REPRESENTATIVES FOR RESPONDENT:
Richard Potts, Jasper County Assessor
Joshua D. Pettit, Consultant, Nexus Group

BEFORE THE
INDIANA BOARD OF TAX REVIEW

Demotte Property Management, LLC	)	Petition No.: 37-024-06-1-4-00002
	)	Parcel: 015-01154-00
Petitioner,	)	
v.	)	
	)	County: Jasper
Jasper County Assessor	)	Township: Keener
	)	Assessment Year: 2006
Respondent	)	

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

November 17, 2008

FINAL DETERMINATION

The Indiana Board of Tax Review (the "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. The issue presented for consideration by the Board was whether the subject property is over-assessed in light of its environmental contamination.

PROCEDURAL HISTORY

2. On April 21, 2008, the Jasper County Property Tax Assessment Board of Appeals ("PTABOA") issued its determination upholding the Keener Township Assessor's 2006 assessment of the subject property.

3. On May 21, 2008, pursuant to Ind. Code § 6-1.1-15-1, the Petitioner filed a Form 131 Petition for Review of Assessment, asking the Board to review the subject property's 2006 assessment.

HEARING FACTS AND OTHER MATTERS OF RECORD

4. On August 19, 2008, pursuant to Ind. Code § 6-1.1-15-4 and § 6-1.5-4-1, the Board's duly designated Administrative Law Judge, Ellen Yuhan ("ALJ"), held a hearing in Rensselaer, Indiana.

5. The following persons were sworn and presented testimony at the hearing:

For the Petitioner: Richard J. Cook, Jr., member Demotte Property Management, LLC
Roy Gouwens, appraiser

For the Respondent: Joshua D. Pettit, Nexus Group,
Richard Potts, Jasper County Assessor,
Earl Walton, PTABOA chairman
William L. Woods, PTABOA member

6. The Petitioner presented the following exhibits:

Petitioner Exhibit 1 – July 31, 2008 letter from Nicolas C. Welte, P.E. to Kevin Houppert with attachments; July 7, 2007, letter from John Gunter to Ray Debshaw; August 9, 2004, letter from John Gunter to Ray Debshaw;

May 10, 2005, letter from Anne DaVega to Ray Debshaw; October 6, 2005, letter from Anne DaVega to Ray Debshaw; November 18, 2005, letter from Anne DaVega to Ray Debshaw

Petitioner Exhibit 2 – Expert Report of Audrey S. Kortz, L.P.G.

Petitioner Exhibit 3 – April 25, 1994, article from *Los Angeles Business Journal*

7. The Respondent did not present any exhibits.

8. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits:

Board Exhibit A – Form 131 petition

Board Exhibit B – Notice of hearing dated July 10, 2008

Board Exhibit C – Sign-in sheet

9. The ALJ did not inspect the subject property.

10. For 2006, the PTABOA determined the assessed value of the property to be: Land: $33,900 Improvements: $68,900 Total: $102,800.

11. The Petitioner contends the property should be assessed for $0.

JURISDICTIONAL FRAMEWORK

12. The Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property; (2) property tax deductions; and (3) property tax exemptions; that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Indiana 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.

FINDINGS OF FACT

13. The subject property is located at 634 N. Halleck in Demotte. The Petitioner leases it to a tenant that operates a dry cleaner. *Cook testimony*.

14. When the Petitioner bought the subject property, Mr. Cook did not know that it was contaminated. *Cook testimony*.

15. In 2003, an investigation of the property revealed the presence of perchlorethylene ("PCE") in the property's soil and groundwater. *Pet'r Ex. 2 at 2*. The Indiana Department of Environmental Management ("IDEM") demanded that the property be cleaned up. *Id*.

16. The Petitioner hired American Environmental Corporation to investigate the site. Audrey S. Kortz, American's vice president of technical services, reviewed American's investigation and testing results as well as work that a previous consultant had done. *Id. at 2-3*. Based on her review, Ms. Kortz concluded that Sunrise, Inc., which had operated a dry cleaner and laundry on the property between 1986 and 2006, caused the contamination. *Id. at 2, 4*.

17. Ms. Kortz estimated that cleaning up the contaminated groundwater under a remedial work plan that had been provided to IDEM would take four-to-five years. *Id. at 4*. As of December 28, 2007, American had spent $120,190. *Id*. Ms. Kortz estimated that five years of system "O & M," quarterly monitoring, and site restoration would cost an additional $485,360. *Id*.

18. Currently, the Petitioner operates the subject property at a loss, because the Petitioner uses all of the rent to pay attorneys and cleanup costs. *Cook testimony*.

19. Roy Gouwens, an appraiser who is Mr. Cook's friend, testified for the Petitioner. Mr. Gouwens did not appraise the subject property. *Gouwens testimony*. Nonetheless, Mr. Gouwens thought that the cleanup costs were far more than what the property would be worth in the foreseeable future. *Id*. He also generally referred to cases where damages have been awarded to offset the stigma that attaches to a contaminated property even after the property has been cleaned up. *Id.*

CONCLUSIONS OF LAW AND ANALYSIS

A. Burden of Proof

20. A taxpayer seeking review of an assessing official's determination must make a prima facie case proving both that the current assessment is incorrect and what the 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). If the taxpayer meets that burden, the assessing official must offer evidence to impeach or rebut the taxpayer's evidence. *See American United Life Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004); *Meridian Towers*, 805 N.E.2d at 479. But the burden of persuasion remains with the taxpayer. *See Thorntown Tel. Co. v. State Bd. of Tax Comm'rs*, 629 N.E.2d 962, 965 (Ind. Tax Ct. 1995).

21. Of course, that begs the question of how a taxpayer may go about meeting its burden of proof. To answer that question, we turn to the 2002 Real Property Assessment Manual and to the basic principles underlying Indiana's assessment system.

22. Indiana assesses real property based on its true tax value, which Manual defines 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 at 2 (incorporated by reference at 50 IAC 2.3-1-2). The appraisal profession traditionally has used three methods to determine a property's market value: the cost, sales-comparison, and income approaches. *Id*. at 3, 13-15. Indiana assessing officials generally use a mass-appraisal version of the cost approach set forth in the Real Property Assessment Guidelines for 2002 – Version A.

23. A property's market value-in-use, as determined using the Guidelines, 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 2006). A taxpayer may rebut that presumption with evidence that is consistent with the Manual's definition of true tax value. MANUAL at 5. A market-value-in-use appraisal prepared according to the Uniform Standards of Professional Appraisal Practice ("USPAP") often will suffice. *Id*.; *Kooshtard Property VI*, 836 N.E.2d at 506 n.6. A taxpayer may also offer actual construction costs, sales information for the subject or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.

B. The Petitioner Did Not Meet its Burden

24. The Petitioner contends that the subject property should be assessed for $0 because of its significant environmental contamination. The Respondent agrees that the property's contamination affects its value but contends that the Petitioner failed to quantify that effect.

25. We agree with the Respondent. The Petitioner did not offer any facts to support its position other than the estimated costs to clean up the contamination and Mr. Cook's testimony that the Petitioner was operating the property at a loss. Based on those facts, Mr. Gouwens testified to his belief that anticipated cleanup costs would exceed the property's value. He also pointed to the stigma that he believed

will attach to the property even after the contamination is cleaned up. But Mr. Gouwens did not appraise the property, nor did he testify that his opinion was based on generally accepted appraisal principles.

26. While the Board has been unable to find a published Indiana decision directly on point, courts from other jurisdictions have split about whether the effect of contamination on a property can be measured by anticipated cleanup costs. Some courts have recognized simply deducting the present value of those cleanup costs from a property's market value in an unimpaired state as an "acceptable, if imperfect surrogate" for gauging the property's true market value. *Commerce Holding Corp. v. Bd. of Assessors of Town of Babylon*, 88 N.Y.2d 724, 673 N.E.2d 127, 131, 649 N.Y.S.2d 932 (N.Y. Ct. of App. 1996); *see also, e.g., E.I. Du Pont De Nemours & Co. v. Colorado State Bd. or Assessment Appeals*, 75 P. 3d 1129 (Co. Ct. App. 2003).

27. Other courts have rejected that method. *See e.g., Inmar Assocs., Inc. v. Borough of Carlstadt*, 549 A.2d 38 (N.J. 1988) (rejecting taxpayer's claim for a dollar-for-dollar reduction based upon cost of cleanup and discussing other potentially appropriate ways to value contaminated property); *Vogelgesang v. Cecos Int'l, Inc*., 85 Ohio App. 3d 339, 349, 619 N.E.2d 1072 (1993).

28. In some instances, courts that otherwise recognize the validity of deducting the present value of cleanup costs from a property's unimpaired value caution against using that approach where it would lead to a negative value for productive property:

> The use of this method would be disfavored, for example, when the property is capable of productive use, but the high cleanup costs yield a negative property value. In such a case, the cleanup cost could be more appropriately accounted for by adjustments to the projected income stream.

Commerce Holding Corp., 673 N.E.2d at 772 n. 5. Other courts have affirmed holdings of fact-finders that were swayed, in part, by the "Standard on the

Valuation of Property Affected by Environmental Contamination," published in 1992 by the International Association of Assessing Officers ("IAAO"). *In re: the Camel City Laundry Co*., 123 N.C. App. 210, 219 472 S.E.2d 402, 407-08 (1996); *see also Garvey Elevators, Inc. v. Adams County Board of Equalization*, 261 Neb. 310, 621 N.W.2d 518, 527-28 (2001). That IAAO standard similarly cautions against discounting a property's unimpaired value by its dollar-for-dollar cleanup costs because that approach may ignore the property's value-in-use:

> [T]here is a tendency to discount [the unencumbered] value based on costs related to remediating or isolating the environmental contamination. Fully deducting the costs may overstate the decline in value, because the value in use concept would then be ignored. *Value in use suggests that a property which is still in use, or which can be used in the near future, has a value to the owner*. This would be true even if costs to cure environmental problems exceed the nominal, unencumbered value.

Camel City, 472 S.E.2d at 407 (quoting IAAO Standard, Clause 4.1)(emphasis in *Camel City Laundry*)

29. Here, the Petitioner asks us to find that the subject property has no value, despite the fact that it continues to rent the property to a dry cleaner. That is a doubtful proposition, at best. As explained above, Indiana defines a property's true tax value as its market value-in-use, rather than simply its value in exchange. Like the *Commerce Holding Corp*. court and the IAAO Standard, the Board doubts the validity of any valuation approach that would result in zero or nominal value for a property that is being used to produce an income stream.

30. The Board need not decide that question, however, because Mr. Gouwens did not subtract the present value of the cleanup costs from the subject property's market value-in-use in an unimpaired state. Indeed, the Petitioner offered no market-based evidence to quantify the subject property's value either with or without contamination. And while Mr. Garvey pointed to the total estimated costs for

cleaning up the property over four-to-five years, he did not discount those costs to present value.

31. Mr. Gouwens's testimony about the stigma associated with contaminated properties suffers from the same problem—he did not point to anything to quantify the effect of that stigma on the subject property's market value-in-use. Instead, he testified generally that courts have awarded damages for stigma and referred to a newspaper article about a case in which a property owner was awarded $865,000 in damages for "permanent post-clean-up stigma." *Gouwens testimony; Pet'r Ex. 3*. Of course, the stigma attached to that property says nothing about what, if any, stigma will attach to the subject property.

32. Finally, Mr. Gouwens testified that the Petitioner did not have the subject property appraised because people from "the county" had "implied" that an appraisal would be unnecessary and that they would not assign the property any value. *Gouwens testimony*.

33. Mr. Gouwens apparently was referring to settlement negotiations with the Respondent. But he did not claim that the parties had reached an agreement. The Petitioner was free to negotiate with the Respondent to settle its appeal. Absent reaching an agreement, however, the Petitioner needed to prove that it was entitled to relief. The Petitioner cannot alter its burden of proof by pointing to failed settlement negotiations.

34. We note that the Petitioner did not expressly allege that the Respondent was equitably stopped from contesting the Petitioner's request for a $0 assessment. Even if it had, Mr. Gouwens's claim that unidentified people from the county "implied" that an appraisal would be unnecessary was far too vague to support an estoppel claim. Also, equitable estoppel generally may not be invoked against government entities. *Dep't of Local Gov't Fin. v. State Bd. of Tax Comm'rs*, 820 N.E.2d 1222, 1228 (Ind. 2005). Public policy concerns may justify departing from that rule in a given case. *See Hi-Way Dispatch, Inc. v. Indiana Dep't of*

State Revenue, 756 N.E.2d 587, 598-99 (Ind. Tax Ct. 2001)("The exception to the general rule exists where the public interest would be threatened by the government's conduct."). The Petitioner, however, offered no public policy concerns to justify departing from that general rule.

35. Because the Petitioner did not offer probative evidence to show the subject property's market value-in-use, it failed to make a prima facie case for a change in assessment.

SUMMARY OF FINAL DETERMINATION

36. The Petitioner failed to make a prima facie case of error. The Board finds for the Respondent. No change in the assessment is warranted.

This Final Determination of the above captioned matter is issued this by the Indiana Board of Tax Review on the date first written above.

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Commissioner, 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

IMPORTANT NOTICE

- Appeal Rights -

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>