

REPRESENTATIVES FOR PETITIONER: John Reed, Manager of Property Tax, May Department Stores, Thomas Atherton, Attorney with Katz and Korin, representing May Department Stores, G. John Cento, Attorney with Katz and Korin, representing May Department Stores.

REPRESENTATIVES FOR RESPONDENT: Rick Barter, Vanderburgh County Hearing Officer, Al Folz, Knight Township Assessor, Joe Gries, Knight Township Deputy Assessor

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

In the matter of:

EQUITABLE LIFE ASSURANCE)	
SOCIETY, C/O MAY)	
DEPARTMENT STORES CO.)	Petition No: 82-027-97-1-5-00077
)	
Petitioner)	County: Vanderburgh
)	
v.)	Township: Knight
)	
VANDERBURGH COUNTY)	Parcel No.: 0971017106054
PROPERTY TAX ASSESSMENT)	
BOARD OF APPEALS And)	
MADISON TOWNSHIP,)	
)	
Respondent)	Assessment Year: 1997
)	

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

[January 16, 2003]

FINAL DETERMINATION

The Indiana Board of Tax Review assumed jurisdiction of this matter as the successor entity to the State Board of Tax Commissioners, and the Appeals Division of the State Board of Tax Commissioners. For convenience of reference, each entity is without distinction hereafter referred to as the "Board".

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:
ISSUE – Whether the grade for the subject property is overstated.

Procedural History

2. Pursuant to Ind. Code § 6-1.1-15-3, Scott Brown, Property Tax Manager, filed a Form 131 on behalf of May Department Stores Co. petitioning the Board to conduct an administrative review of the above petition. The Form 131 was filed on December 26, 1997. The determination of the PTABOA was issued on December 11, 1997.
3. On March 22, 1999, the State Board conducted a hearing. Pursuant to an Indiana Tax Court decision with a similar issue to this case, a second hearing was held on August 20, 2002.

Hearing Facts and Other Matters of Record

4. Pursuant to Ind. Code § 6-1.1-15-4 a hearing was held on August 20, 2002 in Evansville, Indiana before Jennifer Bippus, the duly designated Administrative Law Judge authorized by the Board under Ind. Code § 6-1.5-5-2.
5. The following persons were present at the hearing:

For the Petitioner:

Mr. John Reed – Property Tax Manager of May Department Stores Co.

Mr. Thomas Atherton – Attorney with Katz and Korin, representing May

Department Stores Co.

Mr. G. John Cento – Attorney with Katz and Korin, representing May Department Stores Co.

For the Respondent:

Mr. Rick Barter - Vanderburgh County Hearing Officer

Mr. Al Folz - Knight Township Assessor

Mr. Joe Gries – Knight Township Deputy Assessor

6. The following persons were sworn in as witnesses and presented testimony:

For the Petitioner:

Mr. John Reed – Property Tax Manager of May Department Stores Co.

(Mr. Atherton and Mr. Cento were not sworn in.)

For the Respondent:

Mr. Rick Barter, Vanderburgh County Hearing Officer

Mr. Al Folz, Knight Township Assessor

Mr. Joe Gries – Knight Township Deputy Assessor

7. The following exhibits were presented at the hearing:

For the Petitioner:

Petitioner's Exhibit 1 – Comparison of Indiana department stores with supporting documents:

- a. Property record cards for Famous Barr #41, JC Penney, Lazarus, and DeJong's, department stores, located in Eastland Mall.
- b. Property record cards for LS Ayres #26, JC Penney, Marshall Fields, and Sears, department stores located in Glenbrook Mall.
- c. Property record cards for LS Ayres #27 and Lazarus, department stores located in Glendale Mall.
- d. Property record cards for LS Ayres #28, JC Penney, Sears, Lazarus, and Wards, department stores located in Castleton Square Mall.

Equitable Life Assurance Society/May Department Stores Co.

- e. Property record cards for LS Ayres #29, JC Penney, Sears, Kohl's, and Carson Pirie Scott, department stores located in Southlake Mall.
- f. Property record cards for Famous Barr #30, Marshall Fields, and Sears, department stores located in University Park Mall.
- g. Property record cards for LS Ayres #31, JC Penney, Sears, Lazarus, and Von Maur, department stores located in Greenwood Mall.
- h. Property record cards for LS Ayres #32, JC Penney, Sears, Lazarus, and Wards, department stores located in Lafayette Square Mall.
- i. Property record cards for LS Ayres #34, Sears, and Lazarus, department stores located in Washington Square Mall.
- j. Property record cards for LS Ayres #36, JC Penney, Sears, and Lazarus, department stores located in College Mall.
- k. Property record cards for LS Ayres #37 and Target, department stores located in Scottsdale Mall.
- l. Property record cards for LS Ayres #39, JC Penney, Sears, Lazarus, and Kohl's, department stores located in Tippecanoe Mall.
- m. Property record cards for LS Ayres #42, JC Penney, and Sears, department stores located in Muncie Mall.

Petitioner's Exhibit 2 – Exterior and Interior photographs of May

Company Department Stores:

- a. Famous Barr, Eastland Mall, Evansville, Indiana.
- b. LS Ayres, Glenbrook Shopping Center, Ft. Wayne, Indiana.
- c. LS Ayres, Glendale Shopping Center, Indianapolis, Indiana.
- d. LS Ayres, Castleton Square, Indianapolis, Indiana.
- e. LS Ayres, Southlake Mall, Merrillville, Indiana.
- f. LS Ayres, University Park Mall, Mishawaka, Indiana.
- g. LS Ayres, Greenwood Shopping Center, Greenwood, Indiana.

- h. LS Ayres, Lafayette Square, Indianapolis, Indiana.
- i. LS Ayres, Washington Square, Indianapolis, Indiana.
- j. LS Ayres, College Mall, Bloomington, Indiana.
- k. LS Ayres, Tippecanoe Mall, Lafayette, Indiana.
- l. LS Ayres, Muncie Mall, Muncie, Indiana.

For the Respondent:

Respondent's Exhibit 1 – Written comments presented by Rick Barter,
Vanderburgh County Hearing Officer.

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

Board Exhibit A- Copy of the Form 131.

Board Exhibit B- Copy of the Notice of Hearing dated July 3, 2002.

Board Exhibit C- Copy of the Request for Additional Evidence from the Respondent dated August 20, 2002.

9. The Respondent requested at the hearing that all previous evidence be allowed. The following exhibits were presented as additional evidence by the Respondent postmarked on August 21, 2002:

Respondent's Exhibit 2 – A copy of a letter sent to Mary Kay Fischer by John Gerard, Knight Township Deputy Assessor, in response to the comparables offered by the Petitioner at the hearing on March 22, 1999.

Respondent's Exhibit 3 – A copy of the issue and response presented to Ginny Whipple, State Tax Board Hearing Officer at the March 12, 1999 hearing by Cheryl Musgrave, Vanderburgh County Assessor and Tammy Elkins, Acting Vanderburgh County Hearing Officer.

Respondent's Exhibit 4 – A copy of 50 IAC 2.2-11-1 General Commercial Mercantile "GCM" models.

Respondent's Exhibit 5 – A copy of 50 IAC 2.2-10-3 Grade.

Respondent's Exhibit 6 – Copies of property record cards for department stores located in Vanderburgh County:

- a. Lazarus, North Green River Road
- b. JC Penney, North Green River Road
- c. Elder Beerman, 4801 Washington Avenue
- d. Sears, 4801 Washington Avenue

Respondent's Exhibit 7 – A copy of all of the property record cards submitted by the Petitioner and listed in π 6, Petitioner's Exhibit 1 above.

Respondent's Exhibit 8 – A summary of the Issues and Responses provided by the County dated March 9, 1999:

- a.. A copy of the Board of Review final determination.
- b. A copy of the property record card for the subject property.
- c. Interior and exterior photographs of the subject building.
- d. Plat map for the subject property.
- e. Copies of permits issued by the Department of Buildings.
- f. A copy of the minutes of the Board of Review hearing.

Respondent's Exhibit 9 – A copy of the following documents:

- a. Floor area check and control documents for the Evansville project with property record card.
- b. Floor area check and control documents for the Tippecanoe project with assessment record.
- c. Floor area check and control documents for the Castleton Square Project with property record card.
- d. Floor area check and control documents for the Muncie project with property record card.

Respondent's Exhibit 10 – A copy of 50 IAC 2.2-11-4, Graded photos of "B" grade department stores.

Respondent's Exhibit 11 – A copy of 50 IAC 2.2-7-6 Grade.

Respondent's Exhibit 12 – A copy of Indiana Tax Court Case, *Deer Creek Developers, Ltd., v. Department of Local Government Finance*, 769 N.E. 2d 259 (Ind. Tax 2002).

Respondent's Exhibit 13 – Copies of the following documents:

- a. Notice of Hearing issued by State Board on February 17, 1999.
- b. A copy of a letter to Tammy Elkins, Chief Deputy Assessor for Vanderburgh County from Richard W. Hermes, Manager, Property Tax for May Department Stores Company dated November 19, 1997.
- c. A copy of a Notice of Preliminary Hearing and Site Inspection sent to Scott Brown of May Department Stores Company from Vanderburgh County Assessor dated October 24, 1997.
- d. A copy of the Form 131 filed with the County Assessor dated December 26, 1997.
- e. A copy of the Assessment Determination issued by the Vanderburgh County Assessors
- f. A copy of the Form 130 filed with the County on September 5, 1997.
- g. A copy of the notice of hearing issued by the County Board of Review on October 24, 1997.
- h. A copy of the property record card for the May Department Store located in Tippecanoe County.
- i. A copy of the various statistics on May Company stores.

Jurisdictional Framework

10. This matter is governed by the provisions of Ind. Code § 6-1.1-15, and all other laws relevant and applicable to appeals initiated under those provisions, including all case law pertaining to property tax assessment or matters of administrative law and process.
11. The Board is authorized to issue this final determination pursuant to Indiana Code § 6-1.1-15-3.

Indiana's Property Tax System

12. The Indiana Constitution requires Indiana to create a uniform, equal, and just system of assessment. See Ind. Const. Article 10, §1.

13. Indiana has established a mass assessment system through statutes and regulations designed to assess property according to what is termed “True Tax Value.” See Ind. Code § 6-1.1-31, and 50 Ind. Admin. Code 2.2.
14. True Tax Value does not precisely equate to fair market value. See Ind. Code § 6-1.1-31-6(c).
15. An appeal cannot succeed based solely on the fact that the assessed value does not equal the property’s market value. See *Town of St. John V*, 702 N.E. 2d.
16. The Indiana Supreme Court has said that the Indiana Constitution “does not create a personal, substantive right of uniformity and equality and does not require absolute and precise exactitude as to the uniformity and equality of each individual assessment”, nor does it “mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant”, but that the proper inquiry in tax appeals is “whether the system prescribed by statute and regulations was properly applied to individual assessments.” See *Town of St. John V*, 702 N.E. 2d.
17. Although the Supreme Court in the *St. John* case did declare the cost tables and certain subjective elements of the State’s regulations constitutionally infirm, it went on to make clear that assessment and appeals must continue to be determined under the existing rules until new regulations are in effect.
18. New assessment regulations have been promulgated, but are not effective for assessments established prior to March 1, 2002. See 50 Ind. Admin. Code 2.3.

State Review and Petitioner’s Burden

19. The State does not undertake to reassess property, or to make the case for the petitioner. The State decision is based upon the evidence presented and issues raised during the

- hearing. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E. 2d 1113 (Ind. Tax 1998).
20. The petitioner must submit 'probative evidence' that adequately demonstrates all alleged errors in the assessment. Mere allegations, unsupported by factual evidence, will not be considered sufficient to establish an alleged error. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E. 2d 1113 (Ind. Tax 1998), and *Herb v. State Bd. of Tax Comm'rs*, 656 N.E. 2d 1230 (Ind. Tax 1998). ['Probative evidence' is evidence that serves to prove or disprove a fact.]
 21. The petitioner has a burden to present more than just 'de minimis' evidence in its effort to prove its position. See *Hoogenboom-Nofzinger v. State Bd. of Tax Comm'rs*, 715 N.E. 2d 1018 (Ind. Tax 1999). ['De minimis' means only a minimal amount.]
 22. The petitioner must sufficiently explain the connection between the evidence and petitioner's assertions in order for it to be considered material to the facts. 'Conclusory statements' are of no value to the State in its evaluation of the evidence. See *Heart City Chrysler v. State Bd. of Tax Comm'rs*, 714 N.E. 2d 329 (Ind. Tax 1999). ['Conclusory statements' are statements, allegations, or assertions that are unsupported by any detailed factual evidence.]
 23. Essentially, the petitioner must do two things: (1) prove that the assessment is incorrect; and (2) prove that the specific assessment he seeks, is correct. In addition to demonstrating that the assessment is invalid, the petitioner also bears the burden of presenting sufficient probative evidence to show what assessment is correct. See *State Bd. of Tax Comm'rs v. Indianapolis Racquet Club, Inc.*, 743 N.E.2d 247, 253 (Ind., 2001), and *Blackbird Farms Apartments, LP v. DLGF* 765 N.E.2d 711 (Ind. Tax, 2002).
 24. The State will not change the determination of the County Property Tax Assessment Board of Appeals unless the petitioner has established a 'prima facie case' and, by a 'preponderance of the evidence' proven, both the alleged error(s) in the assessment, and specifically what assessment is correct. See *Clark v. State Bd. of Tax Comm'rs*, 694 N.E. 2d 1230 (Ind. Tax 1998), and *North Park Cinemas, Inc. v. State Bd. of Tax Comm'rs*, 689

N.E. 2d 765 (Ind. Tax 1997). [A ‘prima facie case’ is established when the petitioner has presented enough probative and material (i.e. relevant) evidence for the State (as the fact-finder) to conclude that the petitioner’s position is correct. The petitioner has proven his position by a ‘preponderance of the evidence’ when the petitioner’s evidence is sufficiently persuasive to convince the State that it outweighs all evidence, and matters officially noticed in the proceeding, that is contrary to the petitioner’s position.]

Discussion of Issue

ISSUE: *Whether the grade for the subject structure is overstated*

25. The Petitioner contends that the correct grade for the subject structure is “B” (120%).
25. The Respondent contends the correct grade of the subject structure is “B+2” (140%).
26. The applicable rules governing this Issue 1 are:

50 IAC 2.2-1-30

“Grade” means the classification of an improvement based on certain construction specifications and quality of materials and workmanship.

50 IAC 2.2-10-3(a)

Grade is used in the cost approach to account for variations from the norm or “C” grade. The quality and design of a building are the most significant variables in establishing grade.

50 IAC 2.2-11-1

[This section contains general commercial models for office structures.]

50 IAC 2.2-10-3(b) and (c)

The pricing schedules contained in 50 IAC 2.2-11-6 reflect the “C” grade standards of quality and design unless otherwise stated. The following schedule illustrates the multiplier applied to each listed grade classification:

- (1) "A" grade indicates a multiplier of one hundred sixty percent (160%).
- (2) "B" grade indicates a multiplier of one hundred twenty percent (120%).
- (3) "C" grade indicates a multiplier of one hundred percent (100%).
- (4) "D" grade indicates a multiplier of eighty percent (80%).
- (5) "E" grade indicates a multiplier of forty percent (40%).

50 IAC 2.2-10-3(c)

Because structures sometimes fall between major grade classifications, or at intermediate grade levels a method of interpolation is built into the system. Intermediate grade levels are indicated by suffixing the letter symbol "A" through "E" of the major classification with one (1) of the following:

[Subdivisions 1-4 describe intermediate grades ranging from A+10 through E-4.]

27. Evidence and testimony considered particularly relevant to this determination include the following:
- a. The highest grade on any store owned and operated by May Company in Indiana is the subject store at 140%. All of the other stores in Indiana are graded at 120%. *Reed Testimony.*
 - b. All of the stores have the same layout, color type, designs, fixtures, lighting patterns, ceilings, heating, air conditioning, and floor types. The company buys everything in bulk and uses it throughout all of their stores to cut down on costs. *Reed Testimony.*
 - c. Property record cards show that all over Indiana the May Company stores are listed at the "B" grade (120%). The comparables of all of the malls in Indiana where the May Company stores are located show that all of the other major department stores are either at the "B" grade (120%) or lower. *Reed Testimony. Petitioner's Exhibit 1.*
 - d. Photographs of all of the stores owned by the May Company in Indiana show that the same materials, design, and quality are used in every store and it

would be difficult to distinguish between the stores. *Reed Testimony*.

Petitioner's Exhibit 2.

- e. The subject property was designed and constructed in-house as a Famous Barr. LS Ayres stores (many of the comparables) were built prior to the take-over by the May Company. *Reed Testimony*.
- f. No construction costs were provided as evidence. *Reed Testimony Gries Testimony*.
- g. *Deer Creek Limited v. State Board of Tax Commissioners* should be a tax court case considered. This case sets the guidelines for submitting evidence in a case. *Barter Testimony*.
- h. Each township assesses the properties in accordance with their own townships. The township assessors compare the properties within their townships and grade accordingly. No taxpayer is guaranteed a perfect assessment. *Barter Testimony*.
- i. The Petitioner has not *specifically* stated the differences between the subject store and all of the other May Company stores. The exterior features were not elaborated on. It is the job of the Petitioner to show where the differences are between the buildings. *Gries Testimony*.
- j. There is no dispute to the similarities provided by the Petitioner, but the county looks at the subject store as an entity within Knight Township and there is no disparity in the township when it comes to grade. The subject property is the best department store in Knight Township and is at the high end of the B grade. *Barter Testimony*.

Analysis

- 28. The Petitioner contends that the “B+2” (140%) grade applied by the local officials is overstated compared to other May Company department stores located in Indiana. The Petitioner contends the Famous-Barr department store located in Eastland Mall should have a “B” (120%) quality design factor applied. The property record card shows the local officials applied a grade of “B+2” (140%).

29. The May Company identified properties that are similarly situated to the contested property. Petitioner's Exhibits 1 and 2, along with testimony of Mr. Reed establish the similarity of other May Company stores in Indiana that have the grade of "B" (120%) applied to their assessment.
30. Petitioner's Exhibit 1 identifies twelve (12) May Company stores in Indiana that have a grade of "B" (120%) applied to their assessment. The exhibit also identifies stores of competitors and their respective grade factors. The only store in the exhibit with a grade factor exceeding "B" (120%) is the contested Famous-Barr store in Evansville.
31. The May Company offered the testimony of Mr. Reed regarding the "signature" interior finishes of May Company stores. In support of their testimony the photographs submitted in Petitioner's Exhibit 2 show the similarities between the Eastland Mall Famous-Barr store in Evansville and the other May Company stores in Indiana. The interior photographs specifically show similar lighting, ceiling, and floor finish. The exterior photographs show similar design and construction materials, but the Petitioner does not point to any specific differences or details of the exteriors of the buildings.
32. The property record cards (Petitioner's Exhibit 1) confirm the ages of the structures and the fact that the only structure with a grade higher than "B" (120%) is the Evansville Famous-Barr store. In addition, a photograph of an LS Ayres department store is illustrated in the manual as a "B" grade department store to guide the assessor in establishing grade.
33. The State will not change the determination of the Board of Review unless the petitioner has established a 'prima facie case' and, by a 'preponderance of the evidence' prove, both the alleged error in the assessment, and specifically what assessment is correct. See *Clark v. State Board of Tax Commissioners*, 689 N.E. 2d 765 (Ind. Tax 1997).
34. The Petitioner has identified similarly situated properties and has established disparate treatment. *Town of St. John V*, 702 N.E. 2d at 1040. The burden now shifts to the

County Board to present evidence to contradict the Petitioner's evidence and justify its decision with substantial evidence.

35. In support of the determination that a "B+2" (140%) grade is appropriate for the Famous-Barr store the County Board presented the testimony of Rick Barter, Vanderburgh County Hearing Officer and Joe Gries, Deputy Knight Township Assessor. The County also submitted various exhibits of evidence from the first hearing on this case in March of 1999.
36. The Township raised the question of construction costs for the subject property. The Petitioner's witness testified he did not have that information. Cost information may be used as a tool for quantifying grade but it is not the only analysis that is acceptable. The Petitioner chose to identify properties that are similarly situated to the contested property and used these comparables to establish disparate treatment between the contested property and other similarly situated properties.
37. The County and Township's evidence and testimony was based on grading within Knight Township itself. The evidence provided was not specifically addressed. The County provides property record cards of other Knight Township department stores but does not show the relationship as to where the differences appear. The County does not explain why the Famous-Barr store is of superior workmanship and why the "B+2" grade is applied. Relevancy of the documents to this appeal cannot be established without some testimony about the proffered evidence.
38. The County Board presented testimony and documents but their evidence failed to disprove the set of facts established by the Petitioner. For all the reasons set forth above, the County Board has failed to rebut the Petitioner's case with substantive evidence. Accordingly, a change is made to the assessment as a result of this appeal. The subject Famous-Barr department store's grade will be changed from "B+2" (140%) to "B" (120%).

Summary of Final Determination

Determination of ISSUE: Whether the grade for the subject property is overstated..

39. The Petitioner did prevail by a preponderance of the evidence on the Issue. There is a change in the assessment with regard to this issue. The grade is changed from “B+2” (140%) to “B” (120%).

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

Chairman, Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice.