STATE OF INDIANA
Board of Tax Review

JOHN ROGERS	)	On Appeal from the Lake County Property
	)	Tax Assessment Board of Appeals
	)	
Petitioner,	)	
	)	Petition for Review of Assessment, Form 131
v.	)	Petitions No.: See Attachment.
	)	Parcels No.: See Attachment.
LAKE COUNTY PROPERTY TAX	)	
ASSESSMENT BOARD OF APPEALS	)	
And CALUMET TOWNSHIP	)	
ASSESSOR	)	
	)	
Respondents.	)	

Findings of Fact and Conclusions of Law

On January 1, 2002, pursuant to Public Law 198-2001, the Indiana Board of Tax Review (IBTR) assumed jurisdiction of all appeals then pending with the State Board of Tax Commissioners (SBTC), or the Appeals Division of the State Board of Tax Commissioners (Appeals Division). For convenience of reference, each entity (the IBTR, SBTC, and Appeals Division) is hereafter, without distinction, referred to as "State". The State having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

Issue

1) Whether the property should receive a greater negative influence factor.

Findings of Fact

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also, if appropriate, any conclusion of law made herein shall also be considered a finding of fact.

2. Pursuant to Ind. Code § 6-1.1-15-3, Nelvin Reagins filed Form 131 petitions on behalf of John Rogers requesting a review by the State.[1] One Form 131 petition was filed on November 1, 2000; the Lake County Property Tax Assessment Board of Appeals (PTABOA) issued the Form 115, Notification of Final Assessment Determination, on the underlying Form 130 petition on October 2, 2000. The remaining Form 131 petitions were filed on January 19, 2000; the Lake County PTABOA issued Forms 115 for these appeal petitions on December 20, 1999.

3. Pursuant to Ind. Code § 6-11-15-4, an administrative hearing was scheduled for January 29, 2002, at 1:00 P.M. in Crown Point, Indiana. Notice of said hearing was mailed to Nelvin Reagins and John Rogers at the addresses listed on the petitions. The notices were mailed on December 21, 2001.

4. On January 29, 2002, administrative law judge Ellen Yuhan conducted the administrative hearing on the Form 131 petitions. Neither the Petitioner nor his representative appeared at the hearing.

5. The Petitioner and his representative did not contact the State or the administrative law judge prior to the scheduled hearing date and did not request a continuance of the hearing.

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[1] The record indicates that Mr. Rogers, the owner of the property on the assessment date, is deceased. Mr. Reagins, the current owner of the parcels under appeal, has been designated Petitioner's Representative. Mr. Douglas M. Grimes is the attorney for both the Estate of John Rogers and Mr. Reagins. (Board's Exhibit D).

6. The administrative law judge verified that notices of hearing were mailed, with proof of mailing, and also verified that the notices to the taxpayer's representative were not returned to the State as undeliverable.

7. The State issued an Order of Dismissal (State's Exhibit C) on March 5, 2002. Said Order allowed the Petitioner ten (10) days to file a written objection, requesting the Order be vacated and set aside.

8. On March 9, 2002, Douglas M. Grimes, attorney for the Petitioners, served the State with an Objection to Issuance of Order of Dismissal (State's Exhibit D).

9. In response to the above Objection, the State granted the request for a rehearing (State's Exhibit E) on March 19, 2002.

10. Pursuant to Ind. Code § 6-11-15-4, an administrative hearing was held on May 8, 2002, before administrative law judge Ellen Yuhan. Testimony and exhibits were submitted as evidence. Douglas M. Grimes, attorney, represented the Petitioner. Donald Griffin, Commercial Supervisor for Calumet Township, and Mary Shaw, Assistant Commercial Supervisor, represented the Calumet Township Assessor's Office. No representative was present from the Lake County PTABOA.

11. At the hearing, the Form 131 petitions were made a part of the record and labeled State's Exhibit A. The Notices of Hearing on Petition are labeled State's Exhibit B. In addition, the following documents were submitted to the State:
    Petitioner's Exhibit 1- Deed for four parcels purchased at tax auction by Nelvin and Maxine Reagins.
    Petitioner's Exhibit 2-Form 130 petition with grounds for appeal.
    Petitioner's Exhibit 3-Record of Decision (ROD) for the subject parcel.
    Petitioner's Exhibit 4-Declaration of Restriction on Use of Real Property for parcels owned by Nelvin Reagins.
    Petitioner's Exhibit 5-Letter from the Indiana Department of Environmental Management (IDEM) to Maxine Reagins.

Petitioner's Exhibit 6-Verified Complaint to Declare Restrictive Covenant.
Petitioner's Exhibit 7-Letter from the United States Environmental Protection Agency (EPA) to Nelvin Reagins.
Petitioner's Exhibit 8-Letter from the EPA to Mr. Grimes.
Petitioner's Exhibit 9-Letter from the EPA to John Rogers.
Petitioner's Exhibit 10-General Notice and Demand Letter from the EPA to Nelvin and Maxine Reagins.
Petitioner's Exhibit 11-Letter, dated March 8, 1993, from Mr. Grimes to the EPA.
Petitioner's Exhibit 12-Letter, dated March 8, 1993, from Mr. Grimes to the Calumet Township Assessor.
Petitioner's Exhibit 13-Order from the Lake County Circuit Court.
Petitioner's Exhibit 14-Administrator's Deed, dated August 20, 2001, transferring the subject property from John Rogers' estate to Nelvin and Maxine Reagins.
Petitioner's Exhibit 15-Notices of Tax Sale for the subject property, dated January 2, 2001.

12. The property under appeal consists of twenty-one parcels, which are part of the Lake Sandy Jo landfill, located on the southeast side of the City of Gary, Calumet Township, Lake County.

13. The Hearing Officer did not view the subject property.

Issue No. 1 - Whether the property should receive a greater negative influence factor.

14. The PTABOA determined that the parcels should receive a negative influence factor ranging from 30% to 80% (sixteen of the twenty-one parcels have a negative 80% influence factor). The Petitioner contended the following:
    1. the property has no productive value;
    2. the property is obsolete because no income-producing activity can be conducted on the property;

3. The property is under the dominion and control of the United States government and, as such, should be treated as government owned and occupied;[2]
4. The facts are not covered by Indiana laws pertaining to property assessment, procedures, and guidelines; and
5. The property should have no remainder value and no true tax value.

15. Mr. Grimes testified to the following:
    a. Nelvin and Maxine Reagins originally purchased the property at a Commissioners' sale in 1984. For personal reasons, they subsequently transferred the property to John Rogers, who owned the property on the assessment date and held the property until his death. The property has been deeded back to the Reagins by John Rogers' estate. *Grimes Testimony; Petitioner's Exhibits 1 and 14.*
    b. The parcels under appeal are included in what is known as the Lake Sandy Jo (LSJ) Superfund site, bounded on the south by the Tri-State Expressway (Interstate 80-94), on the west by Wright Street, on the north by 25th Avenue, and on the east by Jennings Street. During the mid-1980's, the United States Environmental Protection Agency (EPA) determined that there was a release or threatened release of hazardous substances from the LSJ site. The EPA undertook several actions at the site under the authority of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). The actions included a Site Investigation (SI), Feasibility Study (FS), and Remedial

[2] The Petitioner did not develop this argument. However, the State notes "The owner of any real property on the assessment date of a year is liable for the taxes imposed for that year on the property, unless a person holding, possessing, controlling, or occupying any real property on the assessment date of a year is liable for the taxes imposed for that year on the property under a memorandum of lease or other contract with the owner that is recorded with the county recorder before January 1, 1998." Ind. Code § 6-1.1-2-4(a).

Investigation (RI). The RI concluded that landfill surface soils, nearby drainage ditch sediments, and groundwater contained site related contaminants. The recommended cleanup action for the site involved the following: sediment excavation; soil cover for the landfill; groundwater, surface water, and sediment monitoring; and providing an alternate water supply for citizens with private wells in the area. These actions were completed in 1986 at a cost of $6.1 million. *Grimes Testimony; Petitioner's Exhibits 2 and 3.*

c. In 1995 deed restrictions were imposed by the EPA on the LSJ landfill property. (Petitioner's Exhibits 4, 5, and 6). The purpose of the restrictions was to preserve the integrity of the soil cover placed on the property and to restrict access to the site. The restrictive covenants and requirements run with the land and remain in full force and effect in perpetuity, irrespective of any sale, conveyance, alienation, or other transfer of any interest or estate in such property. Unless prior written approval of the EPA is obtained, these restrictions include: no use of ground water, no use of or activity performed at the property which may damage any remedial action component constructed for or installed by the EPA; no residential use within the fence line; and no excavation, installation, construction, removal or use of any buildings. These restrictions continue until the EPA determines that the site no longer poses a threat to human health and to the environment. *Grimes Testimony. Petitioner's Exhibits 2, 4, and 6.*

d. The assessment is incorrect because the property has no productive value. The letters from the EPA and the restrictive covenants clearly demonstrate that this property doesn't have value. The EPA has not responded to Petitioners' request for clarification as to when the restrictions may be lifted. There is also a potential liability to the owner, in this case, clean-up costs in excess of $6 million. The Reagins cannot use the property; it is effectively controlled by an agency of the United States

government. Nothing can be done without the approval of the EPA. It would be next to impossible to sell the property for any purpose because of the deed restrictions and the potential liability. *Grimes Testimony; Petitioner's Exhibits 2, 4, 5, 8, and 10*.

e. The property continues to be assessed and the back taxes continue to accrue. The Petitioner went to Court to get an order removing the properties from the tax sale until a decision was reached by the Lake County Board of Review and the State on the appeals. The Notices of Tax Sale show the penalties and the delinquent taxes. *Grimes Testimony; Petitioner's Exhibits 13 and 15.*

f. In response to questions from the administrative law judge, Mr. Grimes testified that Mr. Reagins does not anticipate being able to use the property; however, Mr. Reagins did not let it go to the tax sale because, while he may not want to use it, he may want to sell it. The property is located in a desirable area along the Interstate between Burr Street and Grant Street. The Petitioner has not yet had to pay anything for the clean up. *Grimes Testimony*.

16. Mr. Griffin testified that, prior to 1997, there was a 50% negative influence factor on most of the land in consideration of the contamination. In 1997, an additional 30% was added for a total of 80% negative influence factor.

Conclusions of Law

1. The Petitioner is limited to the issues raised on the Form 130 petition filed with the Property Tax Assessment Board of Appeals (PTABOA) or issues that are raised as a result of the PTABOA's action on the Form 130 petition. 50 IAC 17-5-3. See also the Forms 130 and 131 petitions authorized under Ind. Code §§ 6-1.1-15-1, -2.1, and –4. In addition, Indiana courts have long recognized the principle of exhaustion of administrative remedies and have insisted that every

designated administrative step of the review process be completed. *State v. Sproles,* 672 N.E. 2d 1353 (Ind. 1996); *County Board of Review of Assessments for Lake County v. Kranz* (1964), 224 Ind. 358, 66 N.E. 2d 896. Regarding the Form 130/131 process, the levels of review are clearly outlined by statute. First, the Form 130 petition is filed with the County and acted upon by the PTABOA. Ind. Code §§ 6-1.1-15-1 and –2.1. If the taxpayer, township assessor, or certain members of the PTABOA disagree with the PTABOA's decision on the Form 130, then a Form 131 petition may be filed with the State. Ind. Code § 6-1.1-15-3. Form 131 petitioners who raise new issues at the State level of appeal circumvent review of the issues by the PTABOA and, thus, do not follow the prescribed statutory scheme required by the statutes and case law. Once an appeal is filed with the State, however, the State has the discretion to address issues not raised on the Form 131 petition. *Joyce Sportswear Co. v. State Board of Tax Commissioners,* 684 N.E. 2d 1189, 1191 (Ind. Tax 1997). In this appeal, such discretion will not be exercised and the Petitioner is limited to the issues raised on the Form 131 petition filed with the State.

2. The State is the proper body to hear an appeal of the action of the County pursuant to Ind. Code § 6-1.1-15-3.

A. Indiana's Property Tax System

3. Indiana's real estate property tax system is a mass assessment system. Like all other mass assessment systems, issues of time and cost preclude the use of assessment-quality evidence in every case.

4. The true tax value assessed against the property is not exclusively or necessarily identical to fair market value. *State Board of Tax Commissioners v. Town of St. John,* 702 N.E. 2d 1034, 1038 (Ind. 1998)(*Town of St. John V)*.

5. The Property Taxation Clause of the Indiana Constitution, Ind. Const. Art. X, § 1 (a), requires the State to create a uniform, equal, and just system of assessment.

The Clause does not create a personal, substantive right of uniformity and equality and does not require absolute and precise exactitude as to the uniformity and equality of each *individual* assessment. *Town of St. John V,* 702 N.E. 2d at 1039 – 40.

6. Individual taxpayers must have a reasonable opportunity to challenge their assessments. But the Property Taxation Clause does not mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant. *Id.* Rather, the proper inquiry in all tax appeals is "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Id.* at 1040. Only evidence relevant to this inquiry is pertinent to the State's decision.

B. Burden

7. Ind. Code § 6-1.1-15-3 requires the State to review the actions of the PTABOA, but does not require the State to review the initial assessment or undertake reassessment of the property. The State has the ability to decide the administrative appeal based upon the evidence presented and to limit its review to the issues the taxpayer presents. *Whitley Products, Inc. v. State Board of Tax Commissioners,* 704 N.E. 2d 1113, 1118 (Ind. Tax 1998) (citing *North Park Cinemas, Inc. v. State Board of Tax Commissioners,* 689 N.E. 2d 765, 769 (Ind. Tax 1997)).

8. In reviewing the actions of the PTABOA, the State is entitled to presume that its actions are correct. See 50 IAC 17-6-3. "Indeed, if administrative agencies were not entitled to presume that the actions of other administrative agencies were in accordance with Indiana law, there would be a wasteful duplication of effort in the work assigned to agencies." *Bell v. State Board of Tax Commissioners,* 651 N.E. 2d 816, 820 (Ind. Tax 1995). The taxpayer must overcome that presumption of correctness to prevail in the appeal.

9. It is a fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr., *Administrative Law and Practice,* § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128.

10. Taxpayers are expected to make factual presentations to the State regarding alleged errors in assessment. *Whitley*, 704 N.E. 2d at 1119. These presentations should both outline the alleged errors and support the allegations with evidence. "Allegations, unsupported by factual evidence, remain mere allegations." *Id* (citing *Herb v. State Board of Tax Commissioners,* 656 N.E. 2d. 890, 893 (Ind. Tax 1995)). The State is not required to give weight to evidence that is not probative of the errors the taxpayer alleges. *Whitley,* 704 N.E. 2d at 1119 (citing *Clark v. State Board of Tax Commissioners,* 694 N.E. 2d 1230, 1239, n. 13 (Ind. Tax 1998)).

11. One manner for the taxpayer to meet its burden in the State's administrative proceedings is to: (1) identify properties that are similarly situated to the contested property, and (2) establish disparate treatment between the contested property and other similarly situated properties. *Zakutansky v. State Board of Tax Commissioners,* 691 N.E. 2d 1365, 1370 (Ind. Tax 1998). In this way, the taxpayer properly frames the inquiry as to "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Town of St. John V,* 702 N.E. 2d at 1040.

12. The taxpayer is required to meet his burden of proof at the State administrative level for two reasons. First, the State is an impartial adjudicator, and relieving the taxpayer of his burden of proof would place the State in the untenable position of making the taxpayer's case for him. Second, requiring the taxpayer to meet his burden in the administrative adjudication conserves resources.

13. To meet his burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to establish a prima facie case, the taxpayer

must introduce evidence "sufficient to establish a given fact and which if not contradicted will remain sufficient." *Clark,* 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners,* 634 N.E. 2d 882, 887 (Ind. Tax 1994).

14. In the event a taxpayer sustains his burden, the burden then shifts to the local taxing officials to rebut the taxpayer's evidence and justify its decision with substantial evidence. 2 Charles H. Koch, Jr. at §5.1; 73 C.J.S. at § 128. *See Whitley,* 704 N.E. 2d at 1119 (The substantial evidence requirement for a taxpayer challenging a State Board determination at the Tax Court level is not "triggered" if the taxpayer does not present any probative evidence concerning the error raised. Accordingly, the Tax Court will not reverse the State's final determination merely because the taxpayer demonstrates flaws in it).

C. Review of Assessments After *Town of St. John V*

15. Because true tax value is not necessarily identical to market value, any tax appeal that seeks a reduction in assessed value solely because the assessed value assigned to the property does not equal the property's market value will fail.

16. Although the Courts have declared the cost tables and certain subjective elements of the State's regulations constitutionally infirm, the assessment and appeals process continue under the existing rules until a new property tax system is operative. *Town of St. John V,* 702 N.E. 2d at 1043; *Whitley,* 704 N.E. 2d at 1121.

17. *Town of St. John V* does not permit individuals to base individual claims about their individual properties on the equality and uniformity provisions of the Indiana Constitution. *Town of St. John*, 702 N.E. 2d at 1040.

Issue No. 1 - Whether the property should receive a greater negative influence factor.

18. The PTABOA determined that the parcels should receive a negative influence factor ranging from 30% to 80% (sixteen of the twenty-one parcels have a negative 80% influence factor). The Petitioner contended the parcels have no value.

19. The Lake County Land Valuation Commission was required to collect sales data and land value estimates to create a Land Order. This Land Order identified a range of land values that the assessor used as a base rate for determining the True Tax Value of property.

20. Land Order values may be adjusted by the application of influence factors. An influence factor is defined in 50 IAC 2.2-4-10 as "a condition peculiar to the lot that dictates an adjustment to the extended value to account for variations from the norm." Influence factors may be applied for the following conditions: topography; under improved property; excess frontage; shape or size; a misimprovement to the land; restrictions; and other influences not listed elsewhere.

21. To prevail in an appeal for the application of a negative influence factor, the Petitioner must present both "probative evidence that would support an application of a negative influence factor and a quantification of that influence factor at the administrative level." *Phelps Dodge v. State Board of Tax Commissioners*, 705 N.E. 2d 1099 (Ind. Tax 1999).

22. As discussed, the BOR applied a negative influence factor to the parcels for the year under appeal. Because the parties agree that a negative influence factor should be applied to the parcels, the first prong of the two-prong test articulated in *Phelps Dodge* is satisfied.

23. As a result of contamination, the EPA imposed restrictive covenants on the property. These restrictions include: no use of ground water, no use of or activity performed at the property which may damage any remedial action component constructed for or installed by the EPA; no residential use within the fence line; and no excavation, installation, construction, removal or use of any buildings, unless prior written approval of the EPA is obtained. (Petitioner's Exhibit 6).

24. Mr. Grimes asserted that, as a result of these restrictive covenants, the property has no productive value. (Board's Exhibit 1, attachment to the Form 131 petition).

25. Influence factors may be quantified through the use of market data. "These influence factors, expressed as a percentage, reflect a deviation from the market based range of values assigned to the property through the Land Order. Therefore, influence factors may be quantified by the use of market data in order to effectively reflect the actual deviation from the market value assigned a piece of property through the Land Order. Consequently, the Court holds that in any hearing regarding influence factors, market data may be used to quantify influence factors." *Phelps Dodge*, 705 N.E. 2d at 1106.

26. However, no appraisal or other supporting documentation was introduced to quantify the impact of these restrictive covenants on the market value of the property on the assessment date of March 1, 1997. For example, no evidence was presented to establish ongoing unsuccessful attempts have been made to sell the property. No evidence of comparable properties was introduced to demonstrate that similarly contaminated properties have been determined to have no value.

27. Further, no evidence was presented to establish the duration of these restrictions or the likelihood of obtaining EPA permission to put the land to use. Although undisputed testimony indicated the Petitioner had unsuccessfully attempted to obtain this information from the EPA, it remains incumbent on the Petitioner to

present probative evidence of the extent and impact of the restrictions on the value of the property.

28. The record is therefore void of any independent evidence to establish the market reaction to the imposition of these restrictive covenants. Unsubstantiated conclusions regarding the effect of the restrictive covenants, presented in lieu of factual evidence concerning the market value of the land, do not constitute probative evidence. *Whitley*, 704 N.E. 2d at 1119.

29. The Petitioner has therefore failed to present evidence to quantify the request for an increased negative influence factor, as required by the second prong of the two-prong test articulated in *Phelps Dodge*.

30. Indeed, professional authority recognizes that even contaminated land seldom has no value: "When determining the highest and best use of the property, it is important to recognize that that current use may need to be modified or abandoned. However, seldom is property so contaminated that the highest and best use indicates no value." Standard on the Valuation of Property Affected by Environmental Contamination, International Association of Assessing Officers, clause 4.4.1, page 12 (1992).

31. The evidence on the record in fact contradicts the claim that the land has no market value.

32. On March 2, 1999, the Petitioner, Mr. Rogers, obtained a Court Order removing the parcels from a tax sale scheduled for March 10, 1999. (Petitioner's Exhibit 13).

33. Subsequently, on August 20, 2001, the Estate of John Rogers conveyed the parcels to Nelvin and Maxine Reagins for "good and sufficient consideration." (Petitioner's Exhibit 14).

34. Additionally, testimony offered at the administrative hearing indicated that Mr. Reagins did not want the property sold at a tax sale because he may sell it himself as a result of its desirable location next to an interstate highway.

35. The record is clear: the Petitioner obtained a Court order to prevent auction of the property at a tax sale, the Reagins purchased the property for "good and sufficient consideration," and Mr. Grimes acknowledges that the land is being held for potential future sale.

36. When coupled with the complete absence of market data concerning the value of the land, these actions that have been taken both to acquire and maintain ownership of the land are inconsistent with the claim that the land has no value. Instead, the actions of both Mr. Rogers and Mr. Reagins clearly establish that the property has, at least, some minimal value in the marketplace.

37. For all the reasons above, the Petitioner failed to meet his burden in this appeal. Accordingly, no change is made to the assessment as a result of this issue.

Summary of Final Determination

Issue 1 - *Whether the property should receive a greater negative influence factor.*

38. The Petitioner failed to meet his burden on this issue. No change is made to the assessment as a result of this issue.

The above stated findings and conclusions are issued in conjunction with, and serve as the basis for, the Final Determination in the above captioned matter, both issued by the Indiana Board of Tax Review this ____ day of June, 2002.

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Chairman, Indiana Board of Tax Review