REPRESENTATIVE FOR PETITIONER:
Gerold L. Stout, Hoeppner, Wagner, & Evans, LLP

REPRESENTATIVE FOR RESPONDENT:
Robert Metz, Director of Hearings & Appeals, Lake County

BEFORE THE
INDIANA BOARD OF TAX REVIEW

Michelle Cubit,	)	Petition Nos.: 45-008-12-3-5-00186
	)	45-008-12-3-5-00187
	)	
	)	
Petitioner,	)	
	)	Parcels: 45-19-23-412-002.000-008
v.	)	45-19-23-412-005.000-008
	)	
	)	
Lake County Assessor,	)	County: Lake
	)	Township: Cedar Creek
	)	
Respondent.	)	Assessment Year: 2012

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

May 11, 2015

FINAL DETERMINATION

The Indiana Board of Tax Review ("Board") having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUE

1. Michelle Cubit appeals the credit under Ind. Code § 6-1.1-20.6-7.5 applied to her two vacant parcels for 2012. Those parcels were part of a larger property that contained a dwelling. The Auditor applied the credit applicable to non-residential property to the vacant parcels. We find that they instead should have received the same credit as the land beyond the dwelling's footprint on the parcel with the dwelling.

PROCEDURAL HISTORY

2. On August 5, 2013, Michelle Cubit filed two Form 133 Petitions for Correction of an Error with the Lake County Auditor challenging how the subject parcels were classified for purposes of applying credits under Ind. Code § 6-1.1-20.6. The Auditor disapproved the petitions and forwarded them to the Lake County Property Tax Assessment Board of Appeals ("PTABOA"). On September 12, 2013, the PTABOA denied the petitions. Ms. Cubit then timely appealed to the Board.

3. On November 10, 2014, our designated administrative law judge, Ellen Yuhan, held a hearing on Ms. Cubit's appeals. Neither she nor the Board inspected the parcels.

4. Gerald Stout appeared as counsel for Ms. Cubit. Ms. Cubit, however, did not call any witnesses. Mr. Metz, director of hearings and appeals for the Lake County Assessor, was sworn and testified.

5. Ms. Cubit's decision not to call any witnesses led to some confusion. Her counsel, who was not sworn, mingled factual assertions with his legal arguments. We do not consider any of his unsworn factual statements in making our decision.

6. Ms. Cubit offered the following exhibits:

   Petitioner Exhibit 1**:** Aerial photograph with parcel lines**,**
   Petitioner Exhibit 2: Indiana Constitution, Article 10, Section 1,
   Petitioner Exhibit 3: Definition of curtilage from the Free Merriam-Webster Dictionary,

Petitioner Exhibit 4: Definition of curtilage from The Law Dictionary,
Petitioner Exhibit 5: Definition of curtilage from Black's Law Dictionary,
Petitioner Exhibit 6: Aerial map of the parcels from Google Maps,
Petitioner Exhibit 7: Photographs of the parcels,
Petitioner Exhibit 8: Tax statements.

7. The Assessor offered following exhibits:

Respondent Exhibit 1: Property record card for 45-19-23-412-002.000-008,
Respondent Exhibit 2: Property record card for 45-19-23-412-005.000-008.

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

Board Exhibit A: Form 133 petitions,
Board Exhibit B: Hearing notices,
Board Exhibit C: Hearing sign-in sheet.

OBJECTION

9. The Assessor objected to Ms. Cubit's exhibits because she had not seen them before the hearing. *See* 52 IAC 2-7-1(b) (requiring a party to provide all other parties with an exhibit list 15 business days before a hearing and copies of its documentary evidence 5 business days before a hearing). Ms. Cubit's counsel represented, without contradiction, that all her exhibits were offered at the PTABOA's hearing. We therefore overrule the Assessor's objection and admit the exhibits. *See* 52 IAC 2-1-1(d) (providing that the Board or its administrative law judge may waive exchange deadlines for materials that were submitted at a PTABOA hearing).

SUMMARY OF MS. CUBIT'S CASE

10. Ms. Cubit's property is located at 224 N. Clark in Lowell. In 2012, the property consisted of three tax parcels—a parcel with a dwelling (45-19-23-412-001.000-008), which is not under appeal, and the subject parcels, both of which were assessed as vacant land with a 3% "tax cap." According to Ms. Cubit, the parcels' taxes should be capped at 1% of their gross assessments because they are part of the same homestead as the parcel with the dwelling. In the alternative, she argues that the two parcels should be classified as "other residential property" and have their taxes capped at 2% of their gross assessments. *Stout argument*.

11. The Indiana Constitution requires the General Assembly to limit a taxpayer's property tax liability on "tangible property, including curtilage, used as a principal place of residence" by a taxpayer who owns the property to no more than 1% of its gross assessed value. *Stout Argument (citing Ind. Const. Art. 10 § 1 (c)(4) and (f)(1))*. Because the Constitution does not define curtilage, one must look to standard definitions. Those definitions include the enclosed space of grounds and buildings immediately surrounding a dwelling and any outbuildings or yard. *Stout argument; Pet'r Exs. 2-5*.

12. Aerial photographs with parcel lines overlaid show the three parcels that compose Ms. Cubit's property. All three parcels are within the home's curtilage. The dimensions for the three parcels are roughly as follows:

    - Dwelling parcel: 9,075 sq. ft. (110' x 82.5')
    - Vacant parcel: 4,537.5 sq. ft. (55' x 82.5')
    - Vacant parcel: 1,925 sq. ft. (17.5' x 110')

    Stout argument; see also, Pet'r Exs. 1, 6-7.

13. The Auditor apparently followed a ruling from the Department of Local Government Finance ("DLGF") that a 3% cap applies to all vacant land. But that ruling does not comply with the Indiana Constitution. According to Ms. Cubit, her appeals are also distinguishable from *Spelbring v. Elkhart County Ass'r*, pet. no. 06-08-3334-008-012 (IBTR, Aug. 23, 2013). In that case, there was nothing to show that the vacant lot at issue was part of a larger property with a residence. *Stout argument*.

14. While the Assessor claims not to have known that Ms. Cubit was claiming an error in applying the appropriate tax cap, Ms. Cubit's Form 133 petitions address precisely that issue. *Stout argument*.

SUMMARY OF THE ASSESSOR'S CASE

15. The Assessor did not receive any exhibits before the hearing and therefore had no advance notice about the basis for Ms. Cubit's appeals. *Metz testimony*.

16. There were three separate parcels in 2012. They were combined in 2014 and the combined parcel falls under the 1% cap. The Assessor followed the "Indiana guidelines" both in assessing the parcels and in allocating tax caps. *Metz testimony*.

ANALYSIS

17. As Ms. Cubit points out, Article 10 §1 of the Indiana Constitution directs the General Assembly to limit a taxpayer's property tax liability (excluding taxes imposed after being approved in a referendum and certain other taxes in eligible counties) to between 1% and 3% of a property's gross assessed value depending on the type of property at issue. The General Assembly implemented that requirement through Indiana Code § 6-1.1-20.6-7.5, which provides the following credits, commonly referred to as "tax caps":

> (a) A person is entitled to a credit against the person's property tax liability for property taxes first due and payable after 2009. The amount of the credit is the amount by which the person's property tax liability attributable to the person's:
> (1) homestead exceeds one percent (1%);
> (2) residential property exceeds two percent (2%);
> (3) long term care property exceeds two percent (2%);
> (4) agricultural land exceeds two percent (2%);
> (5) nonresidential real property exceeds three percent (3%); or
> (6) personal property exceeds three percent (3%);
> of the gross assessed value of the property that is the basis for determination of property taxes for that calendar year.

I.C. § 6-1.1-20.6-7.5(a). Excluded from those caps are taxes approved in a referendum and certain other taxes in eligible counties, including Lake County. *Id.*; I.C. § 6-1.1-20.6-7.5(c).

18. In 2012, for purposes of the tax-cap statute, a "homestead" "refer[red] to a homestead that [was] eligible for a standard deduction under IC 6-1.1-12-37." I.C. 6-1.1-20.6-2(a) (Supp. 2009).[1] Indiana Code § 6-1.1-12-37 in turn provided, in relevant part:

> (a) The following definitions apply throughout this section:

[1] The statute has since been amended to define a homestead for purposes of the tax-cap statute as "a homestead *that has been granted a standard deduction* under IC 6-1.1-12-37." I.C. § 6-1.1-20.6-2(a); 2013 Ind. Acts. 257 § 28 (emphasis added).

(1) "Dwelling" means any of the following:

(A) Residential real property improvements that an individual uses as the individual's residence, including a house or garage.

…

(2) "Homestead" means an individual's principal place of residence:

(A) that is located in Indiana;

(B) that:

(i) the individual owns;

(ii) the individual is buying under a contract…

(iii) the individual is entitled to occupy as a tenant stockholder...; or

(iv) is a residence described in section 17.9 of this chapter that is owned by a trust…; and

(C) *that consists of a dwelling and the real estate, not exceeding one (1) acre, that immediately surrounds the dwelling*.

…

(b) Each year a homestead is eligible for a standard deduction from the assessed value of the homestead for an assessment date. The deduction provided by this section applies to property taxes first due and payable for an assessment date only if an individual has an interest in the homestead described in subsection (a)(2)(B) on:

(1) the assessment date; or

(2) any date in the same year after an assessment date that a statement is filed under subsection (e) or section 44 of this chapter, if the property consists of real property.

Subject to subsection (c), the auditor of the county shall record and make the deduction for the individual or entity qualifying for the deduction.

I.C. § 6-1.1-12-37 (Supp. 2012) (emphasis added).

19. "Residential property," by contrast, was defined as:

[R]eal property that consists of any of the following:

(1) A single family dwelling that is not part of a homestead and the land, not exceeding one (1) acre, on which the dwelling is located.

(2) Real property that consists of:

(A) a building that includes two (2) or more dwelling units;

(B) any common areas shared by the dwelling units; and

(C) the land not exceeding the area of the building footprint on which the building is located….

I.C. § 6-1.1-20.6-4 (Supp. 2012).

20. Finally, "non-residential real property" is defined as follows:

> (a) As used in this chapter, "nonresidential real property" refers to either of the following:
>
> (1) Real property that:
>
> (A) is not:
>
> (i) a homestead; or
>
> (ii) residential property; and
>
> (B) consists of:
>
> (i) a building or other land improvement; and
>
> (ii) the land, not exceeding the area of the building footprint or improvement footprint, on which the building or improvement is located.
>
> (2) Undeveloped land in the amount of the remainder of:
>
> (A) the area of a parcel; minus
>
> (B) the area of the parcel that is part of:
>
> (i) a homestead; or
>
> (ii) residential property.
>
> (b) The term does not include agricultural land.

I.C. § 6-1.1-20.6-2.5.[2]

21. Ms. Cubit offered little evidence. At most, the record shows the following: (1) Ms. Cubit bought the parcels on July 22, 2013, (2) they are contiguous to, and closely associated with, a parcel containing her home, (3) all three parcels together total less than one acre,[3] (4) the three parcels were combined into a single tax parcel for 2014, and (5) the Auditor has treated the combined parcel as a homestead for purposes of the tax-cap statute. Although sparse, that is enough evidence for us to find that the three parcels were part of the same property and that, to the extent the owner used the house as her primary place of residence, all three parcels would be part of a homestead within the definition of the standard-deduction and tax-cap statutes. To the extent the owner did not use the house as her principal place of residence, all three parcels would likely fit the definition of "residential property" within the meaning of the tax-cap statute.

22. It appears Ms. Cubit treated the property as her principal place of residence beginning in July 2013. But her appeal addresses taxes based on the 2012 assessment. And she

[2] The relevant portions of the definitions for residential and nonresidential property are the same now as they were at the times relevant to this appeal.

[3] The combined parcels total approximately 15,537.5 square feet. An acre has 43,560 square feet.

offered nothing to show whether the previous owners used the property as their principal place of residence. Absent such evidence, we cannot determine whether the subject parcels should be given the tax-cap credit for homesteads or instead should be given the credit for residential property. In either case, the parcels should get the same credit as the credit given to the portion of the dwelling parcel's land that exceeded the dwelling's footprint.[4]

23. Although the Assessor did little to develop the argument, the PTABOA's determinations refer to a "ruling" issued by the DLGF indicating that vacant land must be classified as non-residential property. Nobody offered a copy of that "ruling" or described its contents beyond the vague reference in the PTABOA determinations. Thus, it is unclear whether the ruling purports to include land that, while assessed separately as a vacant tax parcel, is used as part of a larger property that includes a dwelling. We will not assume that is the case. Indeed, we see nothing in the relevant statutes to support such an interpretation. When defining a homestead or non-residential property, the statutes largely speak not of tax parcels but of "real property" "real estate," and "land." By itself, the mere fact that the property in question was divided into separate tax parcels does not change the land's relationship to the dwelling with which it was associated.

24. We therefore order that the subject parcels be given the same tax-cap credit for the taxes based on the 2012 assessment date (payable in 2013) as the credit given to the land beyond the dwelling's footprint on the dwelling parcel for that same year.

SUMMARY OF FINAL DETERMINATION

25. Because the vacant parcels under appeal were part of a larger property containing a dwelling, they should be given the same credit for taxes based on the 2012 assessment as

[4] It appears from the aerial photograph that house is a single-family dwelling. That is consistent with Mr. Metz's testimony that Ms. Cubit received the homestead credit for the combined parcel starting in 2014. The record, however, is silent regarding how the previous owners used the property in 2012—it could have contained more than one dwelling unit. Thus, the land under the dwelling might have received the credit for residential property, while the rest of the land would have received the credit for nonresidential property.

was given to the land beyond the dwelling's footprint on the parcel containing the dwelling (45-19-23-412-001.000-008).

The Final Determination of the above captioned matter is issued on the date first written above.

_____
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>.