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

Petition: **89-024-15-1-4-00815-16**
Petitioner: **Cummings Properties LLC**
Respondent: **Wayne County Assessor**
Parcel: **89-07-01-310-202.000-023**
Assessment Year: **2015**

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

Procedural History

1. The Petitioner initiated its 2015 assessment appeal with the Wayne County Assessor on September 8, 2015.

2. On March 4, 2016, the Wayne County Property Tax Assessment Board of Appeals (PTABOA) issued its determination lowering the assessment, but not to the level requested by the Petitioner.

3. The Petitioner timely filed a Petition for Review of Assessment (Form 131) with the Board, electing the Board's small claims procedures.

4. The Board issued a notice of hearing on November 3, 2016.

5. Administrative Law Judge (ALJ) Joseph Stanford held the Board's administrative hearing on December 12, 2016. He did not inspect the property.

6. Certified tax representative Richard Werner appeared for the Petitioner and was sworn as a witness. Attorney Brian Cusimano appeared for the Respondent. Wayne County Assessor Betty Smith-Henson and Bradley Berkemeier of Nexus Group were sworn as witnesses for the Respondent.[1]

Facts

7. The eight-unit apartment building under appeal is located at 200 South Green Street in Fountain City.

8. The PTABOA determined a total assessment of $180,300 (land $28,000 and improvements $152,300).

[1] Wayne Township Assessor Timothy G. Smith was present at the hearing but was not sworn as a witness.

9. The Petitioner requested a total assessment of $101,900 (land $28,000 and improvements $73,900).

Record

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

    a) Form 131 with attachments,

    b) A digital recording of the hearing,

    c) Exhibits:

Petitioner Exhibit 1:	Subject property record card,
Petitioner Exhibit 2:	Presentation of valuation approaches for the subject property prepared by Richard Werner (pages 5 and 6 marked CONFIDENTIAL).[2]

Respondent Exhibit B:	Income analyses of the subject property prepared by Bradley Berkemeier (marked CONFIDENTIAL),
Respondent Exhibit D:	Page 2-64 from *Income Approach to Valuation* from the International Association of Assessing Officers,
Respondent Exhibit E:	Pages 485 and 486 from *The Appraisal of Real Estate*.[3]

Board Exhibit A:	Form 131 with CONFIDENTIAL attachments,
Board Exhibit B:	Notice of hearing dated November 3, 2016,
Board Exhibit C:	Hearing sign-in sheet,
Board Exhibit D:	Notice of Appearance for Brian A. Cusimano.

    d) These Findings and Conclusions.

Contentions

11. Summary of the Petitioner's case:

    a) The property's 2015 assessment is too high. In an effort to prove this, the Petitioner offered an analysis estimating the property's value at $101,900. Mr. Werner, the Petitioner's certified tax representative, prepared the analysis by developing the cost, sales-comparison, and income capitalization approaches to value. Ultimately, Mr. Werner assigned "all of the weight" on the income capitalization approach to value in accordance with Indiana law. *Werner argument (citing* 50 IAC 27-5-10)*; Pet'r Ex. 2*.

[2] While Mr. Werner did not specifically state Petitioner's Exhibit 2 is confidential, it appears to include the subject property's actual income and expense data. Respondent's Exhibit B and attachments to Board's Exhibit A appear to also include similar income data. For these reasons, the Board has marked specific income data as confidential.
[3] The Respondent did not introduce Respondent's Exhibits A or C.

b) Mr. Werner first developed a cost approach to value, even though he ultimately did not rely on it. Because he was unable to any relevant land sales in either Fountain City or comparable small towns, Mr. Werner "concur[ed] with the Assessor's land value at $8,000 an acre." Because he did not offer much testimony regarding the cost approach to value, it appears he computed his improvement value using generally the same methodology as the Respondent and developed an improvement value of $149,600. His indicated value under the cost approach was $177,600. *Werner argument; Pet'r Ex. 2*.

c) Mr. Werner also developed a sales-comparison approach. Mr. Werner focused on properties that were "originally built to be used as apartments." He found two recent sales from Connersville, one from Richmond, and one from Hagerstown. Mr. Werner made several adjustments to account for differences between the properties. First, he made adjustments based on location and percentage of difference in land value. Next, he made adjustments for "building area" and a 10% adjustment for "levels" because the subject property consists of two one-story buildings. An adjustment of 6% was made to account for the difference between "brick and frame exterior walls according to the Association of Realtors." Finally, he made adjustments to account for differences in other items based on the "depreciated cost of those items via the cost approach." Admittedly, he failed to consider the number of units or the rental incomes of the comparable properties he selected. His indicated value under the sales-comparison approach was $105,900 or $16.40 per square foot. *Werner testimony; Pet'r Ex. 2*.

d) Finally, Mr. Werner developed an income capitalization approach for the property. He based his computation on "actual rental income, vacancies, and expenses as reported by the Petitioner on its 2014 federal tax return, and taking the appropriate percentage of a consolidated total." As to market rent and expenses, there are no other apartment properties in Fountain City that compare to the subject property. Additionally, Mr. Werner admitted he did not compare the subject property to properties in "other small towns." Utilizing a capitalization rate from "RealtyRates.com," he settled on a final value of $101,900. Because this approach yielded "the lowest of the three value indications," the subject property should be valued at $101,900. *Werner testimony; Pet'r Ex. 2.*

12. Summary of the Respondent's case:

a) The property is correctly assessed. Nevertheless, the Respondent's witness, Mr. Berkemeier, a property tax consultant with Nexus Group, prepared two income capitalization computations. In the first computation, Mr. Berkemeier relied on the actual income data provided by Mr. Werner, believing that "those rent figures are going to be reasonable and be expected for that area." Believing that Mr. Werner's vacancy and collection loss estimate was excessive at 17%, he consulted "RealtyRates.com" for a market-based percentage. Additionally, Mr. Berkemeier added an additional 1% to account "for people who live in the apartments but do not pay." A total vacancy and collection loss of 9.9% was subtracted from the potential gross income. *Cusimano argument; Berkemeier testimony; Resp't Ex. B.*

b) Next, Mr. Berkemeier utilized an expense percentage of 46.79% obtained from "RealtyRates.com" based on the Indianapolis market for the first quarter of 2015. He also utilized a capitalization rate of 8.53% that was "adjusted for replacement reserves" of $362 per unit. Accordingly, this computation yielded a value of $216,000. *Berkemeier testimony; Resp't Ex. B.*

c) Mr. Berkemeier's second income capitalization computation is essentially the same as the first. The major difference is that this computation utilizes a capitalization rate that accounts for replacement reserves within the rate rather than requiring a separate computation. The capitalization rate, including replacement reserves, was 9.87%. Mr. Berkemeier's final value conclusion was the same as his first computation, $216,000. The value conclusions reached by Mr. Berkemeier are higher than the current assessment, but the Respondent requested the assessment remain at $180,300. *Berkemeier testimony; Cusimano argument; Resp't Ex. B.*

d) Mr. Werner's value computation is flawed for several reasons. In his sales-comparison approach, Mr. Werner failed to consider either the number of units or the rental income of his purportedly comparable properties. Further, the adjustments lack any paired-sales analyses to support them. Regardless, there is "limited value" in looking at the sales-comparison approach for an investment property. *Cusimano argument (referencing Pet'r Ex. 2).*

e) As to Mr. Werner's income capitalization approach, he overestimated vacancy and collection loss by utilizing actual figures rather than market figures. Moreover, his computation of replacement reserves does not comply with generally accepted appraisal principles. In using the entire building cost, Mr. Werner has included more than only short-lived items such as HVAC and carpeting. Thus, his computation greatly overestimates expenses and underestimates the property's value. For these reasons, the Petitioner failed to meet its burden of proof. *Cusimano argument (referencing Pet'r Ex. 2); Berkemeier argument.*

Burden of Proof

13. Generally, the taxpayer has the burden to prove that an assessment is incorrect and what the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Ass'r,* 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also Clark v. State Bd. of Tax Comm'rs,* 694 N.E.2d 1230 (Ind. Tax Ct. 1998). The burden-shifting statute as amended by P.L. 97-2014 creates two exceptions to that rule.

14. First, Ind. Code § 6-1.1-15-17.2 "applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal is an increase of more than five percent (5%) over the assessment for the same property for the prior tax year." Ind. Code § 6-1.1-15-17.2(a). "Under this section, the county assessor or

township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court." Ind. Code § 6-1.1-15-17.2(b).

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

16. Here, there is no dispute the assessment decreased from $221,900 in 2014 to $180,300 in 2015. Additionally, Mr. Werner failed to offer any argument or evidence to dispute this fact. The burden shifting provisions of Ind. Code § 6-1.1-15-17.2 do not apply, and the burden remains with the Petitioner.

Analysis

17. The Petitioner failed to make a prima facie case for reducing the 2015 assessment.

    a) Real property is assessed based on its market value-in-use. Ind. Code § 6-1.1-31-6(c); 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2). The cost approach, the sales comparison approach, and the income approach are three generally accepted techniques to calculate market value-in-use. Assessing officials primarily use the cost approach, but other evidence is permitted to prove an accurate valuation. Such evidence may include actual construction costs, sales information regarding the subject or comparable properties, appraisals, and any other information compiled in accordance with generally accepted appraisal principles.

    b) Regardless of the method used, a party must explain how the evidence relates to the relevant valuation date. *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). For a 2015 assessment, the valuation date was March 1, 2015. *See* Ind. Code § 6-1.1-4-4.5(f).

c) The Petitioner relied on an “analysis” prepared by its tax representative, Mr. Werner.[4] In his analysis, Mr. Werner developed three approaches to value: the cost approach, the sales-comparison approach, and the income capitalization approach. While his reconciliation of value places “all weight” to the income capitalization approach, the Board will examine all three approaches, beginning with the cost approach.

d) Mr. Werner said little regarding his cost approach to value, other than to state it was “very similar” to the Respondent’s cost computation. He did not indicate how or why the cost approach was relevant to the property’s value, given that it is an income-producing property. Further, he placed no weight on this approach in reconciling his final value. Therefore, the Board will assign it little probative value as well.

e) Next, the Board turns to Mr. Werner’s sales-comparison approach. *See* 2011 REAL PROPERTY ASSESSMENT MANUAL at 9 (incorporated by reference at 50 IAC 2.4-1-2) (stating that the sales-comparison approach relies on “sales of comparable improved properties and adjusts the selling prices to reflect the subject property’s total value.”); *see also, Long,* 821 N.E.2d 466, 469.

f) To effectively use the sales-comparison approach as evidence in a property tax appeal, the proponent must establish the comparability of the properties being examined. Conclusory statements that a property is “similar” or “comparable” to another property are not sufficient. *Long,* 821 N.E.2d at 470. Instead, the proponent must identify the characteristics of the subject property and explain how those characteristics compare to the characteristics of the purportedly comparable properties. *Id.* at 471. Similarly, the proponent must explain how any differences between the properties affect their relative market values-in-use. *Id.*

g) Mr. Werner did little to prove his purportedly comparable properties are actually comparable to the subject property. He failed to consider important factors such as the number of apartment units or total rental income. His analysis failed to include any adjustments to account for these important differences.

h) Further, while Mr. Werner adjusted the sale prices of his purportedly comparable properties for differences in other factors, he failed to support those adjustments. Mr. Werner attempted to explain them to some extent, but, at best, his adjustments inappropriately mix elements of the cost approach and the sales-comparison

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[4] The Petitioner submitted another “Property Tax Assessment Appeal Report” along with its Form 131. This report was also prepared by Mr. Werner and is dated November 11, 2015. On its face, this report includes similar information as Petitioner’s Exhibit 2. However, upon further inspection the two reports are markedly different. Most importantly, the report attached to the Form 131 specifically states it was prepared in accordance with Uniform Standards of Professional Appraisal Practice (USPAP) and lists Mr. Werner’s accreditation. Petitioner’s Exhibit 2 states neither. The Board will not speculate as to why Mr. Werner did not include this crucial information in Petitioner’s Exhibit 2. Additionally, the reports yield different values when examining the land portion of the computations. As the Petitioner did not introduce into evidence the report attached to the Form 131 nor did Mr. Werner testify to anything in the report, the Board will not place any weight on this report.

approach. While his format may not differ significantly from that of a certified appraiser in an appraisal report, the appraiser's assertions are backed by his education, training, and experience. When an appraiser certifies that he complied with USPAP, the Board can infer that the appraiser used objective data, where available, to quantify his adjustments. Mr. Werner failed to provide any indication that his report complies with USPAP. Given the failure to support his adjustments, the mixing of approaches, and the lack of USPAP compliance, the Board finds his sales-comparison approach is insufficiently reliable.

i) Finally, the Board turns to Mr. Werner's income capitalization approach. This approach, however, suffers from a major flaw depriving it of probative value. In Mr. Werner's computation of replacement reserves, he considered the entire building value rather than the cost of only short-lived items. This computation employs a methodology that does not appear to comport with generally accepted appraisal principles. Moreover, it appears to significantly overestimate replacement reserves, and consequently, significantly underestimate the value.

j) The Board notes that Mr. Werner, while appearing as a witness, was also acting as an advocate. In his capacity as a witness he offered his own "analysis" and arguments regarding that evidence. In his role as an advocate he offered arguments against the Respondent's evidence. By stepping well outside the bounds of a typical expert witness, Mr. Werner casts doubt on his own independence. Finally, because Mr. Werner acted both as an advocate and as a witness, the Board has serious doubts about his credibility as an independent expert. For these reasons, and the various issues previously addressed, the Board finds Mr. Werner's opinion unreliable. Consequently, the Petitioner failed to make a prima facie case that the assessment should be reduced.

k) Where a Petitioner has not supported its claim with probative evidence, the Respondent's duty to support the assessment with substantial evidence is not triggered. *Lacy Diversified Indus. LTD v. Dep't of Local Gov't Fin.,* 799 N.E.2d 1215, 1221-22 (Ind. Tax Ct. 2003). Here, however, the Respondent offered a competing income capitalization approach valuing the subject property at $216,000. But, because the Respondent conceded that the assessment should remain at $180,300, the Board will not examine the Respondent's evidence.

Conclusion

18. The Board finds for the Respondent.

Final Determination

In accordance with these findings and conclusions, the 2015 assessment will not be changed.

ISSUED: May 10, 2017

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

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