

REPRESENTATIVE FOR PETITIONER: Robert A. Borgmann, Attorney at Law

REPRESENTATIVES FOR RESPONDENT: Marilyn S. Meighen, Attorney at Law; Brian A. Cusimano, Attorney at Law; Heather A. Scheel, Attorney at Law

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

WC MIDDLETOWN LLC D/B/A)	Petition No.:	33-006-14-3-4-20421-15
MILLER'S MERRY MANOR,)		
)		
Petitioner,)	Parcel No.:	33-17-30-400-318.000-006
)		
v.)		
)	County:	Henry
HENRY COUNTY ASSESSOR,)		
)		
Respondent.)	Assessment Date:	March 1, 2014

FINAL DETERMINATION ON SUMMARY JUDGMENT

INTRODUCTION

1. Only errors correctable without resort to subjective judgment may be raised as mathematical errors on a Form 133 Petition for Correction of an Error. WC Middletown, LLC filed a Form 133 petition seeking to reduce its assessment on grounds that the Henry County Assessor computed the wrong effective age for its building. But valuing property under Indiana's current real property assessment system inherently requires the exercise of subjective judgment. We therefore grant the Henry County Assessor's motion for summary judgment and deny Middleton's cross motion.

PROCEDURAL HISTORY

2. On November 6, 2014, Middletown filed its Form 133 petition seeking to correct an error in its 2014 assessment. The Henry County Assessor and Auditor disapproved the

petition. On July 17, 2015, the Henry County Property Tax Assessment Board of Appeals upheld the denial, finding that “effective year changes are subjective” and that they cannot be corrected on a Form 133 petition. Middletown then timely appealed to the Board.

3. The Assessor moved for summary judgment. At the parties’ request, we vacated the previously scheduled hearing on the merits and set a briefing schedule. Middletown then responded to the Assessor’s motion and made its own cross-motion for summary judgment.

4. The Assessor submitted the following designated evidence:

Exhibit 1: Affidavit of Jodi Brown, Henry County Assessor
Exhibit A: 2013 property record card– subject property
Exhibit B: 2014 property record card – subject property
Exhibit C: Copy of Middletown’s Form 133 Petition for Correction of an Error

5. Middletown submitted the following designated evidence:

Exhibit 1: Affidavit of William Mullineaux, certified tax representative
Attachment A: Level III Certified Indiana Assessor-Appraiser certificate
Attachment B: certified tax representative certificate
Exhibit 2: 2011 Real Property Assessment Guidelines, Appendix F

UNDISPUTED FACTS

6. The improvement at issue is a 17,656 square foot, wood-joint building constructed in 1974. It is operated as a nursing home and is located in Middletown, Indiana. *Brown Aff. at ¶2, Exs. A-B.*

7. In 2013, the building was assessed as general commercial residential (“GCR”), with a quality grade of “C,” a condition rating of “average,” and an effective age of 23. *Brown Aff., at ¶2, Ex. A.*

8. The Assessor reviewed an analysis of nursing home properties in Henry County in order to assess Middletown’s property for 2014. She changed several components of the assessment. Those changes included raising the location multiplier from .83 to .87 and decreasing the building’s effective age to nine years. The Assessor ultimately determined a replacement cost new of \$1,232,332, to which she applied 15% normal depreciation and a market factor of 1.25 (which was unchanged from 2013) to reach a value of \$1,309,400 for the building. *Brown Aff. at ¶¶2-3, Exs. A-B.*
9. The 2011 Real Property Assessment Guidelines outline a process for determining a building’s effective age, and in turn, the amount of normal depreciation. Under Table F-2, a 40-to-42-year-old building in average condition has an effective age of 41. And under Table F-3, a GCR nursing home with wood-joint framing and a quality grade of “C” or less has a typical life expectancy of 35 years. Finally, under Table F-4, a building with an effective age of 40-42 years and a life expectancy of 35 years has normal depreciation of 80%. Applying that depreciation percentage to the Assessor’s replacement cost new (and keeping her market factor of 1.25) yields a value of \$308,100 (rounded):

Replacement cost new:		\$1,232,332
Depreciation (inverse):	x	<u>.20</u>
Depreciated cost:		\$246,466
Market factor:	x	<u>1.25</u>
Value:		\$308,083

See Pet’r Ex. 1, at ¶¶6-16; Pet’r Ex. 2.

DISCUSSION

A. Summary Judgment Standard

10. Our procedural rules allow summary judgment motions, which are 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 County Property 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 to show that 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 rather 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 nonmovant. *See Carey v. Ind. Physical Therapy, Inc.*, 926 N.E.2d 1126, 1128 (Ind. Ct. App. 2010).

B. Analysis

11. A taxpayer must use the appropriate method to challenge a property's assessment. *Bender v. State Bd. of Tax Comm'rs*, 676 N.E.2d 1113, 1114 (Ind. Tax Ct. 1997). For the 2014 tax year, a taxpayer had two methods for challenging an assessment: (1) the process under Ind. Code § 6-1.1-15-1 through -4, which is commonly known as the Form 130/131 process; or (2) the correction of error process under Ind. Code § 6-1.1-15-12, for which the Form 133 petition is prescribed. Taxpayers could use the Form 130/131 process to challenge both subjective and objective errors, but they could use a Form 133 petition only to challenge objective errors. *See, e.g., Muir Woods, Inc. v. O'Connor*, 36 N.E.3d 1208, 1210-1211 (Ind. Tax Ct. 2015); *Hatcher v. St. Bd. of Tax Comm'rs*, 561 N.E.2d 852, 857 (Ind. Tax Ct. 1990). "[W]here the decision under review is automatically dictated by a simple true or false finding of fact, it is considered objective and properly challenged via Form 133." *Bender*, 676 N.E.2d at 1115.
12. The Assessor argues that determining a property's value in general, and its effective age in particular, requires subjective judgment, and that Middletown therefore could not bring

its appeal on a Form 133 petition. Middletown admits that the Assessor used subjective judgment in determining the underlying parcel characteristics, such as condition, that are used to determine effective age, normal depreciation, and ultimately, the improvement value. But it argues that once those decisions are made, “the procedure used to calculate effective age is straightforward and exact” under Appendix F to the 2011 Real Property Assessment Guidelines. *Pet’r Brief* at 7. We agree with the Assessor.

13. The goal of Indiana’s real property assessment system is to arrive at an assessment reflecting the property’s true tax value. 50 IAC 2.4-1-1(c); 2011 REAL PROPERTY ASSESSMENT MANUAL at 3. “True tax value” does not mean “fair market value” or “the value of the property to the user.” I.C. § 6-1.1-31-6(c) and (e). It is instead determined under the rules of the Department of Local Government Finance (“DLGF”). I.C. § 6-1.1-31-5(a); I.C. § 6-1.1-31-6(f). The DLGF defines “true tax value” as “market value in use,” which it in turn defines as “[t]he 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 MANUAL at 2.
14. That has not always been Indiana’s valuation standard. Under Indiana’s old property tax system, true tax value was determined solely by reference to administrative regulations and bore no relation to any external benchmark. *Westfield Golf Practice Center, LLC v. Washington Twp. Assessor*, 859 N.E.2d 396, 398 (Ind. Tax Ct. 2007). That changed in response to the landmark *Town of St. John* litigation where the Indiana Supreme Court ultimately held that the State Board of Tax Commissioners’ then-existing cost schedules violated Ind. Const. Art. 10 § 1. *See State Bd. of Tax Comm’rs v. Town of St. John*, 702 N.E.2d 1034, 1042-43 (Ind. 1998). Beginning in 2002, the State Board of Tax Commissioners, and its successor, the DLGF, overhauled Indiana’s property tax system. They adopted market value-in-use as the standard for measuring true tax value and incorporated an external benchmark that includes market concepts. *See Westfield Golf*, 859 N.E.2d at 399 (“Beginning in 2002, however, Indiana’s overhauled property tax

assessment system incorporates an external, objectively verifiable benchmark—market value-in-use.”).

15. The purpose of the Manual and Guidelines is to accurately determine “true tax value,” not to “mandate that any specific assessment method be followed.” 50 IAC 2.4-1-1(c). All three standard appraisal approaches—the cost, sales-comparison, and income approaches—are “appropriate for determining true tax value.” 2011 MANUAL at 2. Although property is generally assessed using the mass-appraisal cost approach laid out in the Guidelines, the Manual allows for the use of “other relevant information in applying the cost approach,” and says that assessors “may also use either the sales comparison approach or the income approach, or both, in determining true tax value....” *Id.* at 3. In that vein, the Tax Court has explained that the assessment guidelines promulgated in conjunction with the 2002 version of the Manual merely provided a “starting point” for an assessor to determine a property’s market value-in-use. *Westfield Golf*, 859 N.E.2d at 399. The Court recognized that “[i]n certain instances, assessing officials must adjust their assessments to arrive at a property’s actual market value-in-use.” *Kooshtard Property VIII, LLC v. Shelby County Ass’r*, 987 N.E.2d 1178, 1180 (Ind. Tax Ct. 2013).
16. Under this new system, an assessment determined in accordance with the Manual is presumed to be correct. *See* 2011 MANUAL at 3. Taxpayers generally cannot rebut this presumption by simply contesting the assessor’s methodology. *See 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.”). To make a case for a lower assessment, taxpayers must use relevant market-based evidence to “demonstrate that their suggested value accurately reflects the property’s true market value-in-use.” *Id.* *See also* 2011 Manual at 3 (“Whether an assessment is correct shall be determined on the basis of whether, in light of the relevant evidence, it reflects the property’s true tax value as defined in this manual.”).

17. What all this means is that determining a property’s true tax value under our current assessment system inherently requires subjective judgment. The Tax Court has recognized as much:

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.”

Town of St. John, et al. v. State Bd. of Tax Comm’rs, 698 N.E.2d 399, 400 (Ind. Tax Ct. 1998);¹ *see also, Stinson v. Trimas Fasteners, Inc.*, 923 N.E. 2d 496, 502 (Ind. Tax Ct. 2010) (explaining that “[t]he valuation of property is the formulation of an opinion; it is not an exact science.”).

18. The Tax Court’s decision in *Kooshtard Property VI, LLC v. White River Twp. Ass’r*, illustrates these points in the context of a claim challenging an assessor’s determination of a structure’s effective age—the same determination that Middletown contests in this case. There, the assessor had “tweaked” a building’s effective age both to reflect modernization and remodeling and to make the building’s value more consistent with its sale price. *Kooshtard Property VI, LLC v. White River Twp. Ass’r*, 836 N.E.2d 501, 506 (Ind. Tax Ct. 2005). The Court agreed that the assessor perhaps should have “tweaked” the building’s condition rating instead of its effective age. Nonetheless, the Court explained, “a technical failure to comply with the procedures set forth in the Guidelines’ cost approach does not render an assessment invalid as long as the individual assessment is a reasonable measure of true tax value.” *Id.* at 506, n.6 (emphasis in original). The

¹ Although the Indiana Supreme Court reversed a related decision from the Tax Court, the holding we cite remains legally viable. In an earlier decision, the Tax Court had found that the Indiana Constitution required the State Board of Tax Commissioners to consider “real world evidence” in property tax appeals. *Town of St. John et. al. v. State Bd. of Tax Comm’rs*, 690 N.E.2d 370 (Ind. Tax Ct. 1997). The Tax Court issued the decision we cite in order to clarify when the State Board would have to begin considering real world evidence. *See Town of St. John*, 698 N.E.2d at 400. The Indiana Supreme Court ultimately reversed the Tax Court’s earlier decision in part, holding that there was no state constitutional right to offer “competent real world evidence” in property tax appeals. *State Bd. of Tax Comm’rs v. Town of St. John* 702 N.E.2d 1034, 1043 (Ind. 1998). The Supreme Court, however, did not separately grant review of, or otherwise address, the clarification order we have cited. Under Indiana’s current system, parties to individual tax appeals have the right to offer the type of real world evidence that the Tax Court discussed, even if the source of that right is not the Indiana Constitution. *See* 2011 MANUAL at 3. So the language we quote is on point and persuasive.

taxpayer failed to make a prima facie case, because it failed to account for the building's sale price, modernization, or remodeling. *Id.* at 506.

19. According to Middletown, *Kooshtard Property VI* is inapposite because the Court merely held that the taxpayer failed to meet its burden of proof. But that is precisely the point. To bring a Form 133 petition, a taxpayer must show that the decision at issue is “automatically dictated by a simple true or false finding of fact.” *Bender*, 676 N.E.2d at 1115. Yet strictly applying the Guidelines’ methodology for determining effective age, which is what Middletown wants to do in this case, was not even enough for the taxpayer in *Kooshtard Property VI* to make a prima facie case.
20. While the holdings in *Westfield Golf*, *Eckerling*, and *Kooshtard VI* relied on a since-repealed administrative regulation and a prior version of the Manual, both the current regulation (50 IAC 2.4-1-1) and the 2011 Manual are consistent with the Tax Court’s reasoning in those cases.
21. Despite the current system’s focus on arriving at an accurate true tax value rather than simply applying the mass-appraisal guidelines, Middletown argues that allowing an assessor to tweak parcel characteristics would render the Form 133 process “meaningless and useless” with respect to mathematical errors, because an assessor could always justify a miscalculation as “tweaking.” We disagree. For example, a taxpayer might still be able to use a Form 133 petition to correct a plain scrivener’s error, such as an assessor inadvertently including additional zeros when adding the land and improvement components. But we do find that the new system makes the Form 133 process generally inappropriate to challenge a property’s valuation, because determining true tax value no longer resembles a mathematical exercise.
22. We likewise disagree with Middletown’s suggestion that our decision makes Ind. Code § 6-1.1-4-4.4 irrelevant or that it gives assessors license to make arbitrary assessments. Under Ind. Code § 6-1.1-4-4.4, an assessor must document year-to-year changes to a

parcel's underlying characteristics, including "age, grade, or condition" and explain the reasons for those changes. I.C. § 6-1.1-4-4.4(b). On appeal, the assessor has the burden of proving the changes were valid. *Id.*

23. To the extent Middletown believes the Assessor acted arbitrarily, it was free to appeal the assessment using the Form 130/131 process. In such an appeal, Ind. Code § 6-1.1-4-4.4 might have placed the burden on the Assessor to prove that her changes to the nursing home's effective age were valid. The statute does not spell out the consequences for failing to meet that burden. For the sake of argument, we will assume that the property's valuation would revert to a default level measured by applying the previous year's effective age determination. But the default value would only be a function of the Assessor's failure to meet her burden of proof; it would not transform true tax value into an objective determination made by strictly applying the Guidelines. For example, regardless of whether the Assessor accurately estimated the property's effective age, she would still have been free to offer market-based evidence, such as an appraisal, to support her assessment or to show a different value altogether.

24. Of course, Middletown chose to not appeal its assessment under the Form 130/131 process. Thus, the question before us is not whether the Assessor would have the burden of proof in such an appeal, but whether a Form 133 petition is an appropriate vehicle for Middletown to contest the valuation of its property. *See Pulte Homes of Indiana, LLC v. Hendricks County Ass'r*, 42 N.E.3d 590, 595-96 (Ind. Tax Ct. 2015) (Explaining that a different burden-of-proof statute—Ind. Code § 6-1.1-15-17.2—"shifts the burden to the Assessor only when the validity of the assessment is at issue, not when, as here, there is a preliminary procedural issue being determined."). It is not, and Middletown cannot avoid

the statutory time limitations associated with the Form 130/131 review process by filing its claim on a Form 133 petition.² We must therefore dismiss Middletown's petition.

SUMMARY OF FINAL DETERMINATION

25. Under our current assessment system, determining true tax value inherently requires the exercises of subjective judgment. That precludes using the Form 133 correction of error process to challenge a property's valuation, which is precisely what Middletown has done. For that reason, we conclude that there are no genuine issues of material fact and that the Assessor is entitled to judgment as a matter of law. We therefore grant the Assessor's summary judgment motion, deny Middletown's cross motion, and enter our final determination dismissing Middletown's Form 133 petition.

Dated: July 11, 2017

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

² See *Williams Indus. v. State Bd. of Tax Comm'rs*, 648 N.E.2d 713, 718 (Ind. Tax Ct. 1995) (stating that because the legislature has created specific appeal procedures, a taxpayer must comply with the statutory requirements of filing the proper petitions within a timely manner). See also *Lake Co. Prop. Tax Assessment Bd. of Appeals v. BP Amoco Corp.*, 820 N.E.2d 1231, 1236-1237 (Ind. 2005) (stating that because the taxpayer failed to challenge its assessments within the applicable time period for which a Form 130 was available, it was foreclosed from using a Form 133 for that purpose).

- 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>>.

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