REPRESENTATIVE FOR PETITIONER: Scott Tanner, Tanner Law Group

REPRESENTATIVE FOR RESPONDENT: Beth Henkel, Law Office of Beth Henkel LLC

BEFORE THE
INDIANA BOARD OF TAX REVIEW

Keystone Pointe Homeowners Association, Inc.,	)	Petition No.: 20-015-09-3-4-90055-15
Petitioner,	)	Parcel No.: 11-23-102-019-015
v.	)	
	)	Assessment Year: 2009
Elkhart County Assessor,	)	
Respondent.	)	

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

June 18, 2019

FINAL DETERMINATION GRANTING SUMMARY JUDGMENT FOR THE ELKHART COUNTY ASSESSOR

I. Introduction

1. Keystone Pointe Homeowners Association filed a Form 133 petition for correction of error, alleging that a common area for the subdivision it serves should have been assessed at $0 for 2009 because the Elkhart County Property Tax Assessment Board of Appeals ("PTABOA") had reached that conclusion in Keystone's appeal of the property's 2008 assessment. Under the correction-of-error statute that existed at the times relevant to this appeal, taxpayers generally could only address errors that were correctable without resort to subjective judgment. Valuation is an inherently subjective question, and it is not made any less so based on determinations for other tax years. Similarly, while the correction-of-error statute allowed claims that taxes, as a matter of law, were illegal, the declaration

that an assessment method or procedure was illegal had to come from a court, rather than from an administrative agency like the PTABOA. We therefore grant the Elkhart County Assessor's motion for summary judgment on Keystone's petition.

II. Procedural History

2. We begin with a brief procedural history outlining how the appeal came before us and what has happened since. In our statement of undisputed facts, we set out additional procedural information that bears on our resolution of the appeal.

3. In February 2013, Keystone filed a Form 133 petition alleging that its 2009 assessment should have been $0. As to the statutory basis for its claim, Keystone checked the box indicating that "through error or omission by any state or county officer the taxpayer was not given credit for an exemption or deduction permitted by law." In July 2015, the PTABOA denied the petition on grounds that Keystone had raised a subjective issue that could not be addressed through a Form 133 petition. Keystone then appealed the PTABOA's decision to us.

4. After a telephonic conference, the parties agreed that the appeal could be resolved through summary judgment. Our designated administrative law judge, Kyle Fletcher ("ALJ"), set a deadline for the parties to file cross motions for summary judgment with supporting memoranda. On June 18, 2018, the ALJ held a hearing on the cross motions. Because of a scheduling error, the Assessor's counsel did not attend that hearing and filed an unopposed motion for rehearing, which we granted. The ALJ held the rehearing on July 19, 2018.[1] Neither he nor the Board inspected Keystone's property.

5. The parties designated the following materials with their summary judgment motions:

Petitioner's Exhibit 1:	Declaration of Covenants, Conditions and Restrictions of Keystone Pointe, a PUD
Petitioner's Exhibit 2:	Warranty deeds for common areas
Petitioner's Exhibit 3:	2008 Form 130 petition with attachments

[1] By agreement of the parties, the ALJ held a single summary judgment hearing for Keystone's appeal and a similar appeal by Terrace Green Homeowners Association.

Petitioner's Exhibit 4:	Anthony Lehn's Market Value-in-Use Appraisal of the Common Areas of Keystone Pointe Subdivision
Petitioner's Exhibit 5:	2008 Form 115 determination
Petitioner's Exhibit 6:	Form 17T
Petitioner's Exhibit 7:	2010 Form 134 joint report
Petitioner's Exhibit 8:	2010 Form 115 determination
Petitioner's Exhibit 9:	Notice of Tax Sale
Petitioner's Exhibit 10:	August 14, 2012 payment receipt
Petitioner's Exhibit 11:	2009 Form 133 petition
Petitioner's Exhibit 12:	February 1, 2010 Department of Local Government Finance brochure "Assessment Appeals Frequently Asked Questions"
Petitioner's Exhibit 13:	April 20, 2015 letter from Scott Tanner to the PTABOA
Respondent's Exhibit R-1:	Declaration of Cathy Searcy, Elkhart County Assessor
Respondent's Exhibit R-2:	July 8, 2009 provisional tax bill to Keystone
Respondent's Exhibit R-3:	2009 pay 2010 tax bill to Keystone
Respondent's Exhibit R-4:	2009 pay 2010 tax bill to Terrace Green
Respondent's Exhibit R-5:	Excerpts from memos regarding 2009 & 2010 budget orders[2]

III. Undisputed Facts

6. Keystone is the homeowners' association for Keystone Pointe subdivision in Goshen. It owns the subject property, which is located in that subdivision. The property contains what appears to be a clubhouse. The subdivision's declaration of covenants, conditions, and restrictions ("declarations") identify the property as a "Type I Common Area," and easements benefitting the subdivision's lot owners encumber the property. *See Pet'r Exs. 1-2, 4*.

7. Keystone filed multiple appeals that are relevant to the parties' arguments in this case. We summarize those appeals and related events as follows:

    - August 2009 Keystone filed a Form 130 petition for review of assessment. The petition included, among other things, an appraisal from Anthony Lehn estimating the market value-in-

[2] The Assessor also designated several of Keystone's exhibits as well as excerpts from Keystone's brief

use of Keystone Pointe's common areas at $0 as of March 1, 2006. *Pet'r Ex. 3*; *see also Ex. R-1 at ¶ 6.*

- April 2010 — The Elkhart County Treasurer issued a tax bill for the subject property's 2009 assessment. The tax bill bears the same address that Keystone listed on its Form 133 petition and on a Form 17T that Keystone acknowledges having received. The tax bill was not returned as undeliverable. *Ex. R1 at ¶¶ 8-10; Ex. R-3; Ex. R-6; Brief in Support of the Petitioner's Motion for Summary Judgment at 4.*
- May 2010 — The PTABOA held a hearing on Keystone's 2008 appeal at which Lehn testified. *Pet'r Ex. 5*.
- November 2010 — Keystone filed a Form 130 petition after receiving a Form 11 notice for the 2010 assessment year. *Ex. R-1 at ¶ 16.*
- December 2010 — The PTABOA issued a Form 115 determination valuing the subject property at $0 for 2008. It explained that the common area was owned by the subdivision's lot owners and that its value was reflected in the lot owners' individual parcels. *Pet'r Ex. 5*.
- February 2011 — The Elkhart County Treasurer issued a Form 17T refund claim based on the 2008 appeal. The claim indicated that the Treasurer would apply the refund to the outstanding tax liability for the 2009 assessment year. *Pet'r Ex. 6.*
- December 2011 — Keystone and the Assessor signed a Form 134 joint report for Keystone's 2010 appeal indicating that they agreed to a value of $0. In the section provided for comments, the Assessor wrote, "Per final determination for 2008 assessment year, county PTABOA set value at $0 for HOA. Assessment system was locked for changes in 2010 when determination was made. System was updated for 2011 (and forward) to reflect PTABOA determination. Based on that agreement,

the PTABOA issued a determination valuing the property at $0 for 2010. *Pet'r Exs. 7-8; Ex. R-1 at ¶ 18.*

- February 2013 — Keystone filed its Form 133 petition for the 2009 assessment year.

IV. Analysis

A. Summary judgment standard

8. Our procedural rules allow for summary judgment motions made pursuant to the Indiana Rules of Trial Procedure. 52 IAC 2-6-8. Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Wittenberg Lutheran Village Endowment Corp. v. Lake Cnty. Prop. Tax Assessment Bd. of Appeals*, 782 N.E.2d 483, 487 (Ind. Tax Ct. 2002). The party moving for summary judgment must make a prima facie showing of both those things. *Coffman v. PSI Energy, Inc.*, 815 N.E.2d 522, 526 (Ind. Ct. App. 2004). It is not enough for a movant simply to show an opponent lacks evidence on a necessary element of its claim; instead, the movant must affirmatively negate the opponent's claim. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). If the movant satisfies its burden, the non-movant cannot rest upon its pleadings but instead must designate sufficient evidence to show that a genuine issue exists for trial. *Id.* In deciding whether a genuine issue exists, we must construe all facts and reasonable inferences in favor of the non-movant. *See Carey v. Ind. Physical Therapy, Inc.*, 926 N.E.2d 1126, 1128 (Ind. Ct. App. 2010).

B. Keystone has not alleged errors that could be remedied through the correction-of-error process using a Form 133 petition

9. The Assessor has moved for summary judgment, arguing that Keystone cannot bring its appeal on a Form 133 petition because it is asking us to determine the property's market value-in-use, which requires subjective judgment. Keystone argues that it is not asking us to exercise subjective judgment because the PTABOA already made that subjective determination when it decided Keystone's 2008 appeal. Instead, Keystone believes we need only carry forward the 2008 PTABOA determination into the 2009 assessment year.

1. Differences between the general-appeal and correction-of-error procedures

10. For the years at issue in these appeals, a taxpayer had two ways to challenge an assessment: (1) the general appeal procedure laid out under Ind. Code § 6-1.1-15-1, which taxpayers typically used Forms 130 and 131 to prosecute at the local and state levels, respectively, and (2) the correction-of-error process under Ind. Code § 6-1.1-15-12, which taxpayers prosecuted using a Form 133 petition.[3] The general appeal procedure was only available to challenge a current year's assessment; taxpayers could not use it to challenge assessments from prior years. *Lake County Prop. Tax Assessment Bd. of Appeals v. BP Amoco Corp*., 820 N.E.2d 1231, 1233 (Ind. 2005). A taxpayer could use the procedure to challenge any aspect of that assessment, but it had to file its appeal within tight deadlines.

11. For the 2009 assessment year, that deadline was within 45 days after a notice of assessment. If no assessment notice was issued, a taxpayer had to file its appeal by the later of 45 days after the date of the statement mailed by the county auditor under Ind. Code § 6-1.1-17-3(b),[4] or May 10. *See* I.C. § 6-1.1-15-1(c) and (d) (2008 supp.). If notice of the action of a board or official was not otherwise given, the tax bill was the taxpayer's notice for purposes of determining its right to review. I.C. § 6-1.1-15-13 (2004).

12. The correction-of-error process did not have the same restrictive filing deadlines as the general appeal procedure, but the range of errors that it could be used to correct was much narrower. The correction-of-error statute identified only eight categories of errors

[3] The legislature repealed Ind. Code § 6-1.1-15-1 and § 6-1.1-15-12 in 2017. 2017 Ind. Acts 232 §§ 9, 17. Procedures for appeals and for the correction of errors are now set out in Ind. Code § 6-1.1-15-1.1 -1.2 and Ind. Code § 6-1.1-15-2.1, respectively.

[4] It is not clear that county auditors ever mailed such statements. The legislation that created the obligation to mail those statements originally required auditors to begin mailing them in 2009. The next year, the legislature changed that start date to 2010. 2008 Ind. Acts 146, § 147. In 2009, the legislature deleted the language regarding the auditor's statement from Ind. Code § 6-1.1-17-3 and amended Ind. Code § 6-1.1-15-1(d)(2) to refer to "the tax statement . . . mailed by the county treasurer" rather than to the statement mailed by the county auditor under Ind. Code § 6-1.1-17-3(b). 2009 Ind. Acts 136 §§ 5-6; 2009 Ind. Acts 182(ss) § 114.

that could be addressed. Those categories included, in relevant part, that "taxes, as a matter of law, were illegal," that there was a mathematical error in computing the assessment, or that "through an error of omission by any state or county officer," the taxpayer was not given credit for an exemption permitted by law. I.C. § 6-1.1-15-12(a)(6)-(8) (2011 supp.).

2. Keystone did not timely appeal its 2009 assessment under the general-appeal procedure

13. Keystone does not purport to have appealed its 2009 assessment under the general appeal procedure. Nor could it have. While the Assessor did not issue a Form 11 notice for the subject property's 2009 assessment, the undisputed evidence shows that the Elkhart County Treasurer mailed the tax bill for that assessment in April 2010. In its brief, Keystone alleges it did not receive a "tax notice" for the 2009 tax year. *Brief in Support of the Petitioner's Motion for Summary Judgment at 17*. But it did not designate any evidence to support that allegation. In any case, Keystone was on notice that the property had been assessed for more than $0 when it received the Form 17T indicating that the refund for its successful appeal of the 2008 assessment would be applied to the taxes based on the 2009 assessment. As a matter of law, Keystone did not meet the deadline for appealing its 2009 assessment under the general appeal procedure.

3. Keystone has not alleged cognizable claims under the correction-of-error process

14. We therefore turn to what both parties identify as the central issue: Can Keystone get the relief it seeks through the correction-of-error process? We agree with the Assessor that it cannot.

15. It is not clear which specific category of error Keystone is alleging. On its Form 133 petition, it checked the box indicating that "through error or omission[,] by any state or county officer the taxpayer was not given credit for an exemption or deduction permitted

by law."[5] But it also claimed that the subject property should have been assessed for $0. We interpret that as a claim that there was a mathematical error in computing the assessment or that Keystone's taxes, as a matter of law, were illegal. We address these claims in turn.

a. Keystone was not denied an exemption though an error of omission

16. At best, Keystone makes only a half-hearted claim that it was denied an exemption through an error of omission. It points to Ind. Code § 6-1.1-10-37.5, which creates an exemption for property meeting that statute's definition of a common area. But Ind. Code § 6-1.1-10-37.5 was not enacted until 2015, and Keystone does not argue that it should apply retroactively to the 2009 assessment year. *See* 2015 Ind. Acts 148 § 5. Instead, Keystone argues that the PTABOA created a similar exemption when it determined the property had zero value in 2008. While the PTABOA's decision may have had the same practical effect for Keystone as an exemption, the PTABOA did not, and could not, create an exemption for Keystone's property. That power rests exclusively with the legislature. *See* Ind. Cost. Art. 10 sec. 1 (requiring the General Assembly to provide for a uniform and equal rate of property taxation but allowing it to exempt certain classes of property).

b. Determining a property's market value-in-use is a qualitative decision requiring subjective judgment

17. In interpreting the correction-of-error statute, particularly the ground that there was a mathematical error in computing an assessment, the Tax Court has repeatedly held that a Form 133 petition could "remedy only errors which can be corrected without resort to subjective judgment and according to objective standards." *Muir Woods, Inc. v. O'Connor*, 36 N.E.3d. 1208, 1213 (Ind. Tax Ct. 2015) (*quoting Hatcher v. State Bd. of Tax Comm'rs*, 561 N.E.2d 852, 857 (Ind. Tax Ct. 1990)).

[5] The form uses language from before the correction-of-error statute's amendment in 2011. In any case, the reference to "error *or* omission" is a typo. Both before and after the amendment, the statute referred to an "error *of* omission." I.C. 6-1.1-15-12(a)(8) (2008 supp.) (2011 supp.) (emphasis added).

18. Valuation questions require subjective judgment to resolve. *See id*. at 1213 (*quoting Wirth v. State Bd. of Tax Comm'rs*, 613 N.E.2d 874, 878 (Ind. Tax Ct. 1993); *see also, Town of St. John, et al. v. State Bd. of Tax Comm'rs*, 698 N.E.2d 399, 400 (Ind. Tax Ct. 1998) ("[A] calculation of the effect of real world evidence on an individual assessment will typically require subjective judgment . . . . The court does not foresee any opportunity to apply real world evidence retroactively by using the Form 133 process.").

19. In *Muir Woods*, the Tax Court applied that principle to a claim similar to what Keystone alleges in this case, explaining "whether Muir Woods's common area land was so encumbered that it lacked any value cannot be determined from a simple rendition of objective facts, but requires subjective judgment to analyze the impact of those facts upon value." *Muir Woods*, 36 N.E.3d at 1213; *see also Pulte Homes of Ind., LLC v. Hendricks Cnty. Ass'r*, 42 N.E. 3d 590, 595 (Ind. Tax Ct. 2015). The Court applied the same reasoning in *Pulte Homes of Ind. LLC v. Hendricks Cnty. Ass'r* ("No *per se* rule exists that common areas have zero value, and therefore, any evidence produced would necessarily involve subjective judgment. . . .") (emphasis in original).

20. Keystone seeks to distinguish its appeal from *Muir Woods* and *Pulte Homes* because the PTABOA already determined that Keystone's property was worth $0 in its 2008 appeal. According to Keystone, we can simply carry that value forward to 2009, and doing so requires no subjective judgment. As support for its position, Keystone cites to a brochure from the Department of Local Government Finance ("DLGF") entitled "Assessment Appeals Frequently Asked Questions." In that brochure, the DLGF explains, "[I]f . . . as a result of [a] successful appeal, the assessor changes the underlying parcel characteristics (i.e., grade, condition, etc.)[] those changes resulting from the successful appeal should carry-over to succeeding assessment dates." Although the brochure does not expressly say so, it is referring to Ind. Code § 6-1.1-4-4.5.

21. Neither the highlighted language nor the statute it references applies to the situation before us. Keystone does not identify any underlying parcel characteristics that the Assessor or PTABOA changed in 2008. It instead wants the PTABOA's valuation

decision to carry forward. That ignores the oft-cited rule that "each tax year—and each appeal process—stands alone." *Fisher v. Carroll Cnty. Ass'r*, 74 N.E. 3d 582 (Ind. Tax Ct. 2017). Evidence of a property's assessment in one year has little bearing on its true tax value in another. *See, e.g.*, *Fleet Supply, Inc. v. State Bd. of Tax Comm'rs*, 747 N.E.2d 645, 650 (Ind. Tax Ct. 2001); *Barth, Inc. v. State Bd. of Tax Comm'rs*, 699 N.E.2d 800, 805 n. 14 (Ind. Tax Ct. 1998). Indeed, the DLGF's brochure recognizes that principle in the paragraph immediately preceding the language to which Keystone cites. *See Pet'r Ex. 12 at 4* ("A change in an assessment made as a result of an appeal filed by a taxpayer remains in effect until the next assessment date. In other words, each assessment year stands alone. . . .").

22. It may be true, as Keystone seems to believe, that easements or encumbrances that deprive the fee interest of any value in one year likely will do so in the following year as well. In each instance, however, the determination requires the exercise of subjective judgment. The question does not become objective simply because a subjective determination has previously been made. Thus, neither the PTABOA's determination of the 2008 appeal nor the Assessor's agreement to settle Keystone's 2010 appeal makes the property's valuation any less subjective. The same is true for the Assessor's decision to assess the property at $0 in future years.

c. There has been no judicial declaration that Keystone's taxes, as a matter of law, were illegal

23. Keystone really appears to be arguing that once it used the general-appeal procedure to get a determination valuing its common-area at $0, any subsequent taxes based on valuations in excess of that amount were illegal. As explained by the Indiana Supreme Court, taxpayers could challenge the legality of their assessments under the correction-of-error process if they first availed themselves of the general appeal procedure to challenge a methodology or procedure used to assess their property and obtained a favorable ruling from the Tax Court. That judicial finding would constitute a declaration that the taxes, as a matter of law, were illegal. *Lake Cnty. Prop. Tax Assessment Bd. of Appeals v. BP Amoco*, 820 N.E.2d 1231, 1236 (Ind. 2005); *see also Lake Cnty. Prop. Tax Assessment*

Bd. of Appeals v. U.S. Steel Corp., 820 N.E.2d 1237, 1240 (Ind. 2005).[6] That taxpayer (and certain other taxpayers) could then file Form 133 petitions to have their assessments corrected and 17T forms to obtain refunds. *BP Amoco,* 820 N.E.2d at 1236. But as the Tax Court has held, the declaration of illegality had to come from a court—it could not come from an administrative agency. *Muir Woods,* 36 N.E.3d. at 1212-13. So the PTABOA's determination of Keystone's 2008 appeal does not suffice.

4. Indiana Code § 6-1.1-15-17.2's burden-shifting rule does not apply

24. Finally, Keystone cites to Ind. Code § 6-1.1-15-17.2 and argues that the Assessor has the burden of proof because the subject property's assessment increased by more than 5% between 2008 and 2009. Under that statute, when an assessor fails to meet its burden, the assessment reverts to the previous year's level. According to Keystone, because the Assessor offered nothing to show how the property went from having zero value in 2008 and 2010 to having significant value in 2009, the 2009 assessment must revert back $0. The Tax Court has previously rejected a similar argument, explaining that Ind. Code § 6-1.1-15-17.2's burden-shifting rule applies "only when the validity of the assessment is at issue, not when, as here, there is a preliminary procedural issue being determined," namely whether the taxpayer has alleged claims that may be remedied though the correction of error process. *See Pulte Homes,* 42 N.E.3d at 595-96.

V. Final Determination

25. There is no genuine issue of material fact in this case. As a matter of law, Keystone could not obtain the relief it seeks on a Form 133 petition. We therefore deny Keystone's

[6] Both *BP Amoco* and *U.S. Steel* rely heavily on an administrative regulation that, while effective for the assessment years at issue in those cases, had been repealed by the time the Court issued its decisions. Nonetheless, the Court explained, "we do not discern anything in current law that is inconsistent [with the repealed provision] or the interpretation we give it today." *BP Amoco*, 820 N.E.2d at 1234. The *U.S. Steel Court* also noted that the "legislative and regulatory scheme" required taxpayers to use the general appeal process when challenging the legality of the officials' actions. *U.S. Steel*, 820 N.E.2d at 1239. Because the legislative scheme referenced in *U.S. Steel* largely remained intact through the times relevant to this case, and the repealed regulation is consistent with that law, we are bound by the Court's holdings in those cases.

summary judgment motion, grant the Assessor's motion, and enter our final determination denying Keystone's Form 133 petition.

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

_____
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, 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 Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. The Indiana Tax Court Rules are available at <http://www.in.gov/judiciary/rules/tax/index.html>.