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

Petition: **57-002-15-1-5-01492-16**
Petitioner: **Chad Dull**
Respondent: **Noble County Assessor**
Parcel: **57-13-19-400-311.000-002**
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 his 2015 assessment appeal with the Noble County Assessor on October 13, 2015.

2. On June 3, 2016, the Noble 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. He elected the Board's small claims procedures.

4. The Board issued a notice of hearing on September 8, 2016.

5. Administrative Law Judge (ALJ) Patti Kindler held the Board's administrative hearing on October 13, 2016. She did not inspect the property.

6. Attorney Steven C. Hagen appeared for the Petitioner. Attorney Dennis D. Graft appeared for the Respondent. The following witnesses were sworn:

   For the Petitioner: Chad C. Dull,
   Randall Kirkpatrick, investor and realtor,
   Christine E. Sands, Certified Public Accountant.

   For the Respondent: Kim Carson, Noble County Assessor,
   Gavin Fisher, county consultant.

Facts

7. The property under appeal is a commercial property, commonly known as Albion Liquor Store, located at 702 South Orange Street in Albion.

8. The PTABOA determined a total assessment of $97,500 ($13,400 for land and $84,100 for improvements).

9. On his Form 131, the Petitioner requested a total assessment of $85,900 ($13,400 for land and $72,500 for improvements).

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 A:	"Albion Liquor Store Summary Package" including "assessment record,"
Petitioner Exhibit B:	Property record card for 215 South Orange Street,
Petitioner Exhibit C:	Property record card for 605 South Orange Street,
Petitioner Exhibit D:	Property record card for 607 South Orange Street,
Petitioner Exhibit E:	Property record card for 320 South Orange Street,
Petitioner Exhibit F:	Multiple Listing Service (MLS) sales sheet for 100 East Main Street,
Petitioner Exhibit G:	MLS sales sheet for 100 West Main Street,
Petitioner Exhibit H:	MLS sales sheet for 320 South Orange Street,
Petitioner Exhibit I:	MLS sales sheet for 575 Weber Road,
Petitioner Exhibit J:	MLS sales sheet for 108 South Orange Street,
Petitioner Exhibit K:	MLS sales sheet for 102 West Main Street,
Petitioner Exhibit L:	"Drive-by Comparative Market Analysis" from Steve Kirkpatrick, Broker, dated January 21, 2016,
Petitioner Exhibit M:	Subject property "original offer to purchase,"
Petitioner Exhibit N:	Email from Michael L. Morrissey, attorney, to Steve Hagen, attorney, regarding "Sale and Purchase of Albion Liquor Store," dated January 13, 2015,
Petitioner Exhibit O:	Executed Offer to Purchase, dated January 29, 2015,
Petitioner Exhibit P:	Text of Ind. Code § 6-1.1-5.5-5,
Petitioner Exhibit Q:	Department of Local Government Finance's (DLGF) 2011 Real Property Assessment Manual.
Respondent Exhibit 1:	Sales disclosure of the subject property dated February 13, 2015,
Respondent Exhibit 2:	Subject property "Offer to Purchase,"
Respondent Exhibit 3:	Memorandum of Contract, dated February 13, 2015,
Respondent Exhibit 4:	Four interior photographs and one exterior photograph of the subject property,

Respondent Exhibit 5:	Text of Ind. Code § 6-1.1-5.5-7; § 6-1.1-5.5-8; § 6-1.1-5.5-9; § 6-1.1-5.5-10, version a; § 6-1.1-5.5-10, version b; § 6-1.1-5.5-11; and § 6-1.1-5.5-12,
Respondent Exhibit 6:	Form 131,
Respondent Exhibit 7:	Screenshot of the "Assessor's notes" regarding remodeling of the upstairs apartment dated May 4, 2016.

Board Exhibit A:	Form 131 with attachments and Notice of Appearance for Steven C. Hagen,
Board Exhibit B:	Notice of hearing dated September 8, 2016,
Board Exhibit C:	Hearing sign-in sheet,
Board Exhibit D:	Notice of Appearance for Dennis D. Graft.

d) These Findings and Conclusions.

Objections

11. Mr. Graft, on behalf of the Respondent, made two objections. First, he objected to testimony related to a "verbal conclusion of value" by Randall Kirkpatrick. Mr. Graft argued that Mr. Kirkpatrick is "an investor in the business and therefore may be biased." The Petitioner did not offer a response to this objection. Mr. Graft also objected to Petitioner's Exhibit L arguing that it is hearsay. In response, Mr. Hagen argued that it was too late to object to the document because it was already stipulated into evidence. Mr. Graft responded to that argument by stating "his objection should go to the weight given to the evidence." The ALJ took the objections under advisement.

12. As to Mr. Graft's objection to Mr. Kirkpatrick's testimony, this objection goes to the weight and credibility of the testimony, not the admissibility. Thus, this objection is overruled and Mr. Kirkpatrick's testimony is allowed.

13. Regarding Petitioner's Exhibit L, this exhibit is hearsay as the author of the exhibit, Steve Kirkpatrick, was not present at the hearing to be cross-examined. "Hearsay" is a statement, other than one made while testifying, that is offered to prove the truth of the matter asserted. Such a statement can be either oral or written. (Ind. R. Evid. 801(c)). The Board's procedural rules specifically address hearsay evidence:

> Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. If not objected to, the hearsay evidence may form the basis for a determination. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting determination may not be based solely upon the hearsay evidence.

52 IAC 3-1-5(b). The word "may" is discretionary, not mandatory. In other words, the Board can permit hearsay evidence to be entered in the record, but is not required to allow it.

14. Here, the Petitioner's attorney failed to argue that Petitioner's Exhibit L falls within any recognized exception to the hearsay rule.[1] As such, in response to the hearsay objection, Petitioner's Exhibit L is admitted to the record, but, in accordance with the Board's procedural rules, the Board's determination may not be based solely on that exhibit. In response to Mr. Graft's assertion that the objection should also be viewed as a relevancy objection, this objection goes to the weight and credibility of the exhibit, not its admissibility. Thus, this objection is overruled and Petitioner's Exhibit L is admitted.

15. Mr. Hagen objected to Mr. Fisher's critique of Petitioner's Exhibit L "because the Respondent objected to that exhibit on the grounds of hearsay and it may not be admitted to the record." The ALJ took the objection under advisement. As previously discussed, Petitioner's Exhibit L is admitted thus this objection is likely moot. To the extent Mr. Hagen intends his objection to stand, it is overruled as the Board is unable to find any grounds to exclude Mr. Fisher's discussion of Petitioner's Exhibit L.

Contentions

16. Summary of the Petitioner's case:

a) The subject property's assessment is too high. The assessment increased from $81,500 in 2014 to $97,500 in 2015. This increase is excessive considering the "upstairs apartment was destroyed by a fire." *Hagen argument.*

b) The Assessor erroneously relied on the subject property's sales disclosure in assessing the property. The $200,000 purchase price, taken from the purchase offer and listed on the sales disclosure, represents an allocation of assets totaling $500,000 for federal tax purposes. The sales disclosure indicates an inflated price as it was influenced by federal tax procedure and the seller's preferred allocation of the assets. As such, this does not represent the subject property's "individual purchase price or its market value." *Hagen argument; Dull testimony; Pet'r Ex. M, N, O.*

c) Christine Sands, a Certified Public Accountant (CPA), assisted with the allocation of the subject property's $500,000 contract purchase price among various assets. Ms. Sands determined that $200,000 should be allocated to the real estate contract. That allocation was an estimate, and not based on any market value evidence. Ms. Sands testified that a seller's motivation is to have a higher sale price on their capital assets for federal tax purposes. The amount allocated to the subject property's real estate is dependent on whether the CPA is advising the buyer or the seller of the real estate. *Sands testimony; Pet'r Ex. N.*

[1] Indiana Code § 6-1.1-15-4(p) creates an exception to the hearsay rule for an appraisal report. The Petitioner did not argue that the exhibit in question is an appraisal report and the Board will not view it as an appraisal report.

d) In an effort to prove a more accurate assessment, the Petitioner relied on a "drive-by comparative market analysis" from real estate broker Steve Kirkpatrick. Mr. Kirkpatrick "came up with a figure of $26.77 per square foot" for the retail space.[2] *Hagen argument; Pet'r Ex. L.*

e) The Petitioner also presented a comparable sales analysis prepared by Randall Kirkpatrick, a realtor and investor in the purchase of the subject property. Mr. Kirkpatrick examined several comparable commercial properties. Based on these properties, he opined the subject property should be valued at $72,500. Mr. Kirkpatrick argued several vacant properties were located in the vicinity that could have been utilized as a liquor store at the time the subject property was purchased. As the liquor license is owned by a separate entity, "any vacant retail space could have been used as a liquor store if the buyers acquired a liquor license." *Kirkpatrick argument; Pet'r Ex. F, G, H, I, J, K, L.*

17. Summary of the Respondent's case:

a) The subject property is assessed correctly. The assessment is based on the property's measurements, cost schedules, and the Guidelines. The building is graded "D+2" and is in average condition. The assessment is "more than reasonable" when compared to the purchase price. *Carson argument.*

b) According to the sales disclosure and purchase offer, the Petitioner purchased the "property" for $200,000, in February of 2015. There is nothing that indicates the sale price is invalid, or that the sale was not an arm's-length transaction. *Carson argument (referencing Pet'r Ex. M, N, O); Fisher argument.*

c) After receiving the sales disclosure, the Assessor changed the effective construction date of the building to 1992, raising the original 2015 assessment to $148,500. The effective age was adjusted because an addition to the building was added in a prior year, but was missed in computing the assessment. *Carson testimony; Resp't Ex. 1.*

d) At the PTABOA's request, the Assessor performed an interior and exterior inspection of the property. After the findings were reported, the PTABOA applied a 30% obsolescence to account for the upstairs apartment that had been destroyed by fire and was in the process of being repaired. After the obsolescence was applied, the total assessment was lowered to the current value of $97,500. *Carson testimony; Resp't Ex. 4, 7.*

e) According to Mr. Fisher, who performed an exterior inspection of the property, the Petitioner's purportedly comparable properties lack comparability to the subject property for several reasons:

[2] Steve Kirkpatrick did not actually list $26.77 as the average sale price per square foot on his "drive-by analysis." Mr. Hagen apparently derived this figure by averaging the price per square foot for the four comparable properties listed on Steve Kirkpatrick's letter.

- The property located at 100 East Main Street is "somewhat similar," but it is a 115-year-old mixed-use structure with three stories located in the central business district.

- The property located at 100 West Main Street is a 94-year-old attached structure used primarily for office purposes and would not "necessarily be comparable" without some adjustment.

- The property located at 320 South Orange Street is a restaurant that typically has "lots of interior space and finishes" which would not be easily converted to another use.

- The property located at 575 Weber Road is an industrial property and is "in no way, shape or form comparable to a commercial retail facility."

- The property located at 108 South Orange Street is a "special purpose" bar and grill.

- The property located at 102 West Main Street is also used as a restaurant or bar.

Fisher testimony (*referencing Pet'r Ex. F, G, H, I, J, K*).[3]

f) While the Petitioner's purportedly comparable properties "could" be used to support the subject property's market value-in-use, they would require noticeable adjustments for differences in size, age, and use. Without the proper adjustments, these properties are unreliable as indicators of the value. *Fisher testimony* (*referencing Pet'r Ex. F, G, H, I, J, K*).

g) The Petitioner failed to present any probative evidence of the subject property's market value-in-use. While he presented some purportedly comparable properties, he failed to provide any direct information to indicate how these properties are comparable to the subject property. *Graft argument.*

Burden of Proof

18. 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.

19. 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

[3] Mr. Hagen argued that Mr. Fisher is "being paid to attend the hearing, and therefore may be biased toward the Assessor's position." Under cross examination Mr. Fisher testified that his company receives less than 20% of its overall compensation from Noble County. *Hagen argument; Fisher testimony.*

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).

20. 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.

21. Here, neither party offered any evidence as to who should bear the burden of proof. The Respondent's attorney, in his closing argument, vaguely argued that the Petitioner had the burden of proof. However, this argument is not founded. The subject property record card lists the 2014 total assessment as $81,500. The 2015 total assessment rose by 19.64% to $97,500 as reported on the Form 115. As the Respondent failed to argue any exception to the burden-shifting rule should apply, according to Ind. Code § 6-1.1-15-17.2, the Respondent has the burden to prove the 2015 assessment is correct.

Analysis

22. The Respondent made a prima facie case that the 2015 assessment was correct.

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) Here, the Respondent has the burden of proving the 2015 assessment is correct. In presenting her case, the Respondent based her argument on the subject property's

sales disclosure form. In doing so, she argued the purchase of the property was an arm's-length transaction and representative of a market sale. Specifically, according to the sales disclosure form, the Petitioner purchased the "real estate and building" for $200,000, on February 13, 2015. This purchase was less than one month prior to the relevant valuation date. The sale of a subject property is often the best indicator of its value.

d) The Respondent did not request the assessment to be increased, but that it be maintained at $97,500. The Board finds that the purchase of the property, at least, supports the current assessment as it was so close in time to the relevant valuation date. Accordingly, the Respondent made a prima facie case that the assessment is correct, and the burden shifts to the Petitioner to impeach or rebut the evidence.

e) To that end, the Petitioner argued that the value indicated on the sales disclosure was not the true value of the real estate, but only "an allocation made in the purchase contract." The contract allocated the purchase price as follows:

Real estate	$ 50,000
Building	$150,000
Non-competition agreement	$200,000
Alcohol beverage permit	$ 45,000
Equipment	$ 30,000
Goodwill	$ 25,000
Total	$500,000

f) Both the Petitioner and his CPA, Ms. Sands, contend the allocation of $200,000 for the land and building together is "only an estimate of the overall value for federal tax purposes." They further appear to contend the allocated amounts were inflated for federal tax benefits, and that the "actual value" of the land and building should be less. The Petitioner testified that "he was advised by the attorneys involved" that the property would not be assessed for the amount agreed to in the contract's allocation.

g) The Manual provides the following definition of "market value":

> The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgably, and for self-interest, and assuming that neither is under undue duress.

2011 REAL PROPERTY ASSESSMENT MANUAL at 5-6.

h) The Board is unable to find anything in the record to indicate that this sale did not meet the requirements of a market sale. The Petitioner signed the sales disclosure form, under penalties of perjury, indicating that he purchased the "land and building"

for $200,000. He failed to offer any probative evidence that the value indicated was incorrect, or that any of the other items included in the allocation were either overvalued or undervalued. Further, he failed to offer any other allocation alternative that might serve as a better estimate of the value.

i) In an attempt to support his position, the Petitioner did offer some market-based evidence. Specifically, he focused on the MLS listings gathered by Randall Kirkpatrick and a "market analysis" prepared by Steve Kirkpatrick. This evidence appears to be an attempt to value the property utilizing the sales-comparison approach.

j) However, in order to effectively use the sales-comparison approach as evidence in a property assessment appeal, the proponent must establish the comparability of the properties being examined. Conclusory statements that a property is "similar" or "comparable" to another property do not constitute probative evidence of the comparability of the two properties. *Long*, 821 N.E.2d at 470. Instead, the party seeking to rely on a sales comparison approach must explain the characteristics of the subject property and how those characteristics compare to those of purportedly comparable properties. *See Id.* at 470-71. He or she must also explain how any differences between the properties affect their relative market values-in-use.

k) Here, the type of analysis required and the related adjustments are lacking from the Petitioner's evidence. The Petitioner failed to make any adjustments to the purportedly comparable properties. Further, other than the conclusory opinion from Mr. Randall Kirkpatrick, the evidence failed to yield an indicated value. Thus, the evidence lacks probative value.[4]

l) Consequently, the Petitioner failed to impeach or rebut the Respondent's prima facie case. Thus, the 2015 total assessment will remain at $97,500.

Conclusion

23. The Board finds for the Respondent.

[4] The Petitioner did argue the subject property was over-assessed based on the fact the "upstairs apartment was destroyed by a fire." The Respondent acknowledged this fact, and it seems the PTABOA accounted for this on the Form 115. Here, the Petitioner failed to offer any probative evidence that a further reduction is warranted nor did he provide any evidence of a more accurate value for the property.

Final Determination

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

ISSUED: January 11, 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>.