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

Petition No.: **71-026-02-1-5-00029**
Petitioner: **Jerome Ivacic**
Respondent: **Portage Township Assessor (St. Joseph County)**
Parcel No.: **18-7064-2364**
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 Petitioner initiated an assessment appeal with the St. Joseph County Property Tax Assessment Board of Appeals (the PTABOA) by written document dated January 13, 2004.

2. The Petitioner received notice of the decision of the PTABOA on June 16, 2004.

3. The Petitioner filed a Form 131 petition with the Board on July 12, 2004. The Petitioner elected to have this case heard according to the Board's small claim procedures.

4. The Board issued a notice of hearing to the parties dated April 24, 2008.

5. The Board held an administrative hearing on May 29, 2008, before the duly appointed Administrative Law Judge (the ALJ) Dalene McMillen.

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

   a. For Petitioner: Jerome P. Ivacic, Owner
      Joyce L. Schultz, Witness/Petitioner's Employee

   b. For Respondent:[1] Ross Portolese, PTABOA Member
      Ralph J. Wolfe, PTABOA Member
      Dennis J. Dillman, PTABOA Member
      Rosemary Mandrici, Portage Township Assessor

[1] The Respondent was represented by attorney, Frank Agostino.

Facts

7. The property under appeal consists of a 1,728 square foot duplex with a detached garage located at 1149 Ewing, South Bend, Portage Township, in St. Joseph County, Indiana.

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

9. The PTABOA determined the assessed value of the subject property to be $1,600 for the land and $70,500 for the improvements, for a total assessed value of $72,100.

10. The Petitioner did not request a specific value on the Form 131.

Issue

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

    a. The Petitioner contends that the subject property is over-assessed compared to area properties. *Ivacic and Schultz testimony.*[2] In support of this position, the Petitioner submitted the 2003 assessment information on the assessed value per square foot of sixty-nine duplex properties located in the neighborhood. *Petitioner Exhibit 3; Id.* The Petitioner determined five properties were most comparable to the subject property in size, design and age. *Petitioner Exhibits 1, 2 and 4; Id.* According to the Petitioner, he prepared a grid with adjustments made to the subject property and the comparable properties by calculating the differences between the properties on an assessed value per square foot. *Petitioner Exhibit 2; Id.* The Petitioner contends the comparable analysis shows that the subject property should be valued at $26.96 per square foot or $46,600. *Petitioner Exhibit 2; Id.*

    b. In response to questions from the Respondent, the Petitioner testified that the subject property is a rental and that the gross rent for 2002 as shown on his tax form schedule E was $12,745. *Ivacic testimony.* The Petitioner also testified that he believed the gross rent multiplier for 2002 should be between 4 to 5 times the gross rent. *Id.* The Petitioner contends that to calculate a fair assessed value on the subject property the cost of the utilities should be subtracted from the gross

[2] Mr. Ivacic testified as to negotiations that occurred with the former Township Assessor wherein changes were made to the property's assessment. *Ivacic testimony.* The Respondent contends that the "agreement" was made by the former Assessor when he had no authority to enter into any agreements and any changes purportedly agreed to were not adopted by the PTABOA. *Mandrici testimony*. In fact, the PTABOA voted to uphold Ms. Mandrici's assessment of $72,100. *Board Exhibit A.* Indiana Rules of Evidence, Rule 408 states that "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim, which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount." Therefore, any purported "agreement" with the former assessor has no effect between the parties and no evidentiary value before the Board.

rent and then a gross rent multiplier of 4.5 applied which would result in an assessed value approximately $52,000. *Id.*

c. Finally, in response to questioning from the Respondent, the Petitioner testified that he purchased the property on September 3, 1999. *Ivacic testimony.* When asked what it was purchased for, Mr. Ivacic responded "I believe $45,000." *Id.*

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

a. The Respondent argues that the Petitioner's analysis based on assessed values in the subject neighborhood is flawed. *Mandrici testimony; Agostino argument.* According to the Respondent, properties are not comparable simply because they are located in the same neighborhood. *Id.* Ms. Mandrici testified that physical and obsolescence depreciation is applied to the each property individually in a neighborhood. *Mandrici testimony.*

b. The Respondent further contends that the subject property is correctly assessed at $72,100. *Mandrici testimony.* According to Ms. Mandrici, because the subject property is a rental property, it was priced utilizing a gross rent multiplier of 5.5. *Id.* Ms. Mandrici testified that the gross rent multiplier for the area was determined by compiling rents and gross rent multipliers and 5.5 was the average for the neighborhood. *Id.* Therefore, the Respondent contends, if the average gross rent multiplier of 5.5 is applied to the Petitioner's 2002 gross rent of $12,745, the value of the subject property is approximately $70,100. *Id.*

c. To the contrary, however, the Respondent's witness, Mr. Dillman, testified that a fair assessment of the subject property for the year of 2002 would be to take the Petitioner's gross rent figure of $12,745 times a gross rent multiplier of 4.5 for an assessed value of $57,352, rounded to $57,400. *Dillman testimony.* According to Mr. Dillman, "the gross rent multiplier as established by this county was somewhere between 4 and 5." *Id.* Based on this estimate, Mr. Dillman concludes that the Board should apply a 4.5 gross rent multiplier for the property. *Id.*

Record

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

a. The Form 131 petition and related attachments.
b. The digital recording of the hearing.
c. Exhibits:

Petitioner Exhibit 1 – Petitioner's "small claims narrative," dated May 29, 2008.
Petitioner Exhibit 2 – Petitioner's residential assessment report on the subject property and five comparable properties,
Petitioner Exhibit 3 – Petitioner's 2003 database report on duplex and single-family properties in the neighborhood,
Petitioner Exhibit 4 – St. Joseph County ECAMA overview of property, exterior photograph and property record card for the properties located at 1149 Ewing, 1710 Leer, 1619 Leer, 1133 Calvert, 1610 LWE and 1314 LWE,

Respondent Exhibit 1 – Petition to Indiana Board of Tax Review for Review of Assessment – Form 131,
Respondent Exhibit 2 – Notification of Final Assessment Determination – Form 115,
Respondent Exhibit 3 – Page 4 of Petition to the Property Tax Assessment Board of Appeals for Review of Assessment – From 130,

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.

Analysis

14. The most applicable governing cases are:

a. A Petitioner seeking review of a determination of an assessing official has the burden to establish a prima facie case proving that the current assessment is incorrect, and specifically what the correct assessment would be. *See Meridian Towers East & West v. Washington 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).

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 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").

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

15. The weight of the evidence supports the Respondent. The Board reached this decision for the following reasons:

a. The Petitioner contends that his property is over-valued based on the assessed values of similar duplexes in the neighborhood. *Ivacic testimony.* In support of this contention, Mr. Ivacic presented a chart of the 2003 assessments of 69 neighboring properties and an analysis of the assessments of five purportedly comparable properties. *Petitioner Exhibit 1 – 4.*

b. The 2002 Real Property Assessment Manual (the 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 similar user, for the property." 2002 REAL PROPERTY ASSESSMENT MANUAL – VERSION A at 2 (incorporated by reference at 50 IAC 2.3-1-2). A taxpayer may use any generally accepted appraisal method as evidence consistent with the Manual's definition of true tax value, such as actual construction cost, appraisals, or sales information regarding the subject property or comparable properties that are relevant to the property's market value-in-use, to establish the actual true tax value of a property. MANUAL at 5.

c. Here the Petitioner presents a "comparable" analysis using the cost-based assessments of neighboring properties. *Petitioner Exhibit 2.* In order to effectively use the sales comparison approach as evidence in property assessment appeal, the proponent must 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. *Long*, 821 N.E.2d at 470. Instead, the party seeking to rely on a sales comparison approach must explain the characteristics of the subject property and how those characteristics compare to those of purportedly comparable properties. *See Id.* at 470-71. They must explain how any differences between the properties affect their relative market value-in-use. This the Petitioner did not do. In a broad sense, the Petitioner's position correctly recognizes that one can estimate a given property's market value by comparing it to similar properties, however, the analysis compiled needed to show it was done in accordance with generally accepted appraisal principles. By the Petitioner looking to the purportedly comparable properties' cost-based assessment rather than to their sales prices, the Petitioner improperly mixes two methodologies – the cost and sales comparison approaches. Further, the Petitioner's only evidence regarding the comparability

of the neighboring properties was that the properties were duplexes located in the same neighborhood and they were "similar to the subject in size, design and age." *Schultz testimony.* This is insufficient to show the comparability of the properties.

d. Second, in response to questioning, the Petitioner contends that the property is rental property and, therefore, should be valued using the income approach. *Ivacic testimony.* "The income approach to value is based on the assumption that potential buyers will pay no more for the subject property …than it would cost them to purchase an equally desirable substitute investment that offers the same return and risk as the subject property." MANUAL at 14. Here, the Petitioner testified that a 4.5 gross rent multiplier should be applied after subtracting the utility expenses from the gross rent. Mr. Ivacic, however, failed to present any evidence to show how he determined the ratio or that subtracting utility expense from the gross rent is typical for the market. The Respondent's witness, Mr. Dillman, likewise, testified the gross rent multiplier is between 4 and 5 and accepted the Petitioner's 4.5 estimate. *Dillman testimony.* Mr. Dillman, however, did not agree that utilities should be deducted from the rent. *Id.*

e. Finally, in response to the Respondent's questions, the Petitioner testified "I believe" the subject property was purchased for $45,000 on September 3, 1999. *Ivacic testimony.* The Petitioner did not make such a representation in his Petition. Nor did he present the testimony as part of his case in chief. The Petitioner failed to testify as to whether the sale was an arms' length transaction or whether the sale price represented the property's market value-in-use. Further, the record contains no documentary evidence in support of the Petitioner's purported purchase price.

f. The Respondent, on the other hand, affirmatively testified that the township applies a 5.5 gross rent multiplier to rental properties in the neighborhood and that the 5.5 multiplier was determined by reviewing rents and rent multipliers in the area. *Mandrici testimony*. Thus, the Respondent argues, applying a gross rent multiplier of 5.5 to the Petitioner's 2002 gross rent of $12,745, results in a value of approximately $70,100 for the subject property. *Id.*

g. Here, the Petitioner sought a value of $46,000 using his comparative analysis. The Petitioner and Mr. Dillman presented some evidence that a gross rent multiplier of 4.5 should be used to value the Petitioner's rental property resulting in a value the Petitioner contends is $52,000. Further, the Petitioner presented weak evidence that the property may have been purchased for $45,000 in 1999. None of the evidence, however, was sufficiently certain or sufficiently supported to warrant a change in the assessment. The Petitioner had the burden to raise a prima facie case proving that the current assessment is incorrect, and specifically what the correct assessment would be. *See Meridian Towers* 805 N.E.2d at 478. Here, the Petitioner failed to sufficiently prove what the correct assessment should

be. The Board finds the Respondent's testimony that a 5.5 gross rent multiplier is used in the neighborhood to value rental property is the more credible evidence.

Conclusion

16. The Board holds that the weight of the evidence supports the assessment and finds in favor of the Respondent.

Final Determination

In accordance with the above findings and conclusions the Indiana Board of Tax Review now determines that the assessments should not be changed.

ISSUED: _____

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Commissioner,
Indiana Board of Tax Review

_____
Commissioner,
Indiana Board of Tax Review

Commissioner Duga concurring, Chairman Wendt dissenting.

Concurring Opinion

While I fully concur with the majority opinion, I wish to offer some further comment in light of the dissent.

This is a very close case which turns on the weight of the evidence presented. The evidence presented by both parties, unfortunately, is not particularly clear.

The Petitioner, who is a registered tax representative, did not rely on the September 3, 1999, purchase of the property to establish its value, either in his case in chief nor when the purchase price was solicited by the Respondent's counsel. The only evidence of the purchase price is the Petitioner's response that he believed that he paid $45,000 for the property. The Petitioner, in his closing, sought a value for the property of $52,000, which is greater than the purchase price.

I agree that an arms length purchase at the correct date is the best evidence of value. Here, however, the only evidence is a belief of a price and a date upon which the Petitioner, a tax representative, does not rely. This indicates, to me, that this particular purchase is not an arms' length transaction. The testimony, therefore, while being some evidence, is not strong enough to create a prima facie case.

Similarly, Dennis Dillman does not sufficiently explain how he reached a value of $57,400 to prevent that figure from being merely conclusory. This is especially true given the thorough explanation of the Respondent's $72,100 valuation.[1]

Ultimately, the question is "was there sufficient evidence of what the value of the property should be?" In this case, weighing the evidence, I believe that there is not.

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Commissioner,
Indiana Board of Tax Review

Dissenting Opinion

I respectfully dissent from the majority opinion.

Under the law as it affects administrative cases conducted by the Board, the petitioner has the burden to show by a preponderance of the evidence that he is entitled to a judgment that reflects his evidence. Fundamentally, the petitioner has the burden to initially go forward and present a prima facie case in this effort. As the Tax Court has stated, this evidence can come in various fashions, forms and approaches and such evidence must be considered regardless of how it comes to be part of the record of the proceedings.

[1] Although the Respondent's attorney punted in his closing and asked the Board to choose the value, be it $57,400 or $72,100, the Petitioner continued to seek a lesser value. Therefore, there was no agreement or meeting of the minds among the parties.

In this case, the Petitioner presented evidence in the form of a grid of properties and their corresponding assessments and argued that these properties were "comparable" to the subject property due in large part to the fact that they were situated in the same "neighborhood." The Petitioner concluded that, because these "comparables" were assessed at a lower per square foot basis as compared to the subject property, the subject property was therefore over-assessed. As specifically pointed out by the majority, this evidence was neither persuasive nor probative to the extent that it satisfied the Petitioner's burden to present a prima facie case. I concur with this holding.

Nonetheless, following the Petitioner's presentation of evidence and during the Respondent's cross-examination of the Petitioner, counsel for Respondent queried the Petitioner as to the sales price and the sales date of the property in question. In response, the Petitioner testified that he had purchased the subject property on September 3, 1999, for the price of $45,000. The valuation date that is at issue in this case is January 1, 1999. There is no question but that a sale that is within eight months of the valuation date is relevant. Further, barring other disqualifications or limitations, a sale such as this will often provide the best evidence of the value of the property in question. However, the Petitioner's testimony as elicited by counsel for the Respondent was narrow and brief – offering only the sale date and sales price. The Petitioner offered no additional background information concerning this sale. As important, counsel for the Respondent asked no further questions of the Petitioner regarding the nature of this sale. So, the issue is whether this sale was an "arms length sale" and worthy of great consideration when weighing the evidence. Given the circumstances under which this evidence was elicited, I conclude that it is credible and probative.

It is not just this testimony upon which I base this conclusion. During the Respondent's case-in-chief, counsel for the Respondent called as a witness Dennis Dillman, a member of the PTABOA from which this appeal was taken. This PTABOA member participated in the proceedings below, but dissented from the PTABOA's final determination, (finding that the proper assessed value of the subject property was $72,100).[1] Mr. Dillman testified that the subject property had a value of $57,400 on the assessment date. At this point, this testimony and evidence also became the evidence of this case. Moreover, since this witness was called by the Respondent and his testimony was elicited by its counsel, it became the Respondent's evidence. This conclusion is further bolstered and corroborated by the closing comments of the Respondent's counsel where he referenced Mr. Dillman's testimony while concluding that the proper assessed value of the subject property was within a range of $57,400 (as testified to by Mr. Dillman) and $72,100.

[1] To this Commissioner's knowledge, there is no rule or reported case that would preclude the testimony of such a witness who, as a member of the PTABOA, was directly involved in the preceding stages. On a fundamental level, I have great difficulty in finding that an individual member's testimony concerning the PTABOA's final determination is relevant to a case that advances on appeal to the Board. The PTABOA speaks by one voice in the form of its final determination and not by the various voices of its members. Further, in this case the member's only knowledge of this case was as a result of his participation as a member. He did not come before the Board with any independent factual knowledge or assessing expertise would be a circuitous argument which starts and ends with his participation as a PTABOA member. Irrespectively, the Petitioner did not object so this witness-member's testimony is the evidence of this case.

The Petitioner's evidence and argument was that the proper assessed value of the subject property was $52,000. In large part, the Petitioner's argument is consistent with the testimony of Mr. Dillman. However, the Petitioner decreased his claim arguing that he, as owner of the subject rental property, incurred overhead costs such as utilities. I would find that no such adjustments are required. Given the rather unique nature of the evidence in this case, I would find that the proper assessed value of the property is $57,400.

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Chairman,
Indiana Board of Tax Review

IMPORTANT NOTICE

- 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.