INDIANA BOARD OF TAX REVIEW
Small Claims
Final Determination
Findings and Conclusions

Petitions:	**14-016-13-1-4-00020**
	14-016-13-1-4-00021
	14-016-13-1-4-00022
Petitioner:	**Brady Development, LLC**
Respondent:	**Daviess County Assessor**
Parcels:	**14-13-03-301-011.000-016 [Parcel 011]**
	14-13-03-301-009.000-016 [Parcel 009]
	14-13-03-301-010.000-016 [Parcel 010]
Assessment Year:	**2013**

The Indiana Board of Tax Review (Board) issues this determination in the above matter, and finds and concludes as follows:

Procedural History

1. The Petitioner initiated its 2013 assessment appeals for the above-captioned parcels with the Daviess County Assessor on May 21, 2014.

2. On December 31, 2014, the Daviess County Property Tax Assessment Board of Appeals (PTABOA) issued determinations for each parcel denying the Petitioner any relief.

3. The Petitioner timely filed Petitions for Review of Assessment (Form 131s) with the Board for all three parcels. The Petitioner elected the Board's small claims procedures for all the parcels under appeal.

4. The Board issued notices of hearing on March 10, 2016.

5. Administrative Law Judge (ALJ) Jennifer Bippus held the Board's consolidated administrative hearing on April 20, 2016. She did not inspect the property.

6. Brian Thomas appeared for the Petitioner. Attorney Brian Cusimano appeared for the Respondent. Mr. Thomas and Daviess County Assessor Dennis Eaton were sworn.

Facts

7. The properties under appeal are three vacant commercial lots located at 1712 South State Road 57 in Washington, 1602 South State Road 57 in Washington, and 1670 South State Road 57 in Washington.

8. The PTABOA determined the following 2013 total assessments:

Parcel 011
Land: $130,000 Improvements: $0 Total: $130,000

Parcel 009
Land: $146,400 Improvements: $0 Total: $146,400

Parcel 010
Land: $178,000 Improvements: $0 Total: $178,000

9. At the hearing, Mr. Thomas requested the following 2013 total assessments:

Parcel 011
Land: $9,000 Improvements: $0 Total: $9,000

Parcel 009
Land: $27,800 Improvements: $0 Total: $27,800

Parcel 010
Land: $9,000 Improvements: $0 Total: $9,000

Record

10. The official record for this matter is made up of the following:

a) Petitions for Review of Assessment (Form 131s) with attachments,

b) A digital recording of the hearing,

c) Exhibits:

Petitioner Exhibit A:	Summary of contentions,
Petitioner Exhibit B:	2013 subject property record cards for each parcel,
Petitioner Exhibit C:	Aerial photographs,
Petitioner Exhibit D:	Page 65 and 66 from the Real Property Assessment Guideline,
Petitioner Exhibit E:	Memorandum prepared by Barrett McNagney, LLP, to Mr. Thomas dated April 19, 2016,
Petitioner Exhibit F:	Affidavit of Charles Taylor Jr., dated April 19, 2016.
Respondent Exhibit A:	2005 property record card for Parcel 009,
Respondent Exhibit D:	2013 property record card for Parcel 009,
Respondent Exhibit H:	Letter from Mr. Thomas to Mr. Eaton titled "Additional Evidence Requested by the Daviess County Assessor at the PTABOA Hearing."
Board Exhibit A:	Form 131s with attachments,

Board Exhibit B:	Notices of hearing dated March 10, 2016,
Board Exhibit C:	Notice of Appearance for Marilyn Meighen and Heather Scheel,
Board Exhibit D:	Notice of Appearance for Brian Cusimano,
Board Exhibit E:	Hearing sign-in sheet,
Board Exhibit F:	Respondent's Post-Hearing Brief.[1]

d) These Findings and Conclusions.

Objections

11. Mr. Cusimano objected to Petitioner's Exhibits E and F as hearsay. First, regarding Petitioner's Exhibit E, Mr. Cusimano argued the individual who prepared the memorandum was not present at the hearing to testify. Mr. Thomas responded by stating "the attorney preparing the memorandum instructed him to say, 'the document can stand on its own.'" Mr. Cusimano also objected to Petitioner's Exhibit F arguing the exhibit is an "out of court document" and cannot form the sole basis of the Board's opinion. Mr. Thomas did not offer a response. The ALJ took both objections under advisement.

12. "Hearsay" is a statement, other than the one made while testifying, that is offered to prove the truth of the matter asserted. Such a statement can be either oral or written. (Ind. R. Evid. 801 (c)). The Board's procedural rules specifically address hearsay evidence:

> Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. If not objected to, the hearsay evidence may form the basis for a determination. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting determination may not be based solely upon the hearsay evidence.

52 IAC 3-1-5(b). The word "may" is discretionary, not mandatory. In other words, the Board can permit hearsay evidence to be entered in the record, but it is not required to allow it.

13. As to Petitioner's Exhibit E, it does not appear that the Petitioner offered the exhibit as testimony, but instead as legal argument from the Petitioner's attorney. True, the document contains some statements of fact, but the relevant statements of fact within Petitioner's Exhibit E were made a part of the record through either other exhibits or the testimony of Mr. Thomas. Further, had the Petitioner's attorney been present to make the arguments contained in the exhibit, he would not have been subject to cross-examination regarding those opinions. Additionally, as requested by Mr. Cusimano, the Respondent

[1] At the hearing, Mr. Cusimano requested additional time to submit a post-hearing brief in response to Petitioner Exhibit E. Mr. Cusimano was allotted additional time and timely submitted his post-hearing brief on May 5, 2016. The brief has been entered into the record and labeled Board Exhibit F.

was allotted an opportunity to reply to the legal arguments contained in Exhibit E in a post-hearing brief. *See Bd. Ex. F.* Thus, Mr. Cusimano's objection to Petitioner's Exhibit E is overruled.

14. As to Petitioner Exhibit F, this exhibit is clearly hearsay. It is an affidavit intending to represent the testimony of Charles Taylor Jr. Mr. Taylor was not present at the hearing, and the Respondent was not permitted to cross-exam Mr. Taylor on the exhibit. As such, pursuant to the Board's procedural rules, Petitioner's Exhibit F is admitted to the record, however because the Respondent objected to the exhibit, it cannot serve as the sole basis for the Board's decision. The Board notes, however, the ruling on the Respondent's objections do not affect the final determination.

Contentions

15. Summary of the Petitioner's case:

a) All three lots under appeal are over-assessed. The lots were "purchased for development to be held for sale." The Petitioner buys land to "develop gas stations and convenience stores." When the lots were purchased in 2005, the Petitioner paid "quite a bit more than the current assessment." After the Petitioner purchased the lots, they were "cleaned up" and a home/farm building was removed to improve the marketability and facilitate a sale. Though, according to Mr. Thomas this was "not necessarily" a change in use. No additional improvements have been made, and they remain "part of an inventory of lots" currently owned by the Petitioner. All three lots are currently listed for sale. *Thomas argument; Pet'r Ex. A, F.*

b) The parcels were zoned commercial prior to the 2005 purchase, and they still are to date.[2] The Petitioner has never sought a change in zoning. Previously the lots were utilized by "a local car dealer for a tent sale." However, there are no current plans for developing the lots. At one point, an individual was interested in purchasing the lots, but eventually backed out because of a "wetlands problem." This issue has delayed any future development. *Thomas testimony; Pet'r Ex. B.*

c) The Respondent erroneously assigned "primary and secondary commercial values to the three parcels." This is not accurate because such a classification includes costs for sanitary sewers, storm sewers, portable water lines, fire prevention lines, gas lines, septic systems, water wells, greater improvement of the site and landscaping. As evidenced by aerial photographs, the parcels consist solely of undeveloped land. *Thomas argument; Pet'r Ex. A, C, D.*

d) The parcels should qualify for the "developer's discount." The Petitioner is a land developer within the meaning of Ind. Code § 6-1.1-4-12(a). Further, the parcels in question are land in inventory within the meaning of Ind. Code § 6-1.1-4-12(b). Even though development has not materialized as planned, that does not change the

[2] Both parties' testified all three parcels were classified as commercial. However, the property record card for Parcel 011 appears to indicate that parcel is classified as agricultural. *See Pet'r Ex. B.*

underlying investment and development expectations of the Petitioner at the time of acquisition. Further, no triggering event has occurred that would authorize the Respondent to reclassify the parcels. Specifically, there has been no transfer of title to someone who is not a developer, no construction or taking of a building permit has commenced, and the Petitioner has not changed the use of the parcels. *Thomas argument; Pet'r Ex. A, E* (citing *Aboite Corp. v. State Bd. of Tax Comm'rs*, 762 N.E.2d 254, 257 (Ind. Tax Ct. 2001)).

e) Additionally, the developer's discount "delays the effective date of the assessment." Thus, based on "the value as before the erroneous increase in 2007," the 2013 assessments should be as follows:

14-13-03-301-009.000-016: $27,800
14-13-03-301-010.000-016: $9,000
14-13-03-301-011.000-016: $9,000

Thomas argument; Pet'r Ex. A.

16. Summary of the Respondent's case:

a) As to parcel 009, this lot has been zoned commercial since before the Petitioner's purchase in 2005. In fact, this lot has been zoned commercial since 2002. While that parcel's value has gone up due to trending, the classification did not change. *Eaton testimony; Resp't Ex. A.*

b) As to parcels 010 and 011, the Petitioner applied for a permit to demolish the homes, and "they furnished the permit in August 2005." Further, a local Dodge dealer held a three-day tent sale on the parcels "at least a couple times." That type of activity could not occur in a residentially zoned area. *Eaton argument.*

c) These activities disqualify the property from a "developer's discount" because they "mark a change in use." The Petitioner took steps to utilize the lots in a different manner. The act of clearing ground marks a change in use that is different than the inaction of "letting agricultural land lie follow." Further, if the Petitioner leased its property to a car dealer for commercial use that would also indicate a change in use. Accordingly, "there was action rather than inaction." *Cusimano argument; Bd. Ex. F* (citing *Hamilton Co. Ass'r v. Allisonville Rd. Dev., LLC*, 988 N.E.2d 820 (Ind. Tax Ct. 2013)).

d) Finally, there is a difference between changing the classification of the land and an increased assessment. Thus, the application of the "developer's discount" does not freeze the value of the property. Because the Respondent kept the classification the same before and after the purchase, the Petitioner has no claim for relief. *Cusimano argument; Bd. Ex. F* (citing *Burkett Dev., LLC v. Madison Co. Ass'r*, Ind. Bd. of Tax Rev. pet. no. 48-003-07-1-1-07545 (November 6, 2009)).

Burden of Proof

17. Generally, the taxpayer has the burden to prove that an assessment is incorrect and what the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Ass'r,* 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). The burden-shifting statute as recently amended by P.L. 97-2014 creates two exceptions to that rule.

18. First, Ind. Code § 6-1.1-15-17.2 "applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal is an increase of more than five percent (5%) over the assessment for the same property for the prior tax year." Ind. Code § 6-1.1-15-17.2(a). "Under this section, the county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court." Ind. Code § 6-1.1-15-17.2(b).

19. Second, Ind. Code § 6-1.1-15-17.2(d) "applies to real property for which the gross assessed value of the real property was reduced by the assessing official or reviewing authority in an appeal conducted under IC 6-1.1-15." Under those circumstances, "if the gross assessed value of real property for an assessment date that follows the latest assessment date that was the subject of an appeal described in this subsection is increased above the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase, the county assessor or township assessor (if any) making the assessment has the burden of proving that the assessment is correct." Ind. Code § 6-1.1-15-17.2(d). This change was effective March 25, 2014, and has application to all appeals pending before the Board.

20. Here, the parties agree the assessed value of the lots did not increase by more than 5% from 2012 to 2013. In fact, the assessments were the same in 2012 as they are in 2013. Thus, the burden shifting provisions of Ind. Code § 6-1.1-15-17.2 do not apply, and the burden rests with the Petitioner.

Analysis

21. The developer's discount is based on Ind. Code § 6-1.1-4-12, which provides:

> (a) As used in this section, "land developer" means a person that holds land for sale in the ordinary course of the person's trade or business…
> (b) As used in this section, "land in inventory" means:
> (1) a lot; or
> (2) a tract that has not been subdivided into lots; to which a land developer holds title in the ordinary course of the land developer's trade or business.
> (c) As used in this section, "title" refers to legal or equitable title, including the interest of a contract purchaser.

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(e) Except as provided in subsections (i) and (j), if:

(1) land assessed on an acreage basis is subdivided into lots; or

(2) land is rezoned for, or put to, a different use; the land shall be reassessed on the basis of its new classification.

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(i) Subject to subsection (j), land in inventory may not be reassessed until the next assessment date following the earliest of:

(1) the date on which title to the land is transferred by:

(A) the land developer; or

(B) a successor land developer that acquires title to the land; to a person that is not a land developer;

(2) the date on which construction of a structure begins on the land; or

(3) the date on which a building permit is issued for construction of a building or structure on the land.

(j) Subsection (i) applies regardless of whether the land in inventory is rezoned while a land developer holds title to the land.

22. This statute was amended in 2006, but the intent as explained in prior case law remains the same, to "encourage" land development. *See Howser Dev. v. Vienna Twp. Ass'r*, 833 N.E.2d 1108, 1110 (Ind. Tax Ct. 2005), and *Aboite Corp. v. State Bd. of Tax Comm'rs,* 762 N.E.2d 254, 257 (Ind. Tax Ct. 2001). The encouragement comes by providing that a land developer's land in inventory is not to be reassessed until after title is transferred to somebody who is not a developer, or construction begins on the land. *See* Ind. Code § 6-1.1-4-12(h). Agricultural land values tend to be lower. Consequently, where land was previously assessed with a lower agricultural land value, allowing it to retain that lower valuation for a longer time generally is an encouragement or benefit.

23. Under the developer's discount, only three events trigger an assessor's authority to reassess a property on the basis of a new classification: Transferring title to someone who is not a land developer, beginning construction of a structure, or getting a building permit.

24. Here, the Petitioner failed to make a prima facie case for reducing the assessments.

a) There appears to be no dispute that the Petitioner qualifies as a "land developer" pursuant to Ind. Code § 6-1.1-4-12(a). But whether activities such as the removal of a building or the short-term leasing of parcels for commercial activity disqualify them from the "developer's discount" is a question the Board need not address in this final determination. Even if the properties under appeal qualify for the "developer's discount," the Petitioner failed to prove that any change in the assessments is warranted.

b) The "developer's discount" is a bar on any change to a parcel's classification until one of the triggering events discussed above occurs. Here, there is some confusion

regarding the actual classification of the parcels. Both parties testified that the parcels were classified as commercial, both before and after the Petitioner purchased them. As previously noted, while that is true for Parcels 009 and 010, the property record card for Parcel 011 appears to indicate that it is classified as agricultural. However, there is *no* dispute that the parcels' classifications did not change, either before or after the Petitioner purchased them. Thus, there has been no violation of the "developer's discount" statute, and therefore there is no relief available to the Petitioner.

c) The Petitioner also argued that the parcels' 2013 assessments should revert back to the 2007 values. The Petitioner contends the "developer's discount" provides that actual values are to be "frozen." More specifically, the Board infers the Petitioner is contending that the phrase "may not be reassessed" refers to assessed values, rather than classifications. Ind. Code § 6-1.1-4-12(i). As the Board has previously held, that interpretation is incorrect. *See Burkett Dev., LLC v. Madison Co. Ass'r*, Ind. Bd. of Tax Rev. pet. no. 48-003-07-1-1-07545 (November 6, 2009).

d) Where a statute is susceptible to more than one interpretation, as it is in this case, the statute is ambiguous.[3] In such a case, the intent of the legislature must be ascertained and the statute interpreted to effectuate legislative intent. *See Aboite Corp.*, 762 N.E.2d at 257. "[I]n construing Indiana Code § 6-1.1-4-12, this Court will interpret the statute as a whole, and not overemphasize a strict, literal or selective reading of its individual words." *Id. (citing Gen. Motors Corp. v. Indiana Dep't of Workforce Dev.*, 671 N.E.2d 493, 497 (Ind. Ct. App. 1996)). Furthermore, where a statute is susceptible to more than one interpretation, it is appropriate to consider the consequences of a particular construction. *Herff Jones v. State Bd. of Tax Comm'rs,* 512 N.E.2d 485, 490-91 (Ind. Tax Ct. 1987).

e) The legislature has clearly provided that the assessed value of real property should be adjusted annually. Ind. Code § 6-1.1-4-4.5. Failing to adjust the base rate for the subject property, as suggested by the Petitioner's interpretation of the "developer's discount," would frustrate the intent of the legislature to provide for uniform and equal assessments with a more current valuation date. Ind. Code § 6-1.1-4-4.5(c)(1); 50 IAC 21-3-3. If the Petitioner's position regarding the "developer's discount" were to be accepted, land values protected by that provision could potentially be "frozen" at amounts that are grossly out-of-date for an indefinite period. It is difficult to believe that the legislature would intend such a result.

f) In addition, the Tax Court's discussions regarding the "developer's discount" also makes it clear that the statute covers when land must be, or cannot be, reassessed on the basis of its new classification. *See Howser*, 833 N.E.2d 1108; *see also Aboite Corp.*, 762 N.E.2d 254. The Board is unaware of any authority that supports the Petitioner's argument that property subject to the "developer's discount" cannot be reassessed at all.

[3] Under the developer's discount, the requirement to reassess land when it is rezoned is explicit. *Howser Dev.*, 833 N.E.2d at 1110.

g) The Petitioner's proposed interpretation is incorrect because it fails to put the meaning of "reassessed" into the context of the entire statute. The meaning of the "developer's discount" statute, as a whole, requires that the prohibition against reassessment established in later subsections be consistent with the mandate for reassessment established in prior subsections. *See* Ind. Code § 6-1.1-4-12. Further, the statute on the whole is concerned with *reassessment on the basis of a new classification*, not simply determining an updated value based on an existing classification.

h) The Petitioner also made the argument that the Respondent erroneously added "primary and secondary commercial values to the three parcels." In Indiana, real property is based on its "true tax value," which means "the market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property." Ind. Code § 6-1.1-31-6(c); 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2). The cost approach, the sales comparison approach, and the income approach are three generally accepted techniques to calculate market value-in-use. *Id.* Assessing officials primarily use the cost approach. The cost approach estimates the value of the land as if vacant and then adds the depreciated cost new of the improvements to arrive at a total estimate of value. *Id.* A taxpayer is permitted to offer evidence relevant to market value-in-use to rebut an assessed valuation. Such evidence may include actual construction costs, sales information regarding the subject or comparable properties, appraisals, and any other information compiled in accordance with generally accepted appraisal principles.

i) It is well settled that a party may not make a case for changing an assessment simply by showing how the assessment regulations should have been applied. *See Eckerling v. Wayne Twp. Ass'r*, 841 N.E.2d 674, 678 (Ind. Tax Ct. 2006) ("[S]trict application of the regulations is not enough to rebut the presumption that the assessment is correct.") Instead, the party must offer the types of market-based evidence described above. *Id*. Here, the Petitioner failed to offer any valuation evidence.

j) Consequently, the Petitioner failed to make a prima facie case that the 2013 assessments were incorrect. Where the Petitioner has not supported their claim with probative evidence, the Respondent's duty to support the assessment with substantial evidence is not triggered. *Lacy Diversified Indus. v. Dep't of Local Gov't Fin.,* 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003).

Conclusion

25. The Board finds for the Respondent.

Final Determination

In accordance with these findings and conclusions, the 2013 assessments will not be changed.

ISSUED: July 19, 2016

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days of 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>.