

REPRESENTATIVE FOR PETITIONER:

C. Rex Henthorn, Henthorn Harris & Weliever

REPRESENTATIVE FOR RESPONDENT:

Neda K. Duff, Carroll County Assessor

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Mary K. Fisher	)	Petition No.:	08-011-10-1-4-00001
)		
Petitioner,	)	Parcel No.:	08-04-27-000-094.000-011
)		
v.	)	County:	Carroll
)		
Carroll County Assessor,	)	Township:	Jefferson
)		
Respondent.	)	Assessment Year:	2010
)		

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

October 22, 2012

FINAL DETERMINATION

The Indiana Board of Tax Review (“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

Introduction

1. The subject parcel's assessment increased by more than 5% between 2009 and 2010. The Assessor therefore bore the burden of proving that the parcel's March 1, 2010 assessment was correct. Because the Assessor failed to meet her burden, the taxpayer, Mary K. Fisher, is entitled to have the parcel's assessment reduced to its 2009 level.

Procedural History

2. Ms. Fisher filed a Form 130 petition with the Carroll County Assessor contesting the subject parcel's March 1, 2010 assessment. On May 20, 2011, the Carroll County Property Tax Assessment Board of Appeals ("PTABOA") issued its determination lowering the parcel's assessment, although not to the amount that Ms. Fisher had requested. Ms. Fisher then timely filed a Form 131 petition with the Board. The Board has jurisdiction over Ms. Fisher's appeal under Indiana Code §§ 6-1.1-15 and 6-1.5-4-1.
3. On May 10, 2012, the Board's administrative law judge, Patti Kindler ("ALJ"), held a hearing on Ms. Fisher's petition. Neither the Board nor the ALJ inspected the subject parcel.

Hearing Facts and Other Matters of Record

4. The following people were sworn in and testified:

For the Petitioner: Mary K. Fisher
C. Rex Henthorn, counsel for Ms. Fisher¹
Bill Hinshaw, conservation officer, Department of Natural Resources

¹ The Board has several times noted that it disfavors attorneys acting as both a witness and advocate at the Board's hearings. Nonetheless, the Assessor neither objected to Mr. Henthorn's testimony nor moved to disqualify him, and the Board ultimately does not rely on Mr. Henthorn's testimony in reaching its decision.

Lewie J. Wallace, Commodore, Lafayette Sailing Club

For the Assessor: Neda K. Duff, Carroll County Assessor
Brian Thomas, Ad Valorem Solutions

5. The Assessor submitted the following exhibits:

- Respondent Exhibit A: Copies of two aerial photographs of the subject property
- Respondent Exhibit B: Two Carroll County Commercial and Industrial Neighborhood Valuation Forms and property record cards (“PRCs”) for the subject parcel
- Respondent Exhibit C: Appraisal prepared by Kyle Cross of Cross Appraisals
- Respondent Exhibit D: May 10, 2012 e-mail from Kris Moore to Carroll County Assessor and MLS sheets for seven properties
- Respondent Exhibit E: May 29, 2012 letter from the Assessor in response to the Petitioner’s brief

6. Ms. Fisher submitted the following exhibits:

- Petitioner Exhibit 1: Warranty Deed
- Petitioner Exhibit 2: Claireview Addition plat map
- Petitioner Exhibit 3: Copies of two photographs of the subject parcel
- Petitioner Exhibit 4: Sketch of the subject parcel showing the harbor area
- Petitioner Exhibit 5: Copy of photograph showing a NIPSCO employee launching a boat on the subject parcel
- Petitioner Exhibit 6: Copies of three photographs showing the DNR’s boat, boatlift, and cover located on the subject parcel
- Petitioner Exhibit 7: Copies of four photographs of the Sandy Beach parcel
- Petitioner Exhibit 8: Copies of five photographs of the Cedar Crest parcel
- Petitioner Exhibit 9: December 21, 2010, Harbor Agreement between Ms. Fisher and the Lafayette Sailing Club
- Petitioner Exhibit 10: PRCs for Sandy Beach, LLC
- Petitioner Exhibit 11: PRCs for adjoining parcels owned by Amsler, Gooding, Schultz, and Crawford
- Petitioner Exhibit 12: Zoning Ordinance for Carroll County dated February 2, 1971
- Petitioner Exhibit 13: PRC for the City of Delphi - Riley Park
- Petitioner Exhibit 14: PRC for Cedar Crest Investments, LLC
- Petitioner Exhibit 15: Two pages of information for Bluewater Beach Park and eight pages of information from beacontm
- Petitioner Exhibit 16: Petitioner’s brief²

² Although Mr. Henthorn referred to Petitioner’s Exhibit 16 as a “post hearing brief,” he presented it before the end of the Board’s hearing.

7. The Board recognizes the following additional items as part of the record of proceedings:
 - Board Exhibit A: Form 131 petition
 - Board Exhibit B: Hearing notice
 - Board Exhibit C: Hearing sign-in sheet
 - Board Exhibit D: Notice of Appearance for C. Rex Henthorn
 - Board Exhibit E: Request for Additional Evidence from the Assessor
8. The subject parcel, located at 11810 West 820 North in Monticello and known as Fisher Harbor, is 2.41 acres with frontage on Lake Freeman. The parcel contains a boat ramp and a shed.
9. The PTABOA determined the following March 1, 2010 assessment for the property:
Land: \$247,000 Improvements: \$1,000 Total: \$248,000
10. At the hearing, Ms. Fisher requested that the parcel's assessment be returned to its March 1, 2009 level of \$58,300.

Objections

11. Ms. Fisher made hearsay objections to Respondent's Exhibits C and D and to portions of the Assessor's testimony where she read from Respondent's Exhibit D. Respondent's Exhibit C is an appraisal report prepared by Kyle Cross for Ms. Fisher. Ms. Fisher offered that appraisal report at the PTABOA hearing. Respondent's Exhibit D is an e-mail from Kris Moore, an appraiser, to the Assessor with multiple listing service ("MLS") data attached.
12. The Indiana Rules of Evidence define hearsay as "a statement, other than one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evid. R. 801. The Indiana Rules of Evidence make hearsay inadmissible "except as provided by law or these rules." Ind. Evid. R. 802. That differs from the Board's procedural rules, which allow, but do not require, the Board to admit hearsay:

Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801) may be admitted. If not objected to, the 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 Board's final determination cannot be based solely upon the hearsay evidence.

52 IAC 2-7-3 (2004) (emphasis added).

13. The exhibits and testimony to which the Assessor objected are out-of-court statements offered by the Assessor to prove the truth of the matters asserted therein. Thus, they fit squarely within the definition of hearsay. Nonetheless, the Board frequently deals with evidence similar to Ms. Moore's e-mail and Mr. Cross's appraisal report. Indeed, the Board has decided many cases based on certified appraisal reports like Mr. Cross's, albeit where there have been no objections to their admissibility. The Board therefore overrules Ms. Fisher's objections and admits Petitioner's Exhibits C and D, but notes that its determination cannot be based solely on those exhibits or on the Assessor's testimony in which she read from one of those exhibits.
14. As to that last point, the Board recognizes that Ms. Fisher offered Mr. Cross's appraisal report at the PTABOA hearing. But the Board's proceedings are *de novo*. Thus, the Board will only base its decisions on evidence offered in its own proceedings. Because Ms. Fisher objected to the appraisal report and e-mail at the Board's hearing, the Board must abide by the limitations in its procedural rules on how it may treat that evidence.

Parties' Contentions

A. Summary of the Assessor's Evidence and Contentions

15. The subject parcel's assessment increased by more than 5% between 2009 and 2010. The increase was due to the fact that the land previously had been assessed in neighborhood #10460 as off-water when it properly should have been assessed as waterfront in neighborhood #10461, the neighborhood used for commercial and industrial properties

that have water frontage on Lake Freeman. *Thomas testimony; Resp't Ex. B.* Even though the assessment increased by more than 5%, the burden-shifting statute (Ind. Code § 6-1.1-15-17.2) was not in effect at the time Ms. Fisher filed her appeal. That statute therefore should not apply to Ms. Fisher's appeal. *Duff argument.*

16. At the PTABOA hearing, Ms. Fisher offered an appraisal report prepared by Kyle Cross, an Indiana Trainee Appraiser. The appraisal was also signed by Jack Cross as a supervisory appraiser. The PTABOA found that Mr. Cross's appraisal was convincing enough to lower the subject parcel's March 1, 2010 assessment from \$315,900 to \$248,000. The Assessor therefore pointed to that appraisal to support the PTABOA's assessment. *Thomas testimony; Resp't Ex. C.*

17. The Assessor also offered an e-mail from Kris Moore, an appraiser with Cardinal Appraisal Services, in which Ms. Moore pointed to additional sales data to support Mr. Cross's appraisal. *Resp't Ex. D; Duff testimony.* In particular, Ms. Moore pointed to the following three sales:
 - 1200 West. This is an 83' x 120' lot that sold for \$118,000 on May 2, 2011. Ms. Moore described the sale as "pretty good," but indicated that it should represent the "low end." Using Cross's size adjustments, the sale would indicate a value of \$300,000 for the subject parcel.
 - 4793 Pierces Lakewood. This approximately one-acre parcel sold for \$152,500 on May 22, 2009. It has 175' of frontage and consists of two lots. Just doubling the sale price to reflect the subject parcel's two acres would put it at \$300,000.
 - 0 S. Tioga Road. This is a four-acre parcel that sold for \$675,000 in 2005. Ms. Moore described it as the best sale. If one looks at the sale price on a linear-foot basis, it supports a value of more than \$300,000 for the subject parcel.

Resp't Ex. D. Ms. Moore also indicated that the Assessor "should be viewed as generous" for using Mr. Cross's appraisal as a benchmark for the subject parcel's assessment. *Id.*

18. Although Ms. Fisher claims the subject parcel should be priced as a park using a residential land order, parks are generally priced in commercial neighborhoods. The

difference is that, regardless of their assessments, public parks are exempt from taxation. *Thomas testimony*. Also, while part of the subject parcel was flooded, that was done intentionally to make a boat launch. *Duff testimony; Resp't Ex. A*.

19. Ms. Fisher offered information from the beacontm website to show the assessment for Bluewater Beach in White County. But that information has “sample” stamped across it and a disclaimer at the bottom. Mr. Thomas is familiar with beacon, and he does not believe that White County is a client of Schneider/Beacon. Mr. Thomas therefore believes that the information is merely a sample product and is therefore unreliable. In any case, the information is from 2008 and does not show land values. *Thomas testimony*. Ms. Fisher also pointed to the assessment for a parcel owned by Cedar Crest Investments. But that land received a developer’s discount and therefore is not comparable to the subject parcel. *Duff testimony*.
20. The Assessor requested that the subject property be assessed at no less than \$280,000—the amount estimated in Mr. Cross’s appraisal. *Duff testimony*.

B. Summary of Ms. Fisher’s Evidence and Contentions

21. Because the subject parcel’s assessment increased by more than 300% between the 2009 and 2010 assessment years, the Assessor had the burden of proving that the parcel’s March 1, 2010 assessment was correct. The Assessor relied on the mistaken assumption that the parcel somehow changed to a commercial use and on inadmissible hearsay. The Assessor therefore failed to meet her burden and the parcel’s assessment should be changed back to its March 1, 2009 level. In any case, the subject parcel is restricted by an access easement and Ms. Fisher uses it like a park. If one looks to assessments of properties put to similar uses, the subject parcel’s value closely approximates what it was assessed for before the increase. *Henthorn argument*.
22. Glen David Fisher and his first wife bought the subject parcel in 1976. *Pet’r Ex. 1*. Mr. Fisher married Mary K Fisher after his first wife died, and they owned the subject parcel

until 2010, when Mr. Fisher passed away and Ms. Fisher became the sole owner. *Fisher testimony*.

23. The deed that originally conveyed the property to Mr. Fisher made the conveyance subject to a non-exclusive easement for the benefit of the owners of Lots 15 through 34 and Lots 36 through 41 in Claireview Subdivision. The easement gives access to Lake Freeman by “pedestrians and by autos and/or trailers with Boats.” *Pet’r ex. 1*. While the easement contributes to the value of the benefitted lots, it detracts from the subject parcel’s value and severely affects its marketability. Because of the easement, Ms. Fisher cannot sell the parcel without risking a lawsuit in the process. *Henthorn argument*.
24. Ms. Fisher and the Lafayette Sailing Club (“Club”) have entered into a Harbor Agreement. The late Mr. Fisher was one of the Club’s organizers and made the subject parcel available for the Club’s use. The most recent Harbor Agreement was signed in December 2010, but the terms have been the same since 1979. The agreement allows the Club to use the parcel for its activities and permits members to keep sailboats on site. It also requires the Club to maintain the property and pay its real estate taxes. Other than those two items, Ms. Fisher receives no funds from the Club. In 2011, the Club paid \$2,100 in real estate taxes and had \$2,000 in mowing expenses. *Fisher & Wallace testimony; Pet’r Ex. 9*.
25. Ms. Fisher also allows the Department of Natural Resources (“DNR”) to store a boat and use the parcel’s boat ramp. The DNR has a boatlift and cover located on the parcel. The DNR even installed electricity. The DNR has used the parcel both as a base of operation in emergencies and for practice. *Fisher testimony; Hinshaw testimony; Pet’r Ex. 6*. Similarly, Northern Indiana Public Service Company (“NIPSCO”) uses the boat ramp to launch its equipment so that it can perform maintenance on a dam. And Ms. Fisher allows the sponsors and volunteers of Lake Freeman’s Fourth of July fireworks display to use the property as the official launch area for their boats. Ms. Fisher receives no

compensation from DNR, NIPSCO, or the fireworks committee. *Fisher testimony; Pet'r Exs. 5, 9.*

26. Thus, the subject parcel has not been used for commercial purposes since Mr. Fisher bought it. It is zoned as "L1" under Carroll County's zoning ordinance. That classification allows public parks, playgrounds, and recreational areas. Businesses such as commercial boat docks, boat service areas, marine equipment stores, boat storage yards, and bait and tackle shops are not permitted without first getting a special exception. *Pet'r Exs. 12, 16.*

27. Indeed, because of the easements, the subject parcel's highest and best use would be as a park. And the parcel is assessed far higher than other parks in the area. In 2011, Riley Park in Delphi, which has 17.594 acres, was assessed at \$111,600, or about \$6,200 per acre. *Pet'r Ex. 13.* Similarly, Sandy Beach has a clear beach area and is used for commercial purposes, yet it is assessed at only \$22,000 to \$22,500 per acre. *Henthorn testimony; Pet'r Exs. 7, 10.* And Bluewater Beach is a 3.63-acre park with a boat ramp. It is adjacent to Lake Freeman and is used in the same fashion as the subject parcel. *Henthorn testimony.* Ms. Fisher offered documents from beacon's website showing tax information from 2008 pay 2009 and earlier, and assessment information from 2008, for several parcels that Ms. Fisher claims make up Bluewater Beach. According to Ms. Fisher, those documents show that Bluewater Beach's assessment was close to what the subject parcel had been assessed for in 2009 before the increase. *Pet'r Ex. 15; Henthorn argument.*

28. Other properties' assessments also support lowering the subject parcel's assessment to its 2009 level. A 17.44-acre parcel across the lake from the subject parcel owned by Cedar Crest Investments, LLC has water frontage, yet it is assessed for only \$55,200. Although the Assessor claimed that Cedar Crest parcel was assessed as vacant agricultural land, photographs of that parcel do not show any crops. *Henthorn testimony; Pet'r Exs. 8, 14.* Similarly, when viewed together, four adjacent parcels owned by Amsler, Gooding,

Shultz, and Crawford are close to the same size as the subject parcel. Unlike the subject parcel, however, those four adjacent parcels are unburdened by easements, are buildable lots, and have wells and sewers. Yet, those parcels are assessed for a total of \$246,200, which is slightly less than the subject parcel's assessment. *Henthorn testimony; Pet'r Exs. 2, 11.*

29. Ms. Fisher's counsel and witness, C. Rex Henthorn, also noted that the subject property is unique. According to Mr. Henthorn, the legislature has determined that other unique properties, such as golf courses, must be assessed using the income approach to value. If one takes the subject parcel's limited income and applies a capitalization rate of 8%, which Mr. Henthorn testified was at the high end of rates customarily used for commercial property, the result is close to the subject parcel's original assessment of \$58,300. The Assessor, however, failed to consider the income approach when valuing the subject parcel. *Henthorn testimony.* Also, a sketch of the subject parcel shows a total of 2.41 acres, approximately .4 acres of which are underwater. The parcel's base price should be adjusted to account for that fact. *Pet'r Ex. 4; Henthorn argument.*

30. Finally, while the Assessor relied on Mr. Cross's appraisal, that appraisal was contingent on the following "extraordinary assumptions":

- A well is possible at no more than typical costs,
- A residential building permit is possible,
- The lot was "buildable," and
- The lot can be hooked up to the TLRSD sewer system.

Resp't Ex. 3 at 3. Those assumptions were invalid. The parcel is not buildable because of the access easement. *Henthorn testimony and argument.*

Discussion

A. Burden of Proof

31. Generally, a taxpayer seeking review of an assessor's determination has the burden of proving that her property's assessment is wrong and what its 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). Effective July 1, 2011, however, the Indiana General Assembly enacted Ind. Code § 6-1.1-15-17, which has since been repealed and re-enacted as Ind. Code § 6-1.1-15-17.2.³ That statute shifts the burden to the assessor in cases where the assessment under appeal has increased by more than 5% over the previous year's assessment:

This section applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal increased the assessed value of the assessed property by more than five percent (5%) over the assessed value determined by the county assessor or township assessor (if any) for the immediately preceding assessment date for the same property. 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 the Indiana Tax Court.

I.C. § 6-1.1-15-17.2.

32. Turning to the case at hand, the parties agree that the subject parcel's assessment increased by more than 5% between March 1, 2009 and March 1, 2010. The Assessor, however, argues that the burden-shifting statute does not apply because Ms. Fisher filed her appeal before the statute's effective date. The Board has now issued several decisions explaining that Ind. Code § 6-1.1-15-17.2 and its predecessor, Ind. Code § 6-1.1-15-17, apply to all appeals that the Board had not yet heard as of July 1, 2011. *See, e.g., Stout v. Orange County Assessor*, pet. no. 59-007-09-1-5-00001 (Ind. Bd. Tax of

³ HEA 1009 §§ 42 and 44 (signed February 22, 2012). This was a technical correction necessitated by the fact that two different provisions had been codified under the same section number.

Rev., Nov. 7, 2011); *Kaehr v. Steuben County Assessor*, pet. no. 76-011-07-1-5-00235 (Ind. Bd. Tax Rev., March 13, 2012). The Assessor therefore has the burden of proof.

B. The Assessor's Case

33. The Assessor did not meet her burden of proving that the subject parcel's land assessment was correct. Indiana assesses real property based on its true tax value, which the 2002 Real Property Assessment 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 (2009)). A party's evidence in a tax appeal must be consistent with that standard. *See id.* For example, a market-value-in-use appraisal prepared according to the Uniform Standards of Professional Appraisal Practice ("USPAP") often will be probative. *Id.*; *Kooshtard Property VI, LLC v. White River Twp. Assessor*, 836 N.E.2d 501, 506 n. 6 (Ind. Tax Ct. 2005). A party 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.
34. To support the subject parcel's assessment, the Assessor relied primarily on (1) Kyle Cross's appraisal, and (2) Kris Moore's e-mail and accompanying MLS data. As explained above, however, those exhibits were both hearsay to which Ms. Fisher objected. And the Assessor did not claim that the exhibits fell within any recognized exception to the hearsay rule. The Board is therefore precluded from basing its determination solely on those exhibits.
35. The Assessor, however, offered scant other evidence to show the subject property's true tax value. At best, Brian Thomas testified that the subject parcel's assessment increased because it had previously been assigned to the wrong assessment neighborhood and has now been moved to an appropriate one. But that amounts to little more than a claim that the Assessor properly applied assessment regulations. And both the Indiana Tax Court

and the Board have repeatedly rejected similar attempts by taxpayers to prove a property's market value-in-use by strictly applying assessment regulations. *See e.g., Eckerling v. Wayne Twp. Assessor*, 841 N.E.2d 674, 678 (Ind. Tax Ct. 2006). The Assessor instead needed to show through the types of market-based evidence described in the Manual that the subject parcel's assessment actually reflected its market value-in-use. *See id.* (pointing to the Manual in explaining what types of evidence can be used to demonstrate a property's market value-in-use).

36. Because the Assessor did not offer probative non-hearsay evidence of the subject parcel's market value-in-use, she failed to make a prima facie case that the parcel's assessment was correct. The subject parcel's March 1, 2010 assessment must therefore be reduced to its March 1, 2009 level of \$58,300.

SUMMARY OF FINAL DETERMINATION

37. Because the subject parcel's assessment increased by more than 5% between 2009 and 2010, the Assessor bore the burden of proving that the subject parcel's March 1, 2010 assessment was correct. Her failure to do so means that the parcel's assessment must be reduced to the previous year's assessment level of \$58,300.

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

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

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>>.