

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

NEWPORT HARBOR ASSOCIATION)	CASE NO. CV 11 755497
)	
Appellant,)	JUDGE PAMELA A. BARKER
)	
v.)	JOURNAL ENTRY AND OPINION
)	
CUYAHOGA COUNTY BOARD OF)	
REVISION, ET AL.)	
)	
Appellees.)	

This cause and matter is before the Court as a result of a notice of appeal filed on May 18, 2011, by appellant, Newport Harbor Association (hereinafter "NHA"), which challenges a decision of the Cuyahoga County Board of Revision ("BOR") in which it determined the value, for tax purposes, of certain real property, identified by permanent parcel number 631-07-007 with a tax mailing address of 33 Shoreby Drive, Bratenahl, Ohio, 44108 (hereinafter "the property"), for tax year 2009. The Court has considered this matter upon appellant's notice of appeal, the record and transcript certified by the Cuyahoga County Auditor, and the evidence adduced at the hearing convened before this Court on March 9, 2012.

The property features a common area and walkways and 117 individually sold and subleased docks, with each of the docks being individually owned in fee simple. Thus, although there is one permanent parcel number, each owner is billed for his proportionate share of the real estate taxes, based upon the size of the dock. The property also includes a structure with an exterior square footage of 925 feet and an interior square footage of 805 feet which is utilized as an office and garage for the operation of Newport Harbor, and which has an insurance value, to include contents of the structure, of \$125,000.

The property encompasses 6.0039 acres and is zoned residential and permitted as a conditional accessory use per the Bratenahl Village Code. The NHA facilitates the operation of Newport Harbor which was developed in coordination with a planned residential development, with residences abutting the property. Eighty-three to eighty-four percent of the property is comprised of water and 3.3 acres of the property is the subject of a submerged land lease with the State of Ohio. Newport Harbor was developed out of or is in a flood plain zone; but since it is comprised primarily of water there is nothing that can actually flood; the only negative impact upon the NHA are the costs that must be and have been expended to clean up raw sewage in the harbor that can result and has resulted from storms.

A purchaser or owner of one or more of the 117 docks must be an equity member of Shoreby Club ("the equity membership rule") and twenty-five percent (25%) of the purchasers or owners must be residents of the development or the Village of Bratenahl; an owner can lease his dock to another party, but 25% of the owners or users must be residents of the development or the Village ("the 25% rule").

Newport Harbor differs from a marina in that there are no retail markets, gasoline, ice or other boating or sailing accessories available for sale. There is no pool, clubhouse, cabana or snack bar. The public is not invited nor permitted to be on the property unless requested or invited by a dock owner.

For the 2009 Tax Year, the Cuyahoga County Auditor provided a market land value for the property of \$4,370,200.00 and a market building value of \$459,800.00, for a total market value of the property of \$4,830,000.00. For tax year 2009, the 35% taxable value of the real property was set at \$1,529,600.00 and the taxable value of the building at \$160,900.00 for a

total taxable value of \$1,690,500.00. Newport Harbor filed its Complaint against the valuation of real property with the Board of Revision, seeking to decrease the Property's taxable value from \$1,690,500.00 to \$836,967.00.

NHA, the "owner" of the property, through Dr. Kenneth Spano, who at all times material herein was and is President and custodian of all official records and documents pertaining to the property including official records of all sales of such dock slips **contained therein**, presented testimony and evidence before the BOE and this Court in an attempt to meet the owner's burden to demonstrate that the property has been valued improperly by the auditor. (Emphasis added.) See *Arbogast v. Miliken* (7th App. Dist. 2005), 2005-Ohio-7081, citing *Murray and Co. Marina, Inc. v. Erie Cty. Bd. Of Revision* (1997), 123 Ohio App.3d 166, 174, 703 N.E.2d 846. Specifically, the requested 54% reduction was computed by utilizing historical sales figures concerning 21 of the 117 docks, covering the period from May, 2006 until February, 2011. Dr. Spano opined that on average the documented dock sales represented 46% of the 2009 market value or, conversely a 54% reduction in the market value of NHA's land as determined by the auditor.

The owner also presented evidence to attempt to meet its burden at the BOR hearing through the testimony of Robert J. Andrzejczyk, SRA, Certified Appraiser, who testified in relevant part that "there's just no way to appraise [the property] properly", "[i]t's a one-of-a-kind property", "the sales comparison approach certain doesn't apply", "[t]he income approach certainly doesn't apply", "[t]he income approach can't be stabilized" and "[y]ou have no cost approach." His opinion with respect to utilizing the sales on slips as Dr. Spano had presented as an imputation of value was that "[i]t might be considered as some guideline, but to stabilize

it at any point in time is about impossible because you've got restrictions and memberships to club which are mandatory, and variations in those docks." When asked if he would say that slips comprise 100% of the value of the property, Mr. Andrzejczyk responded, "I would say. That's the motivation of purchase. Sure." Indeed, when asked by Mr. Spano if he agreed with Mr. Spano's "approach", i.e., his computation of value based upon sales of docks, Mr. Andrzejczyk responded, "[t]hat's not an appraisal", "[t]hat's [Dr. Spano's] opinion".

The BOR decided to maintain the market value of the property at \$4,830,000.00 and the appeal to this Court followed.

At the hearing before this Court on March 9, 2012 the NHA, through counsel, presented additional evidence, specifically testimony from Dr. Spano, a Valuation Analysis and Letter of Consultation for Newport Harbor Association dated August 4, 2005 and prepared by Richard W. Linhart, Certified General Real Estate Appraiser, marked and admitted as Plaintiff's Exhibit "1", and the "Owner's Position Statement In Support Of Complaint" filed before the BOR on February 23, 2011 for purposes of the March 2, 2011 hearing on the Complaint, marked and admitted herein as Plaintiff's Exhibit "2".

Plaintiff's Exhibit "1" was not admitted or considered for the purpose of determining the 2009 value of the property since it would be error for this Court to rely on Appraiser Linhart's 2005 report certifying the value of the property as of 1-1-2003, as a determination of value for tax year 2009. See *Plain Local Schools Board of Education v. Franklin County Board of Revision, et al.*, 130 Ohio St.3d 230, 236, 957 N.E.2d 268, 275, and cases cited therein. It was admitted and considered solely for the following purpose: to determine or verify whether or not in 2005 the BOR had used or relied upon the historical dock-sales approach or methodology urged by

appellant to decrease the 2003 taxable value of the property so as to give that approach or methodology any credence, particularly given Mr. Andrzejczyk's testimony before the BOR that the property could not be appraised. Indeed, Plaintiff's Exhibit "1", and/or the testimony of Dr. Spano, does demonstrate the following. For purposes of the 2003 tax year Mr. Linhart did not apply or use a Cost Approach or an Income Approach, but used what he denominated a "Sales Comparison Approach" that incorporated historical or "comparable" dock sales "obtained from discussion with Mr. Diemert", to place a value as of 1-1-2003 at \$5,265,000.00; and in 2005 the BOR decision decreased the property market value for 2003 to \$5,250,000.00, or \$15,000 less than the opinion of value provided by Mr. Linhart.

However, even though it appears that in 2005 the BOR relied in large part upon appraiser Linhart's opinion as to value based upon his "Sales Comparison Approach" that used or incorporated comparable or historical dock sales, the following remains. First, the record from the 2005 BOR hearing was not presented so as to demonstrate whether or not non-hearsay evidence concerning the dock sale prices not otherwise referenced in Mr. Linhart's report was submitted and considered. Second, even if it was only Mr. Linhart's report and hearsay statements or information incorporated therein that was considered by the BOR in 2005 in rendering its decision regarding the 2003 tax value, the auditor did not appeal that decision; and the hearsay rule is relaxed in administrative proceedings. See *Almondtree Apartments of Columbus, Ltd. v. Board of Revision of Franklin County*, 1988 WL 70505 at *2, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1984), 14 Ohio St.3d 49 and *Haley v. Ohio State Dental Bd.* (1982), 7 Ohio App.3d 1. See, also *Plain Local Schools Board of Education v. Franklin County Board of Revision*, *supra*, 130 Ohio St.3d 230 (where the court observed "that the Ohio

Rules of Evidence do not directly apply in administrative proceedings, Evid.R.101(A), but that an administrative tribunal such as the BOR or the BTA is justified in consulting the rules for guidance.”) Third, Mr. Linhart did not testify at the March 2, 2011 hearing in support of the appellant concerning the 2009 tax value, Mr. Andrzejczyk did - and the transcript of the proceedings before the BOR unequivocally demonstrate that he disagreed with Mr. Linhart’s 2005 opinion that the “Sales Comparison Approach” could be used or applied. Indeed, Mr. Andrzejczyk testified that the historical dock sales information approach advanced by Dr. Spano might be considered as a guideline and certainly was **Dr. Spano’s opinion**, but it was not an appraisal.

At the March 9, 2012 hearing, Dr. Spano testified that when a dock owner sells the dock, he or an officer of the Board must consent to it, presumably to ensure compliance with the equity membership rule and the 25% rule. Absent from Dr. Spano’s testimony was that he or a member of the Board must consent to the sales price and therefore, would have to obtain or be provided with proof of the price, either by way of affidavit and/or a certified copy of any written agreement by and between the parties to the sale or canceled check(s), and maintain a record of that proof. Thus, to the extent that Dr. Spano testified, by affidavit and at the hearing, that he is the custodian of all official records and documents pertaining to the property including official records of all sales of such dock slips “contained therein”, his testimony did not establish that as custodian of the records, he actually possesses and maintains competent evidence or documents establishing each and every one of the dock sales and prices associated therewith.

According to Dr. Spano, the "sale" of a dock is tracked or recorded by Land Title Agency; but the dollar amount paid for it is not noted or recorded by that agency. Land Title Agency was one source of the information included on the historical list of sales provided by Dr. Spano. In other words, Land Title Agency, through its employee(s) and/or agent(s), provided information to Dr. Spano verbally concerning the docks sold between 2006 and 2011; it was not established that actual evidence was presented to Dr. Spano by Land Title Agency to prove the dock sales. As far as the prices of the docks sold, that information was generated from merely asking the owners/sellers. However, Dr. Spano testified that previously the sellers/owners had provided affidavits verifying the sales prices and he could obtain and/or provide affidavits. Dr. Spano also testified that he had copies of canceled checks associated with sales. However, affidavits and/or canceled checks were not introduced as evidence either before the BOR or before this Court.

"R.C. 5713.03 states the general rule that when a 'tract, lot, or parcel has been the subject of an arm's length sale between a willing seller and a willing buyer within a reasonable length of time, either before or after the tax lien date, the auditor shall consider the sale price *** to be the true value for taxation purposes.'" *Plain Local Schools Board of Education v. Franklin County Board of Revision, supra*, 130 Ohio St.3d 230, 233-34. "[W]hen such information is available," an "actual sale of [the] 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" will "usually determine the monetary value of the property". *State ex rel. Park Invest. Co. v. Bd. Of Tax Appeals* (1964), 175 Ohio St. 410, 412, 195 N.E.2d 908. However, when such information is not available, an appraisal becomes necessary, the goal of which is to determine the amount which

such property should bring if sold on the open market. See *Plain Local Schools Board of Education v. Franklin County Board of Revision*, *supra*, 130 Ohio St.3d 230, 234, citing and relying upon *State ex rel. Park invest. Co. v. Bd. Of Tax Appeals*, *supra*.

The NHA argues that the evidence presented by and through Dr. Spano concerning the 21 dock sales between 2006 and 2011 is the best evidence available to support a request for change in valuation of real property and that it has more than met its burden of providing evidence supporting a change in valuation. Indeed, a property owner is permitted to express an opinion regarding the value of his or her property even though not formally qualified as an expert. See, e.g., *Smith v. Padgett* (1987), 32 Ohio St.3d 344, 347, 513 N.E.2d 737. However, there is no requirement that the finder of fact accept that value as the true value of the property. *WJK Investments, Inc. v. Licking Cty. Bd. Of Revision*, (1996), 76 Ohio St.3d 29, 32, 665 N.E.2d 111. Indeed, the testimony of Dr. Spano, relating to the key issues of the dock sales and whether or not they were arm's length transactions was based upon hearsay. See *Almondtree Apartments of Columbus, Ltd. V. Board of Revision of Franklin County*, 1988 WL 70505 (Ohio App. 10 Dist.), at *2-3. There was no evidence presented that Dr. Spano ever reviewed any contracts for the sales and purchases of the docks, whether originals or certified copies, business records of Land Title Agency, or any other documents properly evidencing the sales prices. There was no testimony, by affidavit or otherwise, from any of the parties involved in the dock sales transactions and there was no testimony from any employee with or agent of, or records from, Land Title Agency. Dr. Spano relied on oral statements made to him by the owners/sellers and information supplied to him by Land Title Agency, through its employee(s) or agent(s).

Although appellees did not object to the evidence submitted and testimony offered by Dr. Spano concerning the dock sales on the specific basis of hearsay, appellees did argue that the NHA had not submitted competent, probative evidence to establish the correct value of the subject property. Indeed, the document prepared by Dr. Spano as the custodian of records of NHA containing the list of dock sales based upon information compiled by Dr. Spano does not contain the necessary indicia of reliability which would allow or require this court to consider it, despite the fact that appellees did not object to it on the specific basis that it contained or incorporated hearsay. *See Plain Local Schools Board of Education v. Franklin County Board of Revision, supra*, 130 Ohio St.3d 230, 234-35.

Since appellant Newport Harbor Association did not meet or discharge its burden of providing evidence supporting a change in valuation, there is no need for this Court to consider or decide whether or not the evidence presented by appellees, specifically the testimony and report of Kresmir Tomjenovic (Appellee's Exhibit "A) and Exhibits "B" and "C", is competent, probative and/or is objectionable based upon hearsay and other grounds asserted by appellant so as to determine whether or not the auditor justified and defended its valuation.

The decision of the Board of Revisions is **AFFIRMED**.

Judge Pamela A. Barker Dated