

INDIANA BOARD OF TAX REVIEW

Final Determination Findings and Conclusions Lake County

Petition #: 45-028-02-1-4-00279
Petitioner: Nisource Development Company, Inc.
Respondent: Department of Local Government Finance
Parcel #: 008-08-15-0468-0005
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 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 \$28,493,000 and notified the Petitioner on March 31, 2004.
2. The Petitioner filed a Form 139L Petition for Review of Department of Local Government Finance Action for Lake County Residents ("Form 139L petition") on April 26, 2004.
3. The Board issued a notice of hearing to the parties dated October 13, 2005.
4. A hearing was held on November 15, 2005, in Indianapolis, Indiana before Special Master Debra Eads.

Facts

5. The subject property consists of a single occupant, three-story office building located on 30.185 acres of land. The subject property is located at 801 E. 86th Avenue, Merrillville, Ross Township.
6. The Special Master did not conduct an on-site visit of the property.
7. Assessed value of subject property as determined by the DLGF:
Land \$4,128,300 Improvements \$24,364,700 Total \$28,493,000.

8. Assessed value requested by Petitioner at the hearing:
Land \$5,500,000 Improvements \$8,300,000 Total \$13,800,000.
9. The persons indicated on the sign-in sheet (Board Exhibit C) were present at the hearing. Attorneys Vickie Norman and Jon Laramore of Baker & Daniels, LLP appeared on behalf of the Petitioner. Lori Harmon, Assistant Director of Assessment Division for the DLGF, appeared on behalf of the Respondent.
10. Persons sworn in at hearing:
- For Petitioner: Richard Weiss, Appraiser
 Kevin Reiter, Real Estate Analyst, Baker & Daniels, LLP
- For Respondent: Lori Harmon, DLGF Assistant Director of Assessment Division

Issues

11. Summary of the Petitioner's contentions in support of an alleged error in the assessment:
- a) Prudential¹ constructed the subject building in 1978 for use as its corporate headquarters. Prudential used the subject building for that purpose until 1983 when the office closed. The subject property was vacant for six years until the Petitioner purchased it for \$5,850,000 in 1989. *Pet'r Ex. 2 at 3*. Since that time, various NIPSCO companies have occupied the subject building. *Pet'r Ex. 2 at 31*.
 - b) The subject building is a large, single occupant office building with large, open common areas. *Weiss testimony*. It would be cost prohibitive to convert the building to multi-tenant use. *Id.* The subject building is visible from Interstate 65 ("I-65"), but the building cannot be found easily upon exiting I-65. *Weiss testimony*. The subject building does not use space efficiently in comparison to today's standard. *Id.* The lack of efficiency stems from the presence of numerous building service areas and an exterior corridor around the general office perimeter, which allows for proper airflow for the building's radiant heating system. *Weiss testimony; Pet'r Ex. 2 at 31*.
 - c) The Petitioner submitted an appraisal to support its contention that the current assessment of the subject property exceeds its market value-in-use. *Pet'r Ex. 2*. Richard E. Weiss, a licensed Indiana appraiser, performed the appraisal. *Weiss testimony; see also Pet'r Ex. 2 at certification page*. Mr. Weiss estimated the market value of the subject property to be \$13,800,000 as of January 1, 1999. *Pet'r Ex. 2 at cover letter, 32*.
 - d) Mr. Weiss certified that he prepared the appraisal in conformity with "the Code of Professional Ethics and Standards of Professional Conduct of the Appraisal Institute." *Pet'r Ex. 2 at certification page*. At the hearing, Mr. Weiss testified that he was

¹ Although this does not appear to be the full name of the entity in question, it is the only name identified by the parties.

- incorporating Uniform Standards of Professional Appraisal Practice (“USPAP”) when he referred to the “Standards of Professional Conduct of the Appraisal Institute” *Weiss testimony*. Mr. Weiss estimated the market value-in-use of the subject property using the cost, sales comparison, and income approaches to value. *Weiss testimony; Pet’r Ex. 2, passim*.
- e) Mr. Weiss cited Marshall Valuation Service as his primary source for determining the reproduction cost new of the subject building. *See Pet’r Ex. 2 at 14-16*. Mr. Weiss, however, testified that he also relied upon work performed by Cole Layer Trumble (“CLT”). *Weiss testimony*. Mr. Weiss examined sales of thirteen (13) similar single-occupant buildings located throughout the Chicago area in order to estimate total accrued depreciation and obsolescence from all sources. *Pet’r Ex. 2 at 15*. The sale prices indicated that the Chicago area buildings experienced accrued depreciation and obsolescence ranging from 49% to 82%. *Id.* Mr. Weiss further found that, based on Petitioner’s purchase of the subject property for \$5,850,000 in 1989, the subject building had total accrued depreciation and obsolescence of 76% at the time of acquisition. *Id.*
- f) Based on his review of the total accrued depreciation indicated by the thirteen (13) Chicago area sales as well as the indicated loss at the time the Petitioner acquired the subject property, Mr. Weiss estimated that the subject building experienced 2.84% average depreciation per effective year of age. Mr. Weiss estimated that the subject building had an effective age of twenty-five (25) years based upon its date of construction (1978) and upon consideration of its size related operating inefficiencies and single occupancy characteristics. *Id.* Mr. Weiss then multiplied the depreciation rate of 2.84% per effective year of age by twenty-five (25) years to determine that the subject building suffers from accrued depreciation and obsolescence from all sources of 71%. *Pet’r Ex. 2 at 15-16*. Mr. Weiss thus estimated the depreciated reproduction cost of the subject building to be \$7,400,771. *Pet’r Ex. 2 at 15*.
- g) Mr. Weiss determined the value of the subject land for purposes of applying the cost approach by examining sales of five (5) vacant parcels of land from Merrillville, Indiana. *Pet’r Ex. 2 at 10-13*. Based on those sales, Mr. Weiss estimated the value of the subject land, as if vacant, to be \$5,500,000. *Pet’r Ex. 2 at 12*. To that amount, Mr. Weiss added the depreciated cost of the subject building and the value of various site improvements, such as paving, to arrive at a total value under the cost approach of \$13,800,000. *Pet’r Ex. 2 at 15*.
- h) Ideally, an appraiser should base his or her analysis under the income approach on market rents of comparable properties; however, Mr. Weiss was unable to find market rents for single user buildings. *Weiss testimony; Pet’r Ex. 2 at 18*. Mr. Weiss determined that an ascribed net rent based on the thirteen (13) sales he examined from the Chicago area would be a reasonable replacement for actual market rents. *Id.* The rent ascribed by Mr. Weiss was equal to 10% of the net sale price for each property. *Id.* Mr. Weiss’ calculations yielded rental values ranging from \$4.70 to \$8.48 per square foot of gross building area. *Id.* Mr. Weiss then determined that a rate of \$5.50

per square foot of gross building area was appropriate for the subject building, given its size and location. *Id.* Based on that rate, Mr. Weiss determined net operating income for the subject property of \$1,307,565. *Id.*

- i) Mr. Weiss then turned to the question of the appropriate rate to use in capitalizing the subject property's estimated net operating income. Mr. Weiss developed an overall capitalization rate of 10.04%, in part, by using a loan-to-value ratio of 80% and a debt coverage ratio of 1.25. *Id.* Mr. Weiss testified that he decided to use a debt coverage ratio because it is an approach local lenders use. *Weiss testimony.* Mr. Weiss, however, acknowledged that the debt coverage ratio is used more typically by lenders than by investors. *Id.* Mr. Weiss testified that he chose a loan to value ratio of 80% based upon what he felt was most applicable and possible in the mortgage market at the time of his appraisal. *Id.* Mr. Weiss' application of the income approach indicated a value for the subject property of \$13,000,000. *Weiss testimony; Pet'r Ex. 2 at 18 – 20.*
- j) Mr. Weiss based his analysis under the sales comparison approach on the same thirteen (13) sales of properties from the Chicago area that he utilized in estimating accrued depreciation and obsolescence under the cost approach. *Pet'r Ex. 2.* The properties all contained single-tenant buildings at the time of sale. *Weiss testimony; Pet'r Ex. 2 at 31.* Mr. Weiss chose those properties for comparison because he was unable to identify sales of any remotely comparable properties when he reviewed the local market. *Pet'r Ex. 2 at 31.* Because the thirteen (13) comparable properties used by Mr. Weiss are all located in areas with significantly higher land values than the area in which the subject property is located, Mr. Weiss subtracted from each sale price his estimate of the contributing land value. *Weiss testimony; Pet'r Ex. 2 at 31.* Mr. Weiss then determined an unadjusted range for the residual building values of the comparable properties of \$14.36 to \$53.32 per square foot of gross building area. *Pet'r Ex. 2 at 31.* The median value was \$26 per square foot of gross building area, with 62% of the sale prices falling below \$27 per square foot of gross building area. *Id.*
- k) Mr. Weiss did not adjust individual sale prices to reflect differences between the comparable buildings and the subject building. *Weiss testimony.* Instead, Mr. Weiss noted that the comparable buildings all were located within superior office corridors with superior access, visibility and demand as compared to the subject building. *Pet'r Ex. 2 at 31.* Mr. Weiss also determined that the subject building has a 70% efficiency ratio due to the presence of numerous building service areas and an exterior corridor around the general office perimeter. *Id.; Weiss testimony.* Mr. Weiss further described the location of the subject property as secondary. *Id.* Giving primary consideration to the secondary location of the subject property and the extremely limited demand for large single-tenant office space in Northwest Indiana, Mr. Weiss estimated that the most probable building residual value for the majority of subject building was in the range of \$25.00 to \$30.00 per square foot of gross building area. *Weiss testimony; Pet'r Ex. 2 at 31.* Mr. Weiss further estimated that the most probable residual value for the lower level of the building was \$12.00 per

square foot of gross building area. *Weiss testimony; Pet'r Ex. 2 at 31*. Thus, Mr. Weiss arrived at a total building contribution of \$8,289,565, to which he added his estimated land value of \$5,500,000 as determined under the cost approach. This yielded a total estimated value of \$13,800,000 (rounded) under the sales comparison approach. *Id.*

- l) Mr. Weiss relied most heavily upon his estimate of value under the sales comparison approach in arriving at his final estimate of value. *Weiss testimony; Pet'r Ex. 2 at 32*. Due to the age of the improvements and the difficulty of estimating total loss from all sources, Mr. Weiss used the cost approach primarily as support for his conclusions under the sales comparison approach. *Pet'r Ex. 2 at 32; see also Weiss testimony*. Mr. Weiss gave the income approach little consideration due to the lack of information concerning rental income. *Id.* Mr. Weiss did not trend his estimation of value back to January 1, 1999, because the sales he relied upon in estimating value under the sales comparison approach occurred over a broad period ranging from 1995 to 2003. *Id.* Thus, in Mr. Weiss' view, those sale prices, when viewed as a whole, incorporate a time adjustment. *Weiss testimony*.
- m) To further support Mr. Weiss' opinion of value, the Petitioner identified components of the current assessment it believes are incorrect. *See Norman argument*. The Petitioner did so largely through the testimony of Kevin Reiter, a real estate analyst. *See Reiter testimony*. Mr. Reiter visited and toured the subject property in October 2005. *Reiter testimony*.
- n) The Respondent assigned a quality grade of B+1 to the subject building. The Petitioner, however, contends that quality grade assigned to the subject building should not exceed C+2. According to the Petitioner, the subject building has mostly characteristics of C grade buildings as described in the Real Property Assessment Guidelines for 2002 – Version A (“Guidelines”), with some characteristics of B grade buildings. To illustrate its point, the Petitioner submitted photographs that it contends show numerous characteristics consistent with the Guidelines' description of C grade buildings. *Reiter testimony; Pet'r Exs. 1, 3, 5-7*.
- o) The subject building currently is priced as having reinforced concrete framing. The Petitioner contends that the building should be priced as having fire resistant framing, with 25% depreciation. According to the Petitioner, the building's structural steel framing is not encased in masonry; instead, the vertical framing members are simply hidden with hollow plaster and metal framed cylinders that cover the framing for cosmetic purposes. While the steel framing members, excluding the underside of the floors, have a spray-on cellulosic material, that material simply allows the building to meet the minimum fire resistant rating of two hours. *Reiter testimony; Pet'r Exs. 1, 3, 8-12*.
- p) The Petitioner contends that large portions of the subject building have little or no permanent partitioning and that it is entitled to a negative adjustment to account for the lack of partitioning. The Petitioner determined the first floor to be 80% open; the

second floor to be 90% open; and the third floor to be 30% open. The Petitioner presented the testimony of Mr. Reiter, photographs and building plans of the subject building, and the affidavit of the Manager of Facilities Services for NiSource Corporate Services in support of its contentions regarding the lack of portioning in the subject building. *Reiter testimony; Pet'r Exs. 3, 9, 13-16.*

- q) The Petitioner seeks an adjustment in the classification of the subject land. The subject land currently is assessed as consisting of 27.385 acres of primary land and 2.8 acres of undeveloped unusable land. *Pet'r Ex. 3; Resp't Ex. 1.* The Petitioner contends that the breakdown should be as follows: 15.0 acres primary, 6.63 acres secondary, 5.755 acres usable undeveloped, and 2.80 acres unusable undeveloped. The Petitioner also contends that the subject property is entitled to an oversize parcel adjustment pursuant to the Neighborhood Valuation Form for assessment neighborhood 00894. *Reiter testimony; Pet'r Exs. 21-28.*
- r) The Respondent incorrectly measured the mechanical penthouses in the subject building. *Reiter testimony.* The building contains three (3) mechanical penthouses each with 3,612 square feet, which should be priced at \$17.50 per square foot. *Id.* All of the floors of the subject building are assessed as having sprinklers; however, only 6,300 square feet of the first floor and the entire basement are sprinkled. *Id.*

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

- a) The Respondent presented a copy of a newspaper indicating that it cost Prudential \$13,000,000 to construct the subject building in 1978. *Harmon testimony; Resp't Ex. 5.* According to that same article, Prudential originally wanted \$22,000,000 for the subject property. *Id.* The Respondent contends that the subject property is a special purpose property. *Harmon argument.* Thus, according to the 2002 Real Property Assessment Manual ("Manual"), the market value-in-use of the subject property does not equal its value-in-exchange, but rather Prudential's original asking price. *Harmon argument; Resp't Exs. 5, 13.*
- b) The Respondent also presented evidence to support its assessment of the subject property under the Real Property Assessment Guidelines for 2002 - Version A ("Guidelines"). The Respondent submitted a computer generated property record card ("PRC") for the subject property, the Neighborhood Valuation Form for assessment neighborhood 20893, and information concerning land value calculations for that assessment neighborhood to illustrate that the subject property was valued similarly to other property in Lake County. *Harmon testimony; Resp't Exs. 1, 4.* The Respondent contends that the Neighborhood Valuation Form does not provide for an automatic adjustment for oversized parcels. *Harmon argument.* Furthermore, the Respondent contends that the land portion of the assessment is an accurate reflection of the market value of the subject land, especially in light of the fact that Mr. Weiss estimated the market value of the subject land to be \$5,500,000 – over \$1,000,000 more than the amount for which it currently is assessed. *Id; Pet'r Ex. 2 at 12.*

- c) The Respondent contends that it properly priced the subject building as being constructed with reinforced concrete framing. *See Harmon testimony; Resp't Ex. 6.* According to the Respondent, the subject building is consistent with a class B building under Marshall & Swift's classification system rather than a class C building. In fact, the subject building is more in line with a class A building. *Harmon testimony.*
- d) The Respondent reviewed Petitioner's Exhibit 16 and found areas that appear to be partitioned office space. The Respondent believes that the Petitioner included modular partitioning in the highlighted areas of Petitioner's Exhibit 16. Modular partitioning is included as a unit adjustment in the Guidelines; therefore, the modular partitioning should be assessed. *Harmon testimony; Resp't Ex. 8.*
- e) The Respondent also pointed to what it believed to be numerous flaws and irregularities in the appraisal performed by Mr. Weiss.
- f) The Respondent identifies three separate instances in which it feels Mr. Weiss did not conform to USPAP. *Harmon testimony; Resp't Exs. 9, 10.* First, the Respondent contends that Mr. Weiss did not certify that he performed his appraisal in conformity with USPAP. *Harmon testimony; see also Pet'r Ex. 2 at certification page.* In support of its contention, the Respondent submitted a copy of Standards Rule 2-3 from USPAP, which indicates that such a certification is a binding requirement from which departure is not permitted. *Harmon testimony; Resp't Ex. 10.* Second, the Respondent contends that Mr. Weiss departed from USPAP in relying upon the opinion of real estate brokers to identify the contributing land value with regard to sale prices of the thirteen (13) purportedly comparable properties he referenced in his appraisal. *See Harmon testimony.* Third, the Respondent contends that Mr. Weiss departed from USPAP by relying on an electronic service to verify sales information. *Id.*
- g) The Respondent also contends that the Board should disregard sales 8 and 11 in the Petitioner's appraisal because those properties were leased back to the seller and therefore do not represent arms length transactions. *Harmon testimony.*
- h) The Respondent further questions the reliability of Mr. Weiss' sales comparison analysis given that Mr. Weiss described the properties referenced in sales 1 and 13 as having different lot and building sizes despite the fact that the properties have the same street address and at least one common parcel number. *Harmon testimony; Pet'r Ex. 2 at 21, 28-29.* The Respondent also questions Mr. Weiss' inclusion of sale 3, given that one of the buildings on that property is a warehouse while the subject property contains an office building. *Harmon cross-examination of Weiss; Pet'r Ex. 2 at 22-23.* The Respondent further questions Mr. Weiss' use of sales from 1995 and 1996 and 2002 and 2003. *Harmon argument.* In the Respondent's view, those sales are too remote from the January 1, 1999, valuation date set forth in the 2002 Real Property Assessment Manual ("Manual") to be useful. *Id.* Thus, according to the

Respondent, the only valid sales used by Mr. Weiss are sales 4, 6-7, and 9-10. *Harmon argument.*

- i) The Respondent further contends that Mr. Weiss did little to explain how the purportedly comparable buildings compare to the subject building in terms of obsolescence issues other than Mr. Weiss' testimony that all of the buildings at issue are single tenant buildings. *Harmon argument.*
- j) With regard to Mr. Weiss' analysis under the income approach, the Respondent questioned Mr. Weiss as to why he did not obtain actual rental information from the sale-leaseback transactions rather than ascribing rental income of 10% of the sale prices of the comparable properties. *Harmon cross examination of Weiss.* The Respondent also questions Mr. Weiss' use of a debt coverage ratio and a loan to value ratio of 80% in computing his overall capitalization rate. *Id.*
- k) The Respondent agreed to the adjustments sought by the Petitioner with regard to the mechanical penthouses and the sprinkler system. *Harmon testimony.*
- l) The Respondent believes that the Board should uphold the current assessment (presumably with the adjustments to which the Respondent agreed). The Respondent contends that the cost approach is the most appropriate method of valuation, and notes that Mr. Weiss' valuation under the cost approach, prior to applying his unsupported figures for depreciation and obsolescence, is close to the current assessment. *Harmon argument.*

Objections

- 13. The Petitioner made numerous objections to the admission of evidence offered by the Respondent, which the Board addresses in turn.

Lake County Emergency Rules

- 14. The Petitioner's first objection centered on the Board's emergency rules with respect to appeals from Lake County for the 2002 assessment year ("Lake County Rules"). *Laramore objection; see also LSA Document #05-277(E).* More specifically, the Petitioner contended that the Board's Lake County Rules are invalid to the extent that they provide for less discovery than do the Board's rules for appeals from other counties. *Laramore objection.* The Petitioner also claimed that the Board's Lake County rules are invalid to the extent that they only require parties to exchange exhibits five (5) days prior to a hearing while the Board's procedural rules for other counties require the parties to exchange exhibits (5) *business* days, prior to a hearing. *Id.* Thus, the Petitioner objected to the admission of the Respondent's exhibits because, although they were provided to the Petitioner five (5) days in advance of hearing, they were not provided five (5) *business* days in advance of the hearing.²

² The Petitioner also argued that, unlike the Board's procedural rules for other counties, its Lake County Rules do not require parties to exchange summaries of witness testimony. Although the Petitioner noted that it did not receive

15. The Board duly promulgated its Lake County Rules pursuant to HEA 1535, P.L. 235-2003, Ind. Code § 4-22-2-37.1, and Ind. Code § 6-1.1-4-34. The Petitioner does not contend that the Respondent failed to comply with those rules. The Board therefore overrules the Petitioner's objection based upon the validity of its Lake County Rules.

Ms. Harmon's qualification as an expert

16. The Petitioner next objected to two statements made by Ms. Harmon while she was cross-examining Mr. Weiss. First, Ms. Harmon stated that normal appraisal practice required Mr. Weiss to explain the "mathematics" of why he used roughly \$7.50 per square foot as a value for the land portion of sale 9 and roughly \$12 per square foot for the land portion of sale 10. *Harmon cross examination of Weiss*. Ms. Harmon next stated that normal appraisal practice would require adjusting the sale prices of comparable properties "for time." *Id.* The Petitioner noted that, because Ms. Harmon swore an oath at the outset of the hearing, it assumed that any factual statements she made were being made in her capacity as a witness. *See Laramore objection*. The Petitioner based its objection on grounds that Ms. Harmon did not establish that she was an appraiser and that she therefore was not qualified to render an opinion on what constitutes normal appraisal practice. *Id.*
17. As an initial matter, the Board notes that Ms. Harmon made the statements at issue while she was cross-examining Mr. Weiss rather than as a witness in the Respondent's case-in-chief. Nonetheless, as is clear from the Petitioner's objection, the parties treated Ms. Harmon's statements as testimony and the Board will do so as well.
18. Ms. Harmon subsequently testified that she is a Level I and II certified assessor/appraiser, that she has worked in the mass appraisal field in several capacities, and that she has taken various courses, including courses from the Appraisal Institute. Based on her testimony, the Board finds that Ms. Harmon is qualified to render an opinion as to what constitutes normal appraisal practice. The Board recognizes that the qualifications to which Ms. Harmon testified largely relate to the field of mass appraisal, and that Ms. Harmon did not testify that she is a certified or licensed appraiser. Those facts, however, go to the weight of Ms. Harmon's testimony rather than to its admissibility. The Board therefore overrules the Petitioner's objection.
19. The Petitioner also objected to Ms. Harmon providing any testimony concerning Respondent's Exhibit 11, which the Respondent identified as one page excerpt from THE APPRAISAL OF REAL ESTATE (12th Ed.). Based on the Petitioner's objection, Ms. Harmon indicated that she would let the exhibit speak for itself. Consequently, the Petitioner's objection is moot.

witness summaries from the Respondent, the Petitioner did not expressly object to Ms. Harmon testifying at the hearing.

Hearsay objections

20. The Petitioner also interposed a series of hearsay objections to Ms. Harmon's testimony. First, the Petitioner objected to Ms. Harmon's testimony that she found a press release indicating that sale 5 from Mr. Weiss' appraisal was a conglomerate sale involving many properties in the seller's portfolio. *See Laramore objection; Harmon testimony; Pet'r Ex. 2 at 24.* Second, the Petitioner objected to Ms. Harmon's testimony that the building referenced as sale 12 in Mr. Weiss' appraisal was converted to a retail business. Upon questioning by Mr. Laramore, Ms. Harmon testified that she based her assertion in that regard on "hearsay research that I did on the internet." *Harmon testimony.* Finally, the Petitioner objected to Respondent's Exhibit 7, which references the number of interior doors contained in the subject building and which was prepared by an unspecified employee of the Respondent. *See Laramore objection; Harmon testimony.*

21. The Board's procedural rules provide the following with regard to the admissibility of hearsay:

Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), *may be admitted.* If not objected to, the hearsay evidence may form the basis for a determination. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting determination may not be based solely upon the hearsay evidence.

IND. ADMIN. CODE, tit. 52, r. 2-7-3 (2004) (emphasis added). Thus, the Board may admit hearsay, but it is not required to do so. In exercising its discretion regarding the admission of hearsay, the Board considers whether the evidence carries with it any objective indicia of reliability.

22. Ms. Harmon's testimony concerning sales 5 and 12 from the Petitioner's appraisal clearly amounts to hearsay. As to the former, Ms. Harmon based her testimony on assertions contained in a press release that she did not offer into evidence. Moreover, Ms. Harmon offered her testimony in order to prove the truth of the matters asserted in that release. *See Indiana Evid. R. 801* ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). As to the latter, Ms. Harmon herself acknowledged the hearsay nature of her testimony. Ms. Harmon's testimony does not fall within any of the exceptions to the hearsay rule set forth in Rules 803 or 804 of the Indiana Rules of Evidence. In fact, Ms. Harmon did not provide any objective indicia of the reliability of her testimony, given that she did not identify the source of the press release or the website(s) she utilized in conducting her "hearsay" research. The Board therefore sustains the Petitioner's objection and does not consider Ms. Harmon's testimony concerning sales 5 and 12 from Mr. Weiss' appraisal.

23. Respondent's Exhibit 7 is also hearsay. That exhibit sets forth statements made by an employee of the Respondent who did not testify at the hearing, and the Respondent

offered the exhibit to prove the truth of the matter asserted in those statements, i.e. that the subject building has 203 doors. Ms. Harmon did not lay a foundation to show that the exhibit falls within any of the exceptions to the hearsay rule set forth in Rules 803 or 804 of the Indiana Rules of Evidence or that the assertions contained therein bear any other objective indicia of reliability. The Board therefore sustains the Petitioner's objection to Exhibit 7.³

Record

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

- a) The Petition.
- b) The tape recording of the hearing consisting of four (4) cassette tapes labeled IBTR # 6196. There is an approximately fifteen (15) minute portion of tape 2 that is blank. The missing portion is at the end of side A of the tape, and it may have stemmed from the Special Master's inadvertent failure to press the record button after a break in the hearing. The recording resumes at the beginning of side B of tape 2. The missing portion includes the beginning of Lori Harmon's cross-examination of Richard Weiss.
- c) Exhibits:

Petitioner Exhibit 1: Petitioner's Brief

Petitioner Exhibit 2: Summary appraisal as of January 1, 1999 valuation date

Petitioner Exhibit 3: Property Record Card for subject

Petitioner Exhibit 4: Real Property Assessment Manual, pages 2, 3 and 6

Petitioner Exhibit 5: Appendix E, pages 5, 6 and 8 – Real Property Assessment
Guideline

Petitioner Exhibit 6: Photographs of subject's exterior

Petitioner Exhibit 7: Appendix D, General Commercial Models, page 14 – Real
Property Assessment Guideline

Petitioner Exhibit 8: Photographs of subject's framing; subject's building plan

Petitioner Exhibit 9: Property owner's affidavit

Petitioner Exhibit 10: Marshall Valuation framing pricing

Petitioner Exhibit 11: Commercial and Industrial Units, Chapter 6, page 17, Table
6-3 – Real Property Assessment Guideline

Petitioner Exhibit 12: Appendix F, Commercial and Industrial Depreciation, page
26 – Real Property Assessment Guideline

³ The Petitioner also interposed two objections that it subsequently withdrew. The first objection concerned portions of Petitioner's Exhibit 5, which is a newspaper article discussing the Petitioner's purchase of the subject property from Prudential in 1989. When the Respondent clarified that it was offering the exhibit only with regard to the underlined portions of the article, the Petitioner withdrew its objection. The second objection anticipated testimony from Mr. Harmon concerning conversations she had with representatives from a zoning office. The Petitioner withdrew its objection when the Respondent did not offer such testimony.

Petitioner Exhibit 13: Commercial and Industrial Units, Chapter 6, Page 23 – Real Property Assessment Guideline

Petitioner Exhibit 14: Commercial and Industrial Cost Schedules, Appendix G, page 17 – Real Property Assessment Guideline

Petitioner Exhibit 15: Photographs – lack of partitioning on first, second and third floors

Petitioner Exhibit 16: Floor plans – lack of partitioning on first, second and third floors (highlighted areas in yellow reflect open, non-partitioned areas)

Petitioner Exhibit 17: Photographs of subject ceiling showing lack of sprinklers

Petitioner Exhibit 18: Building plan identifying dimensions of three mechanical penthouses

Petitioner Exhibit 18a: Photographs of subject mechanical penthouses

Petitioner Exhibit 19: Appendix G, page 21 – Real Property Assessment Guideline

Petitioner Exhibit 20: Appendix G, Commercial and Industrial Cost Schedules, page 15 – Real Property Assessment Guideline

Petitioner Exhibit 21: Chapter 2, page 85 – Real Property Assessment Guideline

Petitioner Exhibit 22: Commercial and Industrial Neighborhood Valuation – Ross Township, Lake County

Petitioner Exhibit 23: Cole Layer Trumble Company Land Valuation dated February 9, 2004

Petitioner Exhibit 24: Site plan of subject land identifying land allocation

Petitioner Exhibit 25: Photographs of subject parking areas

Petitioner Exhibit 26: Aerial of subject land and improvements

Petitioner Exhibit 27: Affidavit and zoning ordinance

Petitioner Exhibit 28: Petitioner’s requested land allocation and assessment

Petitioner Exhibit 29: Miscellaneous exhibits

Respondent Exhibit 1: Subject property record card

Respondent Exhibit 2: Subject photographs

Respondent Exhibit 3: Plat map page 15-468

Respondent Exhibit 4: Land calculations – Neighborhood 20893 sheet

Respondent Exhibit 5: The Times – Hammond News clipping⁴

Respondent Exhibit 6: Marshall Valuation Service – Class of Construction Section 1, pages 5-8

Respondent Exhibit 7: Approximate door count in “yellow”⁵

Respondent Exhibit 8: Version A – Appendix G Page 19 of Real Property Assessment Guideline

Respondent Exhibit 9: Indiana Administrative Code – 876 IAC 3-6-2 through 876 IAC 3-6-4

Respondent Exhibit 10: Uniform Standards of Professional Appraisal Practice 2004 Edition – Standards Rule 2-3

⁴ As discussed *supra*, only those portion of Respondent’s Exhibit 5 that are underlined are admitted into evidence

⁵ As discussed *supra*, the Board sustains the Petitioner’s objection to Respondent’s Exhibit 7. Thus, although the exhibit is part of the administrative record, it is not part of the evidentiary record upon which the Board renders its decision.

Respondent Exhibit 11: The Appraisal of Real Estate 12th Edition Page 538
Respondent Exhibit 12: Merrillville Town Ordinances – Zoning requirements
Article V of Chapter 21
Respondent Exhibit 13: 2002 Real Property Assessment Manual pages 1-12

Board Exhibit A: Form 139 L
Board Exhibit B: Notice of Hearing
Board Exhibit C: Sign in Sheet

d) These Findings and Conclusions.

Analysis

25. The most applicable laws 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.

26. The Petitioner provided sufficient evidence to support its contention that the current assessment is in error and that the correct assessment should be \$13,800,000. The Board reaches that conclusion for the following reasons:

Petitioner’s prima facie case

- a) The 2002 Real Property Assessment Manual (“Manual”) defines the “true tax value” of real estate 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 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 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; *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*, 842 N.E.2d 899 (Ind. Tax 2006). A taxpayer, however, may offer evidence to rebut that presumption provided such evidence is consistent with the Manual’s definition of true tax value. MANUAL at 5. Thus, appraisals prepared in accordance with the Manual’s definition of true tax value may be used to rebut the presumption that an assessment is correct. *Id.*; *Kooshtard Property VI*, 836 N.E.2d at 505, 506 n.6 (“[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 [USPAP].”). A taxpayer may also rely upon sales information regarding the subject or comparable properties and any other information compiled in accordance with generally accepted appraisal principles. MANUAL at 5.
 - c) The Manual further provides that for the 2002 general reassessment, a property’s assessment must reflect its value as of January 1, 1999. MANUAL at 4. Consequently, in order to present evidence probative of a property’s true tax value, a party relying on an appraisal that estimates the market value of a property as of a date substantially removed from January 1, 1999, must explain how the 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 the value for a property on December 10, 2003, lacked probative value in an appeal from the 2002 assessment of that property).
 - d) Here, the Petitioner submitted a summary appraisal prepared by Richard Weiss, an Indiana certified general appraiser. *Pet’r Ex. 2*. Mr. Weiss testified that he performed the appraisal in conformance with USPAP. *Weiss testimony*. Moreover, Mr. Weiss valued the subject property using the cost, sales comparison, and income approaches to value, ultimately giving the greatest weight to his conclusions under the sales comparison approach. *Pet’r Ex. 2, passim*. Mr. Weiss expressly estimated the market value-in-use of the subject property as of January 1, 1999. *Pet’r Ex. 2 at cover letter, 32*.
 - e) Thus, the Petitioner submitted precisely the type of evidence recognized by the Manual and the Tax Court as relevant to rebut the presumption that the assessment performed by the Respondent in accordance with the Guidelines is correct. The Petitioner therefore established a prima facie case that the current assessment is in error and that the subject property should be assessed for \$13,800,000.

Respondent's impeachment/rebuttal

- f) The burden therefore shifted to the Respondent to impeach or rebut Mr. Weiss' opinion of value. *See Meridian Towers*, 805 N.E.2d at 479.

Impeachment of Mr. Weiss' appraisal

- g) The Respondent contends that Mr. Weiss departed from normal appraisal practice in several respects. The Respondent points to five specific instances of departure: (1) Mr. Weiss failed to certify that he performed his appraisal in conformance with USPAP; (2) Mr. Weiss did not adjust the sale prices of the purportedly comparable properties referenced in his appraisal "for time;" (3) Mr. Weiss departed from USPAP by relying on an electronic service to verify the sales referenced in his appraisal rather than by talking to the parties to those sales; (4) Mr. Weiss did not explain the "mathematics" behind the differences in the per unit prices he assigned to the contributing land values from the comparable sales; and (5) Mr. Weiss departed from USPAP in relying upon the opinions of real estate brokers and other professionals in determining the contributing land values for the comparable sales. *See Harmon testimony*.
- h) As to Respondent's first contention, Mr. Weiss certified in writing that he prepared his appraisal "in conformance with the Standards of Professional Conduct of the Appraisal Institute." *Pet'r Ex. 2 at certification page*. At the hearing, Mr. Weiss explained that the language he used was old, and that he was incorporating USPAP when he referenced the standards of the Appraisal Institute. *Weiss testimony*. In light of Mr. Weiss' testimony, the Board assigns no weight to the lack of an express reference to USPAP in Mr. Weiss' certification.
- i) The Board finds the Respondent's contention that Mr. Weiss departed from USPAP by failing to adjust the sale prices "for time" equally unpersuasive. As an initial matter, the Respondent does not identify the USPAP standard upon which it relies. Regardless of the requirements of USPAP, however, parties must explain how evidence of the market value of a property as of a date substantially removed from January 1, 1999, valuation date set forth in the Manual relates to the property's market value as of January 1, 1999. *See Long*, 821 N.E.2d at 471 (holding that an appraisal indicating the value for a property on December 10, 2003, lacked probative value in an appeal from the 2002 assessment of that property). Mr. Weiss provided such an explanation when he testified that an appropriate time adjustment was incorporated into the sale prices of the comparable properties he used in valuing the subject property under the sales comparison approach, given that those sales occurred over an eight (8) year period bracketing January 1, 1999. *See Weiss testimony*.
- j) The Board likewise gives no weight to the Respondent's contention that Mr. Weiss departed from USPAP by relying on an electronic service to verify the terms of the sales referenced in his appraisal rather than by talking to the parties to those sales. Once again, Ms. Harmon simply made the conclusory assertion that such a practice

does not conform to USPAP, without pointing to any specific standard or rule contained in USPAP. Mr. Weiss, however, testified that he relied upon an electronic service similar to a multiple listing service in obtaining information concerning the sales, and that such information was confirmed by the service. The Board credits Mr. Weiss' testimony on that point.

- k) The Respondent's claims addressing Mr. Weiss' allocation of contributing land value with respect to the sales of the thirteen (13) Chicago area properties he examined in his appraisal are more problematic. As an initial matter, the Board gives little weight to the Respondent's specific point that Mr. Weiss' actions departed from USPAP and normal appraisal practice. The Respondent did not identify the specific USPAP standard that it contends Mr. Weiss violated. Instead, it relied on the conclusory assertions of Ms. Harmon. Mr. Weiss, however, testified that, in his experience, appraisers frequently rely on opinions of brokers and other professionals. *See Weiss testimony*. Absent more specific evidence to the contrary, the Board credits Mr. Weiss' testimony on that point.
- l) The fact that Mr. Weiss may have acted within the bounds of normal appraisal practice, however, does not end the Board's inquiry. The mere fact that an appraiser has acted in accordance with professionally accepted appraisal practices does not necessarily render his or her opinion of value persuasive. Here, Mr. Weiss' allocation of the sale prices of the comparable properties between land and improvements has a profound effect on his analysis under both the cost and sales comparison approaches. Under Mr. Weiss' methodology, his conclusion of value for the subject property is inversely related to the amount of the contributing land value ascribed to the comparable sales upon which he relied. The higher the contributing land value for the comparable sales, the lower Mr. Weiss' conclusion of value should be. Mr. Weiss' failure to provide any evidence regarding the level of expertise of, or the methodology employed by, the parties upon whose allocation opinions he relied detracts from the persuasiveness of his appraisal.
- m) Nonetheless, the Respondent offered no evidence of its own to demonstrate that the allocations relied upon by Mr. Weiss were incorrect. Thus, while the vagueness of Mr. Weiss' testimony concerning his determination of contributing land values detracts somewhat from the persuasiveness of his opinion of value, it does not render his opinion entirely unreliable.
- n) The Respondent also contends that Mr. Weiss failed to explain how the thirteen (13) Chicago area buildings referenced in his appraisal compare to the subject building "in terms of obsolescence issues" other than that all are single tenant buildings. *Harmon argument*. The Respondent presumably is attacking Mr. Weiss' calculation of accrued depreciation of the subject building under the cost approach, given that he based his calculation largely upon an examination of depreciation and obsolescence experienced by the Chicago area buildings. *See Pet'r Ex. 2 at 14-16*. Mr. Weiss testified regarding several sources of obsolescence in the subject building: (1) its inability to be converted to multi-tenant use; (2) its secondary location; and (3) its

inefficient use of space due to the presence of numerous building service areas and an exterior corridor allowing for proper air flow for the building's radiant heating system. *See Weiss testimony; see also Pet'r Ex. 2 at 31.* As noted by the Respondent, Mr. Weiss explained that all of the comparable properties he examined contained single tenant office buildings. Mr. Weiss also generally indicated that all of the comparable properties had superior locations to the subject property. *See Weiss testimony; Pet'r Ex. 2 at 31.* Thus, Mr. Weiss expressly compared the subject building to the thirteen Chicago area buildings upon which he in terms of two of the three primary causes of obsolescence that he identified. Mr. Weiss' failure to provide a more detailed comparison of the buildings detracts only marginally from the reliability of his opinion of value.

- o) The Respondent also questions Mr. Weiss' reliance on certain sales in performing his sales comparison analysis. Specifically, the Respondent contends that Mr. Weiss should not have relied upon sales 8 and 11 because those transactions involved "sale-leasebacks." *Harmon argument; Weiss testimony; Pet'r Ex. 2 at 25-28.* The Respondent apparently contends that such transactions necessarily do not occur at arms length. *See Harmon cross examination of Weiss.* While it is certainly possible that parties to a sale-leaseback transaction might be sufficiently related to render such a transaction not at arms length, the Respondent did not present any evidence of such a relationship between the parties to the two transactions at issue in this case.
- p) The Respondent next points to Mr. Weiss' use of sales 1-3 and 11-14. According to the Respondent, those sales, which occurred in 1995-96 and 2002-03, were too remote from the relevant valuation date of January 1, 1999, to be of any use. As explained above, however, Mr. Weiss adequately explained the relation of those sale prices to the relevant valuation date. The Respondent did not present any evidence to show that the properties were appreciating or depreciating at a rate that would render their 1995-96 or 2002-03 sale prices invalid for determining the subject property's market value-in-use as of January 1, 1999. The Respondent additionally attacks Mr. Weiss' use of sale 3 on grounds that one of the buildings involved in that sale was used as a warehouse rather than as an office building. Mr. Weiss, however, testified that he placed little or no weight on sale 3 in reaching his final opinion of value. *See Weiss testimony.* Thus, Mr. Weiss' inclusion of sale 3 in his analysis does not detract from the reliability of his opinion of value.
- q) The Respondent also points to what it views as discrepancies contained in Mr. Weiss' description of the properties involved in sales 1 and 13. The properties share the same address and one common parcel number, yet Mr. Weiss lists the properties as having different land and building areas. *See Harmon testimony; Harmon cross examination of Weiss; Pet'r Ex. 2 at 21, 28-29.* Mr. Weiss' testimony on that issue is confusing. At one point, Mr. Weiss testified to his belief that the two sales involved the same property, but that the property was redeveloped after the 1995 sale referenced in Mr. Weiss' appraisal as sale 13. *See Weiss testimony.* At another point, Mr. Weiss testified that the two properties referenced in sales 1 and 13 might be different properties, and that he either made a mistake in setting forth the street

addresses for the properties or the properties share the same street address. *See Weiss testimony*. The Board finds that Mr. Weiss' inability to explain the discrepancies with regard to sales 1 and 13 detracts somewhat from the reliability of his opinion value.

- r) Finally, the Respondent questions the validity of Mr. Weiss' determination of net rent and his calculation of an overall capitalization rate in applying the income approach. The Board assigns no weight to the Respondent's attempted impeachment of Mr. Weiss on those grounds. Mr. Weiss testified that he gave little or no consideration to his conclusions under the income approach in reaching his final opinion of value. *See Weiss testimony; Pet'r Ex. 2 at 32*.
- s) In sum, while the Respondent impeached Mr. Weiss' opinion of value to an extent, the Board finds Mr. Weiss' opinion to be probative of the market value-in-use of the subject property as of January 1, 1999. The Board therefore must determine whether the Respondent presented any countervailing evidence of the subject property's market value-in-use to weigh against Mr. Weiss' opinion of value.

Rebuttal evidence

- t) The Respondent offered little market evidence of its own to rebut Mr. Weiss' opinion of value. The Respondent submitted a newspaper article setting forth the original cost to construct the subject building in 1978 and Prudential's asking price in 1983. As an initial matter, the Respondent did not attempt to relate such evidence to the market value-in-use of the subject property as of January 1, 1999. Moreover, the Respondent's reliance on Prudential's original asking price of \$22,000,000 completely lacks merit in light of Prudential's decision to sell the property for \$5,850,000. *See Resp't Ex. 5*.
- u) The Respondent recognizes this incongruity, but relies on a discussion in the Manual regarding the market value-in-use of special purpose properties to support its claim that Prudential's original ask price, rather than the ultimate sale price, is the correct measure of true tax value. Even assuming that the Respondent were correct in its assertion that the subject property is a special purpose property, the Manual does not support the Respondent's position. The Manual provides, in relevant part:

A seller of a special-purpose industrial property would accept nothing less than a *price equal to the utility being gained from the property*. . . . A buyer of a special-purpose property would initially bid no more than necessary to motivate the seller. . . . Since the seller has no motivation to sell at anything less than the value-in-use for a special-purpose property, the ask price becomes the benchmark for a likely transaction under a value-in-use scenario. *In the case in which the seller adjusts its opening price and actually consummates a transaction with the buyer at an agreed price, the bid and ask prices coincide and reflect the value-in-use of the property.*

MANUAL at 4 (emphasis added). Here, Prudential did precisely what the last sentence of the quoted portion of the Manual contemplates – it adjusted its opening price and actually consummated a transaction. The sale price, and not Prudential’s original ask price, reflects the property’s market value-in-use at the time of the sale.

- v) The remainder of the Respondent’s evidence relates to its application of the Guidelines in assessing the subject property. An assessing official, however, cannot rely upon a strict application of the Guidelines to counter a taxpayer’s market-based evidence. Instead, it is incumbent upon the assessing official to offer his or her own market evidence to demonstrate that the assessment is a reasonable reflection of the subject property’s market value-in-use. The Board therefore assigns no weight to the Respondent’s evidence concerning the propriety of its application of the Guidelines in assessing the subject property.
- w) Based on the foregoing, the Petitioner demonstrated by a preponderance of the evidence that the current assessment is in error and that the correct assessment is \$13,800,000. As explained above, the Respondent impeached Mr. Weiss’s opinion of value to a limited extent. The flaws highlighted by the Respondent, however, are not sufficient to render Mr. Weiss’ ultimate opinion of value unreliable. Moreover, the Board finds that Mr. Weiss’ opinion is clearly a better estimate of the subject property’s market value-in-use than is the current assessment under the Guidelines. Absent any countervailing market evidence, the Board finds that Mr. Weiss’ opinion presents the best evidence of the subject property’s market value-in-use.

Conclusion

- 27. The Petitioner made a prima facie case. The Respondent did not rebut Petitioner’s evidence. The Board finds in favor of Petitioner. The preponderance of the evidence demonstrates that the current assessment is in error and that the correct assessment is \$13,800,000.

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: June 29, 2006

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>>.