

REPRESENTATIVE FOR PETITIONERS:

Rebecca Butler Power, Butler Power Law P.C.

REPRESENTATIVE FOR RESPONDENT:

Edward J. Bisch Jr., Indiana Assessment Service

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

WATERFORD DEVELOPMENT CORP.)	Petition Nos.: 20-015-08-1-4-00241
and HOOGENBOOM NOFZIGER)	20-015-08-1-4-00242
REALTY CORP.,)	
)	Parcel Nos.: 20-11-23-276-022.000-015
Petitioners,)	20-11-23-276-018.000-015
)	
v.)	County: Elkhart
)	
ELKHART COUNTY ASSESSOR,)	Township: Elkhart
)	
Respondent.)	Assessment Year: 2008

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

September 25, 2012

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:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Introduction

1. In claiming that their property was assessed too high, the Petitioners, Waterford Development Corp. and Hoogenboom Nofziger Realty Corp., offered valuation opinions from their vice president and an appraiser. But neither opinion was sufficiently credible

to show what the property's market value-in-use was or even to show a likely range of values. The vice president's opinion was simply a modification of a conclusory opinion from one of the Assessor's witnesses that related to an entirely different valuation date. And the Assessor offered persuasive testimony from a review appraiser to discredit the opinion of the Petitioners' appraiser.

Procedural History

2. Hoogenboom Nofziger owns parcel 20-11-23-276-018.000-015 and Waterford owns parcel 20-11-23-276-022.000-015. Those entities use the two parcels together as a retail shopping center known as Goshen Commons Shopping Center. Jointly, these Petitioners contested the parcels' March 1, 2008 assessments. On December 27, 2010, the Elkhart County Property Tax Assessment Board of Appeals ("PTABOA") issued its determinations denying the Petitioners the relief they had requested. The Petitioners then timely filed Form 131 petitions with the Board. The Board has jurisdiction over these appeals under Ind. Code §§ 6-1.1-15 and 6-1.5-4-1.
3. On April 12, 2012, the Board's Administrative Law Judge, Patti Kindler ("ALJ"), held a consolidated administrative hearing on the appeals.¹ Neither the Board nor the ALJ inspected the property.

Hearing Facts and Other Matters of Record

4. The following people were sworn in and testified:
 - Gregory A. Hoogenboom, President, Waterford Development Corp. and
Hoogenboom Nofziger Realty Corp.
 - Steven W. Sante, certified general appraiser
 - Lisa L. Meade, Vice President, Waterford Development Corp. and Hoogenboom
Nofziger Realty Corp.
 - Peter A. Letherman, Senior Vice President, FM Stone Commercial
 - Edward J. Bisch, Indiana Assessment Service
 - Cathy Searcy, Elkhart County Assessor
 - Dana Fisher, Indiana Assessment Service
 - Gavin Fisher, Elkhart County Deputy Assessor

¹ The parties requested a consolidated hearing for the appeal petitions.

Kenneth Voss, licensed appraiser, Kenneth Voss & Associates

5. The Petitioners submitted the following exhibits:

- Petitioners Exhibit 1: Summary of Witness Testimony and Exhibits
- Petitioners Exhibit 2: Appraisal prepared by Steven W. Sante as of January 1, 2007
- Petitioners Exhibit 3: Settlement Statement for Hoogenboom Nofziger dated December 2, 1998
- Petitioners Exhibit 4: 2006 federal income tax returns
- Petitioners Exhibit 5: 2007 federal income tax returns
- Petitioners Exhibit 6: 2008 federal income tax returns
- Petitioners Exhibit 7: 2009 federal income tax returns
- Petitioners Exhibit 8: 2010 federal income tax returns
- Petitioners Exhibit 9: PTABOA Notice of Hearing for Waterford Development with information submitted by Dana Fisher at the PTABOA hearing
- Petitioners Exhibit 10: PTABOA Notice of Hearing for Hoogenboom Nofziger Realty with information submitted by Dana Fisher at the PTABOA hearing
- Petitioners Exhibit 11: Comparison of income capitalization calculation from Assessor's office to Lisa Meade's calculation using actual rents, vacancy, and expenses
- Petitioners Exhibit 12: Appeal Presentation Cover Sheet for Waterford Development, including valuation model prepared by Gavin Fisher for 2010 appeal year, 2009 property record card ("PRC"), and 2008 Form 115
- Petitioners Exhibit 13: Appeal Presentation Cover Sheet for Hoogenboom Nofziger including Valuation Model prepared by Gavin Fisher for 2010 appeal year, 2009 PRC, and 2008 Form 115
- Petitioners Exhibit 14: PRC for MCIC property located on W Lincoln Ave, Goshen
- Petitioners Exhibit 15: PRC, Property Assessment Detail Report, and 2010 payable 2011 tax information for Cripe property located at 23672 US 20, Elkhart
- Petitioners Exhibit 16: Property Assessment Detail Record, photos, PRC, street maps, 2009 pay 2010 tax bill, provisional tax bill for 2009, 2011 pay 2010 tax bill, W-9, and Form 17T for HPC Properties parcel located at 1610 S Nappanee, Elkhart
- Petitioners Exhibit 17: PRC, Search for Elkhart Parcels Report, and Property Assessment Detail Report for LW Properties parcel located at 710 W Lincoln Ave, Goshen
- Petitioners Exhibit 18: Property Assessment Detail Report for Myers property located at 2809 Ferndale Rd, Elkhart

- Petitioners Exhibit 19: Property Assessment Detail Report for SCP property located at 3600 Cassopolis St, Elkhart
- Petitioners Exhibit 20: Aerial Photographs, Site Plan, and Pete Letherman Bio
- Petitioners Exhibit 21: Goshen Commons Rent Roll as of 3-1-08
- Petitioners Exhibit 22: Aerial Map

6. The Assessor submitted the following exhibits:

- Respondent Exhibit 1: Summary of Respondent Exhibits and Testimony
- Respondent Exhibit 2: Power of Attorney for Edward Bisch Jr./Indiana Assessment Service
- Respondent Exhibit 3: Two letter from Lisa Meade to the Assessor, both dated November 12, 2009
- Respondent Exhibit 4: 2008 PRCs for subject property
- Respondent Exhibit 5: Two aerial photographs of the subject property
- Respondent Exhibit 6: Income calculations submitted by Dana Fisher to the PTABOA
- Respondent Exhibit 7: CBRE Richard Ellis information as submitted to PTABOA
- Respondent Exhibit 8: Assessor response to PTABOA request for additional evidence
- Respondent Exhibit 9: Appraisal prepared by Steven W. Sante as of January 1, 2007
- Respondent Exhibit 10: Petitioners response to PTABOA request for additional evidence
- Respondent Exhibit 11: Form 115 determinations for 2008 assessment date
- Respondent Exhibit 12: Sales Comparison Analysis prepared by Gavin Fisher for IBTR hearing
- Respondent Exhibit 13: Appraisal Review prepared by Kenneth W. Voss
- Respondent Exhibit 14: Assessment comparison and PRCs for Waterford Development computing assessment increase between 2007 and 2008

7. The Board recognizes the following additional items as part of the record of proceedings:

- Board Exhibit A: Form 131 petitions
- Board Exhibit B: Hearing notices²
- Board Exhibit C: Hearing sign-in sheets
- Board Exhibit D: Notice of Appearance by Rebecca Butler Power

8. Goshen Commons has three buildings. The Hoogenboom Nofziger parcel contains Building 1, also known as the “big box” building. The Waterford parcel has Buildings 2

² The Board mailed a hearing notice for Hoogenboom Nofziger’s petition on March 7, 2012, but it did not mail a hearing notice for Waterford’s petition until March 20, 2012. At the hearing, the parties agreed to waive the requirement of 30 days advance notice for Waterford’s appeal petition.

and 3 assessed to it. The Petitioners referred to Buildings 2 and 3 as “in-line” retail centers.

9. The PTABOA determined the following assessments:

	<u>Land</u>	<u>Improvements</u>	<u>Total</u>
Hoogenboom Parcel	\$1,118,400	\$1,815,300	\$2,933,700
Waterford Parcel	\$613,600	\$1,040,600	<u>\$1,654,200</u>
			\$4,587,900.

10. The Petitioners requested a combined assessment for both parcels of \$2,135,000.

Objections

11. The parties made several objections, one of which the ALJ ruled on. The Board adopts the ALJ’s ruling. The parties also made several objections that were mooted by the parties rephrasing their questions or simply moving on. The ALJ took the remaining objections under advisement. The Board therefore turns to those objections.

A. The Assessor’s Objections

12. The Assessor objected to several of the Petitioners’ exhibits. The Assessor first objected to Petitioners’ Exhibits 3 and 12-13 on grounds that they did not relate to the March 1, 2008 assessment. Exhibit 3 is a settlement statement from Hoogenboom Nofziger’s 1998 purchase of one of the parcels under appeal. Exhibits 12 and 13 are copies of analyses that Gavin Fisher performed for the Assessor in connection with the Petitioners’ appeals of Goshen Commons’ March 1, 2010 assessments. They also contain handwritten adjustments that Lisa Meade, one of the Petitioners’ witnesses, made to Mr. Fisher’s analyses.
13. The Board agrees that those exhibits are marginally relevant, at best. That is especially true in light of the Petitioners’ failure to explain how the exhibits relate to Goshen

Commons' value as of the January 1, 2007 valuation date that applies to the assessments under appeal. The Board therefore ultimately gives those exhibits no weight.

Nonetheless, given that the parties fully addressed those exhibits at the hearing, the Board sees no reason to exclude those exhibits. The Board therefore overrules the Assessor's objection.

14. The Assessor next objected to Petitioners' Exhibits 14-19: property record cards for six other properties, some which the Assessor's witness, Gavin Fisher, referenced in his analyses concerning the Petitioners' appeal of Goshen Commons' March 1, 2010 assessment. According to the Assessor, those property record cards are outside the scope of what the Petitioners raised on their Form 131 petitions, both of which rely on Steven Sante's appraisal. The Petitioners responded that the property record cards relate to Mr. Fisher's analyses and are therefore relevant. The Petitioners also contend that the property record cards relate to whether assessments in the area were uniform and equal as required by the Indiana Constitution.
15. Some, but not all, of the property record cards relate to properties that Gavin Fisher used in a sales-comparison analysis that he performed for an appeal of Goshen Commons' March 1, 2010 assessment. Once again, those exhibits are marginally relevant at best, and the Board gives them no weight. Nonetheless, the Board overrules the Assessor's objection to the extent that the Petitioners offered the property record cards in connection with Mr. Fisher's analyses. The Board, however, sustains the Assessor's objection to the extent that the Petitioners offered the property record cards to support a claim that the Goshen Commons was not assessed uniformly and equally with other properties in the county. Nothing in the Petitioners' Form 131 petitions even remotely refers to constitutional or statutory requirements for uniformity and equality. The Petitioners have therefore waived that claim.
16. Finally, the Assessor objected to Petitioners' Exhibit 22—an aerial map—on grounds that the Petitioners did not offer that exhibit until after they had rested. The Board notes that the Assessor did the same thing with Assessor's Exhibit 14. In any case, witnesses

referred to the aerial map throughout the hearing without objection. The Board therefore overrules the Assessor's objection to admitting it as an exhibit.

B. The Petitioners' Objections

17. The Petitioners moved to strike testimony from the Assessor's expert witness, Kenneth Voss, that went beyond the scope of the Assessor's question on cross examination. The Assessor asked if Mr. Voss had testified that he would use the Petitioners' federal tax returns and not change the numbers from those returns. Mr. Voss responded that he would use federal returns if he was doing an appraisal and the returns were available to him. He then testified that he thought the returns were private but that they were now being made an open record and he was not sure that Mr. Sante would have wanted that. The Board agrees that Mr. Voss's answer regarding whether the returns were private or had been made public should be stricken.

18. The Petitioners also objected to Respondent's Exhibit 14—property record cards and calculations regarding the increase in the Waterford parcel's assessment between 2007 and 2008—on grounds that the Petitioners did not offer that exhibit until after the close of evidence. The Board agrees that the Assessor should have offered the exhibit earlier when the ALJ was addressing the question to which the exhibit relates: whether the Petitioners or the Assessor had the burden of proof. Nonetheless, the Assessor testified without objection to many of the things reflected in Exhibit 14. And the exhibit relates to an important procedural question about which the Board should be fully informed. The Board therefore overrules the Petitioners' objection.

Parties' Contentions

A. Summary of the Petitioners' Evidence and Contentions

19. The Petitioners contend that Goshen Commons should be assessed for \$2,135,000. In support of their position, the Petitioners offered background information about the property and two valuation opinions.

1. Background

20. In 1998, Hoogenboom Nofziger bought the parcel that contains Building 1 for \$625,000. Shortly thereafter, in December 1999, Waterford bought an additional 6.5 acres, which includes what is now the Waterford Parcel, for \$305,000. Waterford later sold a little over two acres back to the city. That sale reduced Waterford's basis in the property by \$96,000. Waterford has \$555,000 in cost for Building 2, an 8,100-square-foot addition to Building 1, and \$640,755 in cost for Building 3, an 8,000-square-foot free-standing building across Eisenhower Road. *Meade testimony; see also, Resp't Ex. 4.*
21. Building 1 is a 57,753-square-foot "big box" building designed for an anchor tenant. Big Lots had leased 29,200 square feet in Building 1. Big Lots moved out in 2005, although it continued to pay rent through June 2006. The remainder of Building 1 was leased to two tenants: Methodist Occupational (17,390 square feet), which paid \$3.40/sq. ft. plus common area maintenance ("CAM") fees that were capped at \$1.35/sq. ft., and Dollar General (10,260 square feet), which paid \$3.30/sq. ft. plus CAM fees capped at \$1.15/sq. ft. *Hoogenboom testimony; Meade testimony; Pet'rs Ex. 21.* Buildings 2 and 3 contain "in line" stores, which were leased for amounts ranging from \$9.16/sq. ft. to \$14.95/sq. ft. *Sante testimony; Hoogenboom testimony; Resp't Ex. 4.*

22. Counting (1) the Big Lots space, (2) a 1,200-square-foot area of Building 2, and (3) a 2,793-square-foot area of Building 3 that was unfinished, 45.5% of Goshen Commons was vacant on March 1, 2008. *Meade testimony; Pet'rs Ex. 21.*
23. According to (1) Gary Hoogenboom, president of both Hoogenboom Nofziger and Waterford, and (2) Peter Letherman, a longtime broker and the leasing agent for Goshen Commons since June 2009, the property faces several challenges:
- It has limited frontage along, and poor visibility from, Lincoln Avenue (U.S. 33). In fact, the lack of visibility has caused two tenants to ask to re-negotiate their leases. *Hoogenboom testimony; Letherman testimony.*
 - Goshen Commons has not been able to attract a big-box “A credit” type of anchor tenant. *Letherman testimony.* Not only do those tenants generate rent, they help pull in other tenants for the in-line stores. *Id.; see also, Hoogenboom testimony and Sante testimony.*
 - The Petitioners have been forced to divide the space within Building 1. That has created a “bowling alley” effect, meaning that the stores are long and narrow. *Letherman testimony.* Some tenants do not want to pay for that extra depth, which results in that space either being “dark” or leased to tenants rent free. *Id.; Hoogenboom testimony.*
 - When the City of Goshen opened an industrial center to the east of Goshen Commons, it condemned some of the Petitioners’ property and ran Eisenhower Road through Goshen Commons. The road was not planned when the Petitioners bought the property, and it has created further problems. *Hoogenboom testimony.*
24. Based on those challenges, Letherman believed that market rent for Building 1 was between \$4.00 and \$5.00/sq. ft. in 2008. He therefore felt that the rent actually received for that building was within the market range. Letherman also felt that the 10% vacancy rate used by Dana Fisher in her analysis under the income approach was “a little unrealistic” for Goshen Commons. *Letherman testimony.* Goshen Commons has traditionally had a high vacancy rate. Although the property has begun what Letherman

described as an “adaptive re-use,” it takes time to find alternative retailers to occupy the space. *Id.*

2. Sante opinion

25. Steven Sante is an Indiana certified general appraiser and a Senior Residential Appraiser (“SRA”). He has been an appraiser since 1991 and has appraised about 150 commercial properties since 2006. He has also completed most of the work for his designation as a Member of the Appraisal Institute (“MAI”). *Sante testimony; Pet’rs Ex. 2 at 17-20.*
26. In his September 15, 2010 appraisal report, Mr. Sante estimated Goshen Commons’ value as of January 1, 2007. He determined that the property should have had an assessed value of \$2,135,000 for tax year 2008 payable 2009. And he certified that his appraisal conformed to the Uniform Standards of Professional Appraisal Practice (“USPAP”). *Pet’rs Ex. 2 at 1-2, 10-13.*
27. Mr. Sante estimated the property’s value using only the income approach. Mr. Sante’s report does not explain why he did not also apply the cost and sales-comparison approaches to value. But at the Board’s hearing, he testified that buyers in the market for retail centers are investors who simply care about the potential return on investment. Those buyers therefore look at income instead of at what other centers sell for or at the cost approach. *Sante testimony.*
28. To estimate income, Mr. Sante examined and verified Goshen Commons’ actual income from accounting summaries, tax returns, and tenant rent rolls for 2006-2008. Because the assessment under appeal was from 2008, Mr. Sante was looking at the property as it existed on March 1, 2008, and valuing it as of January 1, 2007. He therefore used the property’s 2008 income of \$272,620 as reported on an accounting summary. That number was in the mid-range for all three years. *Pet’rs Ex. 2 at 5; see also, Sante testimony.*

29. Mr. Sante then reviewed the property's expenses for 2006-2009. He ultimately threw out 2008 and included 2009 because the 2008 expenses included unusually high commissions. The expenses that Mr. Sante used did not include taxes or replacement reserves—he felt that the amount spent on maintenance was consistent with what a replacement allowance should be and he dealt with the taxes by loading his capitalization rate with the property's effective tax rate. Mr. Sante also adjusted the property's actual expenses by eliminating an expense that had been listed for a car and reducing the listed management costs. Although allowed under Internal Revenue Service rules, the car expense and part of the management cost were not related to the Goshen Commons real estate. Mr. Sante then averaged the adjusted expenses from 2006, 2007, and 2009 to arrive at \$119,966, or 44% of income. *Sante testimony; Pet'rs Ex. 2 at 6-7.*
30. Mr. Sante also looked at sales of 13 retail centers, which had operating expense ratios ("OERs") ranging from 16.3% to 44.9%. Although Goshen Commons' OER was at the high end of that range, Mr. Sante explained that half of the property was leased to anchor-type tenants, which typically pay lower rents. He therefore felt that the property's actual expenses were reasonable and used them in his report. *Sante testimony; Pet'rs Ex. 2 at 6-7.*
31. Before subtracting expenses from Goshen Commons' operating income, however, Mr. Sante reduced the property's expenses by \$101,202 for Goshen Commons' property taxes. That left expenses of only \$18,764. He then subtracted that amount from the property's gross income to arrive at net operating income of \$253,856. *Sante testimony; Pet'rs Ex. 2 at 9.*
32. Mr. Sante used two methods to estimate a discount rate to apply to the property's net operating income: market extraction and the "Modified Akerson" method. For his market extraction, Mr. Sante looked to the same 13 sales from which he had extracted OERs. The overall capitalization rates ("OARs") from those sales ranged from 6.95% to

11.36%.³ Mr. Sante, however, noted that while most of the OARs were less than 10%, most of the sales were smaller than Goshen Commons and therefore had less risk. One property was older and had approximately 99,000 square feet. Mr. Sante therefore felt that Goshen Commons had more risk than that property. In light of those differences, Mr. Sante did not feel that extracting an OAR from sales was ideal. *Pet'rs Ex. 2 at 7-8; Sante testimony.*

33. For his Modified Akerson analysis, Mr. Sante surveyed lenders to get typical rates, holding periods, amortization periods, and loan-to-value ratios that were being used in the market around the effective date of his appraisal. Mr. Sante then used that information to build an unloaded rate of 9.13%. He loaded that rate by an effective tax rate of 2.7564% to get a loaded rate of 11.89%, which is what he divided into Goshen Commons' net operating income to arrive at a rounded value of \$2,135,000. *Sante testimony; Pet'rs Ex. 2 at 9.*
34. Mr. Sante did not believe that Goshen Commons' income supported the property's assessment of more than \$4,000,000. To explain why, Mr. Sante pointed to many of the same reasons that Hoogenboom and Leatherman discussed, such as the property's poor street visibility, the lack of a big-box anchor, the comparatively lower rates for big-box tenants, and the low traffic counts on Eisenhower Street. *Sante testimony.*

3. Meade's valuation opinion

35. Lisa Meade is Hoogenboom Nofziger's vice president, where she has worked for nearly 18 years. She is in charge of the accounting function and commercial-lease management properties for both Petitioners. Ms. Meade has been a CPA since 1987. *Meade testimony.*

³ Two of the sales did not have an OAR or OER listed. *Pet'rs Ex. 2 at 7.*

36. Ms. Meade revised a calculation that Dana Fisher had offered at the PTABOA hearing on the Petitioners' appeal of Goshen Commons' March 1, 2010 assessments. Ms. Fisher estimated the property's value at \$4,073,700. Ms. Meade used Ms. Fisher's formula, including Ms. Fisher's capitalization rate and expense ratio, but she substituted Goshen Commons' actual income for the income that Ms. Fisher had used. Ms. Meade likewise chose not to use Ms. Fisher's 10% vacancy rate, explaining that by using actual income she was incorporating the property's actual vacancy rate. After making those changes, Ms. Meade arrived at a value of \$2,080,922. *See Meade testimony; Pet'rs Ex. 11.* Ms. Meade estimated that the Petitioners have been over-paying property taxes by about \$60,000 a year. She prepared the Petitioners' tax returns for 2006 through 2010. They showed a loss for each year. *Meade testimony; Pet'rs Exs. 5-6.*

4. Critique of the Fishers' valuation opinions

37. Ms. Meade, Mr. Sante, and Mr. Leatherman all felt that Dana Fisher had overestimated Goshen Commons' potential gross income. Ms. Fisher used triple net leases at \$13.00/sq. ft. for the entire center. That is greater than what Goshen Commons actually generated for much of its space, especially for Building 1. And not all of Goshen Commons' leases were triple net—some tenants did not pay CAM or any expenses. *Meade testimony; Pet'rs Exs. 11, 21.*

38. Mr. Sante was equally dismissive of Gavin Fisher's sales-comparison analysis, which Mr. Fisher offered to the PTABOA at its hearing on Goshen Commons' March 1, 2008 assessment. Mr. Sante criticized Mr. Fisher's choice of comparable sales on a number of fronts, including that they were located in better areas with more traffic and more visibility than Goshen Commons. One property—6302-6347 University Commons—was a converted medical office instead of a retail center. Mr. Sante did agree that one of Mr. Fisher's sales—2101-3227 Northview—could be used as a comparable property. But it had two anchor tenants in place. And it was located across from the toll road with surrounding hotels and restaurants. That property's sale price would therefore require significant adjustment. *Sante testimony.*

39. Mr. Sante believed that Mr. Fisher’s estimate of \$65 per square foot for Building 1 was too high. Mr. Fisher’s estimate is somewhere between the values for a smaller center and a fully occupied center with anchor tenants. Mr. Fisher’s estimate of \$140 per square foot for the in-line buildings was also too high. In fact, a much smaller building in a “power strip” sold for only \$150 per square foot. *Sante testimony*. In Mr. Sante’s view, Mr. Fisher’s overall value estimate of \$6,006,775 was completely out of line. *Id.*

B. Summary of the Assessor’s Evidence and Contentions

40. The Assessor contends that Mr. Sante’s appraisal did not comply with USPAP. In support of that contention, the Assessor offered a review appraisal prepared by Kenneth Voss. The Assessor also offered valuation opinions from Dana and Gavin Fisher to support Goshen Commons’ assessment.

1. Voss review appraisal and testimony

41. Kenneth Voss is a hearing officer in the state of Georgia, an arbitrator, and a consultant. The Appraisal Institute has designated him an MAI, SRA, and CAE. He has over 40 years of experience in appraisal, property tax consulting, assessing, and arbitration. And he has done 4,000 to 5,000 appraisal reviews. *Voss testimony; Resp’t Ex. 13 at 17.*
42. The Assessor hired Mr. Voss to review Mr. Sante’s appraisal and make sure that it complied with USPAP. The Assessor did not ask Mr. Voss to give his own valuation opinion. *Voss testimony; Resp’t Ex. 13.* In fact, Mr. Voss is not licensed in Indiana, and he could not give a valuation opinion for Goshen Commons. To do that, he would need a license and he would probably need to talk to the Fishers to “come up to general competency.” *Voss testimony.*
43. Mr. Voss identified various ways in which he believed that Mr. Sante’s appraisal did not comply with USPAP Standards 1 and 2, including the following:

- Mr. Sante did not indicate which of the three types of USPAP-recognized reports that he was preparing despite USPAP's requirement for that information to be prominently stated in an appraiser's report.
- Mr. Sante did not identify all of the appraisal's intended users. Because he was appraising the property for a tax appeal, he should have included the Assessor.
- Even though he estimated a value as of a date more than 30 days in the past, Mr. Sante did not state that he was doing a retrospective appraisal.
- Although the purpose of Mr. Sante's report was to estimate market value, he did not cite to a source defining market value.
- Mr. Sante did not analyze supply and demand or market trends.
- Mr. Sante developed only the income capitalization approach to determine the property's value despite having included information on 13 sales. In Mr. Voss's view, Mr. Sante had sufficient data to develop an analysis under the sales-comparison approach.
- Mr. Sante did not analyze the property's highest and best use and did not sufficiently explain his capitalization rate. In fact, Mr. Sante used a "discount rate." But Mr. Voss explained that a discount rate is only used if an appraiser is doing a "build up" rate. Also Mr. Sante did not give any support for using a 10% return to the investor in calculating his unloaded Modified Akerson rate. And Mr. Sante's loaded Modified Akerson rate was higher than any of market-extracted rates from the sales listed in his report.
- Mr. Sante did not have an adequate scope of work because he did not estimate market rent or vacancy. Instead, Mr. Sante used the property's actual income. By doing so, however, Mr. Sante really estimated the value of a leased-fee interest in the property instead of a fee-simple interest, which is what Mr. Sante purported to value. The only way that Mr. Sante's estimate could have been for a fee simple interest is if he had explained that contract rent was equal to market rent and had given support for that proposition. But Mr. Sante did not do those things.

- Even as to the property's actual income, Mr. Sante did not discuss the property's leases or include information such as rental rates, expiration dates, renewal options, or whether tenants paid expenses and reimbursements.
- Mr. Sante simply averaged the property's expenses over three years, two of which were after the appraisal's effective date. When doing a retrospective appraisal, however, an appraiser should not use information from after the effective date of valuation.
- Mr. Sante said that the property had an assessed value of \$2,135,000 for 2008 pay 2009. But he should have been estimating the property's market value—not its assessed value.

Voss testimony; Resp't Ex. 13.

44. Mr. Voss also observed that Mr. Sante's value estimate translates to \$28.91/sq. ft., while the sales that Mr. Sante included in his report ranged from \$23.16 to \$150.36/sq. ft., with a mean of \$79.18/sq. ft. In a similar vein, Mr. Sante used net operating income of \$3.44/sq. ft., while the sales ranged from \$2.53 to \$7.71/sq. ft., with a mean of \$6.07/sq. ft.
45. Mr. Voss concluded that while each item might be explained and stand on its own merits, as a whole, Mr. Sante's appraisal report did not comply with USPAP. *Voss testimony; Resp't Ex. 13.* Mr. Voss, however, admitted on cross-examination that he had not asked for Mr. Sante's file in completing his review. He also acknowledged that he finds at least some fault with most of the appraisals he reviews.⁴

2. Dana Fisher's valuation opinion

46. Dana Fisher has been in the assessing field for almost six years and is certified as a Level III assessor-appraiser. She has worked in the Assessor's office and as a commercial

⁴ When asked how many appraisals he had found no fault with, Mr. Voss responded that there were probably more than 500 or 600. *Voss testimony.*

underwriter and loan officer. While working for the Assessor, she reviewed assessments for accuracy. *D. Fisher testimony.*

47. In reviewing Goshen Commons' assessment, Ms. Fisher used the income approach to estimate the property's market value. To determine market rent, she relied on a report that CB Richard Ellis ("CBRE") prepares annually for Elkhart County. She also looked at information from Marcus & Millichap, LoopNet, and Realty Rates. CBRE indicated leases rates of \$10 to \$20/sq. ft, with a median of \$15/sq. ft. LoopNet advertised rents averaging \$13/sq. ft. for properties similar to Goshen Commons. Ms. Fisher used \$13/sq. ft. for market rent. *D. Fisher testimony; Resp't Exs. 1, 6-7.*
48. CBRE indicated a 10% vacancy rate, which Ms. Fisher viewed as reliable because it was prepared for Elkhart County. She used an OER of 15%, which she developed from the local market. Her analysis led to a value of \$4,805,501. *Fisher testimony,*
49. Ms. Fisher explained that she used market rates instead of the Petitioners' actual income, expense, and vacancy information because her goal was to get a fair and equitable market assessment. According to the standards of International Association of Assessing Officials ("IAAO"), market rent, vacancy, and expenses should be used when applying the income approach. The Petitioners' actual income, expense, and vacancy are influenced by issues that are specific to the Petitioners and do not necessarily represent the market. *D. Fisher testimony; Resp't Ex. 1.*

3. Gavin Fisher's valuation opinion

50. Gavin Fisher is a deputy assessor with the Elkhart County Assessor's Office. He is a certified Level III assessor/appraiser and a certified tax representative. He is also a licensed appraiser, although he was not acting in that capacity at the Board's hearing. *G. Fisher testimony.*

51. Mr. Fisher reviews properties under appeal and develops valuations to test the accuracy of the appealed assessments. His was assigned to determine whether there was a discrepancy between the subject property's value and its assessment. His review was independent of Dana Fisher's review. He prepared a sales comparison analysis and concluded Goshen Commons' March 1, 2008 assessment was fair and equitable. Mr. Fisher, however, did not intend for his analysis to be an appraisal. *G. Fisher testimony; Resp't Ex. 12.*
52. According to Mr. Fisher, Goshen Commons has adequate ingress and egress but only a fair visibility rating. It is located on a main thoroughfare and is in average condition. Mr. Fisher therefore searched the extended market area of Elkhart and St. Joseph counties for sales of retail centers that were comparable to Goshen Commons in terms of size, age, and amenities. He found 11 sales and chose the ones most applicable to each parcel under appeal. *Fisher testimony; Resp't Ex. 12.*
53. Mr. Fisher's Building 1 comparables sold for an average of \$69.08/sq. ft. and a median of \$61.99/sq. ft. He reconciled those values to \$65.00/sq. ft. His Building 2 and 3 comparables sold for an average of \$133.90/sq. ft. and a median of \$145.84/sq. ft. Mr. Fisher reconciled those values to \$140.00/sq. ft. Mr. Fisher's reconciled values indicate a combined market value-in-use of \$6,006,775. *G. Fisher testimony; Respondent Exhibit 12.*
54. Finally, Mr. Fisher testified to his belief that if one looked at market rents, the potential rent for Goshen Commons could easily support a value of \$4 million or more. According to Mr. Fisher, an investor would be looking at market rents and not just the property's historic performance, because the issues behind that performance might be correctable. *See G. Fisher testimony.*

Discussion

A. Burden of Proof

55. 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 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). Effective July 1, 2011, however, the Indiana General Assembly enacted Indiana Code § 6-1.1-15-17, which has since been repealed and re-enacted as Ind. Code § 6-1.1-15-17.2.⁵ That statute shifts the burden to an assessor in cases where the assessment under appeal has increased by more than 5% over the previous year's assessment:

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 the Indiana Tax Court.

Ind. Code § 6-1.1-15-17.2 (emphasis added).

56. In the case at hand, the parties agree that the Waterford parcel's assessment increased by more than 5% between March 1, 2007, and March 1, 2008.⁶ The property record cards show an increase of \$161,900 or 10.85%. The parties disagree about what caused the increase. The Assessor contends that the majority of the increase came from upping the percentage of completion for Building 3—in 2007, the building was assessed as 52% complete, while it was assessed as 70% complete in 2008. The Assessor also noted that

⁵ HEA 1009 §§ 42 and 44 (signed February 22, 2012). This was a technical correction necessitated by the fact the two different provisions had been codified under the same section number.

⁶The Hoogenboom parcel's assessment did not increase by more than 5% between the 2007 and 2008 assessment years.

\$58,500 of the overall increase resulted from trending values forward from 2007 to 2008, and that represents a 3.92% increase over the Waterford parcel's March 1, 2007 assessment. The Assessor therefore contends that the Petitioners retain the burden of proof. *Searcy testimony; Resp't Ex. 14.*

57. The Petitioners contend that there were build-outs and other factors that may have contributed to the assessment increase. Although Petitioner's counsel first referred to those build-outs in an unsworn statement, the Petitioners later offered Ms. Meade's testimony that they had made roughly \$100,000 in build-outs, which one tenant was repaying over the initial term of its lease. *Meade testimony.* The Petitioners, however, did not explain how the build-outs or other factors related to the increase in the property's assessment.
58. The Board agrees with the Assessor. Indiana Code § 6-1.1-15-17.2 shifts the burden of proof to an assessor only when the assessed value of the *same property* increases by more than 5%. In this case, the Assessor has shown that the lion's share of the increase came from assessing new physical structures, or at least new portions of previously existing structures, for the first time. The increase stemming from other factors amounted to less than 5% of the parcel's March 1, 2007 assessment and an even smaller percentage of the two parcels' combined assessment. Because the Petitioners use the properties together, and have treated them as a single economic unit both in their appeal petitions⁷ and in the bulk of their valuation evidence, the Board similarly treats them as a single unit for purposes of applying Ind. Code § 6-1.1-15-17.2. The Petitioners therefore retain the burden of proof.

⁷ Both petitions include the following statement: "Parcel 20-11-23-276-018.000-015 and 20-11-23-276-022.000-015 are appraised together as they combine into one shopping center. These parcels should be reviewed together." *Board Ex. A.*

B. Analysis

59. Indiana assesses real property on the basis of its true tax value, which the 2002 Real Property Assessment Manual defines 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.” 2002 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.3-1-2). Appraisers traditionally have used three methods to determine a property’s market value: the cost, sales-comparison, and income approaches. *Id.* at 3, 13-15. Indiana assessing officials generally use a mass-appraisal version of the cost approach set forth in the Real Property Assessment Guidelines for 2002 – Version A.
60. A property’s market value-in-use, as determined using the Guidelines, is presumed to be accurate. *See* MANUAL at 5; *Kooshtard Property VI, LLC v. White River Twp. Assessor*, 836 N.E.2d 501, 505 (Ind. Tax Ct. 2005) *reh’g den. sub nom.; P/A Builders & Developers, LLC*, 842 N.E.2d 899 (Ind. Tax Ct. 2006). But a taxpayer may rebut that presumption with evidence that is consistent with the Manual’s definition of true tax value. MANUAL at 5. A market-value-in-use appraisal prepared according to USPAP often will suffice. *Kooshtard Property VI*, 836 N.E.2d at 506 n.6. A taxpayer may also offer actual construction costs, sales information for the subject or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.
61. Regardless of the method used to rebut an assessment’s presumed accuracy, a party must explain how its evidence relates to the appealed property’s market value-in-use as of the relevant valuation date. *See O’Donnell v. Dep’t of Local Gov’t Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also, Long v. Wayne Twp. Assessor*, 821 NE2d 466, 471 (Ind. Tax Ct 2005). Otherwise, the evidence lacks probative value. *Id.* For March 1, 2008 assessments, the valuation date was January 1, 2007. 50 IAC 21-3-3 (2009).

62. The Petitioners offered a lot of data and other information about Goshen Commons, including the following:
- The property's actual tenant census, lease rates, and vacancies as of March 1, 2008;
 - The property's actual expenses for several years; and
 - Various characteristics that affect the property's ability to generate income, such as its obscured visibility and limited access to a street with relatively low traffic.
63. Of course, that raw information does not, by itself, translate into any particular value or range of values. To that end, the Petitioners also offered valuation opinions from two witnesses: Mr. Sante, a certified appraiser who prepared an appraisal report and also testified at the Board's hearing, and Ms. Meade, Hoogenboom Nofziger's vice president, who modified a valuation opinion originally prepared by Dana Fisher.
64. The Board turns first to Mr. Sante's opinion. Mr. Sante prepared a report in which he estimated Goshen Commons' value using solely the income approach. For his underlying income data, Mr. Sante used the property's actual income from 2008. Apparently because he was relying on the property's actual income, Mr. Sante did not subtract anything for vacancy or collection loss. And Mr. Sante did not indicate either in his appraisal report or in his testimony that he compared the property's actual income or vacancy level to the market. Although Mr. Sante also used a three-year average of the property's actual expenses (minus certain adjustments), he compared the property's actual operating expense ratio to similar ratios that he extracted from the market. Finally, Mr. Sante certified that he prepared his appraisal in conformity with USPAP.
65. At first blush, Mr. Sante's opinion might appear to be probative of Goshen Commons' market value-in-use. But the Assessor's expert witness, Mr. Voss, persuasively explained myriad ways in which Mr. Sante departed from USPAP or otherwise relied on questionable judgments. Some of Mr. Voss's critiques address relatively minor points. For example, Mr. Voss took issue with Mr. Sante's failure to name the Assessor as an

intended user of the appraisal and his failure to explicitly say that he was giving a retrospective opinion of value. But both of those points were obvious from the context of Mr. Sante's report. To the extent those omissions departed from USPAP, those departures do little to affect the credibility of Mr. Sante's opinion.

66. Mr. Voss, however, pointed to other, more-troubling departures. For example, Mr. Sante did not spell out the standard of value that he was estimating. Mr. Voss generously described Mr. Sante's report as indicating that he was estimating the property's market value, but Mr. Voss noted that Mr. Sante failed to cite to the source information for his definition of market value. A closer review of Mr. Sante's appraisal, however, shows that he failed to specify that he was estimating "market value."⁸ Instead, Mr. Sante alternately referred to the property's "assessed value" and simply to the property's "value." *Pet'rs Ex. 2*. At the Board's hearing, Mr. Sante explained that the purpose of the appraisal was to determine the property's "market value-in-use" or its "value-in-use." *Sante testimony*. But he did not explain how he measured that standard.
67. Mr. Sante's omission is significant. This is particularly true given the fact that Mr. Sante used the subject property's actual income without attempting to compare that income to the market. In doing so, Mr. Voss explained that Mr. Sante was really valuing a leased fee interest in Goshen Commons rather than a fee simple interest. And as the Board has previously recognized, that creates the risk of valuing a property owner's relative management acumen instead of the property's inherent characteristics:

[U]sing actual rent from a long-term, below-market lease could result in non-uniform values for properties within the same class and cause identical properties to have different values for tax purposes in violation of constitutional uniformity requirements. Courts in other jurisdictions have noted the absurd results of employing such a system of valuation and have concluded that owners who enter into prudent leases are in effect

⁸ Mr. Voss pointed to pages 7 and 11 of Mr. Sante's report as being where Mr. Sante referenced market value. Page 7 contains no reference to market value. On page 11, Mr. Sante either quoted or paraphrased USPAP SR1-2 where an appraiser is required to identify the purpose of his assignment, including the type and definition of the value to be developed. It further provides that if the value opinion to be developed is market value, an appraiser must ascertain certain things. Below his reference to SR1-2, Mr. Sante wrote, "The purpose is to assist the client in appealing the tax assessment of the property." *Pet'rs Ex. 2 at 11*.

penalized for good negotiating skills, while the lessors with the below-market leases are rewarded for bad management and poor negotiations by a lower valuation.

Schooler v. Boone County Assessor, Pet. no. 06-003-07-1-5-00444 (Ind. Bd. Tax Rev. May 7, 2010); *see also*, *Merrick Holding Corp. v. Board of Assessors*, 382 N.E.2d 1341, 1344 (N.Y. App. Div. 1978); *Sanford*, 694 A.2d 456 (“[V]aluations of properties for local taxation cannot vary with the managerial successes or failure of the owners.”); and *Martin v. Liberty Cty. Bd. of Tax Ass’rs*, 262 S.E.2d 609, 612 (Ga. Ct. App. 1979) (“[I]f tax assessments on the same property were to fluctuate according to the varying terms of a lease, the computation of ad valorem taxes on the basis of such assessments would result in a tax penalty for one who, through business acumen or fortuity, succeeds in leasing his property for an amount in excess of its ‘fair market value’ and a tax windfall to one who, through bad business judgment, leases far below his property’s ‘fair market value.’”).

68. Thus, by using only the property’s actual income, without attempting to compare that income to the market, Mr. Sante risked valuing something other than the real property itself. The Petitioners, however, mitigated that risk somewhat through Mr. Letherman’s testimony that market rent for Building 1 (the big box building) was between \$4.00 and \$5.00/sq. ft. and that the rent that the Petitioners received for that building was within the market range. While Mr. Letherman’s testimony was fairly conclusory, he testified to his expertise and experience with commercial leasing in the area. The Petitioners also offered extensive testimony about the various challenges that detract from Goshen Commons’ ability to generate income. Of course, both Dana Fisher and Gavin Fisher testified that they believed market rent for Goshen Commons was much higher. However, neither showed that the properties on which they based their opinions faced challenges similar to what Goshen Commons faced.
69. Nonetheless, while the Petitioners mitigated concerns that the rental rates charged by Goshen Commons might be below market rates, they did almost nothing to alleviate the

concern that, by using the property's actual income, Mr. Sante attributed a much higher vacancy rate to Goshen Commons than what is reflected in the market. As of March 1, 2008, Goshen Commons had a vacancy rate of 45.5%. Thus, Mr. Sante valued the property on the assumption that only a little more than half of the property would produce any income. Put another way, Mr. Sante essentially posited that potential investors would assume that the former Big Lots space, as well as a portion of Building 3 that was not yet finished on March 1, 2008, would remain vacant in perpetuity, or at least over a likely holding period.

70. That assumption profoundly affected Mr. Sante's valuation opinion; yet there is little support for the notion that Mr. Sante's effective vacancy rate reflected the market. Granted, the same challenges that the Petitioners' witnesses pointed to in justifying Goshen Commons' rental rates might apply equally to its vacancy rate. But even Mr. Letherman did not testify that a 45.5% vacancy was an appropriate market vacancy rate for Goshen Commons. He instead testified that the 10% rate that Ms. Fisher used in her analysis was "a little unrealistic." *Letherman testimony*.
71. Mr. Sante might have allayed those concerns had he at least checked his conclusions under the income approach by applying another generally accepted valuation approach. But he did not. Indeed, Mr. Voss considered Mr. Sante's failure to do so to be a significant flaw.
72. Finally, the Board is swayed by the fact that the Petitioners did not even ask Mr. Sante to respond to Mr. Voss's pointed critiques of his appraisal or to otherwise explain how his appraisal conformed to USPAP. Thus, in light of the myriad ways in which Mr. Sante's appraisal departed from USPAP and the likelihood that at least some of those departures significantly affected his valuation opinion, the Board finds Mr. Sante's opinion insufficient.

73. That leaves Ms. Meade’s valuation opinion. Ms. Meade, however, did little independent analysis; instead, she plugged different data into an income-approach analysis that Ms. Fisher had performed in connection with the Petitioners’ appeal of Goshen Commons’ March 1, 2010 assessment. But Ms. Meade did not explain how mixing Goshen Commons’ income data from 2008 with Ms. Fisher’s March 1, 2010-based analysis related to the property’s market value-in-use as of the January 1, 2007 valuation date that applies to this appeal. Her opinion therefore lacks probative value.
74. Even if Ms. Meade had sufficiently explained how her opinion related to Goshen Commons’ value as of January 1, 2007, her opinion would still lack probative weight. A probative valuation opinion is not merely a mathematical calculation; it includes the exercise of significant judgment. One cannot simply plug different data into an expert’s analysis to reach a different conclusion without the risk of seriously distorting the expert’s underlying analysis. In any case, Ms. Meade’s opinion is necessarily based on the assumption that Ms. Fisher’s analysis was otherwise sound, except for her estimate of net operating income. But Ms. Meade offered scant information to support that notion. Instead, she pointed to documents that simply list Ms. Fisher’s conclusions about the property’s income, expenses, and vacancy rate together with a capitalization rate. Finally, Ms. Meade’s opinion suffers from one of the same problems that plagues Mr. Sante’s opinion—she used the property’s actual income, and along with that, its 45.5% vacancy rate, without comparing that actual income or vacancy rate to the market.
75. Thus, while the Petitioners offered evidence of various factors that tend to depress Goshen Commons’ value, they did not offer any probative method to translate those factors into a likely value or range of values.⁹ The Petitioners therefore failed to rebut the presumption that Goshen Commons’ assessment accurately reflected its market value-in-use as of January 1, 2007.

⁹ Although counsel for the Petitioners referred to Goshen Commons as “almost functionally obsolescent” in her closing argument, none of the Petitioner’s witnesses directly addressed the property’s valuation in terms of obsolescence. And the Petitioners did not attempt to quantify any obsolescence.

Summary of Final Determination

76. The Petitioners failed to make a prima facie case for reducing their parcels' assessments. The Board therefore finds in favor of the Assessor.

The Indiana Board of Tax Review issues this Final Determination of the above captioned matter on the date written above.

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5, as amended effective July 1, 2007, by P.L. 219-2007, 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 Tax Court Rules are available on the Internet at <<http://www.in.gov/judiciary/rules/tax/index.html>>. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. P.L. 219-2007 (SEA 287) is available on the Internet at <<http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>>