REPRESENTATIVE FOR PETITIONERS:
Brad Hasler, Bingham McHale LLP

REPRESENTATIVE FOR RESPONDENT:
Marilyn Meighen, Meighen & Associates PC

BEFORE THE
INDIANA BOARD OF TAX REVIEW

D & J Realty,	)	Petition No.: 59-012-02-1-4-00006
	)	59-012-02-1-4-00007
	)	59-012-02-1-4-00009
Petitioner,	)	59-012-02-1-4-00010
	)	59-012-02-1-4-00011
	)	59-012-02-1-4-00012
	)	
	)	Parcel No.: 012-004-001-000
v.	)	012-004-002-000
	)	012-004-003-010
	)	012-004-003-020
	)	012-004-003-030
	)	012-004-074-000
Paoli Township Assessor,	)	
	)	County: Orange
	)	Township: Paoli
Respondent.	)	Assessment Year: 2002

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

July 9, 2007

FINAL DETERMINATION

The Indiana Board of Tax Review (the 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

ISSUE AND SHORT ANSWER

1. The Petitioner contends that the assessment at issue does not reflect either the subject building's actual use or its lack of ceiling finish. The Petitioner therefore valued the building using what it claimed were the correct cost schedules and adjustments under the Guidelines. Although phrased differently by the parties, the dispositive issue in this case is whether the Petitioner's Guidelines-based evidence was sufficient to rebut the presumption that assessment is correct.

2. It was not. By strictly applying the Guidelines, the Petitioner focused solely on the Respondent's methodology in computing the subject property's assessment. The Indiana Tax Court has squarely rejected such an approach in *Eckerling v. Wayne Twp. Assessor,* 841 N.E.2d 674 (Ind. Tax Ct. 2006). And the Board rejects the Petitioner's attempt to distinguish its approach from the taxpayers' claims in *Eckerling*. Even if the Petitioner could make a case through strictly applying the Guidelines, it did not show that Respondent's choice of cost schedules was incorrect.

PROCEDURAL HISTORY

3. The Petitioner originally filed six separate Form 130 petitions for a group of parcels that it apparently operates as one property. On March 17, 2005, the Orange County Property Tax Assessment Board of Appeals (PTABOA) issued determinations concerning those parcels. In those determinations, the PTABOA indicated that it was combining the parcels into a single parcel under no. 012-004-001-000, and it determined one value for

the six previously separate parcels.[1] On April 15, 2005, the Petitioner filed a separate Form 131 Petition to the Indiana Board of Tax Review for Review of Assessment (Form 131 petition) for each original parcel. The Board has jurisdiction over the Petitioner's appeals under Ind. Code §§ 6-1.1-15 and 6-1.5-4-1.

HEARING FACTS AND OTHER MATTERS OF RECORD

4. On January 9, 2005, Jennifer Bippus, the Board's duly designated Administrative Law Judge ("ALJ"), held a consolidated administrative hearing on the Petitioner's Form 131 petitions.

5. Brad Hasler appeared as counsel for the Petitioner, and Marilyn Meighen appeared as counsel for the Respondent. The following persons were sworn and presented testimony at the hearing:

For the Petitioner:

Henry Hamilton, Tax Representative

For the Respondent:

Linda Reynolds, Orange County Assessor
Kirk Reller, Orange County Technical Advisor

6. The Petitioner submitted the following exhibits:

Petitioner Exhibit A: Copy of a property record card detailing Petitioner's requested assessment.

[1] The PTABOA's Form 115 Notifications of Final Assessment Determination are somewhat unclear as to which parcels were combined. The Form 115 for Parcel No. 012-004-001-000 lists four other parcels that were combined under that parcel number. Those parcels include all of the appealed parcels except Parcel No. 012-004-074-000. But the Form 115 for Parcel No. 012-004-074-000 indicates that it was combined under Parcel No. 012-004-001-000. Similarly, although the Form 115 for Parcel No. 012-004-001-000 indicates that Parcel No. 012-004-003-020 was combined with the other parcels, the actual Form 115 for 012-004-003-020 states that the PTABOA was changing that parcel's assessment to $0 until it could clarify its location. *See Board Ex. A at Pet. No. 59-012-02-1-4-00010.* Read as a whole, however, the Form 115s appear to treat all six parcels as one property. And the parties do the same.

7. The Respondent submitted the following exhibits:

Respondent Exhibit A: Copy of *Westfield Golf Practice Center LLC v. Washington Twp. Assessor, et al.*, No. 49T10-0507-TA-54, 2007 WL 29703 (Ind. Tax Ct. 2007)

Respondent Exhibit B: Copy of *Kooshtard Property VI, LLC v. White River Twp. Assessor*, 836 N.E.2d 501, 505 (Ind. Tax Ct. 2005)

Respondent Exhibit B-1: Copy Tax Court's ruling on petitions for re-hearing in *P/A Builders & Developers, LLC v. Jennings County Assessor, Hurricane Food, Inc. v. White River Twp. Assessor,* and *Kooshtard Property VI v. White River Twp. Assessor*

Respondent Exhibit C: Copy of *Eckerling v. Wayne Twp. Assessor,* 841 N.E.2d 674 (Ind. Tax Ct. 2006)

Respondent Exhibit E: Sketch of the subject property

Respondent Exhibit F: Real Property Assessment Guidelines for 2002 – Version A, App. D at 19[2]

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

Board Exhibit A – The Form 131 petitions

Board Exhibit B – Notices of hearing dated October 24, 2006

Board Exhibit C – Hearing sign-in sheet

9. As noted above, it appears that the PTABOA consolidated the six parcels referenced in the Petitioner's Form 131 petitions into one parcel. For purposes of this appeal, the Board will refer to the six original parcels collectively as "the subject property."

10. The Petitioner leases the subject property for commercial use. It contains a shopping center and other businesses. The property is located at Highway 37 South, Paoli, Indiana.

[2] The Respondent did not submit any document labeled as "Exhibit D."

11. The ALJ did not inspect the subject property.

12. For 2002, the PTABOA assessed the subject property as follows:
Land: $76,400. Improvements: $1,123,400. Total: $1,199,800.

13. The Petitioner requests the following value:
Land: $76,400 Improvements: $1,075,600. Total: $1,152,000.

ADMINISTRATIVE REVIEW AND THE PETITIONER'S BURDEN

14. A taxpayer seeking review of an assessing official's determination must establish a prima facie case proving both that the current assessment is incorrect and what the 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).

15. In making its case, the taxpayer must explain how each piece of evidence relates to its requested assessment. *See Indianapolis Racquet Club, Inc. v. Wash. Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) ("[I]t is the taxpayer's duty to walk the Indiana Board . . . through every element of the analysis").

16. If the taxpayer establishes a prima facie case, the burden shifts to the assessing official to offer evidence to impeach or rebut the taxpayer's evidence. *See American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004); *Meridian Towers*, 805 N.E.2d at 479.

ANALYSIS

17. The subject building contains 16,614 square feet. In valuing the building under the Real Property Assessment Guidelines for 2002 – Version A (Guidelines), the Respondent

divided the building into two parts — a 16,614-square-foot area that it assessed using the model and accompanying cost schedules for a General Commercial Mercantile (GCM) Supermarket, and a 15,478-square-foot-area that it assessed using the model and accompanying cost schedules for a GCM Neighborhood Shopping Center. *Pet'r Ex. 1*. The GCM Supermarket model assumes that 20% of the building is "unfinished storage and service." *Hamilton testimony*; REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A at 19-20 (incorporated by reference at 50 IND. ADMIN. CODE 2.3-1-2). Thus, the Respondent assessed the supermarket portion of the subject building as if it contained 3,322 square feet used for storage. *Hamilton testimony; Hasler argument.*

18. But the Petitioner contends that the portion of the building that the Respondent assessed using the GCM Supermarket cost schedules actually contained 5,238 square feet being used for storage — a difference of 1916 square feet. *Hamilton testimony*. The Petitioner therefore re-computed the assessment by removing 1916 square feet from the area valued as GCM supermarket and valuing those 1916 feet using the GCM Utility Storage cost schedules. *Hamilton testimony; Pet'r Ex. 1*. The Petitioner also contends that a 6900-square-foot area that the Respondent assessed using the GCM Neighborhood Shop cost schedules did not have ceiling finish. *Id*. The Petitioner therefore also adjusted for that discrepancy in re-computing the subject building's value. *Id.*

19. The Respondent disputes the Petitioner's claim that, on the assessment date, the building had 1916 more square feet devoted to utility storage than the Respondent accounted for in its assessment. *Reller testimony*. In fact, the Respondent contends that the subject building contained only 2,580 square feet of utility/storage area, which is less than the 20% accounted for in the GCM Supermarket model. *Id*.; *Resp't Ex. E*. And that includes bathrooms, break-rooms and a deli area, all of which had at least some finish. *Id*.

20. Regardless, the Respondent contends that the Petitioner simply disputed the Respondent's methodology in computing the assessment rather than demonstrating the subject property's market value-in-use. *Meighen argument*. According to the Respondent, the Indiana Tax Court has rejected the Petitioner's approach and ruled that a

taxpayer cannot argue form over substance. *Id.* (citing*, e.g., Westfield Golf Practice Center v. Washington Twp. Assessor,* 859 N.E.2d 396 (Ind. Tax Ct. 2007); *Eckerling v. Wayne Twp. Assessor,* 841 N.E.2d 674 (Ind. Tax Ct. 2006)).

21. The 2002 Real Property Assessment Manual (Manual) defines the "true tax value" of real property 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 2 (incorporated by reference at 50 IAC 2.3-1-2). As the Manual explains, the appraisal profession traditionally has used three methods to determine a property's market value: the cost approach, the sales-comparison approach, and the income approach. *Id*. at 3, 13-15. In Indiana, assessing officials generally assess real property using the Guidelines, which represent a mass-appraisal version of the cost approach.

22. A property's market value-in-use, as determined by applying 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 2006). But a taxpayer may offer evidence to rebut that presumption, provided such evidence is consistent with the Manual's definition of true tax value. MANUAL at 5. A professional appraisal prepared in conformance with the Manual's definition of true tax value and the Uniform Standards of Professional Appraisal Practice (USPAP) generally will suffice. *Kooshtard Property VI*, 836 N.E.2d at 505, 506 n.1. A taxpayer may also rely upon actual construction costs, sales information for the subject or comparable properties, and any other information compiled using generally accepted appraisal principles. MANUAL at 5.

23. Here, the Petitioner did not offer any of the types of market-based evidence that the Manual references. Instead, the Petitioner simply alleged that the Respondent erred in computing the subject building's value under the Guidelines and offered a value computed using its own purportedly correct application of the Guidelines. The Indiana Tax Court, however, has rejected taxpayers' attempts to establish a prima facie case of

error by attacking assessors' methodology in applying the Guidelines. *See Eckerling v. Wayne Twp. Assessor,* 841 N.E.2d 674 (Ind. Tax Ct. 2006); *O'Donnell v. Dep't of Local Gov't Fin*., 854 N.E.2d 90, 93-95 (Ind. Tax Ct. 2006).

24. In *Eckerling v. Wayne Twp. Assessor*, the Eckerlings, who operated an office out of a building originally constructed as a single-family residence, claimed that the Wayne Township Assessor erred in assessing their building using the Guidelines' residential pricing schedules instead of the General Commercial Residential (GCR) schedules. 841 N.E.2d at 674-75. In addressing the Eckerlings' claim, the court first discussed the Guidelines' role in Indiana's real-property-assessment system. The court noted that, given their mass-appraisal duties, assessors do not have the time or data to apply all three generally recognized appraisal models. 841 N.E.2d at 676 (quoting MANUAL at 3). The State Board of Tax Commissioners therefore adopted the Guidelines to explain, in detail, how to apply the cost approach. *Id*.[3] Because assessors often are constrained by limited time and resources, the Guidelines provide a starting point for determining market value-in-use. *Id*. at 678. But they are just that — a starting point. Thus, if the Guidelines yield an assessment that is inconsistent with the Manual's definition of market value-in-use, assessors should consider additional factors to adjust the assessment. *Id*. (quoting MANUAL at 2).

25. The court then addressed the Eckerlings' claims in light of the Guidelines' role in mass-appraisal assessments and a taxpayer's burden of proof in an assessment appeal. The court noted that the governing administrative regulations expressly state that "failure to comply with the . . . Guidelines . . . does not itself show that an assessment is not a reasonable measure of 'True Tax Value[.]" 841 N.E.2d 676 (quoting 50 IAC 2.3-1-1(d)). Thus, the court held that "*strict application of the regulations is not enough to rebut the presumption that the assessment is correct*." 841 N.E.2d at 678 (emphasis added).

[3] The Indiana General Assembly abolished the State Board of Tax Commissioners as of December 31, 2001. P.L 198-2001 SEC. 119(b)(2). Effective January 1, 2002, the General Assembly created the Board and the Department of Local Government Finance ("DLGF"). *See* P.L. 198-2001, SEC. 66; P.L. 198-2001, SEC. 95; Ind. Code § 6-1.1-1-30-1.1(2001); Ind. Code § 6-1.5-1-3(2001). Between them, the DLGF and the Board perform functions previously performed by the State Board. Rules adopted by the State Board of Tax Commissioners, however, are for all purposes rules of the DLGF unless repealed or superseded. *See* Ind. Code § 6-1.1-31-1(c).

Instead, the court explained that a taxpayer may establish a prima facie case if, using the types of evidence described in the Manual, the taxpayer shows that its suggested value accurately reflects the property's true market value-in-use. *Id*.

26. Turning to the facts before it, the court noted that the Eckerlings did not offer any of the types of market-based evidence described in the Manual, such as a market value-in-use appraisal, construction information for the subject property, sales information concerning the subject or comparable properties, or other information compiled in accordance with generally accepted appraisal principles. 841 N.E.2d at 678 (citing MANUAL at 5). Instead, the Eckerlings simply claimed that because they used their property as an office, the assessor should have valued their building using GCR cost schedules rather than the residential cost schedules. The Eckerlings submitted a property record card showing their suggested value as calculated under the GCR schedule. *Id*. Because the Eckerlings had simply focused on the assessor's methodology without showing that the assessment failed to reflect their property's market value-in-use, the court held that they failed to establish a prima facie case. *Id*. The court applied the same reasoning to reject the taxpayers' claims in *O'Donnell v. Dep't of Local Gov't Fin*. 854 N.E.2d at 93-95.

27. Here, the Petitioner contends that it did not dispute the Respondent's methodology, but rather that it demonstrated the subject property's market value-in-use by correctly applying the Guidelines' cost approach. *Hasler argument*. The Petitioner's argument has some facial appeal. The appraisal profession recognizes the cost approach as one of three generally accepted methods for valuing real property, and the Guidelines represent an approved mass-appraisal model of the cost approach. But the Tax Court in *Eckerling* and *O'Donnell* implicitly rejected the Petitioner's argument when it held that a taxpayer cannot rebut the presumption that an assessment is correct simply by strictly applying the Guidelines to reach a different value. Also, as the Manual recognizes, fee appraisers generally apply all three approaches in valuing a property, at least where sufficient data exists to do so. *See* MANUAL at 3. The Petitioner offered no evidence to show that its reliance on only one of the three valuation approaches — and one geared toward mass appraisal at that — without even considering the other two approaches was consistent

with generally accepted appraisal practice. The fact that assessors conducting mass appraisals are often constrained to rely on only one value approach does not automatically make such a tactic persuasive in a proceeding where the goal is to prove an individual property's market value-in-use.

28. The Petitioner, however, argues that its claims differ from the taxpayers' claims in *Eckerling* and the other cases that the Respondent cites. According to the Petitioner, those cases involved "selection type" issues requiring the assessors to exercise discretion, whereas the Petitioner focused on "hard and fast measurements." *Hasler argument*.

29. In rare cases, *Eckerling* might allow a taxpayer to make a prima facie case through identifying and correcting an assessor's non-discretionary errors in applying the Guidelines. This, however, is not such a case. Indeed, the taxpayers' approach in *Eckerling* is conceptually indistinguishable from the Petitioner's main contention in this case. The Eckerlings, like the Petitioner, claimed that their building's use made the assessor's choice of cost schedules inappropriate. And, like the Petitioner, the Eckerlings offered an alternate value computed using what they argued were the correct schedules.

30. Also, the Petitioner is simply wrong in characterizing as non-discretionary the decision whether to value 1916 square feet of the shopping center using the GCM Utility Storage model as opposed to the GCM Supermarket model. The Indiana Tax court repeatedly has held that choosing the correct model to use in valuing a building requires assessors to exercise discretion. *E.g., Bender v. Indiana State Bd. of Tax Comm'rs,* 676 N.E.2d 1113, 1114-16 (Ind. Tax Ct. 1997). In *Bender*, the Tax Court held that taxpayer could not use a Form 133 petition to assert a claim that his apartment building should have been assessed using the GCR pricing schedule rather than the residential pricing schedule. The Tax Court explained that choosing the appropriate model or schedule always requires an assessor to exercise subjective judgment, even where the correct choice appears straightforward:

> Clearly, the assessor must use his or her judgment in determining which schedule to use. It is not a decision automatically mandated by a

> straightforward finding of fact. The assessor must consider the property in question, including its physical attributes and predominant use, and make a judgment as to which schedule is most appropriate. Just as the assessor must use subjective judgment to determine which base price model to employ with these schedules, so too the assessor must exercise his or her discretion to determine which schedule to use. . . . *In some cases, this decision will be a closer call than in others, but regardless of the closeness of the judgment, it remains a judgment committed to the discretion of the assessor*.

Bender, 676 N.E.2d at 113 (emphasis added).

31. And the model and schedule choices that the Petitioner advocates are anything but straightforward. Although Mr. Hamilton did not specify the locations within the subject building that were used for storage, Blake Henry's sketch indicates that the GCM supermarket portion of the building contained substantially less unfinished area than the 5,238 square feet that the Petitioner claims was used for storage. *Reller testimony; Resp't Ex. E*. Mr. Hamilton did not seriously dispute that fact, asserting instead that it was the building's use — not its absence of finish — that dictated his decision to value the disputed 1916-square-foot area using the GCM Utility Storage cost schedules. *See Hamilton testimony*. In any event, the Board finds that the 1916-square-foot-area contained at least some interior finish.

32. The GCM Utility Storage model, however, contemplates unfinished walls, flooring, and ceilings, and "average cost nonmetallic wiring and minimal illumination typical of unfinished areas." GUIDELINES, App D at 20. Thus, deciding whether to value the 1916 square feet using cost schedules for the GCM Supermarket model, which apparently resembles the subject building physically, or the GCM Utility Storage model, which differs significantly from the subject building but describes buildings typically used for the same purpose as the 1916 square feet in question, clearly involves the exercise of discretion.

33. Even if the Petitioner theoretically could establish a prima facie case by strictly applying

the Guidelines, the Petitioner's claims about the Respondent's schedule choice would still fail. Under Indiana's old property taxation scheme, which was based on strict application of the Guidelines, a taxpayer arguing that the assessor had used the wrong schedule to assess its property was required to compare its building's features to the features of the model that the taxpayer argued should apply. *Eckerling*, 841 N.E.2d at 678 n. 4 (citing *LDI Mfg. Co. v. State Bd. of Tax Comm'rs*, 759 N.E.2d 685, 688 (Ind. Tax Ct. 2001). The Petitioner, however, did not attempt to compare the subject building's physical features to either the GCM Utility Storage model or the GCM Supermarket model, other than Mr. Hamilton's reference to adjustments he made for wall height and the presence of sprinklers when valuing a 1916-square-foot area under the utility storage cost schedules. *See Harrison testimony; Pet'r Ex. A*. Instead, the Petitioner focused almost exclusively on the fact that the area in question was used for storage. But while model names are use-based, the model descriptions actually reflect a structure's physical features. *See* GUIDELINES at App. D, *passim; Herb v. State,* 656 N.E.2d 890, 894 (Ind. Tax Ct. 1995).

34. The Board does not mean to imply that the Petitioner's use of the subject building is irrelevant. The fact that a taxpayer stores inventory in space designed for retailing might affect a property's market value-in-use. But the Guidelines assess real buildings — not hypothetical ones. Thus, one does not measure the effect of the lower-level use by calculating what it would cost to construct a building that does not actually exist. Instead, that effect should be reflected in the depreciation applied to the building's replacement cost new, most likely through quantifying abnormal obsolescence.

35. The Petitioner's claim that it is entitled to a deduction for lack of ceiling finish admittedly involves something much closer to a "hard and fast measurement" than does the Petitioner's schedule-choice claim. But at the end of the day, the Petitioner simply argues for an adjustment to a minor element of cost in the context of a sizable commercial property's assessment. In doing so, the Petitioner bases its claim on a strict application of the Guidelines. And, as explained above, the Tax Court has repeatedly rejected taxpayers' attempts to rebut the presumption that an assessment is correct merely

by strictly applying the Guidelines. *Eckerling*, 841 N.E.2d at 678; *O'Donnell*, 854 N.E.2d at 93-95.

Summary of Final Determination

36. The Petitioner failed to make a prima facie case. The Board finds in favor of the Respondent.

This Final Determination of the above captioned matter is issued this by the Indiana Board of Tax Review on the date first written above.

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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>