

REPRESENTATIVE FOR PETITIONER: Richard Werner, Certified Tax Representative

REPRESENTATIVE FOR RESPONDENT: Brian Cusimano, Attorney

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Richmond Enterprises LLC,)	Petition:	89-030-17-1-4-00288-18
)		
Petitioner,)	Parcel:	89-16-35-430-201.002-030
)		
v.)	Assessment Year:	2017
)		
Wayne County Assessor,)		
)		
Respondent.)		

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

June 3, 2019

FINAL DETERMINATION

The Indiana Board of Tax Review (“Board”), having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

INTRODUCTION

1. Richmond Enterprises LLC challenged its 2017 assessment claiming it was too high. Its tax representative, Richard Werner, presented a valuation report. Werner failed to show that he used generally accepted appraisal practices. As a result, Richmond Enterprises failed to make a prima facie case for any reduction in the assessment.

PROCEDURAL HISTORY

2. Richmond Enterprises LLC filed a petition with the Wayne County Property Tax

Assessment Board of Appeals (“PTABOA”) challenging its 2017 assessment. The Assessor valued the property as follows:

Year	Land	Improvements	Total
2017	\$232,500	\$373,300	\$605,800

3. The PTABOA upheld the assessment and Richmond Enterprises filed a petition for review with the Board. On December 4, 2018, the Board’s designated Administrative Law Judge (“ALJ”), Timothy Schuster, held a hearing. Neither he nor the Board inspected the property.
4. Richard Werner represented Richmond Enterprises and testified under oath. Bradley Berkemeier testified under oath for the Assessor.
5. The parties offered the following exhibits:
 - Petitioner’s Ex. 1: Subject property record card (“PRC”),
 - Petitioner’s Ex. 2: 2017 appeal report prepared by Richard Werner,
 - Petitioner’s Ex. 3: Property record cards for sales comparables,
 - Petitioner’s Ex. 4: Sales disclosure forms and table of sales comparables,
 - Petitioner’s Ex. 5: Traffic counts for sales comparables.

 - Respondent’s Ex. 1: Not offered,
 - Respondent’s Ex. 2: PRC for Fazoli’s restaurant located at 4711 National Road,
 - Respondent’s Ex. 3: CoStar listing and PRC for Arby’s located at 3270 E. Main,
 - Respondent’s Ex. 4: CoStar listing for 5055 W. Washington St., Indianapolis,
 - Respondent’s Ex. 5: CoStar listing for 1109 N. Main St., Crown Point,
 - Respondent’s Ex. 6: CoStar listing, sales disclosure form, and PRCs for US 31, Kokomo,
 - Respondent’s Ex. 7: Boulder Group Net Lease Market Report, Q2 2017,
 - Respondent’s Ex. 8: Alternative land extraction,
 - Respondent’s Ex. 9: Berkemeier CoStar survey.
6. The record also includes: (1) all pleadings, briefs, and documents filed in the current appeal, (2) all orders and notices issued by the Board or our ALJ, and (3) a digital recording of the hearing.

BURDEN OF PROOF

7. Generally, a taxpayer seeking review of an assessment must prove the assessment is wrong and what the correct value should be. Indiana Code § 6-1.1-15-17.2 creates an exception to the general 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 appeal, regardless of the level of that increase. 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. I.C. § 6-1.1-15-17.2(b). Richmond conceded that the burden of proof did not shift to the Assessor.

FINDINGS OF FACT

a. The Subject Property

8. The subject property consists of a 2,632 sq. ft. commercial restaurant and 0.62 acres of land located at 4575 National Road East in Richmond, Indiana. It was built in 1987. During the 2017 assessment year it operated as a KFC brand restaurant. *Pet'r. Ex. 2 at 2, 17.*

b. Werner Valuation

9. Richard Werner, Richmond's tax representative, created a "Property Tax Assessment Appeal Report," in which he prepared the cost, assessment comparison, sales-comparison, and income approaches. On cross-examination, he admitted that:
- He is not an appraiser.
 - He did not prepare his report in compliance with the Uniform Standards of Professional Appraisal Practice ("USPAP").
 - He has a contingency fee arrangement with Richmond Enterprises providing that he receives more money the further he is able to lower the assessment.

Werner testimony.

i. Werner cost approach

10. Werner relied on the Department of Local Government Finance (“DLGF”) guidelines to estimate an improvements value for his cost approach but he did not specify which specific cost schedules he used. He arrived at a value of \$86,800 for the improvements. *Pet’r. Ex. 2 at 5; Werner testimony.*

11. To develop a land value, Werner relied on six sales of properties located on National Road. Only one property sold unimproved. For the other properties, he extracted the assessed value of the improvements to arrive at a land value. This resulted in per acre prices ranging from \$37,007 to \$584,510. Werner settled on a value of \$215,000/acre. He multiplied this figure by 0.62 acres to arrive at a land value of \$133,300. After adding the improvements and land values, he arrived at a total cost approach value of \$220,100. *Pet’r. Ex. 2 at 5-6; Werner testimony.*

ii. Werner assessment comparison approach

12. For his assessment comparison approach, Werner found eight other fast food properties within the subject property’s assessment neighborhood. He eliminated four of those for various reasons including a pending appeal, no dining room, land acreage, and location. Werner adjusted the remaining properties for land-to-build ratio, building size, depreciation, grade, and other improvements. Total adjustments ranged from \$20,000 to \$240,000, with three of the four exceeding \$200,000 in adjustments. His adjusted values ranged from \$119.67/sq. ft. to \$182.38/sq. ft. Werner determined the median, \$141.72/sq. ft., and the average, \$146.37/sq. ft. After rounding the midpoint between the average and median values, Werner settled on a total value of \$379,100 under this approach. *Pet’r. Ex. 2 at 7-10; Werner testimony.*

iii. Werner sales comparison approach

13. For his sales comparison approach, Werner first looked for sales in Wayne County between January 1, 2012 and December 31, 2016. He found three sales, but excluded them for various reasons. He then expanded his search statewide using the same criteria. He located four properties from around Indiana with sale prices ranging from roughly \$393,000 to \$550,000. He adjusted for market conditions, location, lot size, and pavement. The gross adjustments ranged from approximately \$65,000 to \$425,000 with three of the four comparable properties receiving adjustments in excess of \$200,000. After making adjustments, Werner's values ranged from \$43.57/sq. ft. to \$157.38/sq. ft. He felt that one comparable was an outlier so he removed the sale and adjusted his range to \$131.91/sq. ft. to \$157.38/sq. ft. After taking the average and median of the range, Werner settled on a value of \$142.21/sq. ft. After applying this to the subject property, he settled on a value of \$374,300 under the sales comparison approach. *Pet'r. Ex. 2 at 13-15; Werner testimony.*

iv. Werner Income Approach

14. Werner began his income approach by assuming that the land and building were owned by the same entity. He used the leases from two other nearby franchise restaurants. From these he concluded to a rent of \$22.53/sq. ft. for the subject property. Using that rent figure, Werner concluded that the annual rent would be \$59,305. He determined his vacancy rate from 29 fast food properties in Richmond. Of those 29, three were vacant as of the assessment date. He used a vacancy rate of 10.3%. *Pet'r. Ex. 2 at 16-17; Werner testimony.*
15. To develop his capitalization rate, Werner reviewed a RealtyRates.com investor survey for the first quarter of 2017. The survey included a minimum, maximum, and average cap rate in the national market for fast food restaurants. Werner used the average rate, 11.25%, and concluded it was appropriate for the subject property. He did not review any other surveys about capitalization rates. *Pet'r. Ex. 2 at 16; Werner testimony.*

16. Werner then calculated replacement reserves using what he described as “common figures” from when he was a trainee appraiser between 2007-2009. Werner arrived at a net operating income of \$43,456 after subtracting collection loss, vacancy, and expenses. He applied the 11.25% cap rate and concluded to a value of \$386,300 using this approach. *Pet’r. Ex. 2 at 17-18; Werner testimony.*

v. Werner reconciliation

17. Werner excluded the cost approach value because of the building’s age. He gave equal weight to his assessment comparison, sales-comparison, and income approaches concluding to a reconciled value of \$375,200 as of the January 1, 2017 assessment date. *Pet’r. Ex. 2 at 19; Werner testimony.*

c. Berkemeier Testimony

18. Brad Berkemeier, a level III assessor-appraiser and consultant with Nexus Tax Group, testified for the Assessor. He critiqued Werner’s work, noting a number of potential issues. These included Werner’s choice of comparables and inconsistencies with his adjustments. He also noted a number of ways Werner failed to use generally accepted appraisal techniques including using leased-fee sales without adjustment, and using sales that included business value. He also took issue with how Werner developed his vacancy and capitalization rates. *Resp’t Exs. 2-9; Berkemeier testimony.*

CONCLUSIONS OF LAW AND ANALYSIS

19. Indiana assesses real property based on its true tax value, which the Indiana Department of Local Government Finance (“DLGF”) has defined as “the market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property.” I.C. § 6-1.1-31-6(c); 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2). Parties may offer evidence that is consistent with the DLGF’s definition of true tax value. A market value-in-use appraisal prepared according to the Uniform Standards of Professional Appraisal Practice often will be probative. *Eckerling v. Wayne Twp. Ass’r*, 841 N.E.2d 674, 678 (Ind. Tax

Ct. 2006). Parties 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 acceptable appraisal principles. *Id.*; *see also* I.C. § 6-1.1-15-18 (allowing parties to offer evidence of comparable properties' assessments in property-tax appeals). January 1, 2017 is the relevant assessment date for this appeal. I.C. § 6-1.1-2-1.5.

20. On cross-examination, Werner admitted that he has a direct financial interest in the outcome of this appeal due to his contingency fee arrangement. We find Werner's admissions troubling because "[a] contingent witness fee arrangement raises the specter of an auctioning of the truth and casts a pall over the entire fact finding process." *Wirth v. State Bd. of Tax Comm'rs*, 613 N.E.2d 874, 876-77 (Ind. Tax Ct. 1993). In this case, we find that Werner's direct financial interest in the results of his valuation severely undercut his credibility. More importantly, there are significant problems with his opinions.
21. As the Assessor pointed out, Werner exclusively relied on the guidelines to develop a value for the improvements under the cost approach. Even if we were to find his calculations were correct, it is still insufficient to support a reduction in the assessment. A party cannot make a case for changing an assessment simply by showing how the assessment regulations should have been applied. *Eckerling v. Wayne Twp. Ass'r*, 841 N.E.2d 674, 678 (Ind. Tax Ct. 2006) ("Strict application of the regulations is not enough to rebut the presumption that the assessment is correct.") Instead, a party must offer market-based evidence. *Id.* Werner offered no market-based evidence to value the improvements in his cost approach.
22. A taxpayer may offer assessment information for comparable properties, but that information must be compiled using generally acceptable appraisal principles. But Werner failed to show he used generally accepted appraisal principles in his assessment comparison approach. Many of the adjustments were inconsistent or unexplained and resulted in large gross adjustments that undercut the alleged comparability of the sales.

In making its case, Richmond Enterprises must walk the Board through the facts supporting its case and the Board will not make its case for it. *Indianapolis Racquet Club, Inc. v. Washington Twp. (Marion Cnty.) Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004).

23. Similarly, Werner failed to explain many of the adjustments to his sales comparables. We also credit Berkemeier's testimony that some of the sales included leases or business value. Taken together, this renders Werner's sales comparison approach unreliable.
24. For his income approach, Werner relied primarily on just two leases with little explanation as to why he did not present additional data. For his capitalization rate, he failed to show why the national average from one survey was appropriate for the subject property. We find his entire income approach unreliable.

CONCLUSION

25. We find Werner's contingency fee arrangement with Richmond undercuts his credibility as an expert witness. In addition, we find his opinions fail to establish prima facie case for any reduction in the assessment. The Assessor did not seek an increase. Thus, we order no change to the 2017 assessment.

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 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>>.