

REPRESENTATIVE FOR PETITIONER:

Matthew J. Ehinger, Attorney.

REPRESENTATIVE FOR RESPONDENT:

Robert W. Metz, Director of Appeals, Lake County

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Curtis James Investments)	Petition No.:	45-030-06-1-4-00002
(Applesauce-Applebee's))		
)		
Petitioner,)		
)		
)	Parcel No.:	45-12-22-351-003.000-030
v.)		
)		
)		
Lake County Assessor,)	County:	Lake
)		
Respondent.)	Assessment Year:	2006

Appeal from the Final Determination of the
Lake County Property Tax Assessment Board of Appeals

FINAL DETERMINATION

The Indiana Board of Tax Review (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

PROCEDURAL HISTORY

1. The Petitioner initiated its assessment appeal by written notice to the Lake County Property Tax Assessment Board of Appeals (the "PTABOA") on January 23, 2008.
2. The PTABOA failed to hold a hearing on the Petitioner's appeal within the statutory time frame of 180 days. *See* Ind. Code § 6-1.1-15-1(k) ("the county board shall hold a hearing on a review under this subsection not later than one hundred eighty (180) days after the date of that notice.")
3. The Petitioner filed an appeal to the Board by filing a Form 131 petition on June 14, 2012. *See* Ind. Code § 6-1.1-15-1(o)(1) ("If the maximum time elapses under subsection (k) for the county board to hold a hearing; the taxpayer may initiate a proceeding for review before the Indiana board by taking the action required by section 3 of this chapter at any time after the maximum time elapses.").

HEARING FACTS AND OTHER MATTERS OF RECORD

4. On May 12, 2014, the Board's administrative law judge (the ALJ), Ellen Yuhan, held the hearing. She did not inspect the property.
5. The following persons were sworn and presented testimony at the hearing:
For the Respondent:
Robert W. Metz, Director of Appeals, Lake County,
Nicole Ooms, Deputy Assessor, Ross Township.¹
6. The Petitioner offered the following exhibits:
Petitioner Exhibit A – Form 130 petition,

¹ Carla D. Higgins and Melody Kikkert were also present at the hearing.

Petitioner Exhibit B – Form 131 petition,
Petitioner Exhibit C – Assessment record showing the 2005 and 2006 assessed values for the subject parcel,
Petitioner Rebuttal Exhibit 1 – Sales information for 1620 E. Commercial Avenue, Lowell,
Petitioner Rebuttal Exhibit 2 – Retail information for 4651 W. 61st Avenue, Hobart,
Petitioner Rebuttal Exhibit 3 – Retail information for 771 E. 81st Place, Merrillville.

7. The Respondent offered the following exhibits:

Respondent Exhibit 1 – Sales analysis for the subject property, 8425 Broadway,
Respondent Exhibit 2 – Sales analysis for 650 W. Lincoln Highway,
Respondent Exhibit 3 – 2004 and 2005 sales disclosure forms and property record card for the subject property,
Respondent Exhibit 4 – Sales disclosure form and property record card for 10343 Indianapolis Blvd.,
Respondent Exhibit 5 – Sales disclosure form and property record card for 8455 Broadway,
Respondent Exhibit 6 – Sales disclosure form and property record card for 1620 E. Commercial,
Respondent Exhibit 7 – Sales disclosure form and property record card for 4651 W. 61st Avenue,
Respondent Exhibit 8 – Sales disclosure form and property record card for 771 E. 81st Place,
Respondent Exhibit 9 – Sales disclosure form and property record card for 200 U.S Hwy. 41,
Respondent Exhibit 10 – Sales disclosure form and property record card for 720 E. 81st Avenue,
Respondent Exhibit 11 – Sales disclosure form, MLS listing and property record cards for 3915 Ridge Road and 3903 Ridge Road,
Respondent Exhibit 12 – Sales disclosure form and property record card for 31 W. Lincoln Hwy.,
Respondent Exhibit 13 – Sales disclosure form and property record card for 7876 Broadway,
Respondent Exhibit 14 – Sales disclosure form and property record card for 9407 Wicker,
Respondent Exhibit 15 – Sales disclosure form and property record card for 740 E. 81st Avenue,
Respondent Exhibit 16 – Sales disclosure form and property record card for 600 81st Avenue,
Respondent Exhibit 17 – Sales disclosure form and property record card for 1545 W. U.S. Hwy. 30,
Respondent Exhibit 18 – Sales disclosure form and property record card

- for 260 E. 84th Drive,
- Respondent Exhibit 19 – Sales disclosure form and property record card for 8455 Broadway,
- Respondent Exhibit 20 – Sales disclosure form and property record card for 10343 Indianapolis Blvd.,
- Respondent Exhibit 21 – Sales disclosure form and property record card for 650 W. Lincoln Hwy.,
- Respondent Exhibit 22 – Sales disclosure form and property record card for 8239 Georgia St.,
- Respondent Exhibit 23 – Sales disclosure form and property record card for 10685 Randolph St.,
- Respondent Exhibit 24 – Map of two sold properties.

8. 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 March 26, 2014,
- Board Exhibit C – Order Granting Petitioner’s Motion for Determination Concerning Burden of Proof,
- Board Exhibit D – Notice of Appearance by Paul Jones and Matthew Ehinger,
- Board Exhibit E – Hearing sign-in sheet.

9. The subject property is an Applebee’s Restaurant located at 8425 Broadway, Merrillville, Indiana.²

10. For 2006, the township assessor assessed the subject property at \$1,261,100 for the land and \$669,900 for improvements (totaling \$1,931,000).

11. For 2006, the Petitioner contends the Assessor has the burden of proof and if she fails to meet that burden the total assessed value should be reduced to the 2005 assessment, \$977,400.

OBJECTIONS

12. On May 8, 2014, the Petitioner filed a Motion to Exclude the Respondent’s Evidence, arguing the witness and exhibit list exchange was due April 21, 2014 and the document

² For reasons unknown, some documents list the street number as 8425 and others list it as 8415.

exchange was due May 5, 2014. The Petitioner claims it did not receive a formal copy of the Respondent's witness and exhibit list until April 28, 2014, seven days past the deadline under 52 IAC 2-7-1(b)(2). The Respondent did e-mail a copy of the witness and exhibit list on April 24, 2014, which is also past the deadline. At the time the motion was submitted, the Petitioner had not received any documentary evidence from the Respondent. Counsel argues that the Petitioner would be extremely prejudiced if the Respondent is able to present evidence, testimony, and information that the Petitioner has not had the opportunity to research and investigate.

13. At the hearing the Petitioner stated it received the witness and exhibit list and the map, Respondent Exhibit 24, was attached. The Petitioner conceded to the map being admitted, objecting only to the written text on that exhibit because it is not substantiated.
14. Mr. Metz stated that all the evidence had been sent at the same time. Mr. Metz testified that he had an overnight mail receipt with a tracking number, but because it was mailed through the county mail department he does not actually have an exact date when the packet was mailed.
15. Mr. Ehinger produced the actual envelope and the documents that were included in the original mailing they received, and it consisted of four pages. Mr. Ehinger stated that those four pages were the same as the four pages e-mailed.
16. The Petitioner also objected to any testimony related to the underlying exhibits because that information would be the same thing as the actual exhibits and the Petitioner has not had time to prepare for those.³
17. The Board's procedural rules require each party to provide all other parties a list of witnesses and exhibits at least 15 business days before a hearing and copies of its

³ The Petitioner failed to object to the testimony of Ms. Ooms relating to the substance of the exhibits, proceeded to cross-examine Ms. Ooms regarding the substance of the exhibits, and admitted rebuttal exhibits regarding the substance of the exhibits. The Board finds the Petitioner has waived this objection.

documentary evidence at least five business days before a hearing. 52 IAC 2-7-1(b). The Board may exclude evidence based on a party's failure to comply with those deadlines. 52 IAC 2-7-1(f). The ALJ sustained the objection and excluded the exhibits with the exception of Exhibit 24. In a dispute regarding the exchange of exhibits, the Board has discretion to exclude exhibits, but is not compelled to do so. As the final resolution of the matter is not affected by the conclusion, the Board ratifies the ALJ's determination.⁴

BURDEN OF PROOF

18. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that a property's assessment is wrong and what its correct assessment should 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). Nevertheless, the Indiana General Assembly enacted a statute that in some cases shifts the burden of proof:

This section applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal is an increase of more than five percent (5%) over the assessment for the same property for the prior tax year. In calculating the change in the assessment for purposes of this section, the assessment to be used for the prior tax year is the original assessment for that prior tax year or if applicable, the assessment for that prior tax year:

- (1) as last corrected by an assessing official;
- (2) as stipulated or settled by the taxpayer and the assessing official; or
- (3) as determined by the reviewing authority.

Ind. Code § 6-1.1-15-17.2 as amended March 25, 2014.

19. The Petitioner filed a motion asking the Board to rule in advance of the hearing that the Assessor had the burden of proof on grounds that the subject parcel's 2006 assessment

⁴ The Board notes that the Petitioner failed to place in the record, or attach to its Motion to Exclude Respondent's Evidence, the Assessor's allegedly deficient documents. Thus, the Petitioner has impeded the Board's ability to determine whether or not the Assessor was in substantial compliance or the Petitioner was prejudiced to such a degree that exclusion is warranted. Judging by the Petitioner's cross-examination and rebuttal exhibits, it appears the Petitioner was well aware of the sales comparisons the Assessor intended to introduce, and its claims of "extreme prejudice" ring hollow.

increased to \$1,931,000 from the 2005 assessed value of \$977,400. The Board granted the motion.

RESPONDENT'S CONTENTIONS

20. The subject property sold in 2004 for \$1.7 million. It sold again in 2005 for \$1.9 million. A Schlotzky's Deli across the street sold on 4/12/2004 for \$268.91 s/f. A review of other sales, including one on Indianapolis Blvd., a Burger King, an Arby's, a Hooters, and a Jalapenos, had a median of \$264 s/f. *Ooms testimony*. The Assessor argues this evidence supports the assessment.

PETITIONER'S CONTENTIONS

21. The burden of proof is on the Assessor in this case. Under Ind. Code § 6-1.1-15-17.2, the Assessor has not satisfied the burden of proof. *Ehinger argument*.
22. Petitioner challenged the probative value of Ms. Ooms's testimony, arguing:
 - a. Ms. Ooms did not investigate the sale or verify the sale with the buyer or the seller. She was not aware that the sales of the property were leased fee sales. She agreed that in a leased fee sale, on a long-term lease, the value of the sale price does not necessarily include just the improvements and the real estate, but rather an income stream. *Ooms cross-examination*.
 - b. Ms. Ooms believes that the sale of 8455 Broadway was an arm's-length transaction, but because it occurred in 2004, she does not know that positively. She testified that the sale of 8455 Broadway was not a distressed sale. Theoretically, the sale could have been part of a portfolio sale, but she does not believe that to be so because it went from one individual owner to another individual owner and not a name brand chain. *Ooms cross-examination*.

- c. The sales included in the exhibits show the median price per square foot is \$264. *Ooms testimony.* Ms. Ooms did not confirm the sales in her exhibits with the buyers and sellers, but they were all valid sales in the system. *Ooms cross-examination.*
 - d. Ms. Ooms did not undertake a detailed sales comparison approach. She did not make adjustments for condition, age, size, or location. She did not trend the sales for time because the sales were from 2004 and 2005, the state mandated time period for the 2006 assessment date. *Ooms cross-examination.*
 - e. Ms. Ooms did not do a cost approach to value for the subject property. She considers the assessed value to be the value using the cost approach. She also did not do an income approach to value. *Ooms cross-examination.*
 - f. Ms. Ooms does not know if the sales of 1620 E. Commercial, 4651 W. 61st, and 771 E. 81st Place, involved the sale of a brand or a lease of the property. *Petitioner Rebuttal Exhibits 1-3; Ooms cross-examination.*
 - g. Ms. Ooms testified that she is not an appraiser or real estate broker. Nor is she a Member of the Appraisal Institute (MAI) or a CMI. The testimony provided is not in accordance with USPAP. *Ooms cross-examination.*
23. The Board has determined on several occasions that when doing a sales comparison approach the individual presenting the sales comparison approach must provide a detailed comparison of each of the properties being utilized in the sales comparison approach as compared to the subject property. When that is not done it is not probative evidence of the market value-in-use of the subject property for the assessment date. This did not occur in this case and therefore the evidence presented is not probative. *Ehinger argument.*
24. The previous two sales of the subject property were leased fee sales and not fee simple sales, and accordingly, the Assessor did not show probative evidence of the market value-

in-use of the fee simple property, which is required under Indiana property tax law.
Ehringer argument.

ANALYSIS

25. In Indiana, assessors value real property based on the property's true tax value, which the 2002 Real Property Assessment Manual defines 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." MANUAL at 2. Thus, a party's evidence in a tax appeal must be consistent with that standard. *Id.* A market-value-in-use appraisal prepared according to USPAP will often be probative. *Kooshtard Property VI v. White River Twp. Ass'r*, 836 N.E.2d 501,506 n. 6. (Ind. Tax Ct. 2005). A party may also offer actual construction costs, sales information for the subject or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.
26. Regardless of the method used to rebut an assessment's presumption of accuracy, a party must explain how its evidence relates to the subject property's market value-in-use as of the relevant valuation date. *O'Donnell v. Department of Local Government Finance*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also Long v. Wayne Township Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). For the March 1, 2006, assessment, the valuation date was January 1, 2005. 50 IAC 21-3-3.
27. Here, the Assessor's exhibits were excluded because the Assessor failed to exchange them according to the statutory requirements. However, probative evidence of the value of a property does not necessarily require evidence to be documented in exhibits.
28. Ms. Ooms testified that the subject property sold for \$1.9 million in 2005. The Petitioner has not challenged that testimony.⁵ Evidence of a prior sale of the subject property in reasonable proximity to the valuation date may be sufficient evidence to support a valuation:

⁵ Mr. Ehringer's unsworn statements and argument are not evidence.

Indiana's assessment manual provides that a taxpayer may rebut the presumption of correctness afforded to assessments through the presentation of sales information regarding the *subject* or comparable properties. 2002 Real Property Assessment Manual (2004 Reprint) (hereinafter "Manual") (incorporated by reference at 50 Ind. Admin. Code 2.3-1-2 (2002 Supp.)) at 5. Conversely, an assessing official may also support the correctness of an assessment through the presentation of such evidence.

Shelbyville MHPI, LLC v. Thurston, 978 N.E.2d 527, 530 (Ind. Tax Ct. 2012) (emphasis added). The Petitioner failed to introduce any evidence regarding the 2005 sale of the subject property. When asked by the Petitioner if there was any investigation regarding the specifics of the 2005 sale, such as interviewing the buyer or seller, Ms. Ooms stated she did not make any inquiries. The Petitioner asked a series of hypothetical questions about whether the sale, if a leased fee sale, might require adjustments to arrive at a fee simple valuation. But the Petitioner failed to introduce any evidence that the 2005 sale involved a leased fee interest, and the Board has no grounds to find that the 2005 sale must be adjusted in order to be considered probative evidence. The Assessor has made a prima facie case to support an assessment of \$1,900,000.⁵

29. The Petitioner chose not to present a case in chief, rolling the dice that the Board would find that the Assessor failed to meet the burden of proof.⁶ Ergo, the Petitioner has failed to rebut the Assessor's prima facie case.

CONCLUSION

30. The Respondent established a prima facie case for an assessment of \$1,900,000.

⁵The Board finds that the sales comparison analysis of other properties fails to establish the comparability of the properties being examined. Conclusory statements that a property is "similar" or "comparable" to another property do not constitute probative evidence of the comparability of the two properties. *Long*, 821 N.E.2d at 470. Because the Assessor made no adjustments to account for differences in size, age, condition or location, the analysis does not establish a prima facie case. However, any flaws in the comparable analysis are irrelevant to the Board's determination.

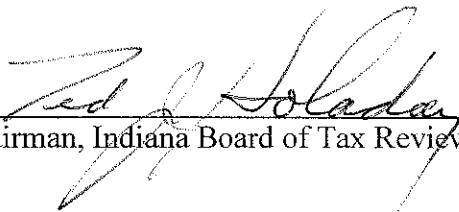
⁶ Not only did the Petitioner choose not to present a case, but after handing what was evidently the Petitioner's appraisal to the ALJ by mistake, demanded its return to ensure it would not inadvertently become part of the record.

FINAL DETERMINATION

In accordance with the above findings of fact and conclusions of law, the Indiana Board of Tax Review determines that the assessed value of the Petitioner's property for the March 1, 2006 assessment is \$1,900,000.

The Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review on this date _____.

ISSUED: October 20, 2014



Chairman, Indiana Board of Tax Review



Commissioner, Indiana Board of Tax Review



Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5, as amended effective July 1, 2007, by P.L. 219-2007, and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. P.L. 219-2007 (SEA 287) is available on the Internet at <http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>