BEFORE THE INDIANA BOARD OF TAX REVIEW

COUNTRYSIDE HOMEOWNERS ASSOCIATION, INC.	)	Petition Nos.: *see* attached
Petitioner,	)	
v.	)	Parcel Nos.: *see* attached
HAMILTON COUNTY ASSESSOR	)	
Respondent.	)	Assessment Year(s): *see* attached

Appeals from Determinations of the Hamilton County Property Tax Assessment Board of Appeals

FINAL DETERMINATION DISMISSING APPEAL PETITIONS

I. Introduction

If a taxpayer acts within Indiana Code 6-1.1-15-1's relatively short deadline for appealing an assessment, the taxpayer may assert all grounds upon which he believes the assessor erred in valuing his property. Those appeals are filed with the Board on Form 131 petitions. Even if the taxpayer misses Ind. Code 6-1.1-15-1's deadline, he may still appeal the assessment using a Form 133 petition. But the taxpayer may only raise objective errors; he may not challenge qualitative or discretionary decisions that require the exercise of subjective judgment. Here, the Petitioner used Form 133 petitions to claim that its parcels, which the Petitioner describes as common areas of a residential neighborhood that are subject to restrictions on their transfer and use, have zero market value-in-use. But that differs from simply adding or subtracting pre-determined costs from assessment regulations—the type of straightforward objective

determination for which the Form 133 process was designed. Instead, the Petitioner's claims require applying evidence external to those assessment regulations to make a qualitative decision about the value of its property. And that inherently requires subjective judgment. The Board therefore dismisses the Petitioner's Form 133 petitions.

II. Procedural History

The Petitioner filed a Form 133 Petition for Correction of an Error for each parcel referenced in the attachment to this Final Determination. In those Form 133 petitions, the Petitioner claimed that its taxes, as a matter of law, were illegal and that there were mathematical errors in computing the assessments for its common areas. The Petitioner cited to *Brenwick TND Communities, LLC & BDC Cardinal Associates, LP v. Clay Twp. Assessor, et al.* pet. nos. 29-003-03-1-5-00034 *et al*. (Ind. Bd. Tax Rev. May 15, 2006) for the proposition that the common areas have no market value-in-use due to covenants and restrictions on their use and/or transfer. The Petitioner also alleged violations of (1) constitutional and statutory requirements for uniformity and equality, (2) the equal privileges and immunities clause of the Indiana Constitution, and (3) the equal protection clause of the Fourteenth Amendment to the United States Constitution.[1] The Petitioner grounded those claims on its allegation that "similarly situated" property was assessed as having zero value using the same market value-in-use standard that applied to the assessments of the Petitioner's common areas.

The Hamilton County Property Tax Assessment Board of Appeals ("PTABOA") denied the petitions and the Petitioner filed them with the Board. On January 13, 2012, the Board issued an Order to Show Cause Why Petitions Should Not Be Dismissed on Grounds That They Allege Errors in Subjective Judgment ("Show Cause Order"). The Show Cause Order covered all the petitions at issue in this Final Determination. In the Show Cause Order, the Board explained

[1] The petitions cite to Ind. Const. Art. I § 23, Ind. Const. Art. X § 1, and Ind. Code § 6-1.1-2-2.

why it believed that the petitions did not allege objective errors that could be corrected under the Form 133 procedure outlined in Ind. Code § 6-1.1-15-12. To the extent that the Petitioner believed that its claims were properly raised on Form 133 petitions, the Board gave the Petitioner until March 1, 2012, to file a memorandum and any other materials to support its position. The Board also gave the Respondent until April 3, 2012, to file any response.

Various other homeowners' associations and developers in Boone, Decatur, Hamilton, Hendricks, Marion, and Morgan counties[2] filed similar petitions, and the Board issued similar show cause orders in those appeals. Because of the similarities in the petitions and in the parties' responses to the show cause orders, the Board consolidated the appeals for purposes of a hearing on the show cause orders.[3] The Board held that hearing on August 29, 2012, through its designated administrative law judge, David Pardo ("ALJ").

All pleadings and documents filed in the above-captioned appeals as well as all orders and notices issued by the Board or its ALJ are part of the record, as is the digital recording of the August 29, 2012 hearing. In addition, the Petitioner offered the following three exhibits at the hearing, all of which were admitted without objection:

Petitioner Exhibit 1:	Property Record Card ("PRC") for a property owned by Brenwick TND Communities, LLC,
Petitioner Exhibit 2;	PRC for a property owned by Countryside Homeowner's Ass'n,
Petitioner Exhibit 3:	PRC for a property owned by Springmill Villages Homeowners Ass'n.[4]

[2] One taxpayer from Boone County and one taxpayer from Morgan County each filed appeal petitions alleging that its common areas should be assessed at zero value. The Morgan County taxpayer withdrew its petitions before the Board scheduled a hearing on the Show Cause Orders. Similarly, the Boone County taxpayer notified the Board that the parties had agreed to settle the taxpayer's appeals and that it would dismiss those appeals upon receiving appropriate refund documents from local officials.

[3] The responses filed by five taxpayers in Marion County differed significantly from the other responses. The Board therefore held a separate consolidated hearing on the show cause orders issued in those appeals.

[4] At the consolidated hearing, the Hendricks County Assessor offered a document on her letterhead with what appeared to be her responses to interrogatories. The ALJ sustained the Petitioner's objection on grounds that the responses were not signed. The Petitioner, however, indicated that it would withdraw its objection if the assessor submitted signed responses. The ALJ set a deadline of September 5, 2012, for the assessor to submit signed responses. She failed to do so, and the Board adopts the ALJ's ruling sustaining the Petitioner's objection.

III. Analysis

A. The Form 133 procedure is only available to correct objective errors.

As the Board explained in its Show Cause Order, there are two basic avenues for contesting a property's assessment before state and local agencies: (1) the appeal procedure under Ind. Code § 6-1.1-15-1 through -4, which for purposes of this Final Determination the Board will refer to as the "general appeal procedure," and which is prosecuted before the Board using a Form 131 petition; and (2) a more substantively restrictive procedure under Ind. Code § 6-1.1-15-12, which is prosecuted both locally and before the Board using a Form 133 petition. *See Bender v. Indiana State Bd. of Tax Comm'rs,* 676 N.E.2d 1113, 1114 (Ind. Tax Ct. 1997).

The subsections of Ind. Code § 6-1.1-15-1 that set forth the general appeal procedure's deadline for initiating an appeal at the local level have been amended several times since 2002. *See* 2004 Ind. Acts 1, § 3; 2005 Ind. Acts 199, § 6; 2006 Ind. Acts 162, § 2; 2007 Ind. Acts 219, § 38; 2009 Ind. Acts 136, § 5; *see also*, I.C. § 6-1.1-15-0.6 (codifying previously un-codified acts concerning appeals of 2002-2004 assessments). Nonetheless, in cases where a taxpayer is notified of a change in assessment (including notice via a tax bill), a taxpayer has always had to file an appeal within 45 days of that notice. *See id*. Although the deadline for appealing other assessments has varied, it has never extended past the later of following: (1) May 10; or (2) 45 days from the date of a tax statement based on the assessment and, in one year, 45 days from a county auditor's statement under Ind. Code § 6-1.1-17-3(b). *Id*. By contrast, a taxpayer seeking the Form 133 procedure's more-limited substantive relief may file a petition up to three years after the date on which taxes for the challenged assessment were first due. *See Will's Far-Go v. Nusbaum*, 847 N.E.2d 1074 (Ind. Tax Ct. 2006).

Although the Form 133 procedure's filing deadline is more generous than the filing deadline under the general appeal procedure, the relief available under the Form 133 procedure is far more circumscribed. While a taxpayer may use the general appeal procedure to address objective errors as well as errors that arise from an assessing official exercising subjective judgment, the Form 133 procedure may only be used to correct narrowly defined errors, the following two of which the Petitioner has alleged in these appeals: "[t]he taxes, as a matter of law, were illegal" and "[t]here was a mathematical error in computing the assessment." I.C. § 6-1.1-15-12 (a)(6) and (7). The Indiana Tax Court has interpreted Ind. Code § 6-1.1-15-12 to mean that the Form 133 procedure may only be used to correct objective errors; it may not be used to correct "qualitative or discretionary decisions by assessors." *E.g. Bender* 676 N.E.2d at 1115; *Hatcher v. State Bd. of Tax Comm'rs,* 561 N.E.2d 852, 857 (Ind. Tax Ct. 1990). Thus, "where the decision under review is automatically dictated by a simple true or false finding of fact, it is considered objective and properly challenged via Form 133." *Bender,* 676 N.E.2d at 1115. While most of the Tax Court's decisions have addressed claims alleging mathematical errors, the Tax Court has applied the same test to a taxpayer's claim under Ind. Code § 6-1.1-15-12(a)(6) that its taxes, as a matter of law, were illegal. *Rott Development Co. v. State Bd. of Tax Comm'rs,* 647 N.E.2d 1157, 1160 (Ind. Tax Ct. 1995) (explaining that "[t]he State Board is correct in its assertion that the Form 133 procedure can be used only to correct objective errors" in a case where the taxpayer alleged, in part, that its taxes were illegal as a matter of law under Ind. Code § 6-1.1-15-12(a)(6)).

B. Under Indiana's current law governing real property assessment, using external evidence to determine a property's market value-in-use is a qualitative decision that requires subjective judgment.

After the Board decided *Brenwick*, various developers and homeowners' associations filed almost 2,000 Form 133 petitions alleging that their common areas should be assessed at zero value. The post-*Brenwick* appeals present a threshold question about whether a taxpayer may use a Form 133 petition as the vehicle to assert claims that a subdivision's common areas lack any market value-in-use because of restrictions imposed on their use and transfer. The Board finds that such claims may not be brought on a Form 133 petition.

Indiana assesses property based on its true tax value. I.C. § 6-1.1-31-6(c). For most real property, true tax value is the value determined by the Department of Local Government Finance's rules. *Id.*[5] Those rules, in turn, define true tax value 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) (2009).

That has not always been Indiana's valuation standard. Under Indiana's old property tax system, true tax value was determined solely by reference to administrative regulations and bore no relation to any external benchmark. *Westfield Golf Practice Center, LLC v. Washington Twp. Assessor,* 859 N.E.2d 396, 398 (Ind. Tax Ct. 2007). That changed in response to the landmark *Town of St. John* litigation, where the Indiana Supreme Court ultimately held that the State Board of Tax Commissioners' then-existing cost schedules violated Ind. Const. Art. 10 § 1. *See*

[5] The General Assembly has chosen to define the true tax value of certain types of property statutorily without reference to administrative regulations. For example, the true tax value of property regularly used as a golf course is "the valuation determined by applying the income capitalization appraisal approach." I.C. §6-1.1-4-42(c). *See also, e.g.*, I.C. § 6-1.1-4-39(a) (defining the true tax value of property with four or more units that is regularly used to furnish rental accommodations for 30 days or more as the lowest valuation determined by applying the cost, sales-comparison, and income capitalization approaches).

State Bd. of Tax Comm'rs v. Town of St. John, 702 N.E.2d 1034, 1042-43 (Ind. 1998). Effective beginning in 2002, the State Board of Tax Commissioners ("State Board"), and its successor, the Department of Local Government Finance ("DLGF"), overhauled Indiana's property tax system. In doing so, they adopted market value-in-use as the standard for measuring true tax value. By adopting that standard, the DLGF incorporated an external benchmark for true tax value that includes market concepts. *See Westfield Golf,* 859 N.E.2d at 399 ("Beginning in 2002, however, Indiana's overhauled property tax assessment system incorporates an external, objectively verifiable benchmark—market value-in-use.").

Under the new system, an assessment determined using the 2002 Real Property Assessment Manual and the accompanying guidelines adopted by the DGLF (the Real Property Assessment Guidelines for 2002 – Version A) is presumed to be accurate. *See* MANUAL at 5; *Kooshtard Property VI, LLC v. White River Twp. Assessor*, 836 N.E.2d 501, 505 (Ind. Tax Ct. 2005); *reh'g den. sub nom.; P/A Builders & Developers, LLC*, 842 N.E.2d 899 (Ind. Tax Ct. 2006). A taxpayer, however, may rebut that presumption with evidence that is consistent with the Manual's definition of true tax value. MANUAL at 5. The Manual points to various types of market-based evidence, such as market value-in-use appraisals, sales information both for the property under appeal and comparable properties, and other information compiled according to generally accepted appraisal principles. *Id.; see also, Kooshtard Property VI,* 836 N.E.2d at 506 n. 6 (describing a market-value-in-use appraisal performed in accordance with the Uniform Standards of Professional Appraisal Practice as the most effective way to rebut the presumption that a property was assessed accurately).

Using external, market-value-in-use evidence—as opposed to simply adding or subtracting pre-determined costs from assessment regulations—to determine a property's market

value-in-use requires subjective judgment. The Tax Court has recognized as much, saying the following: "A calculation of the effect of real world evidence on an individual assessment will typically require subjective judgment. . . . The court does not foresee any opportunity to apply real world evidence retroactively by using the Form 133 process." *Town of St. John, et al. v. State Bd. of Tax Comm'rs,* 698 N.E.2d 399, 400 (Ind. Tax Ct. 1998).[6] Indeed, as the Tax Court has explained "[t]he valuation of property is the formulation of an opinion; it is not an exact science." *Stinson v. Trimas Fastners, Inc.*, 923 N.E. 2d 496, 502 (Ind. Tax Ct. 2010).

The valuation determinations at issue in these appeals differ materially from the types of determinations that the Tax Court has recognized as proper subjects for a Form 133 petition. The Tax Court decided those cases under the old assessment system. To the extent they address assessments, the Tax Court's opinions involve simple, straightforward factual questions about whether an assessor properly applied some objective component of the assessment regulations. For example, in *Rinker Boat Co. v. State Bd. of Tax Comm'rs*, 722 N.E.2d 919 (Ind. Tax Ct. 1999), the assessor valued the taxpayer's building as having forced-air heat when it really had only unit heaters, high-intensity lighting instead of its actual florescent lighting, and more partitioning than actually existed. *Rinker Boat Co. v. State Bd. of Tax Comm'rs*, 722 N.E.2d 919, 921-23 (Ind. Tax Ct. 1999). The Tax Court found that those were objective errors, at least to the extent that the costs of the correct components could be determined from assessment regulations.

[6] Although the Indiana Supreme Court reversed a related decision from the Tax Court, the holding that the Board has cited remains legally viable. In a decision that pre-dated the decision cited by the Board, the Tax Court had found that the Indiana Constitution required the State Board of Tax Commissioners to consider "real world evidence" in property tax appeals. *Town of St. John et. al. v. State Bd. of Tax Comm'rs*, 690 N.E.2d 370 (Ind. Tax Ct. 1997). The Tax Court issued the decision that the Board has cited in order to clarify when the State Board of Tax Commissioners would have to begin considering real world evidence. *See Town of St. John*, 698 N.E.2d at 400. The Indiana Supreme Court ultimately reversed the Tax Court's earlier order in part, holding that there was no state constitutional right to offer "competent real world evidence" in property tax appeals. *State Bd. of Tax Comm'rs v. Town of St. John* 702 N.E.2d 1034, 1043 (Ind. 1998). The Supreme Court, however, did not grant review of or otherwise address the clarification decision that the Board has cited. And under Indiana's current system, parties to individual tax appeals have the right to offer the type of real world evidence that the Tax Court discussed, even if the source of that right is not the Indiana Constitution. *See* MANUAL at 5. So the language that the Board has quoted from the Tax Court's clarification order is on point and persuasive.

Id.; *see also, Wareco Enterprises, Inc. v. State Bd. of Tax Comm'rs*, 689 N.E.2d 1299 (Ind. Tax Ct. 1997) (finding the following to be objective errors: (1) improperly calculating perimeter-to-area ratio, (2) failing to subtract the costs of components included in the model that was used to assess the building but that were not actually included in the building, and (3) applying the wrong depreciation table).

None of the Tax Court's decisions address a taxpayer challenging whether an assessor properly recognized or quantified an influence factor. Yet the effect of easements and other restrictions that burden a particular property, such as the ones that are the focus of this dispute, are expressed as negative influence factors. *See* REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A, ch. 2 at 61-62, 78-79, 94-95 (setting forth an influence factor code for "Restrictions," described as "a decrease based on encumbrances, restrictive covenants, or obstructions that limit the use of the land."); *see also*, *Talesnick v. State Bd. of Tax Comm'rs,* 756 N.E.2d 1104, 1108 (Ind. Tax Ct. 2001) ("The use of influence factors are appropriate for making adjustments to the value of land that is encumbered by an easement."). Even under the old self-referential assessment system, influence factors were quantified using market evidence. *Talesnick,* 756 N.E.2d at 1108.

1. Neither *Brenwick* nor *Lakes of the Four Seasons Prop. Owners' Ass'n v. Dep't of Local Gov't Fin.* stands for the proposition that a property automatically has zero market value-in-use simply because it is classified as common area.

Nonetheless, the Petitioner cites to *Brenwick* and to the Indiana Tax Court's decision in *Lakes of the Four Seasons Prop. Owners' Ass'n v. Dep't of Local Gov't Fin*., 875 N.E.2d 833 (Ind. Tax Ct. 2007) for the proposition that all common areas must be assessed as having zero market value-in-use. Neither decision, however, actually supports that proposition.

In *Brenwick*, the developers of two residential subdivisions claimed that the subdivisions' common areas should be assessed as having zero value. *Brenwick,* slip op. at 7. Because that was a question of first impression in Indiana, the Board surveyed decisions from other states. *Id*. at 12-15. Based on the majority view, which the Board found to be generally consistent with Indiana law, the Board explained:

> [c]ommon areas within a subdivision may be so encumbered as to deprive them of any market value-in-use. Clearly, the encumbrances must be severe and the taxpayer seeking to demonstrate that real property is devoid of any market value-in-use bears a heavy burden. Nonetheless, it is a factual question.

Id. at 17. Turning to the specific evidence before it, which included the specific covenants and restrictions burdening the developer's common areas and an appraiser's expert opinion, the Board concluded that the common areas lacked any market value-in-use. *Id*. at 17-23. But the Board "emphasiz[ed]" that it was basing its finding on the "unique facts" presented in that case. *Id*. at 23. Thus, contrary to the Petitioner's view of *Brenwick*, the Board did not decide that land held as common area inherently and objectively lacks any market value-in-use, but rather that based on the specific evidence before it, the particular common areas at issue in that case had zero value.

The same is true for *Lakes of the Four Seasons.* In that case, a homeowner's association appealed from the Board's final determination upholding the assessment of streets owned by the association. The streets had been assessed at $70,290, or approximately $650 per acre. *Lakes of the Four Seasons,* 875 N.E.2d at 834. The Board had rejected the association's claim that its streets should have been valued at zero. While Board recognized that the streets were burdened with easements and other restrictions that likely affected their market value-in-use, it also found that the association had offered neither an appraisal nor other evidence compiled in accordance

with generally accepted appraisal principles to quantify the effect of the easements and restrictions. *Id*.

In front of the Tax Court, the DLGF[7] argued that, without an appraisal, the association's claim that its streets had zero value was merely a conclusory statement. *Id*. at 836. The Tax Court disagreed, explaining that "an owner's testimony as to the value of his or her property will carry probative force if it is based upon facts and not speculation." *Id*. By contrast, explained the court, if the owner fails to identify the objective bases for his opinion, that opinion gives no way for an adjudicator to assess whether it is rationally based on the owner's perceptions. *Id*. In the case before it, the Tax Court found that the association's evidence provided:

> an objective, factual basis for its opinion that its streets have no value: it derives no benefit from owning the streets (the benefit is to the individual property owners within Lakes of the Four Seasons), it cannot sell or convey the streets to another party, the streets generate no income, and the streets cost at least $200,000 annually to maintain.

Id.

Because the association's evidence sufficed to make a prima facie case, the burden shifted to the DLGF to rebut that evidence. *Id. at 837.* The DLGF responded by simply explaining the process it had used to assess the property. *Id.* Given the association's evidence about how the specific restrictions deprived its streets of any independent value, however, the DLGF's explanation did not show that the assessment accurately reflected the streets' market value-in-use. *Id*. The Tax Court therefore reversed the Board's determination. *Id.*

Thus, like the Board in *Brenwick*, the Tax Court relied on an un-rebutted valuation *opinion*. The Tax Court did not hold, as the Petitioner argues, that once property is classified as a common area of a subdivision, that fact automatically and objectively dictates that the property

[7] The DLGF, through its contractor, had assessed the taxpayer's property and therefore was the respondent in the taxpayer's appeal. *See Lakes of the Four Seasons*, 875 N.E.2d at 834.

has zero market value-in-use. The Petitioner, however, seizes on the Tax Court's reference to "objective" evidence and argues that, because the underlying facts at issue in *Brenwick* and *Lakes of the Four Seasons* could be determined objectively, the ultimate factual findings—that the common areas in those cases had zero market value-in-use—were objective determinations that merely required a "grasp of the obvious." *Petitioner's Response to Order to Show Cause Why Form 133 Petitions Should Not Be Dismissed* at 5 (*citing Bock Products, Inc. v. Indiana State Bd. of Tax Comm'rs,* 683 N.E.2d 1368, 1371 (Ind. Tax Ct. 1997)).

The Board disagrees with the Petitioner's conclusions. While some of the underlying facts in *Brenwick* and *Lakes of the Four Seasons* might have required only a grasp of the obvious to determine, that does not make the ultimate valuation conclusions based on those facts purely objective. Appraisers routinely base valuation opinions, at least in part, on easily determined facts, such as a house's size or the number of bedrooms that it has. But the amount reflected in the appraiser's valuation opinion is just that—an opinion; it is not an objective fact. To the contrary, determining a property's market value or market value-in-use inherently requires applying generally accepted appraisal principles to raw data. That, in turn, requires the exercise of judgment. Indeed, appraisers seldom reach identical valuation conclusions when appraising the same property. And the Board cannot help but note that despite the Petitioner's heavy reliance on *Brenwick* and *Lakes of the Four Seasons*, the taxpayers in those cases used the general appeal procedure—not the Form 133 procedure—to bring their claims.[8]

[8] In *Lakes of the Four Seasons*, the taxpayer filed a Form 139L petition. The Board promulgated that form for appeals from DLGF determinations under Ind. Code §§ 6-1.1-4-33 and -34. Those statutes dealt with appeals generated by the 2002 general reassessment in Lake County that the DLGF performed through a contractor. Although those statutes did not entitle taxpayers to a hearing before the Lake County PTABOA, they otherwise largely mirrored the general appeal procedure. Thus, a taxpayer needed to seek an informal hearing with the DLGF's contractor within 45 days after having been given notice that his property had been reassessed, and if the taxpayer was unhappy with the results of that informal hearing, he needed to appeal to the Board within 30 days. I.C. § 6-1.1-4-33(g) (2004); I.C.§ 6-1.1-4-34(c) (2004).

The Petitioner, however, points to an entry by Justice Sullivan from the *Lakes of the Four Seasons* litigation in which Justice Sullivan wrote:

> Implicated in this appeal are principles by which property owned by homeowners' associations is assessed for property tax purposes. The purpose of this Entry is to put of record the fact that my wife and I are members of a homeowners' association that owns certain property for the benefit of its members. However, after careful consideration in general, and review in particular of the requirements of Canon 3(E)(1) of the Indiana Code of Judicial Conduct, I have concluded that there is nothing that requires me or would make it advisable for me to disqualify myself from this proceeding and I plan to participate.

Petitioner's Response, Ex. A. The Petitioner relies on the first part of the entry, where Justice Sullivan indicates that the DLGF's petition for review implicated "principles by which property owned by homeowners' associations is assessed for tax purposes." But Justice Sullivan's entry is merely a statement from one out of five justices explaining why he chose not to disqualify himself in a case where the Indiana Supreme Court ultimately chose not to accept review. And the denial of review is an act without precedential value. *See* Ind. Appellate Rule 63(N) ("The denial of a Petition for Review shall have no legal effect other than to terminate the litigation between the parties in the Supreme Court."). Even if Justice Sullivan's entry had any precedential value, the entry does not purport to address the question at issue in these appeals—whether determining the effect that transfer and use restrictions have on a common-area parcel's market value-in-use is an objective decision, or instead is a qualitative decision that requires subjective judgment. Justice Sullivan's entry therefore does nothing to support the Petitioner's position.

2. The Board's determination in *Throgmartin Henke, LLC v. Hamilton County Assessor* does not support the Petitioner's position.

The Petitioner also points to the Board's determination in *Throgmartin Henke Development, LLC v. Hamilton County Assessor*, pet nos. 29-015-08-3-5-00010 and -11 (Ind.

Bd. Tax Rev. Jan. 24, 2012). In that case, the Board granted the relief that a developer had requested in Form 133 petitions where the developer alleged that its property had been reassessed in violation of what is commonly known as the "developer's discount" statute. That statute recognizes only limited situations in which a developer's "land in inventory" may be reassessed, one of which is when a building permit is issued. I.C. § 6-1.1-4-12(h). The Board interpreted that exception as applying only to valid building permits. *Throgmartin Henke,* slip op. at 11. Although building permits had been issued for the developer's land, the undisputed evidence showed that those permits were issued based on requests from builders who had neither actual nor apparent authority to make those requests. *Id.* at 11-14.

In response to the Hamilton County Assessor's claim that the Board could not grant the developer relief on a Form 133 petition, the Board pointed to Ind. Code § 6-1.1-15-12(6) and explained that "[t]o determine something 'as a matter of law' simply means to apply the law to the undisputed, material facts." *Id* at 14-15. Thus, because local officials could not validly issue a permit in response to a request from someone other than the property's owner or its agent acting with actual or apparent authority, the Board found that the taxes were illegal as a matter of law and could be corrected using a Form 133 petition.

The Petitioner's reliance on the above-quoted language from *Throgmartin Henke* is misplaced. Nothing in that determination supports the notion that, by simply alleging that its taxes, as a matter of law, were illegal, a taxpayer may use the Form 133 process to address qualitative determinations requiring subjective judgment, such as the valuation determinations at issue in these appeals. To the contrary, *Throgmartin Henke* centered on a question of law: whether a building permit issued in response to a request by someone other than a developer or its authorized agent triggers an assessor's authority to reassess a developer's land in inventory.

3. The issue at hand is not analogous to claims that a building was improperly denied a kit adjustment, and even if it were, that analogy would not support the Petitioner's position.

The Petitioner likens valuing a subdivision's common areas to an assessor determining whether a given building qualified for a kit adjustment under the State Board of Tax Commissioners' old regulations. As the Petitioner explains, taxpayers have successfully used Form 133 petitions to challenge various assessors' failures to apply kit adjustments to qualifying buildings. That is not an apt analogy, however. In 1992, the State Board of Tax Commissioners amended its regulations to establish a separate classification for light pre-engineered or kit-type buildings, and once a building was determined to meet that classification, the base rate used to assess it was reduced by 50%. *Barth, Inc. v. State Bd. of Tax Comm'rs*, 699 N.E.2d 800, 803-04 (Ind. Tax Ct. 1998). With the possible exception of agricultural land, however, a parcel's true tax value under Indiana's current assessment system does not hinge solely on how it is classified for purposes of assessment regulations. *See Westfield Golf* 859 N.E.2d at 399 (explaining that the new system "shifts the focus from examining how the regulations were applied (i.e. mere methodology) to examining whether a property's assessed value actually reflects the external benchmark of market value-in-use.").[9]

In any case, while the Tax Court recognized that a taxpayer could use a Form 133 petition to challenge the denial of a kit adjustment, it did so only because the State Board of Tax Commissioners had prescribed that form for such challenges, not because the court viewed the determination as objective:

> The State Board's choice of the Form 133 process is puzzling indeed. The Form 133 Petition is used to correct objective errors in assessments. It therefore follows

[9] Various statutes do mandate specific assessments for a small number of statutorily created land classifications. *See, e.g.*, I.C. § 6-1.1-6-14 (providing that land classified as native forest, forest plantation, or wildlands shall be assessed at $1 per acre). The Petitioner does not point to, nor has the Board found, any statute that creates a separate assessment classification for common areas of a subdivision.

> that the State Board has deemed the qualification of a building for a kit adjustment to be an objective determination, i.e., one capable of being made without resort to subjective judgment. This is surprising given the vague guidance assessors receive for determining the qualification of a building for a kit adjustment. As this Court noted in *King Indust. Corp*., Instructional Bulletin 91-8 gives assessing officials wide discretion in determining whether a building qualifies for the kit adjustment. This would seem to be inconsistent with the State Board's choice of the Form 133 process. However, in deference to the State Board's expertise in these matters and its authority to regulate appeals to the State Board, the Court accepts the State Board's conclusion that the qualification of an improvement for a kit adjustment is an objective determination.

Barth, 699 N.E.2d at 804 n.10 (citations omitted). Indeed, when the State Board of Tax Commissioners later replaced the kit adjustment with a model and accompanying pricing schedules for general commercial kit ("GCK") buildings, the Tax Court held that taxpayers could not use a Form 133 petition to challenge an assessor's decision about whether or not to apply the GCK pricing schedules. *Southworth v. Grant County Property Tax Assessment Bd. of Appeals*, 791 N.E.2d 862, 864 (Ind. Tax Ct. 2003).

Thus, under Indiana's current assessment system, the process of determining a given property's market value-in-use, including whether the property has any value at all, is a qualitative decision that requires subjective judgment. The Petitioner's view that a property's market value-in-use can be objectively determined by classifying the property as common area is therefore at odds with the law.

C. The fact that the same common areas at issue in these appeals were later assessed as having zero value does not alter the Board's analysis.

The Petitioner, however, has offered deposition excerpts that arguably create a factual issue as to whether local assessing officials nonetheless treated the valuation of common areas as a purely objective determination in the years after the Board issued *Brenwick*. For example, the Hamilton County Assessor testified as follows:

Q: So if the legal description says common area, the memo would go into ProVal[10] that says common area?

A: Yes.

Q: Is the assessor's office still using ProVal?

A: Yes.

Q: So once a parcel is designated as common area, it automatically has a value of zero; is that correct?

A: At this time, yes.

Q: And since 2006?

A: Yes.

Q: Other than looking for a memo about that parcel in ProVal or looking at the legal description, is there anything else that the assessor's office looks at to determine if a parcel is common area?

A: No, I can't think of anything else.

Hamilton County Dep. at 17:11-25.[11] Hamilton County officials also apparently used a Form 133 correction of error as the vehicle to change a common-area parcel's assessment for 2011. *Pet'r Ex. 1.*

Similarly, beginning with the 2006 assessment year, once the Marion County Assessor's office determined (1) that a parcel was shown to be a common area on a plat or map, (2) that it was owned by a homeowner's association, and (3) that it was not used for profit, the parcel was assessed at zero value. *See Marion County Dep. at 18:8-26:25.* Likewise, beginning in 2007, the Hendricks County Assessor valued common areas at zero. *Hendricks County Dep. at 16:14-22; 19:11-17.* The assessor's office identified common areas by searching its database for any indication in a parcel's legal description that it was a common area. *Id. at 17:12-18:2.* Once a parcel was identified as common area, the Hendricks County Assessor valued it at zero. *Id. at 18:7-16.*

The Board harbors doubts about whether an assessor's misunderstanding of the holdings in *Brenwick* or *Lakes of the Four Seasons* somehow transforms what under Indiana's assessment

[10] ProVal is software for Hamilton County's assessment system. *Petitioner's Response, Ex. B at 17:11-25.*

[11] The Petitioner attached various deposition excerpts to its response. Instead of the exhibit numbers, the Board cites to the county whose officials and employees the Petitioner deposed.

system is properly viewed as a subjective determination into an objective one. But the Board leaves that question for another day, because even if a local official's decision to assess all common areas at zero value makes what otherwise should be a qualitative decision requiring the exercise of judgment into a rudimentary objective determination, that is not what the assessor did in the years covered by the Petitioner's appeals. In those years, local officials obviously determined that the common areas in question had value.

The Petitioner urges the Board to find the later-year assessments relevant for an additional reason. Effective July 1, 2012, the Indiana General Assembly enacted Ind. Code § 6-1.1-15-18, which allows parties to offer evidence of how comparable properties were assessed in order to determine the market value-in-use for a property under appeal:

> (a) This section applies to an appeal to which this chapter applies, including any review by the board of tax review or the tax court.
> (b) This section applies to any proceeding pending or commenced after June 30, 2012.
> (c) To accurately determine market-value-in-use, a taxpayer or an assessing official may:
> (1) in a proceeding concerning residential property, introduce evidence of the assessments of comparable properties located in the same taxing district or within two (2) miles of a boundary of the taxing district; and
> (2) in a proceeding concerning property that is not residential property, introduce evidence of the assessments of any relevant, comparable property.
> However, in a proceeding described in subdivision (2), preference shall be given to comparable properties that are located in the same taxing district or within two (2) miles of a boundary of the taxing district. The determination of whether properties are comparable shall be made using generally accepted appraisal and assessment practices.

I.C. § 6-1.1-15-18. The Petitioner argues that, because the statute applies to all proceedings under Chapter 15, including the section that governs the Form 133 procedure (Ind. Code § 6-1.1-15-12), a taxpayer must be able to make a case on a Form 133 petition using evidence of how comparable properties were assessed. And because the exact same common areas were assessed

for zero value in later years, argues the Petitioner, no subjective judgment is required to establish comparability.

The Petitioner, however, misses the fundamental point: determining a property's market value-in-use from external evidence—as opposed to simply plugging-in or subtracting pre-determined costs from assessment regulations—is a qualitative decision that requires one to exercise judgment. Indiana Code § 6-1.1-15-18 explicitly makes the assessments of comparable properties relevant and admissible in determining a given property's market value-in-use. But the statute does not make that determination objective. Indeed, in a case like this, it begs the question: Which set of assessments accurately reflects the common areas' market values-in-use—the pre-2006 assessments where the common areas were assessed as having some market value-in-use, or the post-2006 assessments where they were assessed at zero value?

D. The Petitioner's claims of lack of uniformity and equality and violations of the equal protection and equal privileges and immunities clauses raise only subjective errors.

Finally, all of the reasons that the Board has laid out to explain why determining a property's market value-in-use necessarily requires subjective judgment apply equally to the Petitioner's allegations that the assessments of its common areas for the years under appeal violate constitutional and statutory requirements for uniformity and equality, equal protection, and equal privileges and immunities. The Petitioner bases those claims on the notion that similarly situated properties were being assessed at zero value using the same market value-in-use standard that applied to the assessments for the Petitioner's common areas. But as the Tax Court explained in *Westfield Golf*, properties are similarly situated under Indiana's current assessment system when they have the same market value-in-use, not simply when they are classified as the same type of property. In *Westfield Golf*, the taxpayer claimed a lack of uniformity and equality because the landing area on its driving range was assessed using a

different base rate than the rates used to assess the landing areas for other driving ranges. *Westfield Golf*, 859 N.E.2d at 397-98. The Tax Court rejected that claim, explaining that the taxpayer had improperly focused solely on the methodology used to assess its driving range rather than showing the driving range's market value-in-use or the market values-in-use for any comparable properties. *Id*. at 399.

The Petitioner, however, seeks to avoid the inherently subjective nature of determining whether properties are similarly situated to each other by again pointing to how its own common areas were assessed in the years after the Board decided *Brenwick*. But differences in a property's assessment between tax years do not implicate statutory or constitutional requirements for uniformity and equality, equal protection, or equal privileges and immunities.

Article 10 section 1 of the Indiana Constitution reads, in relevant part: "The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal." Ind. Cost. Art. 10 § 1(a) (2012).[12] That provision requires the following: "(1) uniformity and equality in assessment, (2) uniformity and equality as to the rate of taxation; and (3) a just valuation for taxation of all property." *Ind. Historic Partners v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1224, 1228 (Ind. Tax Ct. 2008). Those requirements are designed "to distribute the burden of taxation on principles of uniformity, equality, and justice." *Id*.

In Indiana, the amount owed for each individual property is set by allocating the total amount of property taxes to be raised in a taxing district among all pieces of property in proportion to their assessments. *See State of Indiana ex. rel., Attorney General v. Lake Superior Ct.*, 820 N.E.2d 1240, 1244 (Ind. 2005) (explaining in a "broad brush" how taxes are assessed

[12] Article 1, section 10 was amended in 2004 and 2010. Neither of those amendments dealt with the quoted language.

and distributed among properties). Thus, when, in a given year, a property owned by one taxpayer is assessed differently than similarly situated properties in the same taxing jurisdiction owned by other taxpayers, the tax burden is not being distributed uniformly and equally among all taxpayers; the taxpayers who own the more-favorably assessed properties gain at the expense of other taxpayers. That does not hold true when the same tax parcel is assessed differently from year to year. The parcel's assessment in later years, even if significantly lower than its earlier assessments, does not affect the owner's tax burden (or any other taxpayer's burden) in those earlier years. For that same reason, year-to-year differences in how the same property is assessed do not implicate the fourteenth amendment's equal protection clause or the Indiana Constitution's equal privileges and immunities clause.

IV. Conclusion

The Petitioner brought its claims using the Form 133 procedure, which affords relief only for objective errors. The Petitioner alleges that the common areas of its subdivision have zero market value-in-use because of restrictions on their use and transfer. But making that determination requires one to do more than apply easily identifiable facts to mechanical calculations under the assessment regulations. Thus, it is a qualitative decision that requires subjective judgment, and it is beyond the scope of relief available through the Form 133 procedure. The Board therefore dismisses all of the petitions listed in the attachment to this Final Determination.

Dated: _____

_____
Chairman, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

IMPORTANT NOTICE

- REHEARING AND APPEAL RIGHTS -

Within 15 days of the date of this notice, a party to the proceeding may request a rehearing before the Indiana Board. The Indiana Board MAY conduct a rehearing and affirm or modify the final determination. A petition for rehearing does not toll the time in which to file a petition for judicial review unless the petition for rehearing is granted (Ind. Code § 6-1.1-15-5)

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>.

Distribution:

Brad Hasler
BINGHAM GREENBAUM DOLL, LLP
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204

Marilyn Meighen, Attorney at Law
11015 Lakeview Drive
Carmel, IN 46033

Hamilton County Assessor
33 N 9th Street, Suite 214
Noblesville, IN 46060

Countryside Homeowners Association, Inc.
9757 Westpoint Drive, Suite 600
Indianapolis, IN 46256