination of value, allowed in the second paragraph).[1354]

Element 3: No Taxable Value

The third element requires that the remainder of the property, if any exists, have "no taxable value." As discussed above, if the land has eroded into the Lake, it has become part of the public trust property of the state and would, therefore, have no taxable value. This would require a factual determination by the BOR.

What is "Upon Consideration Thereof"?

Finally, the statute requires that the BOR may authorize the removal of the parcel from the tax duplicate "upon consideration thereof," but does not indicate what procedure such "consideration" entails. Is it an adversary proceeding to which the school board is entitled to notice, or some other type of proceeding? While there have been no judicial or BTA interpretations of the words "upon consideration thereof" as used in R.C. 1506.48, similar phraseology ("board of revision may consider") in both judicial and BTA decisions indicates such BOR "consideration"

No. 2021-1093 ("Absent extenuating circumstances, this Board has historically rejected the argument that a property is worthless or has zero value."; *Chicagoland Oil Company, LLC v. Cuyahoga County Board of Revision* (January 5, 2023), BTA No. 2021-1170; *Browning-Ferris Industries of Ohio, Inc. Glen Willow Properties, Inc. Per Auditor v. Cuyahoga County Board of Revision* (January 30, 2023), BTA No. 2021-2540; *RGT Holdings LLC v. Hamilton County Board of Revision* (February 6, 2023), BTA Nos. 2019-1547, 2019-155.

[1353] Such "remnants" might remain, for example, where a larger piece of land is taken by eminent domain or in connection with platted community owned land used for surface water drainage.

[1354] Further, even if the owner had previously filed a BOR complaint within the then-current triennial period, she would be allowed to refile by claiming under R.C. 5715.19(A)(2)(b) that the property "lost value due to some casualty."

typically takes place in the context of an adversary proceeding, i.e., a regular valuation hearing.[1355] - In addition, because the removal of the property from the duplicate arguably has an *impact* similar to granting an exemption from property tax, it can be argued by analogy that the school board should be able to oppose such removal as it would be able to oppose a proposed property tax exemption.[1356] Most likely then, the local school board would be the complainant in a BOR proceeding challenging an auditor's reappraisal that reduces the valuation of the erosion-damaged property. As with other BOR proceedings, as the complainant it would bear the burden of proof.[1357]

[1355] In a decision of the Ohio Supreme Court, where the phrase "board of revision may consider" appears, it was followed by the words "a claim to decrease property tax valuation…" See *Cardinal Federal S. & L. Assn. v. Cuyahoga County Board of Revision*, 44 Ohio St.2d 13 (1975) (Syllabus 1). Several courts of appeals, citing the *Cardinal Federal* case, have also followed the phrase "board of revision may consider" with "a claim to decrease property tax valuation." See, for example, *Capoccia v. Franklin County Board of Revision*, 10th Dist. Franklin 1994 WL 621705 (Nov. 11, 1994); *Janis v. Summit County Board of Revision*, 9th Dist. Summit C.A. No. 11370, et. seq. 1984 WL 6196 (May 30, 1984); *Bank One of Columbus v. Franklin County Board of Revision*, 10th Dist. Franklin No. 94APH04-465, 1994 WL 590052 (Oct. 25, 1994). Similarly, a Westlaw search of the phrase "board of revision may consider" shows that in numerous BTA decisions that phrase is frequently followed by the words "a claim to decrease valuation". See, for example, *Susan Chmura Barreca v. Cuyahoga County Board of Revision* (June 17, 2008), BTA No. 2008-R-695 ("Furthermore, a county board of revision may consider a claim to decrease valuation only where the claimant…").

[1356] See R.C. 5715.27(C) and (D) ("(C) A board of education …may, with respect to any application for exemption of property located in the district …file a statement with the commissioner or auditor and with the applicant indicating its intent *to submit evidence and participate in any hearing on the application*...A statement filed in compliance with this division entitles the district to submit evidence and to participate in any hearing on the property…" and "(D) The commissioner or auditor shall not hold a hearing on or grant or deny an application for exemption of property in a school district whose board of education has requested notification under division (B) of this section until the end of the period within which the board may submit a statement with respect to that application under division (C) of this section."). The counter to that argument, however, is that in the case of a property tax exemption the property to be exempt is in existence while in the case of land that has been at least 90% eroded, there is little, if any, land that remains to be taxed.

[1357] See *SmartlandCL4, LLC v. Cuyahoga County Board of Revision* (December 2, 2020), BTA No. 2019-2151 ("[T]he complainant bears a burden not to merely challenge the auditor's valuation or assessment, but rather to provide competent and probative evidence that an alternative value reflects the true value of the subject property.").

CHAPTER 23
THE BOR'S ROLE WITH PROFESSIONAL SPORTS STADIA

CHAPTER SUMMARY

- Under R.C. 307.696 and 307.699, certain political subdivisions in Ohio are granted authority to help facilitate the financing, construction, and operation of sports facilities for professional athletics.

- Under the statutory scheme, the property used in connection with those sports facilities may in some circumstances be granted an exemption from real property tax. If such an exemption is granted, then the entity that owns the facility is required to make an annual Payment in Lieu of Taxes ("PILOT"), the amount of which is determined by the auditor.

- Owners who object to the amount of the PILOT as determined by the auditor, may file an appeal with the BOR.

Certain political subdivisions in Ohio are granted the authority to help facilitate the financing, construction, and operation of sports facilities for professional athletics.[1358] Under the Revised Code, a "sports facility" is defined as "a sports facility that is intended to house major league professional athletic teams, including a stadium, together with all parking facilities, walkways, and other auxiliary facilities, real and personal property, property rights, easements, and interests that may be appropriate for, or used in connection with, the operation of the facility."[1359] Public financing has helped in the financing and construction of professional sports stadia, including those in Cincinnati,[1360] Cleveland,[1361] and Columbus.[1362]

[1358] See R.C. 307.696, R.C. 307.699.

[1359] See R.C. 307.696(A)(3).

[1360] See Lee Geige, Comment, *Cheering For the Home Team: An Analysis of Public Funding of Professional Sports Stadia in Cincinnati, Ohio*, 30 U. TOL. L. REV. 459 (1999).

[1361] See Frank A. Mayer III, *Stadium Financing: Where We Are, How We Got Here, and Where We Are Going*, 12 Jeffrey S. Moorad Sports L.J. 195 (2005), fn. 1.

[1362] See, *Franklin County authority provides $146 million for new Crew Stadium but doesn't monitor spending*, October 18, 2020, Columbus Dispatch.

PILOT Payments

The statutory scheme allowing for such financing, construction, and operation is lengthy and complex.[1363] For purposes of understanding the BOR's role in that statutory structure, however, it is sufficient to know that the BOR becomes involved where a sports facility's owner, who makes payments in lieu of real property taxes (a "PILOT" payment) on certain property connected to the sports facility, challenges the amount of those PILOT payments. That challenge is filed at the BOR.[1364]

The law envisions that real property used in connection with such sports facilities may under some circumstances be granted an exemption from real property tax[1365] and that, if such exemption is granted, the political subdivision or corporation that owns the sports facility "shall make an annual service payment in lieu of taxes [the PILOT payment] on the exempt property for each tax year…in which the facility…is used by a major league professional athletic team for its home schedule."[1366] Using a formula set forth in the statute,[1367] the county auditor "shall determine the amount of service [PILOT] payments for that tax year" for the property to which the PILOT payment applies.[1368] Once determined, the auditor is required to notify the property owner of the amount of the PILOT payments no later than sixty days before the date on which the first payment of real property taxes would otherwise be due. The PILOT payments are collected in the same manner as property taxes for that tax year.[1369]

[1363] See R.C. 307.696, R.C. 307.699.

[1364] See R.C. 307.699(F).

[1365] See R.C. 5709.081(B) ("…all buildings, structures, fixtures, and improvements of any kind to the land, that are constructed … after March 2, 1992, and are part of or used in a public recreational facility used by a major league professional athletic team or a class A to class AAA minor league affiliate of a major league baseball team for a significant portion of its home schedule, and land acquired by a political subdivision in 1999 for such purposes or originally leased from a political subdivision… are declared to be public property used for a public purpose *and are exempt from taxation*, if all of the following apply…"). (italics added).

[1366] See R.C. 307.699(B). In full, subsection reads "Any political subdivision or subdivisions or any corporation that owns a sports facility that is both constructed under section 307.696 of the Revised Code *and includes property exempt from taxation* under division (B) of section 5709.081 of the Revised Code, shall make an annual service payment in lieu of taxes on the exempt property for each tax year beginning with the first tax year in which the facility or part thereof is used by a major league professional athletic team for its home schedule. The amount of the service payment for a tax year shall be determined by the county auditor under division (D) of this section." (italics added).

[1367] See R.C. 307.699(C) and (D).

[1368] See R.C. 307.699(D).

[1369] See R.C. 307.699(E).

Appeal of the PILOT Determination to the BOR – R.C. 307.699(F) ("699(F)")

The Revised Code allows for an appeal of the auditor's "determination of the annual service [PILOT] payments." Such an appeal may be brought either by "the owner of property exempt from taxation" in connection with a "a public recreational facility"[1370] or by "persons…entitled to file complaints under 5715.19 of the Revised Code…."[1371] As with valuation complaints to the BOR, under 699(F) appeals of the auditor's determination must be brought "within the time period for filing complaints under section 5715.19…"[1372] Further, like complaints under 5715.19, a complaint filed under 699(F) "shall be regarded as a complaint for the purposes of divisions (B), (C), (E), (F), (G), and (H) of section 5715.19 of the Revised Code";[1373] provisions which deal, amongst other things, with time frame and notice requirements; a listing of the individuals or entities who have the authority to file a complaint; the tendering by the owner of amounts purportedly owed and the accrual of interest thereon; and the complainant's requirement to provide to the BOR all information or evidence within the complainant's knowledge or possession affecting the subject property, to name a few.[1374]

Despite those similarities, there are differences between the more common valuation appeal under 5715.19 and those allowed under 699(F). For example, while valuation complaints under 5715.19 are filed with the auditor,[1375] under 699(F) appeals to the BOR are taken by filing the complaint directly with the BOR itself.[1376] Unlike the standard procedure of 5715.19, under

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[1370] See R.C. 5709.081(A) ("Real and tangible personal property owned by a political subdivision *that is a public recreational facility* for athletic events shall be exempt from taxation if all of the following apply…") and R.C. 5709.081(B) (In applicable part "… buildings…that are constructed….and *are part of or used in a public recreational facility* used by a major league professional athletic team … are declared to be public property used for a public purpose and are exempt from taxation, if all of the following apply…") (italics added).

[1371] See R.C. 307.699(F).

[1372] See R.C. 307.699(F).

[1373] See R.C. 307.699(F).

[1374] See R.C. 5715.19(B), (C), (E), (F), (G), and (H).

[1375] See R.C. 5715.19(A)(1) ("…a complaint against any of the following determinations for the current tax year shall be filed with the county auditor…").

[1376] See R.C. 307.699(F) ("The owner of property exempt under taxation under section 5709.081 or persons and political subdivisions entitled to file complaints under section 5715.19…may appeal the determination of the annual service payments…*to the board of revision*…The appeal shall be taken by filing a complaint *with that board*…") (italics added).

699(F) after the BOR receives the complaint *it* forwards the complaint to the auditor who, thereafter, has thirty days to "certify to the board of revision a transcript of the record of the proceedings of the county auditor pertaining to the determination of the annual service payments."[1377] This, of course, is the opposite of the procedure under 5715.19 where it is the *auditor* who forwards the complaint to the BOR.[1378]

In addition, unlike 5715.19, 699(F) specifies that the complaint "need not be on the form prescribed for other complaints filed under section 5715.19…" And further, 699(F) requires that the complaint be more specific than complaints filed under R.C. 5715.19. For example, 699(F) requires that the complaint not only include an identification of the exempt property subject of the appeal, but also attach "a copy of the auditor's certification to the owner, a calculation of the service payments claimed to be correct and a statement of the errors in the auditor's determination." [1379]

Finally, 699(F) requires that "The board of revision shall order the hearing of evidence and shall determine the amount of service payments due and payable pursuant to this section." Thus, it appears that the BOR's decision is focused primarily on "the amount of service payments due and payable." As with other appeals to the BOR, the burden of proof remains upon the owner to show that the auditor's determination of the amount of the PILOT payments was incorrect.

[1377] See R.C. 307.699(F).

[1378] See R.C. 5715.19(A)(1) ("The county auditor shall present to the county board of revision all complaints filed with the auditor.").

[1379] See R.C. 307.699(F).

CHAPTER 24
TRANSPORTATION IMPROVEMENT DISTRICTS: APPEALS OF SPECIAL ASSESSMENTS TO THE BOR

CHAPTER SUMMARY

- R.C. Chapter 5540 authorizes the creation of Transportation Improvement Districts ("TIDs") by the county commissioners. The primary purpose of a TID is to construct, maintain, repair, and operate transportation projects. To finance those projects, TIDs are granted the authority to levy special assessments against parcels that are benefitted by the TID improvements.

- Owners of those parcels may challenge all or part of those special assessments by filing a complaint at the BOR. Those complaints are handled in the same manner as other BOR complaints.

Revised Code Chapter 5540 deals with transportation improvement districts ("TID").[1380] TIDs are created through the action of the county commissioners[1381] and thereafter governed by the TID's board of trustees.[1382] Under the Code, the BOR hears complaints filed by parties effected by special assessments imposed by the TID's board of trustees.

Purpose and Powers of a TID

According to the Ohio Attorney General:

> The primary purpose of a transportation improvement district is to construct, maintain, repair, and operate transportation projects, which include streets, highways, parking facilities, freight rail tracks and necessarily related freight rail facilities, bridges, tunnels, overpasses, interchanges, and other similar projects.[1383]

Similar to other political subdivisions, a TID is "a body both corporate and politic"[1384] and covers a specified geographic area. In implementing its statutory purposes, TIDs enjoy a broad range of

[1380] See R.C. Chapter 5540.

[1381] See R.C. 5540.02(A) ("A transportation improvement district may be created by the board of county commissioners of a county.").

[1382] See R.C. 5540.02(C)(1) ("… a transportation improvement district shall be governed by a board of trustees…").

[1383] See Ohio Attorney General Opinion 2018-024.

[1384] See R.C. 5540.02(B).

powers including, among others, the authority to issue "notes, bonds, revenue anticipatory instruments, or other obligations"[1385] to finance its projects.

In providing for "the construction, reconstruction, improvement, alteration, or repair of any road, highway, public place, building, or other infrastructure," TIDS are also granted the authority to levy special assessments for improvements.[1386] Where an improvement is proposed, the TID board is required to "indicate by metes and bounds the area in which the public improvement will be made and the area that will benefit from the improvement"[1387] and to "certify to the appropriate county auditor the boundaries of the area that is benefited."[1388]

The process to authorize the proposed improvement entails a public hearing and requires that the secretary-treasurer of the TID board "deliver, to each owner of a parcel of land or a lot that the board identifies as benefiting from the proposed improvement, a notice that sets forth the substance of the proposed improvement and the time and place of the hearing on it."[1389] Once approved, the statute sets out the manner in which the special assessment will be calculated against the effected properties.[1390] The assessments are paid and collected in the same manner as real property taxes[1391] and the monies so collected from the special assessment may be paid into a fund from which, in turn, are paid the costs of the improvement.[1392]

[1385] See R.C. 5540.031(F)(1).

[1386] See R.C. 5540.031(A).

[1387] See R.C. 5540.031(C).

[1388] See R.C. 5540.031(G)(1).

[1389] See R.C. 5540.031(D). In addition, under R.C. 5540.031(D) the secretary-treasurer of the TID board is required to "give notice to each nonresident owner of a lot or parcel of land in the area to be benefited by the improvement, by publication once in a newspaper of general circulation in the one or more counties in which this area is located."

[1390] See R.C. 5540.031(F)(3) ("The board shall levy special assessments at an amount not to exceed ten per cent of the assessable value of the lot or parcel of land being assessed. The board shall determine the assessable value of a lot or parcel of land in the following manner: the board shall first determine the fair market value of the lot or parcel being assessed in the calendar year in which the area to be benefited by the public improvement is first designated and then multiply this amount by the average rate of appreciation in value of the lot or parcel since that calendar year. The assessable value of the lot or parcel is the current fair market value of the lot or parcel minus the amount calculated in the manner described in the immediately preceding sentence. The board may adjust the assessable value of a lot or parcel of land to reflect a sale of the lot or parcel that indicates an appreciation in its value that exceeds its average rate of appreciation in value.").

[1391] See R.C. 5540.031(F)(4).

[1392] See R.C. 5540.031(F)(2) ("All or part of the costs and expenses of providing for…the improvement…may be paid from a fund into which may be paid special assessments levied under this section…"). In addition, "Such costs and expenses may also be paid from the treasury of the district or from other available sources…"

Appeals to the Board of Revision

Owners who seek to challenge all or part of the special assessment imposed against their property by the TID may file a complaint at the BOR. As stated by the Code, "Complaints regarding assessments may be made to the county board of revision in the same manner as complaints relating to the valuation and assessment of real property."[1393] Because special assessments may only be imposed after a series of determinations and calculations have been made by the TID's board of directors, complaints regarding the assessment may include, for example, whether the TID board correctly determined: (1) if the subject property was in the area to be benefited by the improvement; (2) the fair market value of the subject property in the calendar year in which the area to be benefited by the improvement is first designated; and (3) the average rate of appreciation in value of the subject parcel since that calendar year, to name a few.[1394] As with other BOR complaints, "R.C. Chapter 5715 provides the procedure to be followed in contesting assessments before a county board of revision."[1395]

[1393] See R.C. 5540.031(F)(4).

[1394] See R.C. 5540.031(F)(3).

[1395] See *Avery v. Rossford, Ohio Transportation Improvement District*, 145 Ohio App.3d 155, 163 (6th Dist. 2001).

CHAPTER 25
THE BOR'S ROLE IN RESIDENTIAL RENTAL PROPERTY FINES

CHAPTER SUMMARY

- Under R.C. Chapter 5323, in counties with a population of over 200,000, owners of residential rental property are required to file and update information with the county auditor regarding the ownership and location of that property.

- If they fail to do so, the auditor may impose a special assessment against the residential rental property of no less than fifty nor more than one-hundred fifty dollars. That special assessment may be challenged at the BOR.

Revised Code Chapter 5323[1396] requires that owners of residential rental property[1397] report certain information to the county auditor. Under R.C. 5323.99, the BOR hears complaints filed by an owner effected by a special assessment that is imposed against the owner for failure to comply with those requirements.

R.C. Chapter 5323 was first enacted in 2006 and applies only to counties with a population of more than two hundred thousand (200,000) as of the last census.[1398] In those counties, owners of residential rental property are required to file with the county auditor certain information regarding the ownership and location of that property.[1399] That information is maintained either on the tax list or the real property's record[1400] and the owner is required to update that information within sixty (60) days after any change occurs.[1401]

[1396] See R.C. Chapter 5323.

[1397] Under R.C. 5323.01(E) "residential rental property" is defined as "real property that is located in a county that has a population of more than two hundred thousand according to the most recent decennial census and on which is located one or more dwelling units leased or otherwise rented to tenants solely for residential purposes, or a mobile home park or other permanent or semipermanent site at which lots are leased or otherwise rented to tenants for the parking of a manufactured home, mobile home, or recreational vehicle that is used solely for residential purposes. "Residential rental property" does not include a hotel or a college or university dormitory."

[1398] See R.C. 5323.01(E).

[1399] See R.C. 5323.02.

[1400] See R.C. 5232.02(B).

[1401] See R.C. 5232.02(C).

Owners of residential real property who reside outside of Ohio are required to designate, in a manner determined by the county auditor, "an individual who resides in the state to serve as the owner's agent for the acceptance of service of process on behalf of the owner…" and to file in writing with the auditor the name, address, and telephone number of that agent.[1402] If, however, the out of state owner has previously designated, and continues to maintain, a statutory agent with the Ohio Secretary of State, then such owner need not designate a new agent. Instead, in that case, the out of state owner "shall file in writing with the county auditor in the county in which the residential rental property is located a certified copy of the document filed with the secretary of state containing that designation."[1403]

If the owner of the residential real estate fails to file or update the information required under R.C. Chapter 5323 or, if an out of state owner, to designate an agent and file the appropriate document with the auditor, then the auditor "may impose upon any person who violates this section a special assessment on the residential rental property that is the subject of the violation that is not less than fifty dollars or more than one hundred fifty dollars."[1404] That special assessment may be appealed to the board of revision.

At the BOR, as with its other cases, the owner will bear the burden to prove that in imposing the special assessment the auditor's actions were improper. According to the Ohio the Ohio Department of Taxation, "Because [R.C. 5323.99] contains no limitations on who may file such a complaint or when such complaints must be filed, any party may file a complaint at any time against a residential rental property registration penalty, whether it is paid or unpaid."[1405]

[1402] See R.C. 5323.03.

[1403] See R.C. 5323.03.

[1404] See R.C. 5323.99.

[1405] See https://tax.ohio.gov/static/government/bulletin24_rental_registration_notice_and_penalty_assessment.pdf