

REPRESENTATIVES FOR PETITIONER: Duane Zishka, Uzelac and Associates; Frank Mingione, President FAS Plastic Enterprises, Inc.

REPRESENTATIVES FOR RESPONDENT: Gail Sims, Jefferson County Assessor; Will Sims, Hanover Township Trustee; Frank Cummings, Consultant to Hanover Township Assessor

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

In the matter of:

FAS PLASTIC ENTERPRISES, INC.,)	
)	
Petitioner)	
)	
v.)	Petition No.: 39-009-01-1-3-00002 ¹
)	County : Jefferson
)	Township: Hanover
JEFFERSON COUNTY)	Parcel No.: 0090011904
PROPERTY TAX ASSESSMENT)	Assessment Year : 2000
BOARD OF APPEALS And)	
HANOVER TOWNSHIP,)	
)	
Respondents)	
)	

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

August 12, 2002

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

¹ The Petitioner did not receive a Form 11 when the assessment was changed in the year 2000. The Petitioner filed the Form 130 from the Spring 2001 tax bill sent on April 3, 2001 The Petitioner filed the Form 131 on May 18, 2001, which was within the forty-five (45) day deadline established by Ind. Code § 6-1.1-15-1. The assessment year under appeal is 2000.

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

Procedural History

1. Pursuant to Ind. Code § 6-1.1-15-3 Duane Zishka of Uzelac and Associates, filed a Form 131 on behalf of FAS Plastic Enterprises, Inc. (the Petitioner), petitioning the Board to conduct an administrative review of the above petition. The Form 131 was filed on December 10, 2001. The determination of the PTABOA was issued on November 8, 2001.

Hearing Facts and Other Matters of Record

2. Pursuant to Ind. Code § 6-1.1-15-4 a hearing was held on June 4, 2002 in Madison, Indiana before Jennifer Bippus, the duly designated Administrative Law Judge authorized by the Board under Ind. Code § 6-1.5-5-2.

3. The following persons were present at the hearing:

For the Petitioner:

Mr. Duane Zishka, Uzelac and Associates

Mr. Frank Mingione, President, FAS Plastics Enterprises, Inc.

For the Respondent:

Mrs. E. Gail Sims, Jefferson County Assessor

Mr. Will R. Sims, Hanover Township Trustee

Mr. Frank Cummings, Hanover Township Trustee Consultant

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

For the Petitioner:

Mr. Duane Zishka, Uzelac and Associates

Mr. Frank Mingione, President FAS Plastics Enterprises, Inc.

For the Respondent:

Mrs. E. Gail Sims, Jefferson County Assessor

Mr. Will R. Sims, Hanover Township Trustee

Mr. Frank Cummings, Hanover Township Trustee Consultant

5. The following exhibits were presented:

For the Petitioner:

Petitioner's Exhibit A – Copy of the supporting documentation, with photographs for Issue #1.

Petitioner's Exhibit B – Copy of 50 IAC 2.2-10-6.1 (Pricing).

Petitioner's Exhibit C – Copy of the supporting documentation, with photographs for Issue #2.

Petitioner's Exhibit D – Calculations for trending the construction cost for building #6.

Petitioner's Exhibit E – Invoice for the cost of building #6.

Petitioner's Exhibit F – Copy of the comparative cost multipliers from Marshall & Swift.

Petitioner's Exhibit G – Comparison of costs for reinforced concrete block and wood frame.

Petitioner's Exhibit H – Copy of 50 IAC 2.2-11-2 (General Commercial Industrial Models).

Petitioner's Exhibit I – Invoice for the cost of building #3.

Petitioner's Exhibit J – Copy of the property record card from 1995 through 1999 showing the buildings graded "D".

Petitioner's Exhibit K – Copy of the property record card from 2000 with the grades of the buildings changed to "C" grade.

Petitioner's Exhibit L – Additional evidence provided with the invoices for the various subject buildings.

For the Respondent:

Respondent's Exhibit A – Documentation provided by Frank Cummings supporting the Township's assessment of the subject property.

Respondent's Exhibit B – Copy of 50 IAC 2.2-11-2 (General Commercial Industrial Models).

Respondent's Exhibit C – Copy of the property record card for the subject property.

6. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits:
 - [A] Copy of the Form 131.
 - [B] Notice of Hearing dated 5/1/02.
 - [C] Witness and exhibit list submitted by the Petitioner on 2/27/02.
 - [D] Exhibit list submitted by Gail Sims, Jefferson County Assessor on 4/2/02.
 - [E] Witness and exhibit list submitted by Will Sims, Hanover Township Trustee/Assessor on 3/26/02.
 - [F] Witness and exhibit list submitted by Will Sims, Hanover Township Trustee/Assessor on 4/4/02.
 - [G] Witness and exhibit list submitted by Will Sims, Hanover Township Trustee/Assessor on 5/21/02.
 - [H] Disclosure Statement submitted by Mr. Zishka.
 - [I] Stipulation Agreement for Issue #1.
 - [J] Request for Additional Evidence.

7. Mr. Zishka testified that he is a certified Level I and Level II assessor/appraiser in the State of Indiana and is being paid on a contingency basis.

8. During the administrative hearing on June 4, 2001, the parties signed a stipulation agreement. This agreement indicated that the second floor of the office building

(building #4) should be valued as a mezzanine office, not a second story office. The parties agreed that the finished divided mezzanine office pricing of \$22.50 would be appropriate, making a net change in the value of \$2,200. (*Board Exhibit I. Respondent's Exhibit A*).

9. The additional evidence requested from the Petitioner was submitted in a timely manner on June 10, 2002 (June 9, 2002 was on a Sunday) and labeled Petitioner's Exhibit L. The evidence was submitted to all of the parties involved in the hearing.
10. The issues presented for consideration by the Board were:
 - ISSUE 1 – *Whether the upper level of the office building should be valued as office mezzanine or second floor office.*
 - ISSUE 2 – *Whether the grade of the subject structures #1,3,&6 is correct.*

Jurisdictional Framework

11. 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.
12. The Board is authorized to issue this final determination pursuant to Indiana Code § 6-1.1-15-3.

Indiana's Property Tax System

13. The Indiana Constitution requires Indiana to create a uniform, equal, and just system of assessment. See Ind. Const. Article 10, §1.
14. 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.

15. True Tax Value does not precisely equate to fair market value. See Ind. Code § 6-1.1-31-6(c).
16. 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.
17. 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.
18. 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.
19. 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

20. 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).
21. 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.]

22. 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.]
23. 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.]
24. 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).
25. 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.]

Witness Compensation

26. The State's position is that it has the right to make general inquiry regarding, and to consider, the method by which a witness is compensated. Information about the witness' fee can be relevant and necessary in order to evaluate the potential partiality of the witness. A contingent fee arrangement may be considered to inherently affect the objectivity of a witness. The State believes it appropriate to consider the potential of such an arrangement to improperly motivate the witness and adversely affect the reliability of the testimony. It is for these reasons that the State will consider the method of witness compensation in the process of determining the credibility and weight to be given to testimony of a witness whose fee is contingent on the outcome of the issues that he or she is testifying about. This position is supported by the discussion in the case of *Wirth v. State Board of Tax Commissioners*, 613 N.E. 2d 874, 876-77 (Ind. Tax 1993).

Discussion of Issues

ISSUE 1: Whether the upper floor of the office building should be valued as office mezzanine or second floor office.

27. This issue was resolved by the parties in accordance with the terms of the stipulation agreement referred to in Finding #8 above. The Board accepts the parties' stipulation. However, having not considered the issue, this determination should not be construed as endorsing the terms or propriety of the agreement, either explicitly or implicitly.

ISSUE 2 – Whether the grade of subject structures 1, 3 & 6 is correct.

28. The Petitioner contends that the correct grade for the subject structures #1, #3, # 6 is "D".

29. The Respondent contends the correct grade of the subject structures #1, #3, and #6 is “C”.
30. The applicable rule(s) governing this issue 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.]

31. Evidence and testimony considered particularly relevant to this determination include the following:
 - A. The grade history of the subject structures shows that the buildings have been graded “D” since the 1995 reassessment, and were not changed to “C” until the March 1, 2000 assessment. (Petitioner’s Exhibit J. Zishka Testimony).
 - B. The Petitioner calculated the construction cost of building #6, trending it using Marshall & Swift to the 1991 cost per the Indiana Real Property Assessment Manual. (Petitioner’s Exhibit D. Zishka Testimony).
 - C. Both the Petitioner and the Respondent provided calculations using the comparison of costs for the model and the actual construction of the structure trying to justify the grade in this manner. (Petitioner’s Exhibit G. Respondent’s Exhibit A. Zishka and Cummings Testimony).
 - D. The Petitioner provided invoices for all of the subject structures (Buildings #1, #3, #6) signed by the builder. (Petitioner’s Exhibit L).

Analysis of Issue 2

32. The Petitioner stated that structures #1, #3, and #6 should be “D” grade. The Petitioner based this opinion on the calculations provided for building #6 (Petitioner’s Exhibit D), however, the calculation is based on an invoice with no cost breakdowns for the whole of the building. Therefore, the invoices that were provided were inconclusive.
33. The square footages on the invoices signed by the builder do not match the square footages on the property record card. Further, the invoices do not breakdown the complete cost of the buildings, including the interior components. The evidence provided is vague and incomplete. The Petitioner has a burden to present more than just ‘de minimus’ 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).

34. The Petitioner also calculated the value of the buildings comparing the model from the Indiana Real Property Manual unit-in-cost tables with the actual components of the subject structures. The comparison of costs of the model to the subject property requires an adjustment to the pricing ladder, not a grade adjustment. Furthermore, the comparison is flawed. The costs used for the cement block wall are for 12-inch cement block but the model does not specify the size of block. The model specifications and cost tables are for a “C” grade, fire-resistant structure; wood-framed structure will receive a negative adjustment. The evidence demonstrates that the local officials have already adjusted the pricing ladder to reflect the wood frame. Therefore, the evidence presented by Petitioner is not pertinent to the grade issue.
35. 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’ prove, both the alleged error in the assessment, and specifically what assessment is correct. See *Clark v. State Bd. of Tax Comm’rs*, 689 N.E. 2d 765 (Ind. Tax 1997).
36. In this case, the Petitioner did not, by a preponderance of the evidence, meet its burden to prove that the current assessment is incorrect or that the proposed grade of “D” is correct. Accordingly, there is no change in the assessment as a result of this appeal.

Additional Issues

37. The Respondent brought up additional issues not listed by the Petitioner on the Form 131 such as lack of interior wall finish on Building #1, a partition adjustment for Building #3, and a partition adjustment for Building #2. These issues will not be addressed as part of this petition.

Summary of Final Determination

Determination of ISSUE 1: *Whether the upper floor of the office building should be valued as office mezzanine or second floor office.*

38. A stipulation agreement was reached on Issue 1. The Board accepts the stipulation and changes are to be made in accordance with the terms of the stipulation.

Determination of ISSUE 2: *Whether the grade of structures 1,3, & 6 is correct.*

39. The Petitioner did not prevail by a preponderance of the evidence on Issue 2. There is no change in the assessment with regard to this issue.

Determination of the ADDITIONAL ISSUES

40. The additional issues raised by the Respondent were not listed by the Petitioner on the Form 131. The Petitioner was not aware of these issues. Therefore, the issues will not be addressed during this appeal hearing.

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.