INDIANA BOARD OF TAX REVIEW

Final Determination
Findings and Conclusions
Lake County

Petition #: **45-028-02-1-4-00133**
Petitioner: **Whiteco Industries, Inc. (Star Theatre)**
Respondent: **Department of Local Government Finance**
Parcel #: **008081504850004**
Assessment Year: **2002**

The Indiana Board of Tax Review (the "Board") issues this determination in the above matter, and finds and concludes as follows:

Procedural History

1. The informal hearing as described in Ind. Code § 6-1.1-4-33 was held February 12, 2004, in Lake County, Indiana. The Department of Local Government Finance (the "DLGF") determined that the Petitioner's property tax assessment for the subject property was $8,078,800 and notified the Petitioner on March 31, 2004.

2. The Petitioner filed its Form 139L petition on May 3, 2004.

3. The Board issued a notice of hearing to the parties dated July 22, 2005.

4. Dalene McMillen, a special master duly appointed by the Board, held the hearing on August 24, 2005, in Crown Point, Indiana.

Facts

5. The subject property, which is known as the Star Theatre, is located at 1000 East 80th Place, Merrillville, Ross Township in Lake County.

6. The subject property is a 45,559 square foot theatre with general retail, general office and utility storage areas.

7. The Special Master did not conduct an on-site visit of the property.

8. The assessed value of the subject property as determined by the DLGF:
Land: $2,180,100 Improvements: $5,898,700 Total: $8,078,800

9. The assessed value of the subject property as requested by the Petitioner at the hearing:
Total assessed value of $2,125,000

10. The following persons were present and sworn in at the hearing:

For Petitioner:	Richard Archer, Tax Representative Thomas Janik, Witness
For Respondent:	Terry Knee, Assessor/Auditor, DLGF Phillip Raskosky II, Assessor/Auditor, DLGF

Issues

11. Summary of Petitioner's contentions in support of an alleged error in the assessment:

a) The assessed value of the subject property exceeds its 1999 market value.

b) The Petitioner submitted an appraisal of the subject property prepared by David M. Heinowski, a certified appraiser. *Pet'r Ex. 3.* Mr. Heinowski is licensed in the State of Michigan and has a permit for temporary practice in Indiana. *Pet'r Ex. 3.* The appraisal is dated August 5, 2005, and it estimates the value of the subject property to be $2,300,000 as of March 1, 2002. *Pet'r Ex. 3 at 54*. The appraisal further trends the March 1, 2002, to reflect a value of $2,125,000 as of January 1, 1999. *Id.*

c) Mr. Heinowski first estimated the market value of the subject property using the cost approach to value. Mr. Heinowski estimated the replacement cost new ("RCN") of the subject improvements to be $6,636,630 as of December 31, 2004. *Archer testimony; Pet'r Ex. 3 at 38.* To determine the RCN as of the March 1, 2002, assessment date, Mr. Heinowski divided the December 31, 2004, RCN by a comparative cost multiplier of 1.175, which he obtained from a publication of Marshal Valuation Services. This yielded a March 1, 2002, RCN for subject improvements of $5,648,196. *Pet'r Ex. 3 at 38, 39.* Mr. Heinowski then used market-derived data to estimate that the subject improvements suffered depreciation equal to 57% of their RCN. The March 1, 2002, RCN of $5,648,196 less 57% depreciation yielded a depreciated value for the improvements of $2,428,724. Mr. Heinowski added a land value of $1,135,000 to that amount to arrive at a total market value of $3,593,724 (rounded to $3,600,000) as of March 1, 2002. *Pet'r Ex. 3 at 38-42*.

d) Mr. Heinowski arrived at his estimation of 57% physical depreciation by analyzing sales of two comparable properties from Merrillville. Mr. Heinowski's analysis led him to conclude that effective ages of commercial properties in Merrillville exceed the actual ages of those properties. Mr. Heinowski therefore determined the effective age of the subject improvements to be 30 years despite the fact that their actual age was 21 years. The Marshall Valuation Service depreciation schedule indicates 57% depreciation for improvements with an effective age of 30 years based upon a 40-year life expectancy. *Archer testimony; Pet'r Ex. 4; Pet'r Ex. 3 at 41.*

e) Mr. Heinowski considered using the sales comparison approach to value the subject property, but he could not find any sales of comparable properties. *Archer testimony; Pet'r Ex. 3 at 48.* Mr. Heinowski therefore did not use the sales comparison approach in arriving at his final estimation of value. *Id.*

f) Mr. Heinowski estimated the market value of the subject property to be $1,650,000 (rounded) using the income approach to value. *Archer testimony; Pet'r Ex. 3 at 47.* In doing so, Mr. Heinowski examined the income and expenses for the subject property from 1998 – 2001 to develop a "Pro Forma" income statement for March 1, 2002. *Pet'r Ex. 3 at 43-44*.

g) Mr. Heinowski applied an overall capitalization rate of 15% to the pro forma net operating income of the subject property. To determine the overall rate, Mr. Heinowski first used the band of investment technique to calculate a rate of 10.07%. *Id*. According to Mr. Heinowski, that rate was supported by various investor surveys, which cited rates ranging from 8.50% to 11.0%. *Archer testimony; Pet'r Ex. 3 at 46.* Mr. Heinowski then added the 2001 tax rate for the taxing jurisdiction at issue (5.0584%) to derive an overall capitalization rate of 15.1319%, which he rounded to 15.00%. *Id.*

h) Mr. Heinowski gave greater weight to his estimation of value under the income approach than he did to his estimation of value under the cost approach. *Pet'r Ex. 3 at 48*. He found that, given the age of the improvements, it was questionable whether the cost approach "reflects the alternatives to investors." *Id*. Mr. Heinowski estimated the market value of the subject property to be $2,300,000 as of March 1, 2002. *Id*. Mr. Heinowski then trended that amount to a value as of January 1, 1999, using a comparative cost multiplier of .923, which he derived from the comparative cost indexes provided by Marshall Valuation Services. *Pet'r Ex. 3 at 49.* This resulted in a value of $2,125,000 as of January 1, 1999. *Id.*

12. Summary of Respondent's contentions in support of assessment:

a) The Respondent presented the subject property record card, photographs of the subject property, land calculations, a proposed corrected property record card, and a color-coded plat map of the area. *Raskosky testimony; Resp't Exs. 1-6*.

b) The Respondent found that it had erred in calculating the land portion of the assessment. To be consistent with other properties, the land should receive an additional 28% influence factor for the shape and size of the parcel. With this correction, the land value would be reduced to $1,501,900. The total corrected assessment would then be $7,400,600. *Knee testimony; Resp't Ex. 5.*

c) The Respondent noted that the appraisal does not provide a comparison of the subject improvements and the improvements the appraiser used to calculate his depreciation under the cost approach. *Knee testimony*. There is nothing in the appraisal that actually compares the size, year, quality, or type of construction of the three improvements. *Knee testimony*.

d) The Respondent noted that Mr. Heinowski's estimated gross income for the subject property as of the date of the appraisal is significantly more than Mr. Heinowski's actual estimation of value under the income approach. *Knee testimony*.

e) The Respondent also questioned why Mr. Heinowski used the subject property's net operating income from 2002 rather than its net operating income from 1999, given that the relevant valuation date for the 2002 reassessment is January 1, 1999. *Knee argument*. The Respondent noted that one of the investor surveys Mr. Heinowski used to determine his capitalization rate was from 2002 and that the other survey was undated. *Knee argument; Archer testimony*. The Respondent contended that the capitalization rate should be based upon information from 1999. *Knee argument*.

f) The Respondent also noted that Mr. Heinowski did not compare the actual income and expenses of the subject property to the income and expenses of comparable properties in estimating the value of the subject property under the income approach. *Knee argument; Archer testimony*.

g) Finally, the Respondent argued that, given the flaws in the appraisal and the appraiser's failure to support certain of his conclusions, the value shown on the corrected property record card should be upheld. *Knee testimony.*

Record

13. The official record for this matter is made up of the following:

a) The Petition,

b) The recording of the hearing,

c) Exhibits:

Petitioner Exhibit 1 – Form 139L petition,
Petitioner Exhibit 2 – Subject property record card,
Petitioner Exhibit 3 – Appraisal report prepared by David M. Heinowski,
Petitioner Exhibit 4 – Copy of a depreciation schedule from Marshall Valuation Service,

Respondent Exhibit 1 – Subject property record card (PRC),
Respondent Exhibit 2 – Three exterior photographs of the subject, property,
Respondent Exhibit 3 – Plat map of the subject parcel,
Respondent Exhibit 4 – Land Calculations/Land Summary Sheet,
Respondent Exhibit 5 – PRC with proposed land correction,

Respondent Exhibit 6 – Color coded plat map of the subject area and summary sheet of assessed values for Whiteco Industries, Inc. and I-65 and 30 Venture,

Board Exhibit A – Form 139L petition,
Board Exhibit B – Notice of Hearing on Petition,
Board Exhibit C – Hearing sign-in sheet,

d) These Findings and Conclusions.

Analysis

14. The most applicable cases are:

a) A Petitioner seeking review of a determination of an assessing official has the burden to establish a prima facie case proving that the current assessment is incorrect, and specifically what the correct assessment would be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also, Clark v. State Bd. of Tax Comm'rs,* 694 N.E.2d 1230 (Ind. Tax Ct. 1998).

b) In making its case, the taxpayer must explain how each piece of evidence is relevant to the requested assessment. *See Indianapolis Racquet Club, Inc. v. Washington Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) ("[I]t is the taxpayer's duty to walk the Indiana Board . . . through every element of the analysis").

c) Once the Petitioner establishes a prima facie case, the burden shifts to the assessing official to rebut the Petitioner's evidence. *See American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). The assessing official must offer evidence that impeaches or rebuts the Petitioner's evidence. *Id; Meridian Towers*, 805 N.E.2d at 479.

15. The Petitioner did provide sufficient evidence to support its contentions. This conclusion was arrived at because:

a) The 2002 Real Property Assessment Manual ("Manual") defines the "true tax value" of real property as "the market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property." 2002 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.3-1-2). As set forth in the Manual, the appraisal profession traditionally has used three methods to determine a property's market value: the cost approach, the sales comparison approach, and the income approach. *Id.* at 3, 13-15. In Indiana, assessing officials primarily use the cost approach, as set forth in the Real Property Assessment Guidelines for 2002 – Version A ("Guidelines"), to assess real property.

b) A property's market value-in-use, as ascertained through application of the Guidelines' cost approach, is presumed to be accurate. *See* MANUAL at 5; *see also*, *Kooshtard Property VI, LLC v. White River Twp. Assessor*, 836 N.E.2d 501, 505 (Ind. Tax Ct. 2005) *reh'g den. sub nom. P/A Builders & Developers, LLC,* 2006 Ind. Tax LEXIS 4 (Ind. Tax 2006). A taxpayer, however, may use an appraisal prepared in accordance with the Manual's definition of true tax value to rebut the presumption that an assessment is correct. MANUAL at 5; *Kooshtard Property VI*, 836 N.E.2d at 505-06 n.1 ("[T]he Court believes (and has for quite some time) that the most effective method to rebut the presumption that an assessment is correct is through the presentation of a market value-in-use appraisal, completed in conformance with the Uniform Standards of Professional Appraisal Practice [USPAP].").

c) The Manual further provides that for the 2002 general reassessment, a property's assessment must reflect its value as of January 1, 1999. *See* MANUAL at 4. Consequently, in order to present evidence probative of a property's true tax value, a party relying on an appraisal performed substantially after January 1, 1999, should explain how the value estimated by that appraisal relates to the property's value as of January 1, 1999. *See Long v. Wayne Twp. Assessor,* 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005) (holding that an appraisal indicating a property's value as of December 10, 2003, lacked probative value in an appeal from a 2002 assessment).

d) The Petitioner submitted an appraisal prepared by David M. Heinowski, a certified appraiser. *Pet'r Ex. 3.* Mr. Heinowski performed the appraisal in accordance with the "Competency Provision and Rules 1-5 of [USPAP]." *Pet'r Ex. 3 at 53*. The appraisal estimates the market value of the subject property using two generally accepted methods of appraisal - the cost and income approaches to value. *Id. at 33-49.* In his expert opinion, Mr. Heinowski estimated the value of the subject property to be $2,300,000 as of the assessment date of March 1, 2002. *Id. at 49.* Mr. Heinowski then applied a comparative cost multiplier to trend his March 1, 2002, estimation of value to a value as of January 1, 1999, of $2,125,000. *Id*. Thus, under the above cited portions of the Manual and applicable case law, Mr. Heinowski's appraisal suffices to establish a prima facie case that the current assessment is incorrect and that the true tax value of the subject property is $2,125,000.

e) Because the Petitioner established a prima facie case for a change in assessment based upon the appraisal prepared by Mr. Heinowski, the burden shifted to the Respondent to impeach or rebut that appraisal. *See Meridian Towers*, 805 N.E.2d at 479.

f) The Respondent sought to impeach Mr. Heinowski's opinion of value by pointing to what it viewed as several flaws in the appraisal. First, the Respondent pointed out that the appraisal does not contain any information demonstrating that the two purportedly comparable buildings relied upon by Mr. Heinowski in determining the amount of depreciation to apply to the subject improvements actually were comparable to the subject improvements. *Knee argument.*

g) Mr. Heinowski's appraisal does contain information regarding the construction and condition of the purportedly comparable buildings at issue. *See Pet'r Ex. 3 at 39-41*.

His appraisal, however, does not contain any explanation regarding how relevant characteristics of the purportedly comparable buildings compare to those of the subject improvements. Nonetheless, the Respondent did not present any evidence of its own to show that the subject improvements deteriorated at a rate substantially different from the rate determined by Mr. Heinowski. Moreover, Mr. Heinowski admittedly did not place a significant amount of weight on his conclusions under the cost approach in reaching his final estimation of value. *Id. at 48*. Thus, although the absence of evidence demonstrating that the buildings used by Mr. Heinowski in his depreciation calculation were actually comparable to the subject improvements detracts somewhat from the reliability of his estimation of value, it does so only marginally.

h) The Respondent further argued that Mr. Heinowski's estimation of value under the income approach was flawed because he used income and expense information for the subject property without comparing that information to the income and expenses of comparable properties. *Knee argument*.

i) The Board agrees that it is preferable to use aggregate income and expense data from the subject market rather than relying solely upon the income and expenses experienced by the subject property. The income approach to value is premised upon the amount potential buyers would pay for a property based upon the rent that it will produce. *See* MANUAL at 14. Such buyers presumably are concerned with the net rent that a property will generate if it is managed with a reasonable degree of competency. Looking only at the subject property's net operating income creates a risk that the income is skewed by the relative competence of the property's current management. Examining the income and expenses of comparable properties helps negate that risk.

j) Mr. Heinowski does not explain in his appraisal why he did not compare the subject property's income and expenses to the income and expenses experienced by comparable properties in the area. Although Mr. Archer testified that no properties in the area are comparable to the subject property, that testimony is largely conclusory. *See Archer testimony*. The Respondent, however, did not present any evidence to show that the income and expenses experienced by the subject property were unreasonable or that they otherwise differed from the income and expenses experienced by comparable properties. Thus, Mr. Heinowski's failure to compare the subject property's net operating income to the net operating income of comparable properties detracts only marginally from the reliability of his opinion of value.

k) The Respondent also argued that Mr. Heinowski's estimation of value under the income approach was flawed because he relied upon a pro forma estimation of income and expenses from 2002 rather than from 1999. *Knee argument*.

l) The Manual provides that a property's assessment should reflect its value as of January 1, 1999. That mandate is based upon the fact that the Guidelines utilize cost tables derived from 1998 and 1999 data. *See* GUIDELINES, intro at 1 (incorporated by reference at 50 IAC 2.3-1-2). Thus, in order to maintain uniformity and consistency in assessments, values must be based upon 1999 dollars.

m) The Manual, however, does not contemplate valuing a property based upon the characteristics it actually exhibited on January 1, 1999. Instead, real property is assessed based upon the characteristics it exhibits on the assessment date, which in this case was March 1, 2002. Consequently, the better approach in applying an income capitalization analysis is to look at the subject property as it physically existed on March 1, 2002, as well as at the economic conditions prevailing on or about that date. Of course, the value ultimately derived from that analysis must be related back to January 1, 1999.

n) Mr. Heinowski followed the above outlined approach in this case. He prepared a pro forma estimation of the subject property's net operating income as of March 1, 2002, based upon an examination of the property's historical income and expenses. *Pet'r Ex. 3 at 43-44.* Mr. Heinowski then adjusted his March 1, 2002, estimate of value to reflect 1999 dollars through use of a comparative cost multiplier. *Id. at 49.*

o) Finally, the Respondent presented a revised property record. The Respondent, however, did not explain the methodology behind the valuation reflected on that card. The Respondent similarly failed to explain why the valuation on the revised property record card is more probative of the subject property's true tax value than is Mr. Heinowski's opinion of value, other than to point to various flaws within Mr. Heinowski's appraisal. As explained above, however, the purported flaws identified by the Respondent do not significantly detract from Mr. Heinowski's opinion of value.

p) Based on the foregoing, the Respondent failed to impeach or rebut the appraisal submitted by the Petitioner. The preponderance of the evidence supports a finding that the current assessment is incorrect and that the correct assessment is $2,125,000 as determined by the Mr. Heinowski's appraisal.

Conclusion

16. The Petitioner made a prima facie case. The Respondent failed to rebut the Petitioner's evidence. The Board finds in favor of the Petitioner.

Final Determination

In accordance with the above findings and conclusions the Indiana Board of Tax Review now determines that the assessment should be changed.

ISSUED: ________________

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Commissioner,
Indiana Board of Tax Review

IMPORTANT NOTICE

- Appeal Rights -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. You must name in the petition and in the petition's caption the persons who were parties to any proceeding that led to the agency action under Indiana Tax Court Rule 4(B)(2), Indiana Trial Rule 10(A), and Indiana Code §§ 4-21.5-5-7(b)(4), 6-1.1-15-5(b). The Tax Court Rules provide a sample petition for judicial review. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>. The Indiana Trial Rules are available on the Internet at <http://www.in.gov/judiciary/rules/trial_proc/index.html>. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>.