

INDIANA BOARD OF TAX REVIEW
Small Claims
Final Determination
Findings and Conclusions

Petition #: 69-010-12-1-5-00001
Petitioner: John Fleming
Respondent: Ripley County Assessor
Parcel #: 69-09-24-444-124.000-010
Assessment Year: 2012

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 Petitioner initiated an assessment appeal with the Ripley County Property Tax Assessment Board of Appeals (PTABOA) by filing Form 130 dated October 25, 2012.
2. The Petitioner received notice of the decision of the PTABOA on March 20, 2013.
3. The Petitioner filed an appeal to the Board by filing a Form 131 on May 06, 2013. Petitioner elected to have this case heard according to small claims procedures.
4. Administrative Law Judge Paul Stultz held the Board's administrative hearing on March 11, 2014. He did not inspect the property.
5. John Fleming appeared *pro se*. The County Assessor Shawna Bushhorn represented the Respondent. John Fleming, Shawna Bushhorn, and Clint Nuhring were sworn as witnesses.

Facts

6. The subject is single family residential property, as is shown on the property record card. *Resp't Ex. 1.*
7. The PTABOA determined the assessed value for 2012 is \$9,300 for land and \$48,400 for improvements (total assessed value of \$57,700).
8. The Petitioner contended the total assessed value should be \$55,000.

Record

9. The official record for this matter is made up of the following:
- a. The Petition,
 - b. A digital recording of the hearing,
 - c. Petitioner Exhibit 1- Appraisal Report,
Respondent Exhibit 1-Appraisal Report and subject property record card (PRC),
Board Exhibit A - Form 131 Petition with attachments,
Board Exhibit B - Notice of Hearing,
Board Exhibit C - Hearing Sign In Sheet,
 - d. These Findings and Conclusions.

Objections

10. The Respondent objected to the admission of the Petitioner's appraisal of the subject property (Petitioner's Exhibit 1.) because the appraiser who prepared it, Kenneth McIntosh, was not present to testify or be cross-examined about the appraisal. The Respondent probably intended to make a hearsay objection. The appraisal is admissible under administrative law rules. Hearsay evidence is admissible, but with significant limitations:

Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. If the hearsay evidence is not objected to, the evidence may form the basis for a determination. However, if the evidence: (1) is properly objected to; and (2) does not fall within a recognized exception to the hearsay rule; the resulting determination may not be based solely upon the hearsay evidence.

52 IAC 2-7-3. The Board finds the appraisal should be admitted, but because the Petitioner objected, it cannot serve as the sole basis for the Board's decision.

11. Mr. Fleming objected to the admission of the Respondent's appraisal of the subject property (Respondent Ex.1). Mr. Fleming contends Mr. Nuhring's appraisal may be biased because he was a member of the PTABOA and the Assessor paid for the appraisal. Further, Mr. Nuhring did not do an interior inspection of the subject property. The Petitioners' objections go to the weight and credibility of the evidence, not its admissibility. The objection is overruled and Respondent Exhibit 1 is admitted into the record.

Burden of Proof

12. Generally, a taxpayer seeking review of an assessing official's determination has the burden to prove that a property's assessment is incorrect and what the 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). A burden-shifting statute creates two exceptions to that rule in Indiana Code § 6-1.1-15-17.2 as amended by P.L.97-2014.
13. First, I.C. § 6-1.1-15-17.2 "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." I.C. § 6-1.1-15-17.2(a) "Under this section, the county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court." I.C. § 6-1.1-15-17.2(b).
14. Second, I.C. § 6-1.1-15-17.2(d) "applies to real property for which the gross assessed value of the real property was reduced by the assessing official or reviewing authority in an appeal conducted under I.C. § 6-1.1-15." Under those circumstances, "if the gross assessed value of real property for an assessment date that follows the latest assessment date that was the subject of an appeal described in this subsection is increased above the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase, the county assessor or township assessor (if any) making the assessment has the burden of proving that the assessment is correct." This change is effective March 25, 2014, and has application to all appeals pending before the Board. These provisions may not apply if there was a change in improvements, zoning, or use, or if the assessment was based on an income capitalization approach.
15. Both parties agree that the Respondent has the burden of proof. The 2013 PRC shows the assessor's assessment for 2011 was \$52,400. *Resp't Ex. 1*. The PTABOA determination for the 2012 assessment was \$57,700, which is an increase in excess of five percent. *Board Ex. A*.

Contentions

16. The Respondent presented the following evidence:
 - a. The subject property was appraised by certified appraiser Clint Nuhring at the request of the Respondent. *Bushhorn testimony; Resp't Ex. 1*.
 - b. The property was inspected on December 9, 2013. The opinion of value is retrospective to March 1, 2012. An interior inspection was not requested or done. The overall condition of the dwelling was determined based on the exterior condition. The income approach to value was deemed unnecessary and the cost

approach to value was not completed due to the age of the subject property. The value using the cost approach can vary substantially for property that is five or six years old. This is due to variation in arriving at the depreciated value. The appraisal focused on the sales approach to value. *Nuhring testimony; Resp't Ex. 1.*

- c. Due to limited sales data in the local market two comparables used are located in Versailles, not Milan where the subject is located. The choice of the three comparables that were used was based on the fact they resulted in more desirable adjustments. Additional knowledge of the condition of the interior of the subject property could alter the opinion of value. *Nuhring testimony; Resp't Ex. 1.*
- d. Mr. Nuhring was paid \$300 or \$350 for the appraisal and is member of the Ripley County PTABOA. PTABOA members are paid \$150 per day that they execute their duties. He is not being paid to appear and testify at this hearing today. *Bushhorn testimony.*

17. The Petitioner's presented the following evidence:

- a. When the assessment on the property went from \$52,000 to \$68,000, the Petitioner had the property appraised by certified appraiser Kenneth McIntosh. The date of the opinion of value is as of February 14, 2013, and the value is \$55,000. The PTABOA changed the assessed value to \$57,700 which is five percent higher than that appraised value. The PTABOA Determination gave no reason for the assessed value of \$57,700 on the Form 115, *Fleming testimony; Pet'r Ex. 1; Board Ex. A.*
- b. The McIntosh appraisal is more accurate than the Respondent's appraisal because the comparable sales match the subject property better than the comparables in the Respondent's appraisal. Also, the McIntosh appraisal has more comparables. The Petitioner does not think all of the comparable sales in the McIntosh appraisal are from distressed sales. *Fleming testimony; Pet'r Ex. 1; Resp't Ex. 1.*
- c. The Respondent should have found an appraiser who was more impartial than Mr. Nuhring. He was paid for his appraisal assignment and he is a member of the PTABOA and was present at the PTABOA hearing. *Fleming testimony.*

Analysis

18. The Respondent provided sufficient evidence to support the subject properties current assessment. This conclusion was arrived at because:

- a. Real property is assessed based on its "true tax value," which means "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." Ind. Code § 6-1.1-31-6(c); 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC

2.4-1-2). The cost approach, the sales comparison approach, and the income approach are three generally accepted techniques to calculate market value-in-use. *Id.* at 2. Assessing officials primarily use the cost approach. *Id.* at 3. The cost approach estimates the value of the land as if vacant and then adds the depreciated cost new of the improvements to arrive at a total estimate of value. *Id.* at 2. Any evidence relevant to the true tax value of the property as of the assessment date may be presented to rebut the presumption of correctness of the assessment, including an appraisal prepared in accordance with generally recognized appraisal standards. *Id.* at 3.

- b. Regardless of the method used to challenge an assessment's presumption of accuracy, a party must explain how its evidence relates to market value-in-use as of the relevant valuation date. *O'Donnell v. Dep't of Local Gov't Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also Long v. Wayne Twp. Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). For the 2012 assessment, the valuation date was March 1, 2012.
- c. The Respondent engaged Mr. Nuhring to appraise the subject property after the Petitioner appealed. Mr. Nuhring is a certified appraiser. The opinion of value is \$65,000 as of March 1, 2012. Mr. Nuhring determined the income approach to value was unnecessary and the cost approach to value was not appropriate due to the age of the subject property. He focused on the sales comparison approach to value because it is best indication of value for the property. He stated that due to the limited number of sales two comparables were located in Versailles and one was in Milan.
- d. Mr. Fleming contended Mr. Nuhring was not impartial due to the fact he was paid for his appraisal assignment, and that he was a PTABOA member who heard Mr. Fleming's appeal at the PTABOA hearing. Bias goes to the credibility rather than the admissibility of Mr. Nuhring's testimony. *See Mitchell v. State*, 813 N.E.2d 422, 431-32 (Ind Ct. App. 2004). The testimony is admissible.
- e. The Board has previously expressed its disapproval of a member of a PTABOA, who participated in the decision, testifying before the Board on behalf of an Assessor. *See Utilimaster Corp. v. Elkhart Co. Assessor*, Pet. Nos. 20-017-06-1-3-00001, *et. seq.*, Ind. Bd. Tax Rev., February 24, 2010. The Board has noted that it creates the appearance of a conflict of interest and demeans the entire appeals process. It calls into question whether Mr. Nuhring conducted the appraisal in accordance with the Uniform Standards of Professional Appraisal Practice and Advisory Opinions (USPAP). The USPAP ethics rules are clear:

Conduct

An appraiser must perform assignments ethically and competently, in accordance with USPAP and any supplemental standards agreed to by the appraiser in accepting the assignment. An appraiser must not engage in criminal conduct. An appraiser must perform

assignments with impartiality, objectivity, and independence, and without accommodation of personal interests.

In appraisal practice, an appraiser must not perform as an advocate for any party or issue.

UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE
AND ADVISORY OPINIONS at 7 (2004 ed.).

Furthermore, as of July 1, 2014, pursuant to I.C. § 6-1.1-22.6-26.7, appraisers who contract with an assessor are specifically prohibited from serving on the PTABOA in the county where the appraiser is employed.

- f. However, the Board is not reviewing the bias of Mr. Nuhring in regard to the PTABOA determination. The question is whether Mr. Nuhring's role on the PTABOA, and the natural inclination to defend that decision, so impacts his credibility as to find that Mr. Nuhring did not offer an assessment in accordance with generally accepted appraisal practices. The Board reluctantly finds that, in spite of the appearance of impropriety, Mr. Nuhring presents evidence that supports a prima facie case for the Respondent's assessment of the subject property.
- g. The Respondent did not request the assessment be raised to the appraised value of \$65,000 and concedes the value of \$57,700. The burden shifts to the Petitioner to present a prima facie case for a lower value.
- h. The Petitioner submitted an appraisal prepared by a certified appraiser, Mr. McIntosh, valuing the property at \$55,000. His appraisal is arguably probative of the subject property's market value-in-use. As explained above, however, Mr. McIntosh's appraisal report is hearsay, to which the Assessor properly objected. As also explained, if hearsay "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." 52 IAC 2-7-3. That rule essentially restates the "modified residual rule" that Indiana courts have applied to administrative hearings in general. *See CTS Corp. v. Shoulton*, 270 Ind. 34, 383 N.E.2d 293, 296 (1978) ("If properly objected to at the hearing and preserved on review and not falling within a recognized exception to the Hearsay Rule, then an award may not be based solely upon such hearsay.") (quoting *CTS Corp. v. Shoulton*, 354 N.E.2d 324, 332 (Ind. Ct. App. 1976) (Buchanan, J. dissenting)). Because the Petitioner did not introduce any evidence other than the appraisal, the Board cannot lower the assessment by the \$2,700 sought by the Petitioner.

Conclusion

19. The Respondent made a case for the assessment in the amount of \$57,700. The Petitioner failed to prove the assessment should be less.

Final Determination

In accordance with the above findings and conclusions the Indiana Board of Tax Review now affirms the assessment.

ISSUED: September 8, 2014

Commissioner, Indiana Board of Tax Review

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- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days after the date of this notice. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. The Indiana Tax Court's rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.