

REPRESENTATIVE FOR PETITIONER:  
Paul Wallace, Attorney with Bowers Harrison, LLP

REPRESENTATIVES FOR RESPONDENT:  
John Gerard, Center Township Assessor

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**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

Steven L. Fenwick, et al.,	)	Petition No.: 82-020-02-1-3-00115
	)	Parcel No.: 1224034299007
Petitioner,	)	
	)	
v.	)	
	)	County: Vanderburgh
John Gerard,	)	Township: Center
Center Township Assessor	)	Assessment Year: 2002
	)	
Respondent	)	

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Appeal from the Final Determination of  
Vanderburgh Property Tax Assessment Board of Appeals

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**December 2, 2005**

**FINAL DETERMINATION**

The Indiana Board of Tax Review (the Board) having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **ISSUES**

1. The issue presented for consideration by the Board was that the regulations do not define “agricultural use” sufficient for a taxpayer to know what it must do for its property to be assessed as agricultural.

### **PROCEDURAL HISTORY**

2. Pursuant to Ind. Code § 6-1.1-15-3, Paul Wallace, as representative of Steven L. Fenwick et al. (the Petitioner), filed a Form 131 Petition for Review of Assessment, petitioning the Board to conduct an administrative review of the above petition. The Form 131 petition was filed on November 4, 2004. The determination of the Vanderburgh County Property Tax Assessment Board of Appeals (the PTABOA) was issued on October 29, 2004.

### **HEARING FACTS AND OTHER MATTERS OF RECORD**

3. Pursuant to Ind. Code § 6-1.1-15-4 and § 6-1.5-4-1, a hearing was held on March 22, 2005, in Evansville, Indiana before Debra Eads, the duly designated Administrative Law Judge (the ALJ) authorized by the Board under Ind. Code § 6-1.5-3-3.
4. The following persons were sworn and presented testimony at the hearing:

For the Petitioner:

Joe Nickolick, Petitioner

For the Respondent:

John Gerard, Center Township Assessor  
Donald Cobb, Center Township Real Estate Deputy  
Candy Wells, Vanderburgh County Hearing Officer

Tiffany Carrier, Vanderburgh County Deputy Assessor, observed the hearing.

5. The following exhibits were presented for the Petitioner:

Petitioner Exhibit 1 – Legal issues memorandum  
Petitioner Exhibit 2 – Photo of the subject property  
Petitioner Exhibit 3 – Photo of the tract of land to the south and across the road  
from the subject

6. The following exhibits were presented for the Respondent:

Respondent Exhibit 1 – Narrative with attachments of property record cards and zoning maps for parcels: 12-240-34-299-027; 12-240-34-299-001; 12-240-34-299-005; 12-240-34-299-013; 12-240-34-299-014; 12-240-34-299-015; 12-240-34-299-017; 12-240-34-299-018; 12-240-34-299-019; 12-240-34-299-021; 12-240-34-299-023; 12-240-34-299-024; 12-240-34-299-026; 12-240-34-299-030; and 12-240-34-299-032<sup>1</sup>

7. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits:

Board Exhibit A – Form 131 Petition  
Board Exhibit B – Notice of Hearing dated January 25, 2005  
Board Exhibit C – Notice of County Assessor Appearance as Additional Party  
Board Exhibit D – Notice of Appearance of Paul Wallace as attorney for the  
Petitioner

8. The subject property is vacant land assessed as commercial/industrial.

9. The ALJ did not conduct an on-site inspection of the subject property.

10. For 2002, the PTABOA determined the assessed value of the property to be \$45,900 for the land. There are no structures on the property

11. For 2002, the Petitioner contends the assessed value of the property should be \$1,603 for the land.

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<sup>1</sup> The Respondent also lists parcel # 12-240-34-299-020, however no property record card was attached for this parcel.

## JURISDICTIONAL FRAMEWORK

12. The Indiana Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property; (2) property tax deductions; and (3) property tax exemptions; that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Indiana board under any law. Ind. Code § 6-1.5-4-1(a). All such appeals are conducted under Ind. Code § 6-1.1-15. *See* Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.

## ADMINISTRATIVE REVIEW AND THE PETITIONER'S BURDEN

13. 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 Township 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).
14. 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 Township 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”).
15. 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.

## ANALYSIS

16. The Petitioner contends the subject property is indistinguishable from a parcel of land located across the road and directly south of the subject property. The subject property is

valued twenty-eight times higher than the property across the road. *Wallace argument.* The Petitioner argues that the subject property and the property directly to the south are identical in terms of zoning, location, geography, and topography. According to the Petitioner, the only difference is the assessor's determination that the property directly to the south is an "agricultural" parcel. *Wallace argument.*

17. The Petitioner alleges that he is unable to determine what criterion the assessor used in order to determine that a property should be classified as agricultural. *Wallace argument.* According to the Petitioner, he is unable to find a definition for agricultural use in the regulation. The Petitioner contends that he is unable to determine what must be done to be agricultural. *Wallace argument.* The Petitioner further alleges that he cannot determine from the regulations if the "crop" on the agricultural tract must be corn, or whether the crop can be trees, grass or some other form of vegetation. *Wallace argument.* The rules do not say what day or number of days, what crop or types of crops constitutes agricultural use. Nor do the rules state how many days of the year, nor what part of the year a property must be agricultural in order to be valued as agricultural land. *Wallace argument.* Finally, according to the Petitioner, there are seven different classes of agricultural use designated in the 2002 Real Property Assessment Manual, but those classifications are not specific enough to definitely determine the appropriate classification of land. *Wallace argument.*
18. The Petitioner contends that there is grass on the subject property. According to the Petitioner, Emerald Turf Farm which is a grass farm located in Rockport, Indiana is classified as agricultural. *Wallace argument.*
19. In addition, the Petitioner argues that both the subject property and the property located directly to the south are zoned for commercial and industrial use, not agricultural. *Wallace argument.* On the assessment date of any year (March 1) there are no crops growing on any parcel of land. Therefore, according to the Petitioner, it is impossible for the assessor to determine if the appropriate use classification of any vacant tract of land is agricultural. *Wallace argument.* On the date of this hearing (March 22<sup>nd</sup>) there is no

discernable difference between the appearance of the subject property and the property located across the road and to the south. *Nickolick testimony*.

20. In response to questioning, the Petitioner alleged that he cannot state for the record whether a marketable crop has been grown on the subject property. *Wallace response to Gerard questioning*. Nor, the Petitioner alleges, can he answer for the record whether anything has been “harvested” from the subject property due to the lack of a specific definition of what must be harvested. *Wallace response to Gerard questioning*. However, according to the Petitioner, the subject property was not tilled for the purpose of planting crops in the year under appeal. *Wallace response to Wells questioning*.
21. According to the Respondent, both the subject property and the property across the road are zoned for industrial use. However, the use of the land across the road from the subject property is agricultural; therefore, the township has valued that tract utilizing the agricultural land valuation method. *Cobb testimony; Resp’t Ex. 1, property record card 12-240-34-299-027*. According to the Respondent, the neighboring property has historically been farmed and was being farmed at the time of the assessment. *Id.* The Respondent contends that the subject property is not being utilized for agricultural purposes and consequently has been valued as usable undeveloped commercial/industrial land per the approved land order for Center Township. *Cobb testimony; Resp’t Ex. 1*.
22. The Respondent argued that the land valuation of the subject property is consistent with the valuation method and base land rates utilized for the valuing of other commercial/industrial land in the subject area. *Cobb testimony; Resp’t Ex. 1*.
23. According to the Respondent, the Petitioner has not advised the Respondent of the asking price of the subject property, nor has an appraisal of the subject property been offered in order to rebut the value established by the assessor for the subject property. *Cobb testimony*.

24. Further, according to the Respondent, no information regarding a lease for agricultural purposes has been presented to the assessor in support of an agricultural classification for the subject property. *Gerard response to Wallace questioning.*
25. The Respondent testified that, according to the Guidelines, tillable land is land used for cropland or pasture that has no impediments to routine tillage. *Read into the record by John Gerard, identified as Page 103 from the 2002 Real Property Assessment Guidelines.* Further, cropland is land used for production of grain or horticultural crops such as corn, soybeans, wheat, rotation pasture, hay, vegetables, or orchard crops; land used for cover crops; land in summer fallow; idle cropland; land used for Christmas tree plantations; or land used for nursery plantings. *Id.*
26. The Petitioner does not argue that the subject property was being put to an agricultural use at the time of the March 1, 2002, assessment. In response to a question from the Respondent about whether the Petitioner was growing a marketable crop, the Petitioner stated that since there was no definition of marketable crop he could not answer the question. The Respondent also asked the Petitioner if the subject land had been tilled. The Petitioner stated that tilled was not defined, but assuming he knew what was meant by tilled, not at the 2002 assessment date. While Petitioner identified a sod farm that was classified as agricultural and alleged that grass was grown on the subject property. The Petitioner never claimed to be a sod farm and never claimed to have “harvested” the grass as a crop. As the Petitioner is not contending to be an “agricultural” property, the Petitioner has not alleged an error in its assessment as commercial/industrial property rather than an agricultural property.
27. The Petitioner merely contends that the rules do not explain what constitutes agricultural use or how to achieve an agricultural assessment. The Petitioner further contends the regulations lack a definition of agriculture, crops, tilled, and use. However, questions as to definitions do not constitute probative evidence. *See Whitley Prods.*, 704 N.E.2d at 1119-20 n.12; *CDI, Inc. v. State Bd. of Tax Comm'rs*, 725 N.E.2d 1015, 1022 n.8 (Ind. Tax Ct. 2000) (noting that questions as to definitions, the hearing officer's general

assessment methodology and instructions for applying assessment standards are not probative evidence on the issue of grade; the taxpayer should offer specific evidence tied to the various descriptions of grade classifications).

28. Despite failing to claim to be an “agricultural use,” the Petitioner argues that Ind. Code § 6-1.1-14-13 is “unconstitutionally vague” because “it lacks a sufficient definition for agricultural use.” *Pet’r Ex. 1, page 2*. According to the Petitioner, he is unable to determine what must be done to be agricultural. Nor can he determine from the regulations if the “crop” on the agricultural tract must be corn, or whether the crop can be trees, grass or some other form of vegetation. Further, the Petitioner argues, the rules do not say what day or number of days, what crop or types of crops constitutes agricultural use. Nor do the rules state how many days of the year, nor what part of the year a property must be agricultural in order to be valued as agricultural land.
29. “The test to be applied in determining whether an administrative agency regulation can withstand a challenge for vagueness is whether it is so indefinite that persons of common intelligence must necessarily guess at its meaning and differ as to its application.” *Taylor v. Ind. Family & Soc. Servs. Admin.*, 699 N.E.2d 1186, 1192 (Ind. Ct. App. 1998) (quoting *Ind. State Ethics Comm’n v. Nelson*, 656 N.E.2d 1172 (Ind. Ct. App. 1995)). *See also Indiana Department of Natural Resources v. Newton County*, 802 N.E.2d 430 (Ind. 2004) (“The legislature did not need to supply more specific definitions for the terms “willing seller” and “game bird habitat” in Ind. Code § 14-22-8-7(c) (1998) to guide the department. There was no doubt that the property owner was a willing seller. There was no evidence that the department interpreted the terms “game bird” or “habitat” improperly with respect to the acquisition.” ); *Ind. Dep’t of Env’tl. Mgmt. v. Chem. Waste Mgmt., Inc.*, 643 N.E.2d 331, 340 (Ind. 1994) (standards that guide an administrative agency may be described in “very broad and general terms.”)
30. The American Heritage College Dictionary defines “agriculture” as the science, art, or business of cultivating soil, producing crops, and raising livestock; farming. THE AMERICAN HERITAGE COLLEGE DICTIONARY at 27 (Fourth Edition). Further, while not



including a comprehensive listing of all types of vegetation acceptable as “crops”, the GUIDELINES are more than sufficient to allow a reasonable person to make the determination regarding land use and classification.<sup>2</sup> There is a simple answer for Petitioner here. If he wishes to have the property assessed as agricultural, he must farm the land or lease the property to be farmed.

31. Most importantly, however, the Real Property Assessment Manual and Guidelines were not promulgated to regulate the behavior of taxpayers, but to establish a method to uniformly, equally and justly value property. 2002 REAL PROPERTY ASSESSMENT MANUAL (incorporated by reference at 50 IAC 2.3-1-2) (the MANUAL) at 2. The Petitioner appears to allege that if the appropriate “indicia” of agricultural use or relevant date of determination were identified in the Guidelines, that Petitioner could create those “indicia” on the date certain and achieve an agricultural assessment. However, the Guidelines were not developed so that taxpayers may choose their tax assessment. The Manual and Guidelines were developed to uniformly and fairly assess property according to its use.
32. The Petitioner also contends that the subject property and the property across the road are indistinguishable. According to the Petitioner, both properties are zoned commercial/industrial. They are both for sale as commercial/industrial properties and both, the Petitioner argues, are “indistinguishable” on March 1 of any given year.
33. Indiana Code requires uniform and equal assessments. Thus to the extent that the Petitioner can prove that his property is not assessed uniformly or equal to comparable properties, Petitioner’s assessment should be equalized. However, “taxpayers are required to make a detailed factual showing at the administrative level.” *Home Federal Savings Bank v. Madison Twp. Assessor*, 817 N.E.2d 332 (Ind. Tax Ct. 2004). To meet this showing, “the taxpayer must not only present probative evidence in support of its argument, but it must also sufficiently explain that evidence.” *Id.*

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<sup>2</sup> Similarly, *Lombardo*, holds that a statute “need only inform the individual of the generally proscribed conduct, and need not list with itemized exactitude each item of conduct prohibited.” 738 N.E.2d at 656.

34. To introduce evidence of comparable properties, a taxpayer must explain *how* the properties are comparable. See *Blackbird Farms Apts. v. Dep't of Local Gov't Fin.*, 765 N.E.2d 711, 715 (Ind. Tax Ct. 2002) (holding that the taxpayer did not present a prima facie case where it provided assessment information for allegedly comparable properties but failed to explain *how* the properties were comparable). Conclusory statements that a property is “similar” or “comparable” to another property do not constitute probative evidence of the comparability of the two properties. See *Long v. Wayne Twp. Assessor*, 821 N.E.2d 466, 470 (Ind. Tax Ct. 2005). Instead, the proponent must identify the characteristics of the subject property and explain how those characteristics compare to the characteristics of the purportedly comparable properties. *Id.* at 471. The proponent likewise must explain how any differences between the properties affect their relative market values-in-use. *Id.* See also, *Hoogenboom-Nofziger*, 715 N.E.2d at 1024 (holding that taxpayer failed to make prima facie case when he offered conclusory statements and photographs without further explanation); *Lacy Diversified Industries, Ltd. v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1220 (Ind. Tax Ct. 2003) (holding that taxpayer failed to make prima facie case when he offered conclusory statements, property record cards, and photographs without further explanation).
35. Here the Petitioner identified the similarities in zoning between the properties. However, the properties are used for different purposes. This is critical to the difference in assessment between the properties. The Guidelines acknowledge that “some commercial and industrial zoned acreage tracts devote a portion of the parcel to an agricultural use. The assessor classifies these parcels as either commercial or industrial. However, the portion of land devoted to agricultural use should be valued using the agricultural land assessment formula.” GUIDELINES, Chap 2 at 100. Thus, the zoning of the property as commercial or industrial does not dictate its value-in-use.<sup>3</sup> Here, the neighboring property was used for the purpose of planting, growing and harvesting crops. The

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<sup>3</sup> The Petitioner also alleges that the neighboring property is for sale as commercial/industrial property. The fact that it may be sold for a different purpose does not change its present use. At the time the property is used for commercial/industrial purposes, it will be assessed as commercial/industrial. To the extent it is being used for agricultural purposes, it is assessed as agricultural.

Petitioner has alleged no such use on the subject property. The Petitioner, therefore, failed to raise a prima facie case that the subject property was not assessed like other comparable properties were assessed in the 2002 assessment.

36. It is presumed that the value determined according to the rules prescribed in the manual “is the true tax value of the subject property.” Manual at 5. However, a taxpayer is permitted to “offer evidence relevant to the fair market value-in-use of the property to rebut such presumption...” *Id.* Here, Petitioner presented no evidence of the market value of the property. Based on the evidence presented, the Board finds that the Petitioner failed to raise a prima facie case that the assessment on the subject property was in error.

#### **SUMMARY OF FINAL DETERMINATION**

37. The Petitioner failed to make a prima facie case regarding this issue. There is no change to the assessment as a result of this issue.

This Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review on the date first written above.

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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](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>>.