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

Petition Nos.:	**53-017-16-1-4-01891-16**
	53-017-17-1-4-01520-17
Petitioner:	**Kooshtard Property I, LLC**
Respondent:	**Monroe County Assessor**
Parcel No.:	**53-02-33-100-017.000-017**
Assessment Years:	**2016 & 2017**

The Indiana Board of Tax Review ("Board") issues this determination in the above matter, and finds and concludes as follows:

Procedural History

1. Petitioner, Kooshtard Property I, LLC, appealed its 2016 and 2017 assessments. The Monroe County Property Tax Assessment Board of Appeals ("PTABOA") issued determinations upholding the assessments. Petitioner then timely filed its Form 131 petitions with the Board, electing to have its appeals heard under our small claims procedures.

2. On April 30, 2018, Dalene McMillen, our administrative law judge ("ALJ"), held a hearing.[1] Neither she nor the Board inspected the property.

3. Milo Smith, a certified tax representative, appeared for Petitioner. Marilyn Meighen and Brian Cusimano appeared as counsel for Respondent, although only Meighen attended the hearing. Smith and Ashley Johnson-Wilcoxon, an appraiser for First Appraisal Group, Inc., were sworn and testified.[2]

Facts

4. The subject property contains a convenience store with fuel pumps on 2.643 acres of land. It is located at 7340 North Wayport Road in Bloomington.

[1] The hearing originally was scheduled for April 27, 2018, but Respondent requested that it be continued and reset for the next business day (April 30). Petitioner agreed to Respondent's request.
[2] County Assessor Judith Sharp and Wayne Johnson, an appraiser for First Appraisal Group, Inc., were sworn but did not testify.

5. The PTABOA determined the following values for both years under appeal:

Land: $1,057,200 Improvements: $349,700 Total: $1,406,900.

6. Petitioner did not ask for any specific values on its Form 131 petitions. At the hearing, it challenged only the land component of the assessments and requested the following values for both years:

Land: $319,300 Improvements: $349,700 Total: $669,000.

Record

7. The official record for this matter includes the following:

a. A digital recording of the hearing,

b. Exhibits:

Petitioner Exhibit 1:	2016 property record card ("PRC") for the subject property,
Petitioner Exhibit 2:	2017 PRC for the subject property,
Petitioner Exhibit 3:	Petitioner's summary of 2014 and 2015 sales in Washington Township; PRCs and sales disclosure forms for 8112 North Lee Paul Road, 7330 North Wayport Road, and 8310 North Lee Paul Road; PRC for 100 East Sample Road,[3]
Petitioner Exhibit 6:	GIS aerial map of subject property,
Petitioner Exhibit 7:	GIS elevation map of subject property,
Respondent Exhibit B:	Real estate appraisal report prepared by Wayne Johnson and Ashley Johnson-Wilcoxon, First Appraisal Group, Inc., dated April 20, 2018,[4]
Respondent Exhibit C:	Corrected appraisal report pages 72, 73, 93 and 94.

c. All pleadings and documents filed in these appeals, all orders and notices issued by the Board or our ALJ; and these findings and conclusions.

Burden of Proof

8. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that his property's assessment is wrong and what the correct assessment should be. Indiana Code § 6-1.1-15-17.2 creates an exception to that general

[3] Petitioner did not offer an Exhibit 4 or 5.
[4] Respondent did not offer an Exhibit A.

rule and assigns the burden of proof to the assessor where (1) the assessment under appeal represents an increase of more than 5% over the prior year's assessment for the same property, or (2) the taxpayer successfully appealed the prior year's assessment, and the current assessment represents an increase over what was determined in the prior appeal, regardless of the level of that increase. *See* I.C. § 6-1.1-15-17.2(a), (b) and (d). If an assessor has the burden and fails to prove the assessment is correct, it reverts to the previous year's level (as last corrected by an assessing official, stipulated to, or determined by a reviewing authority) or to another amount shown by probative evidence. *See* I.C. § 6-1.1-15-17.2(b).

9. The assessment did not increase by more than 5% between 2015 and 2016, and although Petitioner appealed the 2015 assessment, that appeal was unsuccessful. The parties therefore agreed that Petitioner has the burden of proof for 2016. Assigning the burden for 2017 depends on our resolution for 2016. To the extent Respondent seeks to increase either assessment beyond its current level, however, she bears the burden of proving that higher value.

Petitioner's Request to Withdraw it Petitions

10. On April 26, 2018, Petitioner's representative, Milo Smith, e-mailed the Board purporting to withdraw the appeal petitions. Counsel for Respondent objected to the withdrawal on grounds that Respondent had obtained an "independent third person point of view concerning the market value-in-use of the subject for the contested assessment years" and "incurred substantial expense in so doing." We responded with an e-mail advising the parties that they could address that issue at the scheduled hearing.

11. At the hearing, Smith explained that he received Respondent's exhibits on April 23, 2018. Those exhibits included an appraisal from Ashley Johnson-Wilcoxon[5] in which she valued the property for amounts higher than its assessments. Three days later, he began negotiating with Respondent's counsel to resolve the appeals. Negotiations broke down over Respondent's insistence that Petitioner agree not to appeal its 2018 or 2019 assessments unless they increased by more than 20%. Smith then e-mailed the Board with his withdrawals. *Smith testimony and argument.*

12. Respondent countered by explaining that Petitioner had appealed its assessments for the past several years. During that time, several appraisal reports were prepared, and the land component of the assessment changed back and forth between $300,000 and $1 million. Respondent therefore found it necessary to get an appraisal for the two years currently under appeal. Counsel, reiterated that Respondent had incurred "substantial" expense in contracting for the appraisal report. Upon learning that Respondent would seek an increase to the assessments, Petitioner sought to withdraw its appeals just a couple of

[5] Both Johnson-Wilcoxon and Wayne Johnson signed the appraisal report. Johnson-Wilcoxon was primarily responsible for the appraisal, and she was the only appraiser who testified. For ease of reference, we will refer to the appraisal and valuation opinions contained therein as hers.

business days before the scheduled hearing. Respondent also argued that if Petitioner were allowed to dismiss its appeals, she would consider retroactively increasing the assessments. That, in turn, would likely generate new appeals that we would still have to address. Under those circumstances, Respondent argued that she should be able to present her case in these appeals. *Meighen argument (citing Joyce Sportswear Co. v. State Bd. of Tax Comm'rs,* 684 N.E.2d 1189 (Ind. Tax Ct. 1997).

13. The ALJ took the issue under advisement and proceeded with the hearing. After careful consideration, we deny Petitioner's purported withdrawal of its appeal petitions.

14. The Tax Court addressed a similar issue in *Joyce Sportswear Co. v. State Bd. of Tax Comm'rs,* 684 N.E.2d 1189 (Ind. Tax Ct. 1997). In that case, the State Board had denied the taxpayer's motion to withdraw its appeal petition after two hearings had been held and the State Board's hearing officer had notified the taxpayer that she would recommend increasing the assessment. *Joyce Sportswear*, 684 N.E.2d at 1193. On judicial review, the taxpayer claimed that it had a right to withdraw its petition grounded in Rule 41(A) of the Indiana Rules of Trial Procedure and the common law procedural device of retraxit. *Id*.

15. The Tax Court disagreed. While Trial Rule 41(A)(1)(a) allowed a plaintiff to dismiss a claim without order of the court if it filed a notice of dismissal at any time before an adverse party filed an answer or motion for summary judgment, the State Board's procedural rules did not require responsive pleadings. The Court therefore looked to decisions such as *Rose v. Rose*, 526 N.E.2d 231 (Ind. Ct. App. 1988) in which the plaintiffs sought to dismiss actions as of right where no responsive pleading had been filed but where the cases had proceeded to an advanced stage. It those decisions, the courts explained that Trial Rule 41(A) was meant to "'eliminate the evils resulting from the absolute right of a plaintiff to take a voluntary nonsuit at any stage of the proceedings before the pronouncement of judgment and after the defendant had incurred substantial expense or acquired substantial rights.'" *Joyce Sportswear*, 684 N.E.2d at 1193 (*quoting Rose*, 526 N.E.2d at 235). Those courts similarly found dismissal as of right inappropriate where the "adverse party [would] 'suffer some legal prejudice other than the mere filing of a second lawsuit.'" *Id*. at 1194 (*quoting Rose*, 526 N.E.2d at 234). The Tax Court concluded that denying the taxpayer's purported voluntary withdrawal as of right would be appropriate if the State Board could "demonstrate either substantial expense or legal prejudice." *Id*.

16. Turning to the facts, the Court found that allowing the taxpayer to withdraw its appeal as of right at such an advanced stage would have caused a substantial waste of time and effort. *Id*. at 1193. It would have also legally prejudiced the State Board. While the State Board had plenary authority to reassess property at a higher value while addressing the taxpayer's appeal, the time within which it could raise the assessment outside the appeal process had lapsed. *Id*. at 1194.

17. Similarly, assuming without deciding that retraxit applied to administrative proceedings before the State Board, the Court explained that retraxit is a kind of voluntary dismissal. And in Indiana, "one party's voluntary dismissal of the action did not carry with it the adversary's counterclaim without the adversary's consent." *Id*. at 1195. The Court viewed a counterclaim as a "legal right analogous to the State Board's statutory right to assess the property in this case," and held that retraxit could not be used to prejudice that right. *Id*.

18. Here, Petitioner did not cite to any authority for its claimed right to voluntarily dismiss its appeals. Without a specific request to do so, we will not analyze whether a common law device like retraxit even applies to our administrative proceedings, much less whether it gives Petitioner the right to voluntarily dismiss its petitions without an order from the Board allowing it to do so. But the Trial Rules may be applied to our proceedings to the extent they do not conflict with our procedural rules or applicable statutes. 52 IAC 2-1.2-1; *see also* 52 IAC 3-1-1 (indicating that that our plenary rules apply to small claims appeals unless they are inconsistent with our small claims procedures). We will therefore analyze Petitioner's claim under Trial Rule 41(A).

19. We reach the same conclusion as the Tax Court in *Joyce Sportswear*. Petitioner attempted to unilaterally withdraw its appeals virtually on the eve of hearing. But Respondent had already incurred substantial expense by hiring certified appraisers to appraise the property. Because the standard is "substantial expense" rather than mere "expense," it would have been helpful if Respondent had shown what she paid for those services. Nonetheless, we recognize that commercial appraisals prepared for litigation purposes typically represent a substantial cost. Indeed, the appraisal report in this case is well over 100 pages. Thus, Petitioner did not have the right under Trial Rule 41(A)(1) to withdraw its petitions unilaterally. In light of the lateness of Petitioner's request and the expense incurred by Respondent, we will not order dismissal of the appeals over Respondent's objection.

Summary of the Parties' Contentions

20. Petitioner's case:

    a. Petitioner contends that the Respondent erred by using the same base rate of $400,000/acre to assess both the one-acre primary portion of the site and the remaining 1.643-acres. But that additional area does not have access to city water or sewage disposal. Instead, an aerial map shows a grassy area north of the building and parking lot that contains a septic field. Another aerial map shows a drop in elevation from 774 feet to as low as 732 feet north of the parking lot. Based on the septic field and slope, Petitioner believes that 1.643 acres of its property should be assessed as *unusable*/undeveloped instead of *usable*/undeveloped. Other convenience-store properties have city sewage disposal and do not need extra land for a septic field. Because the entire property

is assessed as usable, it is essentially being charged for charged for sewage disposal twice. *Smith testimony; Pet'r Exs. 1-2, 6-7.*

b. In an apparent attempt to show a lower value for the subject land, Smith, acting as Petitioner's witness, pointed to following five Washington Township land sales from 2014.[6]

Address	Size	Price	Unit Price
7275 North Wayport Rd.	0.735 acres	$18,400	$25,034/acre
8112 North Lee Paul Rd.	1.568 acres	$105,560	$67,321/acre
8112 North Lee Paul Rd.	2.139 acres	$258,340	$120,818/acre
100 East Sample Rd.	7.78 acres	$1,188,097	$152,712/acre
7330 North Wayport Rd.	3.708 acres	$454,375	$122,539/acre

Smith also pointed to a sixth sale—8310 North Lee Paul Rd.—that included a house. He subtracted the assessed value of the house, which yielded an allocated sale price of $121,500 or $73,193/acre for the land. Four of the six properties sold to the State. *Smith testimony; Pet'r Ex. 3.*

c. The median sale price was $120,800 (rounded), which translates to $319,300 for the subject site. When added to the assessment for the improvements ($349,700), that yields a total value of $669,000. *Smith testimony.*

d. Petitioner also challenged the credibility of Johnson-Wilcoxon's appraisal. Unlike the subject property, all eight of her comparable land sales had access to sewage disposal through the City of Bloomington. According to Smith, Johnson-Wilcoxon should have adjusted the sale prices to account for that difference. *Smith argument.*

21. Respondent's case:

a. Respondent offered Johnson-Wilcoxon's appraisal report, which she prepared in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP"). The purpose of the appraisal report was to estimate the property's market value-in-use as of January 1, 2016, and January 1, 2017. *Johnson-Wilcoxon testimony; Resp't Ex. B.*

b. Johnson-Wilcoxon described the property as located south of East Sample Road with visibility from State Road 37, which is being upgraded to Interstate 69. There is also an access road on the property's east side. The site has level to sloping topography and was zoned LB (Limited Business), which Johnson-

[6] Smith listed four additional properties on his summary, but he did not use them in calculating the subject land's value. *Smith testimony; Pet'r Ex. 3.*

Wilcoxon believed enhanced its value. She also considered the site's size and shape. *Johnson-Wilcoxon testimony; Resp't Ex. B.*

c. Johnson-Wilcoxon developed all three generally accepted valuation methodologies—the cost, sales-comparison, and income approaches. *Johnson-Wilcoxon testimony; Resp't Ex. B.*

d. To estimate the site value, which is a necessary component of the cost approach, she used eight local sales—one from the College Mall area, three from Bloomington's east side, and four from the Whitehall area. They ranged from 0.50 acre to 3.33 acres and sold between May 2011, and March 2018, for unadjusted prices ranging from $4.31/sq. ft. to $22.31/sq. ft. Johnson-Wilcoxon adjusted the sale prices to account for differences in market conditions (date of sale), location, visibility, frontage, size, shape and topography. *Johnson-Wilcoxon testimony; Resp't Exs. B-C.*

e. She premised her size adjustment on the fact that larger sites typically sell for less per square foot than smaller sites. For her topography adjustment, Johnson-Wilcoxon explained that part of the subject site could not be developed with improvements. Four of the sites were similar to the subject site in that regard, while the other four were not. She therefore made negative adjustments to the sale prices for the sites that had no impediments to development. Similarly, while all of the comparable sites had access to city sewage disposal, the subject site could dispose of its sewage through its working septic system. She did not believe that the difference in sewage disposal systems merited an adjustment. *Johnson-Wilcoxon testimony; Resp't Exs. B-C.*

f. For 2016, the average adjusted sale price was $9.19/sq. ft. and the median was $8.83/sq. ft. After weighing the sales, Johnson-Wilcoxon determined a value of $9.30/sq. ft. or $1.07 million for the subject property. For 2017, the average and median adjusted sale prices were $9.37/sq. ft. and $9.00/sq. ft., respectively. She determined a value of $9.50/sq. ft. or $1.09 million for the subject property. *Johnson-Wilcoxon testimony; Resp't Exs. B-C.*

g. Next, Johnson-Wilcoxon used Marshall Valuation Services to estimate the replacement cost new for the convenience store and canopy. She then subtracted depreciation based on the effective age and economic life of each building component. She also estimated the depreciated cost for site improvements. When she added those depreciated improvement costs to her site value for each year, she arrived at a rounded value of $1.5 million for both years. *Johnson-Wilcoxon testimony; Resp't Ex. B.*

h. For her sales-comparison analysis, Johnson-Wilcoxon considered sales of four convenience store/service stations from Monroe County. They sold between January 2012, and September 2015. She adjusted their sale prices to account for

various ways in which the properties differed from the subject property. For 2016, her adjusted sale prices ranged from $219.29/sq. ft. to $348.13/sq. ft., which she reconciled at $294/sq. ft. or $1.45 million for the subject property. For 2017, the adjusted prices ranged from $223.39/sq. ft. to $355.05/sq. ft., which she reconciled at $300/sq. ft. or $1.485 million. *Johnson-Wilcoxon testimony; Resp't Exs. B-C.*

i. Turning to the income approach, Johnson-Wilcoxon began her analysis by looking at leases for comparable properties in the region. In determining comparability, she examined things such as the date of the lease, the total area leased, the size and age of the building, the number of fuel islands, and the traffic count near the property. Based on those leases, she settled on annual market rent of $33.00/sq. ft. for each year under appeal. From that potential gross income, she subtracted 10% to account for vacancy and collection loss and arrived at effective gross income of $146,777. She then subtracted expenses, leaving net operating income of $133,035.

j. To determine an appropriate capitalization rate, Johnson-Wilcoxon examined a national survey (Realty Rates) and data from her files. She also calculated a rate using the band-of-investment method. Based on that data, Johnson-Wilcoxon felt a capitalization rate of 9% was reasonable for both years. She divided her estimated net operating income by that rate to arrive at a value of $1,475,000 for each year. *Johnson-Wilcoxon testimony; Resp't Ex. B.*

k. Johnson-Wilcoxon believed that her conclusions under the cost approach were a good indication of value. But all three approaches came to similar values, and she considered them all in settling on values of $1.46 million for 2016 and $1.49 million for 2017. The Assessor asked that we increase the assessment to those amounts. *Meighen argument; Johnson-Wilcoxon testimony; Resp't Exs. B-C.*

l. When asked about Smith's use of sales to the State in analyzing the subject site's value, Johnson-Wilcoxon explained that the State can take property through eminent domain. She did not believe those sales involved typically motivated parties. Also, she could not tell from Smith's analysis whether the sales were for entire properties as opposed to only portions of the properties. And Smith did not adjust any of his sale prices to account for various ways in which the sold properties may have differed from the subject property, such as traffic counts, access, or zoning. *Johnson-Wilcoxon testimony.*

Analysis

22. The most persuasive evidence in the record supports raising the assessments to $1.46 million for 2016 and $1.49 million for 2017. We reach this decision for the following reasons:

a. Indiana assesses real property based on its true tax value, which does not mean fair market value, but rather the value determined under the rules of the Department of Local Government Finance ("DLGF"). The DLGF's 2011 Real Property Assessment Manual defines true tax value as "market value-in-use," which it in turn defines as "the market value-in-use of a property for its current use, as reflected by the utility received by the owner or by a similar user, from the property." 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2). Evidence in a tax appeal should be consistent with that standard. For example, a market value-in-use appraisal prepared according to USPAP often will be probative. *See id. at 3; see also Kooshtard Property VI, LLC 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 property under appeal, sales or assessment information for comparable properties, and any other information compiled according to generally recognized appraisal practices. *See Eckerling v. Wayne Twp. Ass'r*, 841 N.E.2d 674, 678 (Ind. Tax Ct. 2006); *see also* Ind. Code § 6-1.1-15-18 (allowing parties to offer evidence of comparable properties' assessments to determine an appealed property's market value-in-use).

b. Regardless of the type of evidence offered, a party must explain how that evidence relates to the property's market value-in-use as of the relevant valuation date. *Long v. Wayne Twp. Ass'r*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). Otherwise, that evidence lacks probative value. *Id*. For 2016 assessments, the valuation date was January 1, 2016. For 2017 assessments, the valuation date was January 1, 2017. I.C. § 6-1.1-4-4.5(f); 50 IAC 27-5-2(c).

c. Petitioner contends that the assessments were too high because the Respondent misclassified 1.643 acres as useable/undeveloped when it should be *unusable/*undeveloped in light of the topography and septic system. Even if one assumes that Respondent misclassified part of the site, Petitioner failed to make a prima facie case for changing the value. Simply challenging the methodology used to assess a property typically does not suffice to rebut the presumption that the assessment is correct. Instead, a taxpayer must offer probative market-based evidence to show the property's true tax value. *See Eckerling*, 841 N.E.2d at 678.

d. Petitioner offered little or no evidence in that regard. At most, it pointed to (1) aerial maps showing that a significant portion of the site contains a septic field and slopes downward, and (2) Smith's analysis of four sales of vacant land along State Road 37. By themselves, the aerial maps do little to show the site's value, or even a range of values. Petitioner's sales data is similarly inadequate. Smith did little to compare the sold properties to the subject site beyond the fact that all were located along State Road 37. He did not address other relevant characteristics, such as zoning, and he did not even attempt to explain how any relevant differences affected value. That falls well short of the type of analysis necessary to translate raw sales data into probative evidence. *See Long*, 821 N.E.2d at 471 (holding that taxpayers seeking to show their property's value

through sales data for other properties had to explain how property's characteristics compared to the characteristics of the other properties and how relevant differences affected value).

e. Petitioner therefore failed to make a prima facie case for reducing either year's assessment.[7] In any event, we find Johnson-Wilcoxon's USPAP-compliant appraisal and testimony far more persuasive than Petitioner's evidence. Johnson-Wilcoxon used a significant amount of market data in applying all three generally accepted appraisal approaches, and she explained the various judgments she made in reaching her valuation opinions.

f. Petitioner sought to impeach Johnson-Wilcoxon's opinions by claiming that she should have adjusted her comparable land sales to reflect the fact that they all had access to city sewage disposal while the subject site did not. But Johnson-Wilcoxon considered that difference and concluded that no adjustment was necessary because all the sites had access to adequate methods for dealing with sewage. Petitioner did not explain why we should disregard Johnson-Wilcoxon's judgment on that point. Although Smith made much of the fact that the septic system prevented a significant portion of the subject site from being developed, Johnson-Wilcoxon dealt with that fact through a separate adjustment. We therefore give little weight to Smith's criticism.

g. Based on Johnson-Wilcoxon's appraisal, Respondent proved that the subject property's true tax value was $1.46 million for 2016, and $1.49 million for 2017. Both of those values are higher than the current assessments.

Final Determination

23. Petitioner failed to make a prima facie case for reducing the 2016 and 2017 assessments, while Respondent offered a probative USPAP-compliant appraisal showing that the property was worth more than the amounts for which it was assessed in each year. We order that the assessments be changed to $1.46 million for 2016 and $1.49 million for 2017.

[7] AS explained above, the parties agreed that Petitioner had the burden of proof for 2016. Because we are not reducing the 2016 assessment through Petitioner's appeal and the original assessments for 2016 and 2017 were identical, Petitioner also has the burden for 2017.

ISSUED: July 30, 2018

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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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 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>.