

REPRESENTATIVE FOR PETITIONER:

Joshua Neal, Attorney

REPRESENTATIVE FOR RESPONDENT:

F. John Rogers, Attorney

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

CAIMAR PROPERTIES, LLC,	)	Petition No.:	02-073-12-1-4-00122
	)		02-073-13-1-4-00045
Petitioner,)		
	)	Parcel No.:	02-07-10-251-004.000-073
v.)		
	)	County:	Allen
ALLEN COUNTY ASSESSOR,)		
	)	Township:	Washington
Respondent.)		
	)	Assessment Years:	2012, 2013

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

April 27, 2015

INTRODUCTION

1. In this assessment appeal, Caimar Properties, LLC (the “Petitioner”) contested the 2012 and 2013 assessments by the Allen County Assessor (the “Respondent”) of the above-captioned parcel. The Petitioner’s expert, having reviewed recent financial statements and having performed a market analysis of the Fort Wayne metropolitan area, determined that the subject property does not, and likely will not, generate sufficient operating income to sustain a going concern. The Petitioner’s expert thus contends that the subject property should be valued under a liquidation premise. The Respondent’s expert disagrees, finding that valuing the property under a premise other than for its current use does not meet the definition of true tax value. The Indiana Board of Tax Review (the

“Board”) finds that the Petitioner failed to make a prima facie case that supports its contended values for the subject property for the assessment years in question.

PROCEDURAL HISTORY

2. The Petitioner appealed the subject property’s 2012 and 2013 assessments to the Allen County Property Tax Assessment Board of Appeals (the “PTABOA”), which upheld the assessments. The Petitioner then filed Form 131s with the Board for those years.
3. A hearing was held on September 30, 2014, before Gary W. Ricks, the designated administrative law judge (the “ALJ”) appointed by the Board to conduct the hearing. Neither the Board nor the ALJ inspected the subject property.
4. Mark Bovee, Certified Appraiser, Cindy Stanford, Property Tax Consultant, and David B. Kerschner, Secretary/Treasurer and part owner of the subject property testified for the Petitioner. Rob Williamson, the Allen County Commercial Appraisal Deputy Assessor, testified for the Respondent.¹
5. The Petitioner submitted the following exhibits:

Petitioner Exhibit A:	Appraisal of the subject property,
Petitioner Exhibit B:	Definitions from the Uniform Standards of Professional Appraisal Practice (“USPAP”), 2012-2013 ed.,
Petitioner Exhibit C:	Property record card (the “PRC”) for the subject property for 2012.
6. The Respondent submitted the following exhibits:²

Respondent Exhibit 1:	Letter of appraisal assignment transmittal,
Respondent Exhibit 2:	American Institute of Architects (“AIA”) documents,
Respondent Exhibit 3:	Valuation premise,
Respondent Exhibit 4:	Reference to “Cost approach to value,”
Respondent Exhibit 5:	Flyer for Dave & Buster’s,
Respondent Exhibit 6:	Definition of liquidation value. Dictionary of Real Estate Appraisal 167 (4 th ed. 2002),

¹ Millie Dove, Accountant, and Robin M. Thompson, Commercial Deputy Assessor, also attended the hearing, but did not testify.

² The Respondent introduced identical exhibits A through L for 2012 and 2013, with the exception that Exhibit B for each year consists of the PRC for the subject property for that year.

Respondent Exhibit 7: Reference to “Hypothetical conditions.” The Appraisal of Real Estate 135 (12th ed. 2008),

Respondent Exhibit A: Respondent’s position statement,

Respondent Exhibit B: Subject property PRCs for 2012, 2013,

Respondent Exhibit C: Aerial photo of the subject property,

Respondent Exhibit D: Excerpt from the Real Property Assessment Manual,

Respondent Exhibit (E)(1): Cost approach definition from the 2011 Property Assessment Manual,

Respondent Exhibit (E)(2): Cost approach definition from the International Association of Assessing Officers (the “IAAO”) Glossary,

Respondent Exhibit (F)(1): Excerpt; The Appraisal of Real Estate,

Respondent Exhibit (F)(2): Excerpt; Indiana Tax Court decision, *LDI, Manufacturing v. State Board of Tax Commissioners*, 759 N.E.2d 685 (Ind. Tax Ct. 2001),

Respondent Exhibit (F)(3): Cost approach applicability for special purpose property,

Respondent Exhibit G: Actual construction cost date,

Respondent Exhibit (H)(1): Cost date analysis of AIA document,

Respondent Exhibit (H)(2): Typical structural life schedule,

Respondent Exhibit (I)(1): Marshall & Swift cost estimation,

Respondent Exhibit (I)(2): Swift estimator data,

Respondent Exhibit (I)(3): Appendix F of the 2011 Real Property Guidelines,

Respondent Exhibit (J): Building permits for the subject property,

Respondent Exhibit (K): USPAP Standard 1-2 and 2-2 and definitions excerpt,

Respondent Exhibit (L): Respondent representative’s qualifications.

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

Board Exhibit A: Form 131 Petition with attachments for 2012 and 2013,

Board Exhibit B: Hearing notice dated May 14, 2014,

Board Exhibit C: Notice of Appearance for John Rogers,

Board Exhibit D: Notice of Appearance for Joshua Neal,

Board Exhibit E: Hearing sign-in sheet,

Board Exhibit F: Audio recording of hearing.

8. The Petitioner objected to the Respondent’s Exhibit 5 as being inconclusive. The Respondent’s Exhibit 5 is a flyer referring to “D & B Lanes.” While the appraiser had made numerous references to Dave & Buster’s facilities in his testimony as a source of value comparable to the subject property, the flyer does not specifically identify the property as being a Dave & Buster’s property. With that discrepancy noted, the Board finds that the objection goes to the weight of the exhibit rather than to its admissibility. The objection is overruled.

9. The Petitioner asked its appraiser to speculate as to the value of the subject property for 2013. The Respondent objected on the grounds that the question went beyond the scope of the appraiser’s direct knowledge because the appraisal submitted at the hearing referred only to the 2012 tax year. Both parties eventually agreed that the value of the subject property for 2013 can be considered in conjunction with the appraised value for 2012. The objection is overruled.
10. The PTABOA determined the following assessments:

Year	Land	Improvements	Total
2012	\$573,000	\$3,508,600	\$4,081,600
2013	\$573,000	\$3,535,500	\$4,108,500

The Petitioner contends the subject property should be assessed as follows:³

Year	Land	Improvements	Total
2012	\$520,000	\$1,080,000	\$1,600,000
2013	\$520,000	\$1,080,000	\$1,600,000

The Respondent contends the subject property should be assessed as follows:

Year	Land	Improvements	Total
2012	\$520,000	\$3,066,300	\$3,586,300
2013	\$520,000	\$2,964,100	\$3,484,100

JURISDICTIONAL FRAMEWORK

11. The Board is charged with conducting impartial reviews of all appeals concerning: (1) the assessed valuation of tangible property; (2) property tax deductions, (3) property tax exemptions; or (4) property tax credits; that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Board under any law. Ind. Code § 6-1.5-4-1(a). All such appeals are conducted under Ind. Code § 6-1.1-15. *See* Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4

³ On the Forms 131 at issue, the Petitioner contended that the subject property should be assessed at \$3,700,000 and \$1,600,000 for 2012 and 2013 respectively, but offered testimony at the hearing that both years should be assessed at \$1,600,000 each.

THE SUBJECT PROPERTY

12. The subject property is a free-standing family entertainment center (an “FEC”) located at 1414 Northland Boulevard in Fort Wayne. Built in 2007, the building has a total area of 50,504 square feet and is situated on a 9.55 acre site.
13. Two businesses operate within the structure. Crazy Pinz, Inc. (“Crazy Pinz”) consists of a bowling alley, party rooms, an arcade, a miniature golf facility, and a laser-tag facility. Coconutz, Inc. (“Coconutz”), the other business in the building, leases space from Crazy Pinz and consists of a full service restaurant and lounge. Office space, walkways, and dead space also occupy portions of the building. *Neal opening argument, Pet’r Ex. A.*
14. The subject property is a “special-use property” defined as

[a] limited-market property with a unique physical design, special construction materials, or a layout that restricts its utility to the use for which it was built; also called a special-design property.

Respondent Ex. F1.

PETITIONER’S CONTENTIONS

15. The Petitioner engaged Mark Bovee to appraise the subject property. Mr. Bovee holds an MAI accreditation and is a licensed certified general appraiser in Indiana and Michigan. He is an experienced appraiser and has taken coursework in valuing businesses through the American Society of Appraisers. Mr. Bovee is an affiliate member of the Board of Realtors in Steuben County, Indiana, and serves as a supervisor and screener of other MAI candidates for the Appraisal Institute. Mr. Bovee has regularly been engaged to review the work of other appraisers. Mr. Bovee is the past president of the Southwest Michigan/Northern Indiana Chapter of the Appraisal Institute. He has been an appraiser and a consultant for approximately 14 years. With regard to the subject property, Mr. Bovee prepared a Real Property Appraisal Report in accordance with USPAP. *Bovee*

testimony, Pet'r Ex. A, pp. 1, 96.

16. According to the Marshall Valuation Service (the "MVS"), an average quality construction bowling center will have a useful life of 35 years and perhaps as long as 50 years in a market such as the one where the subject property is situated. The chronological age of the subject property appears consistent with the effective age. *Pet'r Ex. A, p. 38.*
17. Mr. Bovee inspected the property. He appraised the property on February 20, 2013, and considers the appraisal to be retrospective to March 1, 2012. *Bovee testimony, Pet'r Ex. A, p. 85.*
18. The appraisal is based on an analysis of the operating business and the most profitable utility the owner would gain from the assessed property. *Bovee testimony.*
19. For purposes of the valuation, Mr. Bovee valued the property under an alternative use scenario. Mr. Bovee contends such valuation method is necessary due to a lack of operating cash flows, specific market area demographics, geographic disposable income, and competing entertainment venues such as sporting events and movie theaters, among others. *Pet'r Ex. A, p. 16.*
20. Comparing the subject property to a sample study of 13 Dave & Buster's locations, an FEC chain with 69 locations largely in the Midwest,⁴ the subject property reflects a trade area population of 529,990 persons below the mean. Furthermore, the subject trade area median disposable income is \$4,101 below the mean. Finally, the average disposable income in 2012 indicates that the subject trade area is \$6,306 below the mean. *Bovee testimony, Pet'r Ex. A. p. 41.*
21. The Petitioner contends that total revenue at Crazy Pinz has decreased over the last several years. Arcade and other entertainment revenue have increased by 31% over the last four years. While both cost of goods sold and net revenues have remained somewhat

⁴There are no Dave & Buster's in the Fort Wayne metropolitan area.

stable during the period, financial statements reflect a significant decline in salaries paid to management and a slight decrease in overall wages. In 2012, there was a significant decline in repair and maintenance expenses. Rent payments shown on the financial statements are made to the owner of the business and do not reflect arm's length transactions. The company's balance sheet shows a long term note of approximately \$6,900,000 for 2012. *Bovee testimony, Pet'r Ex. A, p. 45-48.*

22. League and non-league bowling has declined as an overall percentage of sales from 39.7% of total sales in 2009 to 34.8% in 2012. Revenue from the arcade and games as a percentage of total sales has increased over those same years from 18.6% to 27.1%. Discounting of prices has also increased during the four year period in order to maintain a sufficient revenue level. *Pet'r Ex. A, p. 45.*
23. Ratio analyses are performed to the extent that suitable financial statements are available. One of the issues with the subject's financial statements is that there are inter-company cash payments. These intercompany payments have been ignored. Mr. Bovee notes in his appraisal report that it is his understanding that the owner has contributed significant additional paid-in capital as operating cash flows have consistently been insufficient to pay operating costs. Such payments are reflected in the adjusted balance sheet and intercompany assets, but are nevertheless additional paid-in capital by the owner. The unadjusted balance sheet as of December 31, 2012, reflects a shareholder equity of (\$5,539,089). After adjustment, the 2012 year end balance sheet reflects shareholder equity of (\$2,790,047). *Pet'r Ex. A, p. 48.*
24. The Petitioner contends that, because of the large capital investment required for an FEC, a significant amount of ongoing advertising and marketing is necessary. Declining revenues are almost always a sign of changes in consumer preferences or deterioration in discretionary spending. The Petitioner cites Dave & Buster's comments on the effect of deterioration in guest traffic. "Deterioration in guest traffic and/or a reduction in the average amount guests spend in our stores will negatively impact our revenues. This will result in sales de-leverage, spreading fixed costs across a lower level of sales, and will in

turn cause downward pressure on our profit margin. This could result in reductions in staff levels, asset impairment charges and potential closures.” *Pet’r Ex. A, p. 40.*⁵

25. The subject market area includes almost all of the greater Fort Wayne area. The population estimate for 2010 is 302,833 with 118,877 households. The average age of residents is estimated to be 35.1 years. In 2012, the population increased by 1.02% and the number of households also increased by 1.09%. There is a fairly wide range in median and average disposable income in the market. The age group with the largest median disposable household income is in the 45 to 54 age bracket. The second highest disposable income age bracket is 55 to 64, and the third highest disposable income age bracket is 25 to 34 years of age. This creates demographic issues for the subject property because FECs tend to appeal to younger adults and teenagers. Consequently, the Petitioner contends that the local population with the greatest amount of disposable income within the Fort Wayne trade area would be less likely to visit FECs. *Bovee testimony, Pet’r Ex. A, p. 40.*
26. Comparing the study group to the subject property’s market area indicates lower disposable income in the subject market. The subject’s market area does not appear to have a sufficient number of households to support an FEC, as indicated by a finding of sales for the subject property of less than \$40 per square foot. There has also been a lack of growth in sales revenue, as well as increases in marketing and advertising expenses, and discounts offered to consumers. Given market-based returns on investment capital, the area’s lack of sufficient disposable earnings, low population, and multiple entertainment alternatives, the subject’s market area does not appear to be able to support a 50,504 square foot FEC. *Pet’r Ex. A, p. 42.*
27. The Petitioner contends that the ideal customer for its business is a young family with young children where the parents are aged 25 to 40 years old. In Fort Wayne, older residents tend to have the highest disposable income. The Petitioner contends that peak earning years are enjoyed by people in their forties and fifties. *Bovee testimony.*

⁵ SEC Form 10-K, Dave and Busters, Inc., for the period ending 1/29/12, filed 4/12/12.

28. The Fort Wayne Metropolitan Statistical Area, Allen County and adjacent outlying counties that have a high degree of social and economic integration with the central county or counties as measured through commuting, has decreased by 8.77% since 1990. Allen County is expected to increase its population by 8.37% from 2009 to 2015. *Pet'r Ex. A, pp. 23, 26.*
29. The debt to asset ratio of 1.54 means that there is 54% more debt than assets on the company's books. *Bovee testimony, Pet'r Ex. A, p. 49.*
30. The Petitioner contends that net revenues are rather stable and reflect little volatility. Nevertheless, adjusted earnings before interest, taxes, depreciation, amortization, and restructuring or rent costs ("EBITDAR") represent a problem for the owners because of variances in cash flows. This problem is especially true given the large amount of fixed expenses including debt service. *Pet'r Ex. A, p. 50.*
31. The current sales efficiency of Crazy Pinz is \$38.00 per square foot and declining. In contrast, Dave & Buster's has several stores and approximately 2.7 million square feet of space. In 2012, Dave & Buster's generated \$198.66 of sales volume per square foot. This comparison suggests that the subject is performing well below the sales volume necessary to support a profitable business. The subject's performance is 80.5% below the comparable stores. *Bovee testimony, Pet'r Ex. A, p. 50.*
32. The Petitioner contends that an FEC will typically employ approximately 125 hourly employees and many of such facilities will operate approximately 90 hours per week, with peak days being Saturday and Sunday. The average number of employees per square foot is approximately one hourly employee per 380 square feet of gross building area. The subject is 50,504 square feet which would suggest an hourly workforce of 133 employees. The subject currently employs 86 employees, 70 of which are part-time. It experiences a very high turnover of personnel as evidenced by the 149 W-2 forms for 2012. *Bovee testimony, Pet'r Ex. A, p. 39.*

33. The total tax assessment for 2012 reflects a market value-in-use of \$4,081,600. The assessment reflects the value of the property as a bowling center with a slight downward trend from the 2008 and 2009 assessments. The property tax is \$2.52 per square foot. *Pet'r Ex. A, p. 37.*
34. The Indiana tax code requires that a property be valued with regard to its utility to the owner. From the financial statement analysis, the Petitioner determined that the property generates insufficient sales revenue commensurate with generating acceptable levels of market returns. The Petitioner contends that, as a result, under its current use, the property has greatly reduced utility to the owner. Consequently, the utility to the owner of the real estate lies not in the performance of the FEC, but rather an alternative use of the property that would maximize economic benefit. *Pet'r Ex. A, p. 56.*
35. In addition to the demographic challenges to profitability, the subject is also competing against numerous other entertainment venues in Fort Wayne, such as movie theaters, athletic events, nightclubs, restaurants, and other bowling centers. *Bovee testimony, Pet'r Ex. A, pp. 39-40.*
36. A feasibility analysis when the subject was being considered should have shown whether there was a sufficient population demographic and spending pattern to support an approximate 50,000 square foot business. *Bovee testimony.*
37. FECs are almost always sold as going concern businesses. *Pet'r. Ex. A, p. 11.* Crazy Pinz, however, does not generate sufficient income to value the operation under a going concern premise. *Bovee testimony, Pet'r Ex. A, p. 18.*
38. The business doesn't generate sufficient operating cash flows to pay its operating expenses. The owners have been paying in capital, which is reflected in negative retained earnings for various years. *Bovee testimony.*
39. A business should be valued as a going concern if the property and the operation have a market value that is greater or equal to the sum of the total assets. If, on the other hand,

the enterprise value is less than the sum of separate market values of the business assets, less liquidation costs, then business owner wealth is maximized by selling the business assets, and the business should be valued under the liquidation premise. Under the liquidation premise, the real estate is going to be significantly impaired by the disposition of the assets, because the assets were valued for one use, but will be valued for an alternative use going forward. *Bovee testimony, Pet'r. Ex. A, p. 18.*

40. The underlying fundamental value of the property is always a product of supply and demand and such should be included in an appraisal. *Bovee testimony.*
41. The subject property should be appraised for an alternate use rather than market value-in-use because the property is currently losing money as an FEC and will likely continue to do so. As discussed, this fact requires an appraisal based on a business liquidation premise. The property has high fixed expenses and low income. The property has no value in use to the current owner because the property is losing money. *Bovee testimony, Pet'r Ex. A, pp. 16, 50.*
42. The fixed costs of the operation are such that a sales volume of approximately \$150 per square foot or greater would be necessary. The Petitioner contends that, because of this circumstance, the subject as constructed requires significant deductions for both functional and external obsolescence. *Pet'r Ex. A, p. 56.*
43. The Petitioner contends that when a bowling alley or FEC sells under a liquidation premise, buyers don't typically purchase the property for a continuation of its use. *Bovee testimony.*
44. Regardless of expenses, the subject property generates grossly insufficient sales to support the existing fixed assets including the real property. As a result, there are serious issues as to the viability of the business operation. Crazy Pinz simply does not generate sufficient sales volume to pay the opportunity cost of operation and/or investment. Therefore, the Petitioner contends that the company and assets should be analyzed under a liquidation premise rather than a going concern premise. *Pet'r Ex. A, p. 50.*

45. Since the subject property does not meet the investment criteria for an FEC, the next best use of the building structure would be for general retail, discount retail, or specialized retail use as a single user facility. The conversion to general single tenant retail use would entail the least amount of retrofitting costs and would represent the maximum marketable productive capacity of the building. *Pet'r Ex. A, p. 56.*
46. The maximum use the owner can receive from the subject property would be through an orderly disposition of the assets. *Bovee testimony.*
47. The property value was determined by applying and reconciling the three generally recognized approaches to value: the cost approach, the sales-comparison approach, and the income approach. *Bovee testimony.*

THE COST APPROACH

48. The cost approach is particularly important and useful for valuation of special-use properties when there is limited sales data from which comparative analysis can be made. There is no other process to use for special-use properties. These are properties that are infrequently exchanged in the market, may have special use and users, and are seldom leased. There are underlying assumptions in the cost approach one must consider that may make it more or less probative. For example, the cost approach represents fee simple and stylized value. *Pet'r Ex. A, pp. 57, 58, Bovee testimony.*
49. In the cost approach, the MVS is used to estimate the replacement cost new of a substitute retail property. The elevator and special use fixtures in the building were excluded. By doing so, some forms of functional obsolescence are excluded. External obsolescence is estimated by direct comparison to sales data. The data show that approximately \$15.00 per square foot of replacement cost is from incurable external obsolescence. The cost approach does present some problems in the valuation. It is difficult to determine the amount of functional and external obsolescence. The subject

property has a highly specialized proprietary design that incorporates building costs and issues that would be absent in general retail facilities. There would also be the issue of incurring retrofitting cost to produce an alternative use. Valuing the subject under the cost approach would be somewhat inaccurate because the underlying assumptions such as market income, market expense, and stabilized occupancy are not in place. Because of these issues, the cost approach is given little weight in the final analysis. *Bovee testimony, Pet'r Ex. A, p. 84.*

50. Using the cost approach to value, the subject property should be valued at \$1,610,000. *Pet'r Ex. A, pp. 63.*

THE SALES-COMPARISON APPROACH

51. In the sales-comparison approach, transactions involving similar properties are compared against the subject. A major premise of this approach is that the market value of a property is related to the prices of comparable, competitive properties. In the sales-comparison approach, elements of comparison are used to help explain differences in transaction prices. There are no other FECs in the Fort Wayne area. Using the sales comparison approach to find the value of the property under a liquidation premise would require comparing the subject property to big boxes that were “dark” because there is no comparable business. *Pet'r Ex. A, p. 57, Bovee testimony.*
52. The comparable sales range from 2007 through 2012 and, the Petitioner contends, are direct evidence of the market’s pricing of similar properties. The sales were selected based on the fact that they are not subject to long-term leases or franchise issues that generally include proprietary build-out costs. The second generation sales are reflective of actual exchanged larger retail buildings in the market area. Because there are generally few of these sales in Fort Wayne, the search was expanded outside of the metropolitan area. *Pet'r Ex. A, p. 84.*
53. The first comparable property is a former Kroger store located in Fort Wayne. It was

built in 1987 and measures 41,451 square feet. It sold on December 31, 2012, for \$1,180,000. *Pet'r Ex. A, p. 65.*

54. The second comparable property is a vacant building in Fort Wayne. It was built in 1987 and measures 41,550 square feet. It sold on December 17, 2007, for \$1,070,000. *Pet'r Ex. A, p. 66.*
55. The third comparable property is a former Target store located in Fort Wayne. It was built in 1970 and measures 111,000 square feet. It was listed on February 20, 2013 for \$900,000. *Pet'r Ex. A, p. 67.*
56. The fourth comparable property is a former Wal-Mart store located in Wabash. It was built in 1991 and measures 93,200 square feet. It sold on April 24, 2008, for \$1,475,000. *Pet'r Ex. A, p. 68.*
57. The fifth comparable property is a former Home Depot store in Marion. It was built in 2003 and measures 94,496 square feet. It sold on December 17, 2009, for \$2,742,056. *Pet'r Ex. A, p. 69.*
58. The comparable transactions were adjusted for location, market area, year built, effective age, and wall heights. *Pet'r Ex. A, p. 73.*
59. At the time most of the comparable properties were sold, they were not in use. They represent second generation sales. A second generation sale is a sale where the first user has abandoned the property and sold it for whatever price they could get from a second generation user. *Bovee testimony.*
60. The adjusted sale prices of the comparable properties range from \$15.32 to \$33.53 per square foot. With the exception of the third comparable sale, the sales are generally in the \$30.00 to \$33.00 per square foot range. Both the first and second comparables are the most relevant in terms of comparison to the subject. Analyzing the data results in a reconciled unit price of \$30.00 per square foot.

61. Using the sales comparison approach to value, the subject property should be valued at \$1,515,000. *Pet'r Ex. A, p. 73.*

THE INCOME APPROACH

62. The rationale behind the income approach is that an acceptable measure of a property's value can be its income producing potential. This method analyzes the gross income that the subject can produce, the resulting expenses, and the resulting net income. The net income figure is then capitalized into a value estimate using an appropriate method of direct or yield capitalization. *Pet'r Ex. A, p. 74.*
63. The income approach was developed using rental rate analyses and typical deductions for expenses, credit losses, and anticipated vacancies. The income approach reflects the thinking and actions of investors who might purchase the property for leasing space. Because of the proprietary design, retrofitting costs, as well as a location with secondary visibility, investors are less likely to be buyers of the subject property. *Pet'r Ex. A, p. 84.*
64. The first step in the income analysis is to determine the gross rent potential of the subject property. Because the appraisal assignment is a fee simple analysis, market rent is imputed to the subject property. Market rent is defined as:

The most probable rent that a property should bring in a competitive and open market reflecting all conditions and restrictions of the lease agreement, including permitted uses, use restrictions, expense obligations, term, concessions, renewal and purchase options, and tenant improvements.

Pet'r Ex. A, p. 74.

65. Market rent is imputed to the subject property based on gross building area. The rental rate is reduced by vacancy rates and collection losses as well as by operating expenses over projected periods of vacancy. *Pet'r, Ex. A, p. 74.*
66. Four comparable rental properties were considered in developing the income approach to

value for the subject property. *Pet'r Ex. A, pp. 75, 76.*

67. The first comparable property is a former Big Lots store located in New Haven. It was built in 1967 and measures 30,000 square feet. It has a unit rent of \$3.25 per square foot. *Pet'r. Ex. A, p. 75.*
68. The second comparable property is a former rental building in Anderson. It was built in 1991 and measures 55,668 square feet. It has a unit rent of \$5.00 per square foot. *Pet'r. Ex. A, p. 75.*
69. The third comparable property is a former K-Mart store in Indianapolis. It was built in 1969 and measures 117,797 square feet. It has a unit rent of \$2.37 per square foot. *Pet'r. Ex. A, p. 75.*
70. The fourth comparable property is a retail building in Kendallville. It was built in 1991 and measures 13,364 square feet. It has a unit rent of \$4.25 per square foot. *Pet'r. Ex. A, p. 76.*
71. The comparable rental rates fall within a fairly narrow range with the exception of the third comparable property. The other three comparables suggest an adjusted unit rent range between \$4.00 and \$5.00 per square foot. Because of the subject's size, lack of direct arterial frontage, and location, a unit rent of \$4.25 is deemed appropriate for the subject property in the market. *Pet'r, Ex. A, p. 79.*
72. Using the income approach to value, the subject property should be valued at \$1,620,000. *Pet'r. Ex. A, p. 83, 84.*

RECONCILIATION OF THE THREE METHODS

73. In reconciling the three methods, the cost approach was given little weight, the income approach was given some weight, and the sales comparison approach was given the greatest weight. In light of the consideration of the three approaches, and given the condition of the property, the cost to retrofit it, and the consideration of an alternative

use, the final reconciled value for the subject property is \$1,600,000. *Bovee testimony, Pet'r. Ex. A, pp. 84, 85.*

KERSCHNER TESTIMONY

74. While the subject property continues to lose money, recent innovations such as the addition of a laser tag operation have resulted in an increase in revenue. Mr. Kerschner testified that he expects the property to be profitable in as few as two years. *Kerschner testimony.*
75. Mr. Kerschner testified that there are currently no plans to permanently close the business and that there were no plans to permanently close the business at the time it was appraised in 2013. Closing the business was discussed at the end of last year, but the owners eventually decided against it. Mr. Kerschner testified that cash flow prospects are improving. Nonetheless, Mr. Kerschner did testify that “Randy (95% owner of Crazy Pinz and Coconutz) and I realize we’ll never see anything out of it, but hopefully there will be something there for our children.” *Kerschner testimony.*

RESPONDENT’S CONTENTIONS

76. The Property Assessment Manual defines true tax value as the market value-in-use for a property for its current use as reflected by the utility received by the owner/user from the property. *Resp. Ex. D.*
77. The Respondent’s contended value for the subject property was determined by Rob Williamson. Mr. Williamson is a Commercial Appraisal Deputy for Allen County.⁶ He is a Level III certified assessor/appraiser, a certified tax representative, and a CAE designee candidate. He has worked in the Allen County Assessor’s office for over six years. *Williamson testimony, Resp. Ex. L.*

⁶ Upon cross-examination of Mr. Williamson, the Petitioner elicited that Mr. Williamson is not a licensed appraiser, does not have an MAI designation, has no training to develop the appraisal of a going concern, has not appraised or valued any other businesses, and did not prepare the original assessment for the subject property.

78. The property is a special-purpose property, defined by the Appraisal Institute as “[a] limited-market property with a unique physical design, special construction materials, or a layout that restricts its utility to the use for which it was built.” *LDI Manufacturing v. State Board of Tax Comm’rs*, 759 N.E.2d 685 (Ind. Tax Ct. 2001). Because special-purpose properties are so unique and often not traded in the open market, the cost approach is often seen as one of the most viable ways to value these types of properties. *Resp. Ex. A, p.1-2 Resp. Ex. F1, Resp. Ex. F2.*
79. The subject property’s construction was finalized in 2007, and since it is under a decade old, the construction costs are still considered good indicators of value, albeit requiring adjustments to the valuation dates for each assessment year. These costs were trended using a straight line physical depreciation method determined by picking the most appropriate economic life, which is 35 years. *Resp. Ex. H2.* By dividing the actual age of the subject by its total economic life, depreciation percentages of 14.29% for 2012 and 17.14% for 2013 were determined. When applying these percentages to the determined replacement cost new, and adding the land value determined by the Petitioner, total cost values of \$3,586,300 for 2012 and \$3,484,100 for 2013 result. *Resp. Ex. A, p. 2. Williamson testimony.*
80. Mr. Williamson believes the AIA document represents a reasonable estimate of cost. Consequently, the information contained in the AIA document was given the most weight in determining the cost analysis. *Williamson testimony, Resp. Ex. 2.*
81. The building permits for the subject property further support the AIA cost value. The permits total \$3,874,714 which closely approximates the book asset details for the replacement cost value. *Williamson testimony, Resp. Ex. J.*
82. The cost value, developed with the actual construction cost data, was tested against market data using a Marshall and Swift commercial cost estimator. *Williamson testimony, Resp. Ex. I.(1).*

83. If a property is valued under a premise other than the current use, it cannot be considered for ad valorem tax purposes and does not meet the Manual's definition of true tax value. To do so would be to value the property with a condition known to be false and contrary to what is known about the property. *Resp. Ex. A, p. 3, Williamson testimony.*
84. If a property is underperforming, it might be attributable to poor management or perhaps the property being overbuilt. A prudent investor would look to buy the property as if they were going to achieve the market-based level of income and expense rather than the current [level of income and expense] of the subject property. *Williamson testimony.*
85. Valuing properties based upon how a business is performing would lead to a lack of uniformity in property values. *Williamson testimony.*
86. The Petitioner's witness testified that the property was not going to be considered for liquidation as of the assessment date, so if that assumption is known to be false, it is a hypothetical condition. Under USPAP, a hypothetical condition must be clearly and conspicuously stated and must indicate how it might have affected the value. Failure to do so would be a severe misstep in not only the development of value for ad valorem tax purposes, but also in the application of the appraisal standards under USPAP. *Pet'r Ex. A, p.3, Williamson testimony.*
87. The appraisal submitted by the Petitioner is based upon a hypothetical condition that the subject property will be liquidated and restructured for a subsequent use. USPAP requires hypothetical conditions that are the bases of an appraised value to be revealed as part of the appraisal, which the Petitioner's appraiser failed to provide. As a result, the Petitioner's appraisal is not in full compliance with USPAP. *Williamson testimony.*
88. The value of the business does not affect the value of the real estate. Properties commonly house businesses that aren't doing well. Similarly, apartment developments routinely have buildings below market occupancy, but the focus is on the intrinsic value of the property rather than individual income and expense data because it is not certain whether losses are due to poor management decisions or other factors. *Williamson*

testimony.

89. The subject property should not be appraised for an alternate use because it is being operated as an ongoing business concern for the owners in its current use. *Williamson testimony.*
90. As discussed previously, the Respondent has determined the individual market value-in-use of the subject was \$3,586,300 for 2012 and \$3,484,100 for 2013. *Resp. Ex. A, p. 3.*

BURDEN OF PROOF

91. Generally, a taxpayer seeking review of an assessing official's determination has the burden of making a prima facie case both that a property's assessment is wrong and what its correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). A burden shifting statute creates two exceptions to that rule.
92. First, Ind. Code § 6-1.1-15-17.2 as amended,⁷ "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(d). "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).
93. 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 Indiana Code 6-1.1-15. Under those

⁷ The amendments to Ind. Code § 6-1.1-15-17.2 became effective with the Governor's signature on March 25, 2014. *See* P.L. 97-2014. The statute, as amended, applies to "all appeals or reviews pending on the effective date of the amendments..." *Id.*; I.C. § 6-1.1-15-17.2(e).

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.

94. In any case, if an assessor has the burden and fails to meet it, the taxpayer may offer evidence of the correct assessment. If neither party offers evidence that suffices to prove the property's correct assessment, it reverts to the previous year's value. *See* I.C. § 6-1.1-15-17.2(b).
95. In the instant case, the assessment of the subject property decreased from 2011 to 2012. Consequently, the Board finds, and the parties agree, that the Petitioner has the burden of proof for 2012. The burden with regard to the 2013 assessed value depends on the resolution of the 2012 matter and will be addressed in turn.

ANALYSIS

96. Indiana assesses real property on the basis of its true tax value, which the Department of Local Government Finance (the "DLGF") has defined as the property's market value-in-use. To show market value-in-use, a party may offer evidence that is consistent with the DLGF's definition of true tax value. A market value-in-use appraisal prepared according to the Uniform Standards of Professional Appraisal Practice (the "USPAP") often will be probative. *Kooshtard Property VI v. White River Twp. Ass'r*, 836 N.E.2d 501, 506 n.6. (Ind. Tax Ct. 2005). A party may also offer actual construction costs for the property under appeal, sales information for that property or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.
97. As discussed previously, there are three generally accepted approaches to determining the

value of a property. MANUAL at 9, 10. The cost approach to value is based on the assumption that potential buyers will pay no more for the subject property than it would cost them to purchase an equally desirable substitute parcel of vacant land and construct an equally desirable substitute improvement. *Id.* The sales comparison approach to value is based on the assumption that potential buyers will pay no more for the subject property than it would cost them to purchase an equally desirable substitute improved property already existing in the market place. *Id.* The income approach to value is based on the assumption that potential buyers will pay no more for the subject property than it would cost them to purchase an equally desirable substitute investment that offers the same return and risk as the subject property. *Id.*

98. Regardless of the valuation method used, a party must explain how its evidence relates to market value-in-use as of the relevant valuation date. *See O'Donnell v. Dep't of Local Gov't Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also Long v. Wayne Twp. Ass'r*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005).
99. Here, the Petitioner has the burden of proof for 2012. *Pet'r. Ex. C.* The Petitioner relied primarily on the appraisal of Mark Bovee to make its case. Mr. Bovee's appraisal was conducted in February of 2013 and is retroactive to the valuation date of March 1, 2012. *Petitioner Ex. I.* Mr. Bovee is a licensed appraiser and holds an MAI accreditation. He asserts that the appraisal he conducted on the subject property is USPAP compliant. Mr. Bovee argued that the subject property should be appraised for an alternate use because any appraisal of the subject property should be conducted under a liquidation premise. *Bovee testimony.*
100. The threshold issue that the Petitioner fails to adequately address is whether the Board can consider as probative evidence an appraisal that expressly does not measure the value-in-use of the subject property. Mr. Bovee's analysis under the heading "Definition of Market Value in Use" does cite to the Indiana Real Property Assessment Manual and notes that the definition of true tax value focuses on the utility received by the owner, but he offers no cogent argument or citation to case law for the proposition that the utility

received by the owner can be based on an alternative use. The appraisal returns to this issue on page 57, stating that the “tax code requires that a property be valued as to its utility to the owner,” and under the “current use, the property has greatly reduced utility to the owner.” *Id. at 57*. Thus, Mr. Bovee concludes, “the utility to the owner lies not in the performance of the entertainment center, but rather the alternative use of the property which maximizes the economic benefit to ownership.”⁸ *Id.*

101. Mr. Bovee did not in fact appraise the subject real estate at its current use as an FEC. In his appraisal, the “real property and business assets . . . are valued under an alternative use scenario.” *Pet. Ex. 1 at 16*. Mr. Bovee argues this is “precipitated (sic) by the lack of cash flows, market demographics, and trade area disposable income as well as competing entertainment venues.” *Id.* He concludes that the property “generates insufficient revenues and earnings to allow for a valuation as an operating entity.” *Id. at 15*. Thus, the argument is basically that the property should not be valued⁹ as an FEC, and Mr. Bovee appraised it at its highest and best use which is “second tier retail or general commercial use.” *Id. at 55*. However, this conclusion is premised on finding the alternative “use is the maximum utility received by the owner absent a *profitable business operation*.” *Id. at 15 (emphasis added)*. Mr. Bovee finds support for considering an alternative use appraisal in the liquidation premise. He explains:

Generally, the accepted premise of analyzing the total assets of the business is if the property and operation has a greater or equal market value to the sum of the total assets, then the business should be valued as an ongoing concern premise. If, on the other hand, the enterprise value is less than the sum of separate market values of the business assets, less liquidation costs, then business owner wealth is maximized by selling off the business assets and the business should be valued under the liquidation premise.

Pet. Ex. 1 at 18. Based on his conclusions as to the profitability of the business, he considered retail as the highest and best use of the property if appraised under the liquidation premise.

⁸ The Board notes this is the first time a taxpayer has argued that “fair market value-in-use” means the property should be valued at its highest and best use rather than at a presumably lower actual use.

⁹ It is unclear if Mr. Bovee maintains that the real estate cannot, under general appraisal principles be valued as an FEC, or that an appraisal as an FEC would result in an inaccurate valuation.

102. The Board notes that the “value of a going concern” is simply one of several measures of value, such as market value, fair value, use value, insurable value, etc. *The Appraisal of Real Estate, 14th Ed., Appraisal Institute p. 61-63.* “A going concern is an established and operating business with an indefinite future life.” *Id.* at 63. The valuation of a going concern includes the value of “real property, personal property, financial assets, and the intangible assets of the business.” *Id.* A going concern valuation is usually an opinion of the property’s market value, but may be an opinion of “investment value, use value, or some other type of value.” *Id.*
103. The going concern value is often used to value properties, including bowling alleys, where “the physical real property assets are integral parts of an ongoing business.” *Id.* In such cases, “the real property rarely sells independently of personal property and intangible property.” *Id.* at 704. Consequently, “establishing a reasonable allocation of the value opinion among the realty and non-realty components may be challenging.” *Id.* The appraiser must identify, value, and allocate the various assets of an ongoing concern, particularly in the process of analyzing comparable sales. *Id.* at 705-6. In order to arrive at the property’s highest value in use, an appraiser considers the value of the property in operation and the value as liquidated.

Under the going-concern premise, the business is assumed to continue operating indefinitely. Under the liquidation premise, it is assumed the business operation is closed and the assets are sold off. The premise that results in the highest value indication is used for the development of the final opinion.

Id. at 706. Determining the highest and best use is necessary to determine “the proper appraisal techniques, in selecting comparables, and in making an appropriate allocation of value to the various asset classes.” *Id.* at 706. In appraising “real estate-intensive business properties, all three valuation approaches may be applicable.” It should be kept in mind that:

It may be difficult to separate the market value of tangible assets (i.e. the land and the building) from the total market value of the business, but such a division may be required by the intended user of the appraisal.

Id. at 64.

104. The Board finds no error in Mr. Bovee’s decision to value the property with regard to going concern principles, including the liquidation premise. However, the analysis is fundamentally flawed because the appraisal report failed to value the property as a going concern. Mr. Bovee merely reviewed the finances of the business and compared them to the business model of Dave & Buster’s to conclude that the business was insolvent, and unlikely to become solvent. Mr. Bovee’s quasi-income approach to valuing the business failed to comply with generally accepted appraisal practices. Without a proper analysis of the business as a going concern, the Board cannot conclude that the property was appropriately valued under the liquidation premise.
105. Under the most basic appraisal principles, an appraiser should consider all three approaches.¹⁰ As noted above, this point applies to real estate-intensive business properties. Mr. Bovee acknowledges that FECs “can be exchanged in the market and value points derived from actual market transactions are available,” and furthermore “entertainment centers such as bowling centers are also exchanged in the market more frequently.” *Pet. Ex. 1 at 10*. Mr. Bovee failed to provide any explanation as to whether any FECs or comparable properties were exchanged in the relevant time period in relevant geographic areas.¹¹ Mr. Bovee failed to explain whether he considered a comparable sales approach or any reasons for declining to utilize that approach.
106. The building was constructed in 2007, just 5-6 years prior to the tax years at issue. In regard to the cost approach, Mr. Bovee posits, all in the same paragraph, that (1) “in this case, the cost approach may better represent the value-in-use of the property,” (2) “the cost approach would be the least representative method” for FECs, and (3) “the cost

¹⁰ “Appraisers should apply all the approaches that are applicable and for which there is data.” The Appraisal of Real Estate, 14th Ed., Appraisal Institute p. 45.

¹¹ Clearly, Mr. Bovee’s reliance on the data from Dave & Buster’s indicates that FECs outside of the Fort Wayne market would be relevant to determining the property’s value.

approach may prove to be a suitable indicator of the real property in the absence of a like kind exchange.” *Id. at 10-11*. After reciting these propositions, Mr. Bovee failed to provide a cost approach analysis in valuing the business as an ongoing concern. Mr. Bovee failed to explain whether he considered a cost approach or any reasons for declining to utilize that approach.

107. As for the income approach, Mr. Bovee’s use of market data is fundamentally flawed. Mr. Bovee relies solely on the business model revealed in the SEC filings of Dave & Buster’s, a public traded chain of 58 FECs that operate in substantially larger markets than the subject property. Conspicuously absent is any information regarding the business models or practices of independent FECs in markets comparable to the subject property. The Board does not find it patently obvious that Dave & Buster’s can be considered a “benchmark company” or that its EDITBAR should indicate similar margins for the subject property.¹² These claims are entirely unsupported by statistical data for non-Dave & Buster’s FECs, and nothing in the record suggests that Mr. Bovee is qualified to offer an expert opinion on the general business models of FECs. The Board also notes that Mr. Bovee made no effort to adjust the Dave & Buster’s numbers to make it comparable to an FEC in a smaller market. Also, while Mr. Bovee adjusted the subject property’s business expenses to conform to market factors, he failed to make a similar adjustment to its income, and used the actual sales per square foot in reaching his conclusions.¹³ Thus, Mr. Bovee’s analysis of the value of the business as a going concern fails to comply with generally accepted appraisal principles and the evidence is too unreliable to be considered probative.
108. Without a proper basis for determining that the property should be appraised under the liquidation premise, the Board declines to consider the Petitioner’s appraisal for an alternative use. Consequently, the Petitioner did not meet its burden for 2012.

¹² EDITBAR refers to earnings before interest, taxes, depreciation, amortization, and rent.

¹³ The Board also notes that the appraisal made multiple references to the debt on the subject property, which should not be considered in valuing a going concern.

109. Accordingly, the Petitioner failed to establish a prima facie case that the 2012 appraisal was incorrect. *See Eckerling v. Wayne Twp. Ass'r*, 841 N.E.2d 674 (Ind. Tax Ct. 2006), (stating that “when a taxpayer chooses to challenge an assessment, he or she must show that the assessor’s assessed value does not accurately reflect the property’s market value-in-use.”).
110. When a taxpayer fails to provide probative evidence supporting its position that an assessment should be changed, the Respondent’s duty to support the assessment with substantial evidence is not triggered. *See Lacy Diversified Indus. v. Dep’t of Local Gov’t Fin.*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003); *Whitley Products, Inc. v. State Bd. of Tax Comm’rs*, 704 N.E.2d 1113, 1119 (Ind. Tax Ct. 1998).
111. As discussed previously, because the Petitioner is receiving a degree of relief with regard to the 2012 assessment appeal, and because the assessed value for 2013 is greater than the assessed value for 2012, the Respondent has the burden of proving that the 2013 assessment is correct.
112. The Respondent did not provide a USPAP compliant appraisal to support its assessment of the subject property. The Respondent’s primary witness is not a licensed appraiser. While the Respondent does provide some information that could be used as part of a USPAP compliant appraisal, it does not sufficiently expand on the details with regard to its ultimate conclusions as to the value of the subject property. The Board finds the information provided by the Respondent with regard to the assessed values it applies to the subject property is insufficiently reliable to be probative of the property’s market value-in-use.

CONCLUSION

113. Typically, for 2012, where the Petitioner failed to meet its burden and the Respondent’s duty was not triggered, the assessment would stay at the original amount. However, in this case, the Board recognizes that the Respondent concedes that the assessment amounts should be lowered for each year.

FINAL DETERMINATION

In accordance with the above findings and conclusions, the 2012 assessment is changed to \$3,586,300 and the 2013 assessment is changed to \$3,484,100.

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days after the date of this notice. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. The Indiana Tax Court's rules are available at <http://www.in.gov/judiciary/rules/tax/index.html>.