

REPRESENTATIVE FOR PETITIONER: Charles R. Vaughn, Owner and Attorney

REPRESENTATIVE FOR RESPONDENT: Linda Phillips, Tippecanoe County Assessor

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Twyckenham Village, Inc.)	Petitions No. 79-032-10-1-4-00001
)	79-032-11-1-4-00001
Petitioner,)	
)	Parcel No. 79-11-05-276-010.000-032
v.)	
)	Tippecanoe County
Tippecanoe County Assessor,)	Wea Township
)	
Respondent.)	Assessment Years: 2010 and 2011

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

December 5, 2013

FINDINGS OF FACTS AND CONCLUSION OF LAW

Introduction

1. In this assessment appeal, the Petitioner argues that the income approach to determine value should be based on actual rents and actual vacancy. However, the Petitioner failed to demonstrate that this approach satisfies generally accepted appraisal principles. The Board finds that the assessment for 2010 and 2011 must be affirmed.

HEARING FACTS AND OTHER MATTERS OF RECORD

2. The property is a 24,048 square foot neighborhood shopping center on 5.3 acres located at 3000 S. 9th Street in Lafayette, Indiana.
3. The Petitioner initiated assessment appeals for 2010 and 2011 with the County Property Tax Assessment Board of Appeals (“PTABOA”) by timely filing Form 130 Petitions.
4. On July 26, 2012, the PTABOA mailed its Notification of Final Assessment Determination (Form 115) for 2011, concluding that the assessment is \$1,300,000. On July 27, 2012, the PTABOA mailed its Notification of Final Assessment Determination (Form 115) for 2010, concluding that the assessment is \$1,300,000.
5. On August 23, 2012, the Petitioner filed Form 131 Petitions seeking the Board’s review of the 2010 and 2011 PTABOA determinations. The issue on appeal is whether the current assessment of \$1,300,000 for 2010 and 2011 represents the accurate market value-in-use. The Petitioner claimed the assessed value for 2010 and 2011 should be \$954,443 for each year.
6. Administrative Law Judge (“ALJ”) Ellen Yuhan held the Board’s administrative hearing on October 17, 2013. The following people testified under oath:

For Twyckenham Village: Charles R. Vaughn, part owner
David A. Miller, accountant

For the Assessor: Linda Phillips, Tippecanoe County Assessor
Pamela Hruska, Valuation Specialist

7. The Petitioner presented the following exhibits:

For the 2010 appeal:

Petitioner Exhibit 1 – April 14, 2012 letter from the Tippecanoe County Assessor,
Petitioner Exhibit 2 – Tippecanoe County Assessor’s pro forma,
Petitioner Exhibit 3 – Tippecanoe County Assessor’s pro forma with Petitioner’s
proposed changes,

Petitioner Exhibit 4 – July 27, 2012, Notification of Final Determination,
Petitioner Exhibit 5 – Rebuttal exhibit to Respondent Exhibit 8.

For 2011 appeal:

Petitioner Exhibit 1 – April 14, 2012 letter from the Tippecanoe County Assessor,
Petitioner Exhibit 2 – Tippecanoe County Assessor’s pro forma,
Petitioner Exhibit 3 – Tippecanoe County Assessor’s pro forma with Petitioner’s
proposed changes,
Petitioner Exhibit 4 – July 26, 2012, Notification of Final Determination,
Petitioner Exhibit 5 – Rebuttal exhibit to Respondent Exhibit 8.

8. The Respondent presented the following exhibits for both appeals:

Respondent Exhibit 1 – Property record cards for the subject property,
Respondent Exhibit 2 – Form 11 R/A notice for 2009 pay 2010,
Respondent Exhibit 3 – Form 134, proposed income model and accompanying
letter (3 pages),
Respondent Exhibit 4 – GIS aerial photograph of the subject property,
Respondent Exhibit 5 – Commercial listing for the subject property (2 pages),
Respondent Exhibit 6 – Lease agreement between the Petitioner and Tippecanoe
School corporation (19 pages),
Respondent Exhibit 7 – Commercial listing for Wea Plaza (2 pages),
Respondent Exhibit 8 – Sales of other neighborhood center retail properties (6
pages),
Respondent Exhibit 9 – Exterior photographs of the subject property.

9. The following additional items are recognized as part of the record:

Board Exhibit A – Form 131 Petitions,
Board Exhibit B – Notice of Hearing,
Board Exhibit C – Hearing sign-in sheet.

OBJECTIONS

10. The Respondent objected to Petitioner Exhibit 5 because it was not provided five (5) business days before the hearing date as required by 52 IAC 2-7-1(a). The Petitioner contends the exhibit was intended as rebuttal. The ALJ initially sustained the objection because it was not exchanged in accordance with the Board’s procedural rules. However, when it was clear that the exhibit was offered as rebuttal evidence, the ALJ admitted the exhibit over the Respondent’s objection. The Board adopts the ALJ’s ruling.

11. The Petitioner objected to Respondent Exhibits 5 and 7 because they were asking prices, and because Exhibit 5 is outside the relevant time period. The Petitioner objected to Respondent Exhibit 6 because the lease agreement occurred after the valuation dates for the assessments. The Petitioner objected to Respondent Exhibit 8 on the basis of comparability. The ALJ admitted the evidence over the Petitioner's objections because the objections are to relevancy and not to admissibility. The Board adopts the ALJ's ruling.

BURDEN

12. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that a property's assessment is wrong and what its correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also, Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). Nevertheless, the Indiana General Assembly enacted a statute that in some cases shifts the burden of proof:

This section applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal increased the assessed value of the assessed property by more than five percent (5%) over the assessed value determined by the county assessor or township assessor (if any) for the immediately preceding assessment date for the same property. The county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court.

Ind. Code § 6-1.1-15-17.2

13. In these appeals, both parties agreed that the assessments did not increase by more than 5%. Therefore, Indiana Code section 6-1.1-15-17.2 does not apply and the Petitioner has the burden of proof.

SUMMARY OF THE PETITIONER'S CASE

14. The Assessor over-stated the income on her pro forma. The rent the Assessor used to calculate the income was \$10.00 per square foot for the restaurant and \$11.00 per square foot for the liquor store and small retail space. The actual rent for the liquor store and the small retail space is \$9 per square foot. Using \$9 in the calculation decreases the rental income from \$254,228 to \$226,732. The Assessor also underestimated the vacancy rate. The property's actual vacancy rate is 25%, not the 15 % the assessor relied on. By incorporating these changes and deducting the same expenses as the Assessor, the net operating income is actually \$88,286. Mr. Vaughn used the same capitalization rate the Assessor used and calculated a value of \$954,443. *Vaughn testimony; Petitioner Exhibit 3.*
15. The subject property has been for sale, but there have been no offers. The restaurant space (10,000 square feet) is empty and is the major tenant. As a result, based on the income approach, the property is worthless because the largest space is empty. *Vaughn testimony.* Moreover, there is an abundance of vacant commercial real estate in Tippecanoe County. *Kock testimony.*
16. The Assessor's comparable properties are unreasonable. The Evansville and Clarksville properties are 180 to 200 miles away from the subject property. The property on Sagamore that sold for \$1.2 million is located near the by-pass and as a result generates more traffic than the subject property's location. Further, the Sagamore property was fully rented whereas the subject property has never been fully rented. *Vaughn testimony; Respondent Exhibit 8.*
17. There are two properties in the Lafayette market that are more comparable to the subject property than the Respondent's comparable properties. East Gate Plaza is less than a mile west of the subject property and would rent from \$4.50 to \$6.00 a square foot. Brady Center is located on 18th Street, less than a ½ mile east of the subject property, and would rent for \$6.00 or less a square foot. Both properties have vacancy rates of 50% or more. Most of the commercial properties, units of equal value, have been 25% or more

vacant for the last two or three years. *Vaughn testimony; Koch testimony; Petitioner Exhibit 5.*

18. The listing for the subject property and the lease with the Tippecanoe School Corporation are both irrelevant because they are outside the valuation period. Specifically, the assessment years under appeal are 2010 and 2011, while the lease is a three year lease from October of 2011 to October of 2014. Further, the Petitioner had to make \$30,000 in improvements as part of the lease agreement. *Vaughn testimony; Respondent Exhibits 5 and 6.*
19. The listing for the property on 18th Street is evidence of an asking price. It is not evidence of an actual lease amount. Additionally, the intersection near it has traffic of 27,000 cars per day. By contrast, the subject property has 8,000 cars pass by a day. Leases are based a lot on traffic. *Vaughn testimony; Respondent Exhibit 7.*

SUMMARY OF THE RESPONDENT'S CASE

20. The subject property is a 24,000 square foot neighborhood retail center. During the years in question, it had a liquor store on one end and a popular restaurant at the other. There is inline space that admittedly has problems being leased on a regular basis. *Phillips testimony.*
21. Virtually all retail property in Tippecanoe County is valued on the income approach using market rents, market vacancies, and market data stratified by type of retail. Our office collects market data from brokers, other appeals, and online. The Assessor does not rely on a landlord's individual performance because that is not necessarily representative of the market. Using an individual landlord's performance tends to reward the bad landlords and punish the good. *Phillips testimony.*
22. The rents used in the income approach for the subject property were market rents based upon the rentals throughout the community that are of similar size and quality, and are

not based on individual property's performance. It is not clear if Mr. Vaughn's rents were based on a triple net lease, but the rents used in the pro forma are not for a triple net lease. It is assumed the landlord is bearing the expenses for taxes, maintenance, and reserves. *Phillips testimony; Respondent Exhibit 3; Petitioner Exhibit 3.*

23. Retail vacancy for 2010 was reported at 8.83% across the market. The subject property seemed to be experiencing more vacancy than the market as a whole so the Assessor increased the vacancy rate to 15%. After deducting market expenses, she applied a 9.5% capitalization rate. That is an unloaded capitalization rate because the taxes were expenses. *Phillips testimony; Respondent Exhibit 3; Petitioner Exhibit 3.*
24. The subject parcel is listed for lease a triple net lease a rate of \$13 a square foot, which suggests that the Assessor's market rate assigned to this property of \$11 per square foot is reasonable. Additionally, the actual lease of the property for \$11 per square foot, while after the years in question, supports the fact that the Assessor's rates are not unreasonable.¹ *Phillips testimony; Respondent Exhibits 5 and 6.*
25. A property at 3613 S. 18th Street in Lafayette is similar to the subject property. It was listed during the time period for \$15 a square foot, triple net, which is an indication of market rent. *Phillips testimony; Respondent Exhibit 7.*
26. The properties in Evansville, Clarksville, and West Lafayette are not intended to be comparable to the subject property, but are intended to be a check to see if the Assessor's values were reasonable. The sales of these properties show what investors would pay for neighborhood centers in other communities in Indiana. *Phillips testimony; Respondent Exhibit 8.*
27. The Petitioner offered two properties as comparable to the subject property. East Gate Plaza is not remotely similar to the subject property because it contains an abandoned Payless grocery store. Brady Center is considerably older than the subject property and

¹ The Assessor arrived at this figure after including the monthly common area maintenance of \$343 and subtracting the \$30,000 in improvements that were performed for the purposes of this lease.

not as desirable a space. Further, the Petitioner has not submitted any documentation to support his opinion that these properties are comparable to the subject property. *Phillips testimony; Hruska testimony; Petitioner Exhibit 5.*

ANALYSIS

28. Real property is assessed based on its "true tax value," which means "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." Ind. Code § 6-1.1-31-6(c); MANUAL at 2. There are three generally accepted techniques to calculate market value-in-use: the cost approach, the sales comparison approach, and the income approach. Indiana assessing officials primarily use the cost approach. *Id.* at 3. Indiana has Guidelines that explain the application of the cost approach. The value established by use of the Guidelines is presumed to be accurate, but it is merely a starting point. A taxpayer is permitted to offer evidence relevant to market value-in-use to rebut that presumption. Such evidence may include actual construction costs, sales information regarding the subject or comparable properties, appraisals, *and any other information compiled in accordance with generally accepted appraisal principles.* MANUAL at 5 (emphasis added).
29. Regardless of the valuation method used, a party must explain how its evidence relates to market value-in-use as of the relevant valuation date. *See O'Donnell v. Dep't of Local Gov't Finance*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *Long v. Wayne Township Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). The valuation date for a 2010 assessment is March 1, 2010. The valuation date for a 2011 assessment is March 1, 2011. Ind. Code § 6-1.1-4-4.5(f). Any evidence of value relating to a different date must also have an explanation about how it demonstrates, or is relevant to the required valuation date. *Long*, 821 N.E.2d at 471.
30. The Petitioner's claim depends on a value calculation purportedly using the income approach to determine the actual market value-in-use of the subject property. An income capitalization approach that conforms to generally accepted appraisal principles would be

an acceptable way to prove the market value-in-use of a property and overcome the presumption in favor of the existing assessment. MANUAL at 3. The income capitalization approach values property based on its earning power, and in part relies on income, expenses and occupancy rates of comparable properties in the market. *Indiana MHC, LLC v. Scott County Assessor*, 987 N.E.2d 1182, 1185-86 (Ind. Tax Ct. 2013).

31. The Petitioner contends the income approach for the property should be based on actual rents and vacancy. The Petitioner based his income approach on the pro forma prepared by the Assessor. *Petitioner Exs. 2, 3*. The Petitioner, however, decreased the rents received for the liquor store and the small retail space to reflect the actual rents. The Petitioner increased the vacancy rate to 25%, which it claims is the actual rate. The Petitioner then deducted the market expenses used by the Assessor and applied the Assessor's capitalization rate even though Mr. Vaughn stated he did not agree with it.
32. The Petitioner's income capitalization approach failed to comply with generally accepted appraisal principles because it did not consider rents and vacancy rates in the market. Further, the Petitioner also failed to show that combining the actual rents and the actual vacancy rate with market expenses satisfies generally accepted appraisal principles. There is no indication of how the actual expenses compare to the market expenses. The Petitioner invites the Board to find that his method of relying on actual rents and actual vacancies represents the market value-in-use of the property. The Board declines the Petitioner's invitation. *See Indiana MHC*, 987 N.E.2d 1182, 1185-86. (stating that the petitioner's income capitalization approach, which failed to consider any market data, lacked probative value).
33. To the extent that the Petitioner contends the property suffers from high vacancy or low rental rates can be seen as a claim for obsolescence, this argument also fails. It is not sufficient for the Petitioner to merely identify random factors that may cause the property to be entitled to an obsolescence adjustment. The Petitioner must explain how the purported causes of obsolescence cause the property to suffer an actual loss in value. *See*

34. *Indian Industries, Inc. v. Department of Local Government Finance*, 791 N.E.2d 286, 290 (Ind. Tax Ct. 2003) (“All Indian has done in this case is provide the State Board with a laundry list of factors that may cause obsolescence to its improvements and then say ‘as a result, we’re entitled to a 70% obsolescence adjustment.’ However, Indian needed to link one with the other by showing an actual loss in value”). The Petitioner failed to sufficiently show the property’s market value-in-use. Therefore, the Petitioner failed to make a prima facie case that the subject property’s 2010 and 2011 assessments are incorrect.

35. Finally, the Petitioner also focused on two purportedly comparable sales. *Petitioner Ex. 5*. But, in order to use the sales comparison approach as evidence in a property assessment appeal, the proponent must establish the comparability of the properties being examined. Conclusory statements that a property is “similar” or “comparable” to another property do not constitute probative evidence of the comparability of the two properties. *Long*, 821 N.E.2d at 470. Instead, the proponent must identify the characteristics of the subject property and explain how those characteristics compare to the characteristics of the purportedly comparable properties. *Id.* at 471. The proponent also must deal with how any differences between the properties affect their relative values. *Id.* When seeking to establish comparability of land, the relevant characteristics to compare include things such as location, accessibility, and topography. *See Blackbird Farms Apts., LP v. Dep’t of Local Gov’t Fin.*, 765 N.E.2d 711, 715 (Ind. Tax Ct. 2002) (holding that taxpayer failed to establish comparability of parcels of land where, among other things, taxpayer did not compare the topography and accessibility of parcels). The proponent also must explain how any differences between the properties affect their relative market values-in-use. *Long at 471*. The Petitioner failed to offer any such meaningful analysis in this appeal. In fact, the two purportedly comparable properties have, according to the Petitioner’s witness, much lower rents per square foot than the subject property: \$6.00 or less compared to \$9.00 and \$10.00 per square foot for the subject property. This difference in rental price does not support the Petitioner’s conclusion that

these properties are comparable. The Petitioner's conclusory evidence is insufficient to establish the comparability of these parcels and has no probative value. *Id.*

36. The Petitioner failed to make a prima facie case that the 2010 and 2011 assessments were incorrect. The Assessor's duty to support the assessment with substantial evidence is not triggered. *Lacy Diversified Indus. LTD v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1220 (Ind. Tax Ct. 2003).

FINAL DETERMINATION

In accordance with the above findings of fact and conclusions of law, the Board affirms the 2010 and 2011 assessment.

Commissioner, 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>>.