In the Court of Common Pleas
Cuyahoga County, Ohio

FAIRHILL TOWERS, LLC, Appellant/Cross-Appellee, v. CUYAHOGA COUNTY BOARD OF REVISION, *et al.*, Appellees/Cross-Appellant.	) CASE NO. CV 12-776549)) JUDGE ROBERT C. McCLELLAND))) **Journal Entry:**)) Opinion & Order on Appellee/Cross-Appellant Cleveland Municipal School District's Motion to Consider Additional Evidence pursuant to R.C. 5717.05

OPINION

Appellant/Cross-Appellee Fairhill Towers, LLC, the owner of a 179-unit apartment building at 12000 Fairhill Road, Cleveland, Ohio, filed the Original Complaint Against the Valuation of Real Property with the Board of Revision ("BOR") seeking a decrease in County Auditor's value for tax year 2009. Fairhill alleged that it had purchased the property June 2007 for $5,963,000.[1] In its complaint, Fairhill identified its opinion of its "true value" as $4,900,000 and "taxable value" (35% of true value) as $1,715,000. The Board of Education for the Cleveland Metropolitan School District ("School Board") filed a counter-complaint supporting the auditor's value of $6,300,000, which reflected a land value of $305,000 and building value of $5,995,000.

The BOR adopted the auditor's value, and Fairhill appeals to this Court from that decision pursuant to R.C. 5717.05. The School Board filed a cross-appeal in support of the BOR's decision.

After Fairhill and the School Board filed their merit briefs, this Court scheduled and held a settlement conference. That settlement conference proved unsuccessful as the School Board and BOR indicated that Fairhill had not

[1] The parties agree, however, that the actual purchase price of $6,533,500 included $179,000 of personal property. (Transcript of BOR hearing, 1/13/12, p. 4.)

responded to discovery requests. (*See* JE, 9/13/12.) In light of the School Board and BOR's contention that discovery is allowed in appeals from the BOR's decisions, this Court set a motion deadline and required them to "explain whether or how Civ.R 1(C)(1) and/or (7) apply to this matter and why discovery is allowed in an appeal in light of R.C. 5717.19(G)." (JE, 9/13/12.)

Thereafter, the School Board filed a motion asking this Court's leave to "submit additional evidence consisting of, but not limited to, an expert appraisal report" and requesting "an evidentiary hearing because the School Board's appraisal evidence did not exist and was therefore not in the School Board's possession when the Cuyahoga County Board of Revision heard this matter." (Mot., p. i.) Fairhill filed its brief, contesting the School Board's position on three separate bases.

I. Arguments on the motion for evidentiary hearing

A. *The School Board's position*

The School Board argues that, "[a]t the BOR level, the School Board was not afforded the right to issue discovery pursuant to the Rules of Civil Procedure thus limiting the School Board's opportunity to request financial information and physically inspect the Subject Property." (Mot., p. 1; *see id.*, p. 4.) Because of the lack of access to "information necessary to obtain a competent appraisal report," it couldn't submit one to the BOR. (*Id.*)

The School Board also contends that nothing in the rules of civil procedure precludes the use of discovery tools in the appellate process authorized by R.C. 5717.05. The School Board claims that it "lawfully issued written discovery to Fairhill," which has not responded. (Mot., p. 6.) The School Board does not ask this Court to compel discovery as provided by the civil rules nor does the motion include copies of the purportedly unanswered discovery requests.

B. *Fairhill's position*

In response, Fairhill points to various statements contained in the School Board's merit brief where the School Board argued that, based on the recent, arm's-length sale of the property, an appraisal is "unnecessary." (Fairhill Reply, pp. 1 & 3-4.) Regardless, Fairhill argues, not only does the record contain an MAI appraisal, the School Board cross-examined the appraiser at the hearing. (Fairhill Reply, p. 4.) Given that one appraisal already is in the record, "[t]he School Board does not state why another appraisal is necessary." (Fairhill Reply, p. 5.)

Fairhill also takes issue with the School Board's contention that it lacked access to information necessary to obtain a competent appraisal report: "Comparable sales and market conditions were and are a matter of public record, as available to an appraiser selected by the School Board as they were available to

[Fairhill's] appraiser." (Fairhill Reply, p. 5.) Fairhill also says that its appraisal report, which contained "detailed actual income and expense statements for the Subject Property for the years immediately preceding and immediately after the valuation date, per unit income and expense figures for comparable apartment properties, and the medium per unit income and expense figures for al high rise and low rise buildings, broken down between apartment and other buildings in the Region 4 areas," was on file with the BOR before the hearing. (*Id.*) "The School Board's Motion does not state what 'relevant' evidence its unnamed appraiser wants that is not in the MAI appraisal that was on file with the BOR before the hearing, [which] is a part of the Record in this Court, and that was and is not available in the public records." (*Id.*)

II. Appeals to the court of common pleas from a BOR decision

A. *Discretion on appeal to consider additional evidence under R.C. 5717.05*

Two sections of Ohio Revised Code Title 57 may apply to a court of common pleas' decision to accept additional evidence on appeal from a BOR decision. The first section, R.C. 5717.05, charges the court of common pleas with the duty to determine on appeal the taxable value of the property at issue based on the BOR's record or, in the court's discretion, after considering additional evidence:

> The court may hear the appeal on the record and the evidence thus submitted, or it may hear and consider additional evidence. It shall determine the taxable value of the property whose valuation or assessment for taxation by the county board of revision is complained of, or if the complaint and appeal is against a discriminatory valuation, shall determine a valuation that shall correct the discrimination, and the court shall determine the liability of the property for assessment for taxation, if that question is in issue, and shall certify its judgment to the auditor, who shall correct the tax list and duplicate as required by the judgment.

1. Decision de novo

In 1985, the Supreme Court of Ohio settled the question whether an appeal under R.C. 5717.05 required a trial de novo. *Black v. Board of Revision of Cuyahoga County*, 16 Ohio St.3d 11, 475 N.E.2d 1264 (1985), paragraph one of the syllabus. The Court concluded that "R.C. 5717.05 requires more than a mere appeal because the court must consider anew all of the evidence and may, in its discretion, admit additional evidence." *Id.* at 14. "R.C. 5717.05 contemplates a *decision de novo*. It does not, however, provide for an original action or trial *de novo*." *Id.* at 14.

In *Black,* the Cleveland Board of Education appealed from the Eighth District's decision which had remanded the case for a trial *de novo.* 16 Ohio St.3d at 11-12. The court of common pleas had before it an administrative record that included "two complete narrative appraisal reports, financial statements, lease information, and a verbatim transcript." *Id.* at 15. And, by stipulation, the parties submitted two additional appraisal reports along with the school board's "supplemental report," *id.*, which apparently were produced after the court of common pleas "permitted and compelled [the property owner's] compliance with [the School Board's] discovery demands in anticipation of a hearing de novo." *Black v. Bd. of Revision,* 8th Dist. No. 45395 (Dec. 15, 1983), 1983 Ohio App. LEXIS 12782, *13, *rev'd* 16 Ohio St.3d 11. The Court, however, ultimately rejected the appellate court's conclusion that a court abuses its discretion when it fails to conduct a trial *de novo* "where the facts and evidence of a particular case necessitate a further clarification of the issues and evidence, and such clarification may only be made through a full evidentiary hearing . . . ." 1983 Ohio App. LEXIS 12782at *15.

Although the Court ultimately concluded that R.C. 5717.05 does not provide for an original action or trial *de novo,* the parties did not raise and the Court did not address two issues: (1) whether the court of common pleas correctly exercised its discretion in allowing discovery or additional appraisal reports and (2) whether the complaining parties demonstrated good cause for failing to provide that information to the board of revision.

2. Discretion to allow "additional evidence"

Rather, the Court in *Black* generally addressed the court of common pleas' obligation to consider the administrative record: "The court's review of the evidence should be thorough and comprehensive, and should ensure that its final determination is more than a mere rubber stamping of the board of revision's determination." *Id.* at 13. Thus, a court's review under R.C. 5717.05 requires more than an ordinary appeal; "the court must consider anew all of the evidence and may, in its discretion, admit additional evidence." *Black,* 16 Ohio St.3d at 14; *id.* at paragraph one of the syllabus.

Two years after deciding *Black,* the Court further explained the court of common pleas' appellate review under R.C. 5717.05. In *Park Ridge Company v. Franklin County Board of Revision,* 29 Ohio St.3d 12, 504 N.E.2d (1987), paragraph one of the syllabus, the Court described the decision de novo as "independent" of the BOR's decision:

> In reviewing a board of revision's valuation of property, the common pleas court should make its own independent decision but is not required to conduct an independent proceeding. It should reach its own decision without any deference to the administrative finding. However, it should consider the administrative record,

> giving that record whatever weight the court deems appropriate, even if the court accepts additional evidence.

As the Court noted, the decision to accept additional evidence under R.C. 5717.05, however, does "not begin the evidentiary process anew." *Id.* at 14. Rather, "permitting the parties to supplement the administrative record with additional evidence which could assist the valuation process" is, as the Court stated in *Park Ridge*, the "most judicious[]" exercise of discretion. *Id.*

B. *General prohibition under R.C. 5715.19(G) to consider on appeal information or evidence within the complainant's knowledge at the time of the BOR hearing*

While the court of common pleas has the discretion to permit the parties to supplement the administrative record with additional evidence that would assist the valuation process, that additional evidence must comply with R.C. 5715.19(G). R.C. 5715.19(G) places the burden on the complaining party[2] to present the BOR with "all information or evidence within the complainant's knowledge or possession that affects the real property that is the subject of the complaint." If the complainant fails to do so, R.C. 5715.19(G) bars that complainant from introducing, and the court from considering, such information or evidence on appeal, *unless* the complaint demonstrates "good cause":

> A complainant who fails to provide such information or evidence is precluded from introducing it on appeal to the board of tax appeals or the court of common pleas, except that the board of tax appeals or court may admit and consider the evidence if the complainant shows good cause for the complainant's failure to provide the information or evidence to the board of revision.

1. An appraisal report that didn't exist

Citing *Strongsville Senior Associates v. Strongsville Board of Education,* 8th Dist. Nos. 58127, 58128 & 58129 (Mar. 9, 1991), 1991 Ohio App. LEXIS 912, the School Board argues that it has "good cause" to submit an expert report now because the report did not exist at the time the BOR heard the case. That 1991 decision, however, does not comport with current precedent.

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[2] A "complainant" includes, among others, "[a]ny person owning taxable real property in the county or in a taxing district with territory in the county" and "the board of education of any school district with any territory in the county" who may file a complaint regarding, among other things, the auditor's determination of the total valuation or assessment of any parcel that appears on the tax list. R.C. 5715.19(A)(1).

In *Strongsville,* the city and its board of education appealed the Board of Tax Appeals' decision allowing the property owner to admit his appraiser's testimony and the appraiser's report, neither of which were presented to the BOR. 1991 Ohio App. LEXIS 912 at *4. Pointing to *Coventry Towers, Inc. v. Strongsville,* 18 Ohio St.3d 120, 122, 480 N.E.2d 412 (1985), the court noted that the property owner had retained the appraiser only after the BOR made its decision and the withholding of the information was not "intentional." *Id.* at *5.

> Although certain of the comparable sales, expenses, and other facts contained in [the appraiser's] testimony and written appraisal reports were in existence at the time of the Board of Revision hearing on April 8, 1987, the 'information or evidence', in the words of the statute, that is being presented to the Board of Tax Appeals is the expert opinion of value of [the appraiser]. This 'information or evidence' was not in existence at the date of the Board of Revision hearing, although some of the facts on which it relies may have been so, and this expert opinion evidence cannot be excluded pursuant to O.R.C. Section 5715.19(G) under these circumstances. See also: *Park Ridge Company v. Franklin County Board of Revision* (1987), 29 Ohio St. 3d 12. [*Id.*]

The court ultimately concluded that "[p]ossessing the information is not the same as being in possession of the completed appraisal. Since the appraisal was not even initiated until after the decision of the Board of Revision was rendered, it could not have been 'withheld.'" *Id.* at *5-6.

2. *Strongsville* contradicts *Coventry Towers*

Although the appellate court relied on *Coventry Towers* to support its decision, the facts recounted in *Coventry Towers* differ dramatically from those in *Strongsville.* Unlike *Strongsville,* the city's appraiser in *Coventry Towers* presented a report and testified at the BOR hearing. 18 Ohio St.3d at 120.

On appeal to the Board of Tax Appeals, the city presented the appraiser's revised appraisal, which reflected a decrease in taxable value from the appraiser's original report, to which the property owner objected. *Id.* The information contained in his revised valuation, as the appraiser testified, "was obtained as a result of the hearing before the board of revision." *Id.* at 122. The Court noted that "no evidence [existed in the record] to substantiate an intentional withholding of information by [the city]." *Id.*; *accord Park Ridge,* 29 Ohio St.3d at 13-15 (noting that the record did not demonstrate whether the content of the appraiser's testimony, which supplemented the administrative record, was within the owner's knowledge or possession at that time of the BOR's hearing).

And in a more recent case, the Second District disagreed with the appellate court's suggestion in *Strongsville* that the only relevant inquiry under R.C. 5715.19(G) is whether the proffered appraiser's report existed at the time of the BOR hearing. *Leber v. Greene Cty. Bd. of Revision,* 2d Dist. No. 2007-CA-39, 2008-Ohio-613, ¶ 15. On appeal to the court of common pleas, the property owners in *Leber* attached to their brief a copy of their appraiser's original appraisal report along with a second appraisal report, which the appraiser had prepared *after* the BOR hearing and which contained information that was not contained in the original report. *Id.* at ¶ 2. In her responsive brief, the auditor claimed that the second report included market data and analysis that the appraiser had specifically *removed* from his first report, and she urged the court to disregard the second report. *Id.* at ¶ 3; *see id.* at ¶6-7. The court of common pleas, apparently relying on *Strongsville*, concluded that the appraiser's second report simply expanded and elaborated on the original report and, therefore, considered the report. *Id.* at ¶ 9-10.

On the auditor's appeal to the Second District, the court, relying on *Coventry*, concluded that, "if the information and evidence contained in [the appraiser's] second appraisal was known at the time of the BOR hearing, R.C. 5715.19(G) provides that it should have been submitted to the BOR." *Leber*, 2008-Ohio-613, ¶ 15.

> In our view, a party cannot avoid the consequences of R.C. 5715.19(G) by the simple expedient of taking market data and other information that was known to the party at the time of the BOR hearing and placing it in a second appraisal report that was prepared after the hearing. Contrary to the Lebers' argument on appeal, we believe the critical "information or evidence" referenced in R.C. 5715.19(G) is the substantive content of [the appraiser's] second appraisal report, not the mere existence of the report itself. If the rule were otherwise, a party easily could circumvent the statute by taking information or evidence withheld from the BOR and packaging it in a new document that did not exist at the time of the BOR's hearing. We reject an interpretation of R.C. 5715.19(G) that would permit such a result. [*Id.* at ¶ 13.]

Leber also referenced the Supreme Court of Ohio's decision in *Garfield Mall Associates v. Cuyahoga County Board of Revision*, 66 Ohio St.3d 247, 248, 611 N.E.2d 808 (1993), a decision which post-dates *Strongsville*, for the proposition that "[t]he inadvertent withholding of information from the BOR also may justify preclusion under the statute." *Leber*, 2008-Ohio-613, ¶18 fn.2.

In *Garfield Mall*, the Court concluded that the internal miscommunication between the property owner's legal department and real estate department was not "good cause" for failing to provide to the board of revision information or evidence that was in the property owner's possession. At the hearing before the BTA, the property owner's "expert witness did not appraise

the subject real estate in arriving at true value, but merely reviewed documents dealing with [another's] acquisition of the partnership interest in Garfield Mall Associates." *Id.* The Garfield Heights Board of Education's appraiser, however, "inspected the property and utilized the market and income approaches in determining true value." *Id.* But when the property owner attempted to introduce testimony at the BTA hearing about "the acquisition of the partnership interest" from another witness, the BTA refused to admit the testimony, concluding that knowledge about that acquisition was within the property owner's possession at the time of the hearing before the BOR. *Id.* Thus, if the *underlying factual information* contained in the evidentiary material proffered is within the complainant's knowledge or possession at the time of the hearing before the BOR, then R.C. 5715.19(G) prohibits that complainant from introducing that evidentiary material on appeal *unless* that complainant demonstrates good cause for failing to provide that information to the board of revision.

C. Applying R.C. 5717.05 and R.C. 5715.19(G)

As the foregoing discussion demonstrates, this Court may limit its review under R.C. 5717.05 to the administrative record or, upon exercise of its discretion, expand its review to include additional evidence. That additional evidence, however, must be limited to information that helps explain what the administrative record contains. *Park Ridge*, 29 Ohio St.3d at 14. To begin the evidentiary process anew would defeat the purpose of R.C. 5715.01(B) and R.C. 5715.11, both of which charge the county boards of revision with the duty to hear complaints and revise assessments of real property for taxation. *See also* R.C. 5715.02 & 5715.08- 5715.08.20.

And because the general assembly charged the county boards of revision with the primary responsibility to review the auditor's valuation determination, those boards should have before them the essential valuation evidence they need to satisfy their statutory duty when a complainant seeks to support or challenge the auditor's valuation. By precluding the court of common pleas from reviewing on appeal such additional evidence that affects the property at issue and which was "within the complainant's knowledge or possession" at the time of the BOR proceeding, the general assembly properly placed the burden on the complainant to make a concerted effort to bring all such valuation information before the BOR in the first instance. And while R.C. 5715.19(G) ensures that the complainant approaches the administrative process with due regard, the "good cause" exception allows the court, upon the exercise of its discretion, to accept and consider evidence that wasn't before the BOR where the interests of substantial justice require. In effect, both the restriction and exception in R.C. 5715.19(G) serve the function of the court of common pleas' appellate review described in R.C. 5717.05.

III. Disposition

As this Court understands the School Board's argument, the School Board contends that it is now entitled to discovery of unspecified information because proceedings before the BOR lack a formal discovery process and that lack of formal discovery process precluded it from getting the type of information an appraiser would use to form an opinion on value and create a report. The School Board notes that it is "unaware of judicial precedent which interprets Ohio Civil Rule 1(C)(1) and (7) to preclude discovery in an administrative appeal under R.C. 5717.05." (Mot., p. 6.) It argues, however, that various courts have "recognized the importance of discovery" or "acknowledged its use" in appeals under R.C. 5717.05. (Mot., pp. 5-6.)

A. *Civil rules do not apply to appeals under R.C. 5717.05*

Perhaps some courts have allowed discovery in appeals from BOR decisions, but the Supreme Court of Ohio has decided the broader question of whether the civil rules apply to an R.C. 5717.05 appeal. In *Tower City Properties v. Cuyahoga County Board of Revision*, the Court concluded that they do not: "Civ.R. 1(C) relegates the scope of the Civil Rules to those special statutory proceedings to which the rules are applicable. An appeal under R.C. 5717.05 is not such a proceeding." 49 Ohio St.3d 67, 70, 551 N.E.2d 122 (1990). The School Board, however, relies on *Thomas v. Cuyahoga County Board of Revision* 8th Dist. No. 45270 (Jan. 9, 1983), 1983 Ohio App. LEXIS 15285 – a case that predates *Tower City, Coventry Towers, Black*, and *Park Ridge* – which concluded that the "use of the discovery rules would appear a permissible vehicle for obtaining such additional evidence" under R.C. 5717.05. Because *Thomas* contradicts *Tower City*, it lacks precedential value.

B. *Additional evidence under R.C. 5717.05*

Although the civil rules do not provide a means to obtain evidence relevant to an appeal under R.C. 5717.05, the broader question here is whether this Court should allow the School Board to submit additional evidence at an evidentiary hearing. The only tangible piece of "additional evidence" the School Board identifies is a generic "appraisal report." Without explaining how such a report will supplement the administrative record and aid this Court's valuation process, this Court can only conclude that the School Board seeks permission to begin the evidentiary process anew. Because such a request defeats the purpose of R.C. 5715.01(B) and R.C. 5715.11, this Court denies the request for evidentiary hearing under R.C. 5717.05.

C. *Additional evidence under R.C. 5715.19(G)*

But even if the generic appraisal report would supplement the administrative record and aid this Court's valuation process, the School Board has not explained why the purported inability to engage in the formal discovery

process under the civil rules prevented it from hiring an appraiser at any time before the BOR hearing. *See Black*, 16 Ohio St.3d at 15 (describing the expert appraisal evidence submitted to the BOR by the School Board and property owner); *see also Vandalia-Butler Sch. Dist. Bd. of Ed. v. Montgomery Cty. Bd. of Revision,* 106 Ohio St.3d 157, 2005-Ohio-4385, 833 N.E.2d 271, ¶7 (describing common appraisal methods, including the income-capitalization approach, the sales-comparison approach, and the cost approach). The School Board also has not explained why public information ordinarily used by appraisers when rendering an expert valuation opinion was unavailable in this particular circumstance such that no appraiser could issue a competent appraisal report before the BOR hearing date. *See, e.g., Come Sail Away Condominium Assn. v. Bd of Commissioners of Ottawa Cty.*, 6th Dist. No. OT-96-034 (Apr. 18, 1997), 1997 Ohio App. LEXIS 1497, *14-15 (concluding that the trial court did not abuse its discretion in admitting testimony of a real estate appraiser who prepared a market analysis of the impact of utilities on property values based upon a review of the auditor's and recorder's public records). As such, this Court concludes that failing to retain an appraiser to create an expert appraiser's valuation report, which could have been submitted in support of the auditor's valuation at a BOR hearing, directly relates to the School Board's exercise of its own discretion in the manner it chose to defend the auditor's valuation. Thus, regardless of whether one calls the School Board's actions intentional or unintentional, it is a withholding of evidence that "affects the real property that is the subject of the complaint." R.C. 5715.16(G); *see Garfield Mall,* 66 Ohio St.3d at 248; *Coventry Towers*, 18 Ohio St.3d at 122. As such, this Court cannot consider the School Board's proposed appraisal report on appeal.

ORDER

Appellee and Cross-Appellant Cleveland Municipal School District Board of Education's Motion to Consider Additional Evidence pursuant to R.C. 5717.05 is denied.

SO ORDERED:

/Robert C McClelland

Judge Robert C. McClelland

Date: 11/20/12

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