REPRESENTATIVE FOR PETITIONER:
C. Rex Henthorn, Henthorn, Harris & Weliever

REPRESENTATIVE FOR RESPONDENT:
Beth Henkel, Beth Henkel, LLC

BEFORE THE
INDIANA BOARD OF TAX REVIEW

Mary K. Fisher	)	Petition Nos.: 08-011-12-1-4-00061
	)	08-011-14-1-4-10155-15
Petitioner,	)	
	)	
	)	Parcel No.: 08-04-27-000-094.000-011
v.	)	
	)	
	)	
Carroll County Assessor,	)	
	)	County: Carroll
	)	
Respondent.	)	Assessment Years: 2012 and 2014

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

November 20, 2015

FINAL DETERMINATION

The Indiana Board of Tax Review ("Board") has 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. Mary K. Fisher appealed her assessments for 2012 and 2014. While the appraiser hired by the Assessor did little to convince us that he adequately accounted for an access easement burdening the property, his opinion was still sufficient to show the property was worth at least the amount for which it was assessed in each year.

PROCEDURAL HISTORY

2. Fisher appealed her 2012 and 2014 assessments to the Carroll County Assessor. On April 11, 2013, the Carroll County Property Tax Assessment Board of Appeals ("PTABOA") issued its determination on the 2012 appeal. Fisher responded by timely filing a Form 131 petition with the Board.

3. The PTABOA failed to hold a hearing on Fisher's 2014 appeal within 180 days from her notice for review. *See* Ind. Code § 6-1.1-15-1(k) (requiring a PTABOA to hold a hearing within 180 days of a taxpayer filing a notice for review). Rather than wait for the PTABOA to eventually hold a hearing and issue a determination, Fisher exercised her statutory right to file a Form 131 petition with the Board. *See* I.C. § 6-1.1-15-1(o)(1).

4. On July 9, 2015, our designated administrative law judge, Ellen Yuhan ("ALJ"), held a hearing on Fisher's petitions. Neither the ALJ nor the Board inspected the property.

5. The following people were sworn as witnesses and testified: Mary K. Fisher, Todd Peckny, Randy Carie, Larry Dill, Dale W. Webster, Kathy Mylet, and Jennifer Becker.

6. Fisher offered the following exhibits:

Petitioner Exhibit 4:	Aerial photograph of the subject property
Petitioner Exhibit 5:	Aerial photograph of the subject property
Petitioner Exhibit 6:	Plat of Claireview Addition
Petitioner Exhibit 7:	Partial map of Jefferson Township

Petitioner Exhibits 8-13	Beacon aerial maps of Lake Freeman, including the areas in which the subject property, Tall Timbers, Yeoman Cemetery, Cedar Crest, and Naville properties are located
Petitioner Exhibits 15-16	Photographs showing boat owned by the Indiana Department of Natural Resources at the subject property,
Petitioner Exhibit 17:	Photograph showing a NIPSCO truck on the property
Petitioner Exhibit 18:	Photographs showing roadway or pathway at the subject property
Petitioner Exhibit 20:	*Fisher v. Carroll County Ass'r*, pet. no. 08-011-10-1-4-00001 (IBTR Oct. 22, 2012)
Petitioner Exhibit 22:	Property record card (PRC) for 08-06-27-000-045.000-011 (Naville)
Petitioner Exhibit 24:	PRC for 08-04-33-000-160.000-011 (Cedar Crest)
Petitioner Exhibit 25:	PRC for 08-04-27-000-133.000-011 (Tall Timbers)
Petitioner Exhibit 26:	PRC for 08-04-27-000-006.000-011 (Yeoman Cemetery)
Petitioner Exhibit 27:	PRC for 08-04-27-000-014.000-011 (Yeoman Cemetery)
Petitioner Exhibit 28:	PRC for 08-04-27-000-013.000-011 (Shafer & Freeman Lakes Environmental Conservation ("SFLEC"))
Petitioner Exhibit 32:	Beacon aerial map for Naville
Petitioner Exhibit 34:	Beacon aerial map Cedar Crest
Petitioner Exhibit 35:	Beacon aerial map for Tall Timbers
Petitioner Exhibit 36:	Beacon aerial map for Yeoman Cemetery
Petitioner Exhibit 37:	Sales disclosure form for 08-04-15-000-576.000-011 (Muir property)
Petitioner Exhibit 38:	Photograph of Muir property before improvements
Petitioner Exhibit 39:	Photograph of Muir seawall
Petitioner Exhibit 40:	Photograph of Muir docks
Petitioner Exhibit 41:	Photograph of Muir property post-sale
Petitioner Exhibit 42:	Photograph Tall Timbers
Petitioner Exhibit 43:	Photograph of Tall Timbers
Petitioner Exhibit 44:	Photograph of Yeoman Cemetery lane
Petitioner Exhibit 45:	Photograph of Yeoman Cemetery ramp
Petitioner Exhibit 46:	Photograph of Cedar Crest North
Petitioner Exhibit 47:	Photograph of Cedar Crest East
Petitioner Exhibit 48:	Photograph of Cedar Crest West
Petitioner Exhibit 50:	Certified Deed for Muir property
Petitioner Exhibit 54:	Deposition of William M. Muir

7. The Assessor offered the following exhibits:

Respondent Exhibit 1:	PRC for the subject property
Respondent Exhibit 2:	Summary Appraisal Report of Dale W. Webster as of March 1, 2012
Respondent Exhibit 3:	Warranty deed transferring the subject property from Charles Ade to Glenn D. and Delores M. Fisher
Respondent Exhibit 4:	Harbor Agreement between Mary K. Fisher and Lafayette Sailing Club, Inc.
Respondent Exhibit 5:	Summary Appraisal Report of Dale W. Webster as of March 1, 2014
Respondent Exhibit 6:	Appraisal report of Kyle Cross as of November 11, 2010
Respondent Exhibit 7:	October 6, 2014 letter of Kathy Mylet to the Assessor
Respondent Exhibit 9:	"Mary Fisher Evidence Comparison from Taxpayer Submission"

8. We recognize the following additional items as part of the record: (1) the Form 131 petitions; (2) all motions filed by the parties; (3) all notices and orders issued by the Board; (4) a digital recording of the hearing;[1] and (5) the hearing sign-in sheet.

9. The PTABOA and Assessor determined the following assessments:

Year	**Land**	**Improvements**	**Total**
2012 (PTABOA)	$232,200	$600	$232,800
2014 (Assessor)	$238,000	$600	$238,600

10. Fisher requested the following assessments for both 2012 and 2014:

Land	**Improvements**	**Total**
$61,215	$1,000	$62,215

[1] During the hearing's afternoon session, the recording stopped while pages 10-17 of William Muir's deposition were being read into the record. This was the only un-recorded portion of the hearing. The recording lapse does not affect the completeness of the record because Fisher offered the deposition itself as an exhibit.

OBJECTIONS

A. Fisher's Objections to Exhibits

11. Fisher objected to Respondent's Exhibit 6, an appraisal report prepared by Kyle Cross, a trainee appraiser, and reviewed by Jack Cross, a certified appraiser, valuing the subject property at $280,000 as of November 11, 2010. She argued that the appraisal did not relate to the valuation dates at issue in these appeals and that it was irrelevant because it was prepared for inheritance, rather than property tax, purposes. The Assessor responded that the report offered an opinion of the property's market value and, on its face, was prepared for Fisher "to aid in determining the property tax assessment." The ALJ took the objection under advisement. *Henthorn objection; Henkel response; Fisher testimony; Resp't Ex. 6*.

12. The objection goes more to the exhibit's weight than to its admissibility. Without evidence relating the appraisal to the appropriate valuation dates, Cross' ultimate valuation opinion may lack probative weight. But his observations and judgments about the subject property and appraisal methodology are still relevant to issues in these appeals. We therefore overrule Fisher's objection and admit Respondent's Exhibit 6.

13. Fisher next objected to Respondent's Exhibit 9—a spreadsheet comparing the subject property's features to the features of 17 properties for which Fisher provided documents in the parties' pre-hearing evidence exchange—because the Assessor did not give her a copy of that exhibit until late in the afternoon the day before the hearing. The Assessor responded that the exhibit was demonstrative: it only summarized facts contained in other exhibits. She also explained that she offered the exhibit to demonstrate her rebuttal witness' testimony regarding why the witness did not believe the properties were comparable to the subject property, and neither the Assessor nor her witness knew Fisher would rely on those properties until the Assessor received Fisher's exhibits.

14. We overrule Fisher's objection. Our procedural rules require the parties to exchange witness and exhibit lists 15 business days before a hearing and copies of their documentary evidence five business days before a hearing. 52 IAC 2-7-1(b). While parties cannot avoid those requirements by simply characterizing witnesses or exhibits as "rebuttal," they also cannot be expected to exchange documents before they have any reason to know those documents are even relevant to the proceedings. In any case, the exhibit simply illustrated the testimony of Jennifer Becker, who explained various ways in which the purportedly comparable properties identified by Fisher and her witnesses differed from the subject property.

B. The Assessor's Objections to Exhibits

15. The Assessor objected to Petitioner's Exhibit 43—a photograph of a meter for using the boat ramp at Tall Timbers marina—on relevancy grounds. Fisher did not explain the exhibit's relevance at the time but indicated that she might connect it up. Fisher ultimately argued both that the Tall Timbers property was assessed more favorably than the subject property and that, unlike the subject property, it was used for commercial purposes. The ALJ overruled the objection and admitted the exhibit. We find the exhibit relevant and adopt her ruling.

16. The Assessor also objected to Fisher publishing the July 1, 2015 deposition of William M. Muir (the deposition transcript was also offered as Petitioner's Exhibit 50) on grounds that it was hearsay. Fisher responded that the deposition was not hearsay because (1) Muir was in Florida and would remain there past the scheduled hearing date, and (2) the Assessor received notice of the deposition and the accompanying opportunity to cross-examine Muir. The Assessor countered that receiving notice on June 26, for a July 1 deposition was not reasonable.[2]

[2] Counsel for the parties had slightly different versions of the events leading up to Fisher issuing the deposition notice. And they pointedly differed in their views on whether the notice was reasonable under the circumstances.

17. Muir's deposition meets the definition of hearsay—it contains a series of assertions made by a declarant (Muir) who did not testify at the hearing, and Fisher offered the deposition to prove the truth of those assertions. *See* Ind. Evidence Rule 801(c). But in certain circumstances, "any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party … who had *reasonable notice* [of the deposition]." Ind. Trial Rule 32(A) (emphasis added). One such circumstance is where the "witness is outside the state"; unless it appears the party offering the deposition procured the witness' absence. T.R. 32(A)(3)(b); *see also,* Ind. Evidence Rule 804(b)(1) (creating exception to the hearsay rule for deposition testimony of unavailable witness against a party or predecessor in interest who had a similar opportunity to develop the testimony).

18. Thus, Muir's deposition either is outside the hearsay rule entirely or at least qualifies for an exception to that rule if Fisher gave the Assessor reasonable notice. The question is largely academic, however. Our procedural rules allow us to admit hearsay, with a caveat: if an opposing party properly objects to hearsay that does not fall within a generally recognized exception to the hearsay rule, our determination in the appeal may not be based solely on that hearsay. 52 IAC 2-7-3. We therefore admit the deposition. Because we do not base our final determination solely on Muir's testimony, we need not decide whether Fisher gave the Assessor reasonable notice of the deposition.

C. Objections to Questions

19. Fisher and the Assessor objected to multiple questions asked of various witnesses, mostly on grounds of relevance or that the questions called for legal conclusions or speculation. We overrule all the objections.[3] In any case, we discuss the evidence on which we base our determination of the merits. It is all relevant, and none of it is unduly speculative. Similarly, we do not rely on any witness' testimony about legal conclusions in reaching our own legal conclusions.

[3] In some instances, counsel mooted the objection by rephrasing the question or asking a different question entirely.

BURDEN OF PROOF

20. Generally, a taxpayer seeking review of an assessing official's determination must prove that the assessment is wrong and what the correct assessment should be. Indiana Code § 6-1.1-15-17.2 creates an exception to that general rule and assigns the burden of proof to the assessor in two circumstances. First, where the assessment under appeal represents an increase of more than 5% over the prior year's assessment for the same property, the assessor has the burden of proving that the assessment under appeal is correct. I.C. § 6-1.1-15-17.2(b). Second, the assessor has the burden where a property's gross assessed value was reduced in an appeal, and the assessment for the following date represents an increase over "the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase…" I.C. 6-1.1-15-17.2(d)

21. If an assessor has the burden of proof and fails to meet it, the taxpayer may offer evidence to prove the correct assessment. If neither party offers evidence sufficient to prove the correct assessment, it reverts to the previous year's level, as last corrected by an assessing official, stipulated to by the parties, or determined on review. I.C. § 6-1.1-15-17.2(b).

22. The property's assessment jumped from $58,300 in 2011 to $232,800 in 2012—an increase of far more than 5%. The Assessor therefore has the burden of proof for 2012. *See* IC § 6-1.1-15-17.2(b).

23. The 2014 appeal is a different story. Fisher did not appeal 2013, and the assessment increased by far less than 5% between 2013 and 2014. Thus, neither circumstance outlined in the burden-shifting statute applies. Fisher, however, points to the fact that the assessment did not change between 2012 and 2013 and claims that the 2013 assessment

was simply a continuation of the previous year. She argues that any change to 2012 would necessarily also change the 2013 assessment.[4]

24. We disagree. Each assessment year stands alone. *Fleet Supply, Inc. v. State Bd. of Tax Comm'rs*, 747 N.E.2d 645, 650 (Ind. Tax Ct. 2001) (citing *Glass Wholesalers, Inc. v. State Bd. of Tax Comm'rs*, 568 N.E.2d 1116, 1124 (Ind. Tax Ct. 1991)). Although the Assessor valued the property for the same amount in 2012 and 2013, they are separate assessments. Thus, even if we were to order a change for 2012, that order would not automatically change the property's 2013 assessment. If Fisher wanted the 2013 assessment changed, she needed to appeal it.

THE ASSESSOR'S CONTENTIONS

25. The subject property, located at 11810 West 820 North in Monticello and known as Fisher Harbor, is 2.41 acres with frontage on Lake Freeman. The harbor portion of the lakefront has a steel seawall. The property also has a boat ramp and a shed. *Webster testimony; Resp't Exs. 1-2*.

26. The Assessor believes the property is under-valued. In support, she offered two appraisal reports from Dale W. Webster, a certified general appraiser with designations from the Appraisal Institute as an MAI and SRA. One report values the property as of March 1, 2012, and the other values it as of March 1, 2014. Webster certified that he prepared each appraisal in conformity with the Uniform Standards of Professional Appraisal Practice ("USPAP"). *Webster testimony; Resp't Exs. 2, 5*.

27. As part of the appraisal process, Webster viewed the property and photographed it. He got copies of the property record card and the most recent deed. He also got a copy of a Harbor Agreement between Fisher and the Lafayette Sailing Club, Inc., in which Fisher

[4] At the close of the Assessor's case-in-chief, Fisher made what she called a "motion for summary judgment," but what is more accurately characterized as a motion for involuntary dismissal under Trial Rule 41(e). We address the grounds for Fisher's motion—that the Assessor did not meet her burden or proof and that she was collaterally estopped from asserting a value different from what we determined in resolving Fisher's appeal of the 2010 assessment year—in our discussion of the merits.

leased the property to the Sailing Club for two years, beginning on January 1, 2011. The Club agreed to pay the real estate taxes and related fees. It also agreed to mow the property and otherwise maintain it in a "good and slightly manner (sic)" The lease recognized that the property had not previously been used for a marina or as a commercial harbor, and the Sailing Club agreed not to use the property in a manner that would cause it to be regulated as such. *Webster testimony; Resp't Ex. 4.*

28. Webster believed that the sales-comparison approach was the most appropriate of the three generally accepted valuation approaches to use in appraising the property. He did not develop the cost approach because there were no significant improvements, such as a building, that would need to be depreciated. He similarly chose not develop the income approach because he was unaware of it generating income. If he were to develop the income approach, he would use income and expenses for similar properties rather than the subject property's actual income, because the subject property is not managed properly. For example, Fisher does not charge people to use the boat ramp or store boats. Webster did not know of any other privately owned harbor where people could freely roam the property. Tall Timbers charges for the use of its facilities. *Webster testimony*.

29. Webster used sales of both residential and commercial properties. In his appraisal report, he described the property's highest and best use as single-family residential, and its current use as an interim use based on the Harbor Agreement. At hearing, he described the use as commercial, but recognized that it could also be used for residential purposes. To support Webster's belief that the property could be used for residential purposes, the Assessor called Kathy Mylett, director of the Carroll County Planning Commission, who testified that, given the county's zoning ordinances, setback requirements, and other regulations, the property could be split into three separate residential lots. She also testified that other permitted uses in the zoning district included parks, playgrounds, recreational areas, and golf courses. *Webster testimony; Mylet testimony; Resp't Exs. 2, 5, 7.*

30. Webster ultimately selected waterfront properties that he felt were the most comparable to the subject property in terms of size, location, and overall similarity. He also considered how close the sale dates were to the valuation dates for his appraisals. He adjusted sale prices to reflect relevant differences in the size of the properties and improvements, such as seawalls. He also adjusted the sale prices if the properties had a high or medium bank as opposed to the subject property's low bank. According to Webster, there is market resistance to high-bank properties. He based his adjustments on his analysis of paired sales. *Webster testimony; Resp't Exs. 2, 5.*

31. Comparable 1 in Webster's 2012 appraisal was a 1.246-acre residential property. William and Donna Muir sold it for $118,000 in May 2011. It is approximately seven miles from the subject property, has a high bank, and is wooded. Webster viewed the property from the road but did not walk over the hill to see if there were improvements. Although William Muir testified in his deposition about the costs of building a seawall, docks, boat ramps, and stairways, Webster testified that the costs of building such items does not necessarily equal their contributory values in the market. Webster did not make any adjustment for the seawall because it had the same utility as the subject property's seawall. *Webster testimony; Resp't Ex. 2; Pet'r Ex. 37.*

32. Comparable 2 was also a residential property. Webster did not know if it sold to an adjoining landowner. If true, he agreed that fact might skew the sale price, although it would not necessarily do so. *Webster testimony; Resp't Ex. 2.*

33. Comparable 3, known as "Sandy Beach," is adjacent to the subject property.[5] It was part residential, part farmland, and part commercial. Webster used a list price, instead of a

[5] The Assessor had previously given Fisher's counsel, Rex Henthorn, a copy of Webster's appraisal report with a typographical error indicating that comparable 3 was 7.65 miles northeast of the subject property when it is actually .13 miles southeast, or right next to the subject property. Counsel for the Assessor, Beth Henkel indicated that she had not seen the copy with a typographical error and that she provided an accurate copy to Henthorn in the parties' pre-hearing evidence exchange. Henthorn indicated that Henkel's own copy (although not the copy of the report submitted as Respondent's Exhibit 2) also listed comparable 3 as 7.65 miles northeast of the subject property. Although Henthorn argued that he was misled, it appears that the error was unintentional. In any case, both the copy offered as Respondent's Exhibit 2 and the copy previously given to Henthorn by the Assessor listed correct address and Loopnet listing number for comparable 3. We therefore find that Fisher was not significantly prejudiced by the error.

sale price, because the property had not yet sold. He was not aware of any easements or other restrictions on the property's use. *Webster testimony; Resp't Ex. 2*.

34. The adjusted sale and list prices ranged from $113,638.13 to $161,444.44 per acre. Webster reconciled them to $125,500 per acre, which yielded a value of $302,500 (rounded) for the subject property. *Webster testimony; Resp't Ex. 2*.

35. In his 2014 appraisal, Webster believed comparable 4, located 4.43 miles from the subject property on Dodge Camp Road, was particularly appropriate. It was close to the subject property's size, and had a low bank and harbor-like entrance. It was also adjacent to land with a boat ramp leased from the city that was open and free to the public. The improvements were in very poor condition and the buyer removed them, so the property sold for the land. In fact, Webster adjusted the sale price upward by $25,000 to account for demolition costs. *Webster testimony; Resp't Ex. 5*.

36. Webster agreed that the Dodge Camp Road property was commercial. There had been a grocery store where people could buy bait, tackle, and gas. People could also rent boat slips. The city, however, took the boat launch back after the sale. The buyer told Webster the sale included personal property. But he also said he did not place any value on that property. Webster therefore used the entire sale price in his analysis. *Webster testimony; Resp't Ex. 5*.

37. The adjusted sale prices for the comparable properties in Webster's 2014 appraisal ranged from $119,658.54 to $174,875 per acre. He settled on $125,000 per acre, which was the adjusted price for the Dodge Camp Road property. That yielded a value of $301,000 (rounded) for the subject property. *Webster testimony; Resp't Ex. 5*.

38. Webster listened to Larry Dill, a local attorney with experience in real estate law who Fisher called as a witness, testify about how the easement affected the subject property. Dill's testimony did not change Webster's opinion. Webster explained that the easement is not specific as to location or size and does not preclude Fisher from using the property;

to the contrary, the deed explicitly reserves her right to do so. Fisher may therefore develop the property. *Webster testimony; Resp't Ex. 3.*

39. The Assessor acknowledged that Indiana assesses property based on its market value-in-use rather than purely on its market value. While she agreed that the property's use might be unusual, it is not unique. The property is not owned by a not-for-profit entity, nor is it being put to charitable use. Webster appropriately focused on sales of both residential and commercial properties in valuing the property for what was an interim, commercial use. In fact, an appraiser hired by Fisher's previous attorney valued the property at $280,000 as of November 11, 2010. *Henkel argument.*

40. Fisher did not offer any countervailing market-based evidence. She instead claimed the subject property was assessed less favorably than were various other properties. But she did not show the market-value-in-use for any of those other properties. *Henkel argument* (citing *Indianapolis Racquet Club, Inc. v. Marion County Ass'r*, 15 N.E 3d 150 (Ind. Tax Ct. 2014) and *Thorsness v. Porter County Ass'r*, 3 N.E.3d 49 (Ind. Tax Ct. 2014)).

41. Jennifer Becker explained how the properties identified by Fisher differed from the subject property. Although Fisher offered a property record card for Tall Timbers, that card shows only the commercial portion of the land. It has more than 11 additional acres of agricultural land. It also has 110 feet on the water. One acre is assessed as primary land. By contrast, the subject property is assessed as secondary and usable/undeveloped land. Two other properties, owned by Yeoman and Cedar Crest, are mobile home parks, which are valued on a per-site or per-lot basis. The value for amenities to the land, such as curbs, sidewalks, and similar things are absorbed in the improvement assessments for the sites, with the rest of the land valued as usable/undeveloped. Another parcel was common area for a subdivision's private beach, which by statute, assessors must assess at minimal value. Finally, one of the properties is Lake Freeman itself, which is assessed like a farm pond. *Becker testimony; Resp't Ex. 9.*

FISHER'S CONTENTIONS

42. Webster treated the property as commercial and residential. But Fisher has no plans to build a house on the property, and she does not view it as commercial. Other than the Harbor Agreement with the Sailing Club, she has never charged anyone for using the boat ramp, the beach, or the property in general. The Sailing Club uses the property for social purposes, sailing, parking cars, and picnics. Although the Harbor Agreement expired on December 31, 2012, Fisher and the Club still recognize it and operate under the same terms and conditions. *Henthorn argument; Fisher testimony; Carie testimony; Resp't Ex. 4.*

43. Fisher's home is adjacent to the subject property and faces Lake Freeman. The subject property provides Fisher with her only access to the lake, but it is burdened by the easement requiring her to share it with owners from Claireview subdivision and their guests. Because Webster failed to account for the significant effect of the easement and other encumbrances, his appraisals did not capture the property's market value-in-use, which is not as a residential or commercial property, but rather as a public park. *See Henthorn argument; Fisher testimony; Pet'r Exs. 3-4.*

44. The easement is contained in a warranty deed transferring the property to Fisher's late husband and his wife. The deed provides that the transfer is:

> Subject also to a non-exclusive easement over, across, and upon the above-described real estate for access, by pedestrians and by autos and/or trailers with boats, to and from Lake Freeman, for the benefit of the owners of Lots 15 through 34, inclusive, and Lots 36 through 41, inclusive, in Claireview Subdivision . . . and for the benefit of Arthur L. and Donna M. Kunz, Husband & wife, as owners of an unplatted tract of land . . . and their respective successors in title to said lots and lands; provided . . . that their use of the easement shall not unreasonably transfer with the concurrent use thereof by any other person lawfully upon said real estate; and that Glenn D. Fisher and Delores M. Fisher, their successors and assigns shall have and retain the right to place any improvements upon and make any lawful use of the above described real estate as the owners thereof, so long as reasonable access to Lake Freeman for pedestrian traffic and for autos and/or trailers with boats is maintained.

Resp't Ex. 3; Pet'r Ex .1.

45. Dill described the easement as a "floating easement," meaning it does not cover a defined part of the land. According to Dill, floating easements are commonly used for utility lines, where placement is uncertain when the easement is created. There could be various paths crossing the property, and it would be difficult to define which ones were and were not maintainable. Thus, any attempt by Fisher to build on the property might be challenged. *Dill testimony*.

46. Assuming the other properties' values have increased, their dependency on the easement has also increased, and the owners would be more inclined to zealously resist anything that interferes with their access. Dill was involved in a case from White County that apparently dealt with easements, and his fee was $200,000. In his opinion, it would be naïve for someone to buy the subject property to build a home based on the sale prices for buildable lots, and it would take a naïve banker to loan money for that purpose. *Dill testimony*.

47. People use the easement both day and night throughout the year. They bring boats to launch on the ramp. They use golf carts to access the beach. They drive snowmobiles on the property in the winter. Fisher does not have the right to stop them from using the ramp or the beach. Jennifer Becker, the Assessor's own witness, discussed common areas of subdivisions. Like those common areas, the subject property's value exists in the lots that benefit from the easement. *Henthorn argument*; *Fisher testimony; Pet'r Ex. 18.*

48. Fisher has tried to supervise who accesses the property, but it is difficult. People tell her they are from the subdivision or are friends of members. She believes the public takes advantage of the fact that she owns the tract. For example, NIPSCO, which had no authority to use the boat ramp, put a trailer in to work on a dam. *Fisher testimony; Pet'r Ex. 17.*

49. The Indiana Department of Natural Resources ("DNR") has a boatlift on the property and keeps a boat at the sailing club. Its officers park their cars on the grass away from the boatlift. It has used the property for over 30 years and even installed electricity to operate the boatlift. The DNR does not compensate Fisher for its use of the property. In addition, a barge is assembled on the submerged portion of the property and used in a July 3rd fireworks display. In 2015, there were approximately 150 people in the harbor area to watch the fireworks. *Fisher testimony; Peckny testimony. Pet'r Exs. 15-16.*

50. A roadway or pathway permits access from Calverts Drive across the property. People have used that pathway for the entire 36 years Fisher has lived next to the property. The pathway's use has increased over the past 20 years. According to Dill, that creates a danger someone might assert a prescriptive easement. Identifying who might have the right to assert that claim would be tricky. In Dill's view, Fisher has allowed the property to become a park. *Fisher testimony; Dill testimony; Pet'r Exs. 4, 5, 18.*

51. There were additional problems with Webster's choice of comparable sales and how he adjusted, or failed to adjust, the sale prices. In particular, Fisher pointed to Webster's treatment of the Muir property. The Muirs bought the property, which consisted of three tracts totaling about 1.25 acres, in November 2006. They then made extensive improvements, adding a seawall, docks, boatlifts, and stairways at a cost of $48,000. On May 2, 2011, the Muirs sold the property for $118,000. William Muir estimated the land value at $70,000 and attributed the rest of the sale price to the improvements. The buyers made extensive modifications and built a house. When asked how, if at all, his former property was similar to the subject property, Muir said they were both in Jefferson Township, were on Lake Freeman, and had seawalls. Other than that, he indicated there was "very, very little similarity." *Pet'r Exs. 37-41, 54.*

52. The Cross appraisal similarly fails to show the property's market value-in-use. While Cross indicated he prepared the appraisal to aid in determining the property tax assessment, Fisher contends it was prepared for inheritance tax purposes. Also, the appraisal was contingent on several extraordinary assumptions: that a well could be

installed at no more than typical costs, that it was possible to get a residential building permit, that the lot was buildable, and that the property could be hooked up to the TLRSD sewer system. *Henthorn argument; Resp't Ex. 6.*

53. Cedar Crest, Tall Timbers, Yeoman Cemetery, and Naville are all harbors in Jefferson Township. In Fisher's view, they house commercial enterprises. With the exception of Naville, they all have boat ramps. Yeoman Cemetery and Cedar Crest both have mobile homes and Cedar Crest sells boat slips. The operators of Tall Timbers sell boats, boating equipment, gasoline, and trailers. They also do repair work. It is a marina, not just a harbor. *Fisher testimony; Pet'r Exs. 10-11, 42-48.*

54. Fisher claims there is no logic to how those four commercial properties were assessed in comparison to the subject property. In 2012, Naville, Yeoman, Cedar Crest, and Tall Timbers were assessed at $36,666, $7,909, $24,414, and $20,959 per acre, respectively, while the subject property was assessed at $96,348 per acre, with the first acre valued at $192,000. In 2014, Naville's assessment stayed the same, Cedar Crest's assessment increased slightly, the subject property's assessment increased to $98,755 per acre, and Tall Timber's assessment jumped all the way to $97,800 per acre. *Henthorn argument, Exs.22, 24-27.*

55. Finally, the Assessor should be collaterally estopped from seeking a value different from the amount the Board decided in Fisher's appeal of the 2010 assessment. The property has not changed since March 1, 2010, and people use it in the same way they did then—as a public park benefiting the entire Lake Freeman community. The property should therefore return to being assessed as a park,[6] and the Assessor should move on to properties that deserve attention. There must be an end to these costly proceedings. *Fisher testimony; Henthorn argument* (citing *Lindeman v. Wood*, 799 N.E.2d 1230 (Ind. Tax Ct. 2003).

[6] Fisher did not offer any evidence to show the property was ever assessed as a park. In fact, despite arguing that the property was reclassified as commercial, she did not offer any evidence to show how it was previously classified. According to the property's record card, the Assessor believed the property had been included in the wrong assessment neighborhood and changed it to "the on-lake neighborhood" on October 10, 2012. *Resp't Ex. 1.*

ANALYSIS

56. Indiana assesses real property based on its true tax value, which the 2011 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 by a similar user, from the property." 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2). A party's evidence in an assessment appeal must be consistent with that standard. For example, a market value-in-use appraisal prepared according to USPAP often will be probative. *See id.; see also, Kooshtard Property VI, LLC v. White River Twp. Ass'r,* 836 N.E.2d 501, 506 n.6 (Ind. Tax Ct. 2005). A party may also offer actual construction costs, sale or assessment information for the subject or comparable properties, and any other information compiled according to generally acceptable appraisal principles. *See Kooshtard Property VI*, 836 N.E.2d at 506; *see also* I.C. § 6-1.1-15-18 (allowing parties to offer evidence of comparable properties' assessments to determine an appealed property's market value-in-use).

57. In any case, party must explain how its evidence relates to the subject property's value as of 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). The valuation dates for the assessments under appeal were March 1, 2012, and March 1, 2014, respectively. I.C § 6-1.1-4-4.5(f); 50 IAC 27-5-2(c).

The 2012 Appeal

58. As explained above, the Assessor had the burden of proving that the 2012 assessment of $232,800 was correct. She actually sought an increase in the property's assessment, based on Webster's appraisal. Webster estimated the property's market value-in-use at $302,500 as of the appropriate valuation date. He used a generally accepted valuation approach—the sales-comparison approach—and certified that he prepared his appraisal in conformity with USPAP. His appraisal is therefore prima facie evidence of the property's true tax value.

59. Fisher, however, challenged Webster's appraisal largely on the following grounds: (1) that he mischaracterized the property's use as residential or commercial rather than as a public park and therefore used incomparable properties in his analysis; (2) that he failed to account for the significant effect of the easement and other potential encumbrances on the property's value; and (3) that he did not properly adjust the sale price for the Muir property.

60. As to the first point, Webster characterized the property's use as commercial. But he also looked at sales of residential properties because he believed the property was amenable to residential use. While Fisher may have been able to convert the property to use as a stand-alone residential parcel, at least after the Harbor Agreement expired, she testified that she did not intend to do so. On the other hand, the subject property is adjacent to Fisher's house and represents her only access to the water. Thus, there appears to be a residential aspect to her use of the property. Under the circumstances, we are not unduly troubled by Webster's use of residential property sales in his analysis.

61. We do find merit in Webster's treatment of the property as commercial. Fisher leased the property to the Sailing Club, which used it for access to the water, boat storage, and other recreational activities. There is evidence that other commercial properties offer similar, albeit more extensive, services. The facts that the Sailing Club is not organized for profit and that Fisher charged little rent do not change that basic use. Neither does the fact that she let members of the public use the property for various activities free of charge. Fisher did not apply for an exemption. Thus, we are not concerned with whether she had a dominant profit motive.

62. That does not mean the public use is irrelevant. As Dill explained, it at least creates a risk that someone might assert a prescriptive easement if Fisher were to interfere with that use. Prescriptive easements generally are not favored by law. *Wilfong v. Cessna Corp*., 838 N.E.2d 403, 405 (Ind. 2005). Traditionally, "a party claiming the existence of a prescriptive easement must provide evidence showing 'an actual, hostile, open,

notorious, continuous, uninterrupted adverse use for twenty years under a claim of right.'" *Id.* at 405 (quoting *Carnahan v. Moriah Prop. Owners Ass'n., Inc.*, 716 N.E.2d 437, 441 (Ind. 1999); *see also*, I.C. § 32-23-1-1 ("the right-of-way, air, light, or other easement from, in, upon, or over land owned by a person may not be acquired by another person by adverse use unless the use is uninterrupted for at least twenty (20) years."). In *Fraley v. Minger*, 829 N.E.2d 476 (Ind. 2005), the Indiana Supreme Court synthesized and reformulated the elements necessary for a person without title to obtain ownership of land, holding that the person must prove by clear and convincing evidence (1) control, (2) intent, (3) notice, and (4) duration. *Farley*, 829 N.E.2d at 486. Those reformulated elements apply to prescriptive easements, "save for those differences between fee interests and easements." *Wilfong*, 838 N.E.2d at 406.

63. There is no evidence that anybody has asserted a prescriptive easement, much less that they would be entitled to one. At most, Dill posited that Fisher or a potential buyer might have to defend such a claim if they were to interfere with members of the public using the property to access the water. Fisher offered nothing to quantify the effect of that largely speculative risk on the property's market value-in-use. Under those circumstances, Webster's failure to account for the risk does not significantly detract from the reliability of his valuation opinion.

64. The access easement encumbering the property is not speculative, however. And Fisher offered ample evidence of its constant use throughout the year. Despite those facts, Webster did little to address the easement's effect on value. His comparable properties were not burdened with similar easements. Yet he neither adjusted any of the sale prices to account for that difference, nor explained his decision not to do so in his appraisal report. When asked if he thought it was "significant" to show the other properties lack of similar easements as an adjustment, he responded "not in this case." He also indicated that Dill's testimony about the easement did not change his opinion because the easement could be "positioned" on the property. *Webster testimony.*

65. As Dill explained, any attempt to position the easement might invite litigation. Although that risk is largely speculative, we cannot completely discount it. Potential litigation aside, Webster did little to persuade us that the easement did not affect the property's value in comparison to properties unburdened by similar easements. On the other hand, Fisher did not offer any market-based evidence to quantify that effect, even roughly. We give no weight to Dill's testimony about his attorney's fee in a different case about which he offered no details. On balance, we find that Webster's failure to more meaningfully deal with the easement detracts from the reliability of his valuation opinion. But it does not render his opinion devoid of probative weight.

66. Fisher also pointed to William Muir's deposition, in which Muir testified to what he believed was the lack of similarity between his property and the subject property, the cost of various improvements he and his wife made to the property, and how the sale price was allocated between the land and those improvements. Although she did not explicitly indicate as much, Fisher appears to argue (1) that Webster should not have used the Muir property in his analysis in the first place, and (2) that he failed to adjust the sale price appropriately to account for relevant differences between the properties, such as the existence of a newer seawall, docks, decks, and a boatlift.

67. We give little weight to Muir's conclusory statements about the comparability of the two properties. *See Long*, 821 N.E.2d at 470 (explaining that a taxpayer's statements that a property is "similar" or "comparable" to another property are conclusory and do not constitute probative evidence). His testimony about the sale price's allocation is a little more helpful, although knowing how the buyer allocated the price may be more significant. Regardless of the specific allocation, we have no reason to doubt that the docks and decks contributed to the total sale price. And Webster did not adjust the sale price to account for those items. Given Webster's testimony that he viewed the property from the road and did not walk over the hill, he may not have been aware they even existed. Thus, Webster's treatment of the Muir sale detracts somewhat from the reliability of his ultimate valuation opinion.

68. Despite the problems with Webster's appraisal, we find his valuation opinion offers some evidence of the subject property's true tax value and makes a prima facie case that the property was worth at least the amount for which it was assessed. That is particularly true when one considers that the property was assessed for almost $70,000 less than Webster estimated.

69. Having found the Assessor made a prima facie case in support of the assessment, we must now address whether Fisher offered countervailing evidence to show a lower value. Fisher pointed to what she viewed as inconsistent assessments of the subject property and several other waterfront properties used for commercial purposes. It is unclear whether she offered that assessment information to prove the subject property's true tax value or instead claimed that she was entitled to an equalization adjustment based on a lack of uniformity and equality. She failed to offer sufficient probative evidence on either point.[7]

70. While a party may offer evidence of comparable properties' assessments to prove the market value-in-use of a property under appeal, the determination of comparability must be made "using generally accepted appraisal and assessment practices." I.C. § 6-1.1-15-18(c). Thus, the party must explain how relevant characteristics of the other properties compare to those of the property under appeal and how any relevant differences affect values. *See Long*, 821 N.E.2d at 471; *see also*, *Indianapolis Racquet Club, Inc. v. Marion County Ass'r*, 15 N.E.3d 150, 155 (Ind. Tax Ct. 2014).

71. Fisher offered some evidence to compare the subject property to the other properties in question, though all but one were located in different assessment neighborhoods than the subject property. She offered aerial photographs to show their locations on the lake. She also offered ground level photographs showing the water frontage and topography for portions of the properties. While that is a start, it falls well short of the type of comparison contemplated by the statute or Tax Court decisions. And Fisher did not even attempt to explain how relevant differences affected the properties' values.

[7] To the extent Fisher claimed she was entitled to an equalization adjustment based on a lack of uniformity and equality, she had the burden of proof. *Thorsness*, 3 N.E.3d at 52-53.

72. Her claim for an equalization adjustment based on a lack of uniformity and equality in assessments similarly fails. As the Tax Court explained in *Westfield Golf Practice Center, LLC v. Washington Twp. Ass'r*, 859 N.E.2d 396 (Ind. Tax Ct. 2007), the focus of Indiana's assessments system has changed from the application of a self-referential set of regulations to a question of whether a property's assessment reflects the external benchmark of market value-in-use. *Westfield Golf Practice Center, LLC v. Washington Twp. Ass'r*, 859 N.E.2d 396, 398-99 (Ind. Tax Ct. 2007). One way to prove a lack of uniformity and equality under Article X section 1 of the Indiana Constitution is to present assessment ratio studies comparing the assessments of properties within an assessing jurisdiction with objectively verifiable data, such as sale prices or market value-in- use appraisals. *Id*. at 399 n.3. The taxpayer in *Westfield Golf* lost its appeal because it focused solely on the base rate used to assess its driving-range landing area compared to the rates used to assess other driving ranges and failed to show the actual market value-in- use for any of the properties. *Id*. at 399. Fisher's uniformity-and-equality claim fails for the same reason—she did not show the market value-in-use for any of the properties on which she based her claim.

73. Finally, Fisher claims that the Assessor was collaterally estopped by our decision in her appeal of 2010 assessment year. In that case, the Assessor had the burden of proof. Fisher properly objected to the bulk of the Assessor's evidence, including the Cross appraisal, as hearsay, and the Assessor did not argue that it fit within a recognized exception to the hearsay rule. Because the Assessor offered no other probative evidence, we held that she failed to meet her burden and that the assessment reverted to the previous year's level of $58,300. *Fisher v. Carroll County Ass'r*, pet. no. 08-011-10-1-4-00001 (IBTR Oct. 22, 2012).

74. The doctrine of collateral estoppel (also called issue preclusion) bars a party from re-litigating a fact or issue that was necessarily adjudicated in an earlier action. *Tofany v. NBS Imaging Systems, Inc.*, 616 N.E.2d 1034, 1037 (Ind. 1993). Because each assessment year and each tax year stands alone, the Tax Court has held that collateral

estoppel generally does not apply in tax cases. *Miller Brewing Co., v. Ind. Dep't of State Revenue*, 903 N.E.2d 64, 69 (Ind. 2009) (quoting *Glass Wholesalers v. Ind. Bd. of Tax Comm'rs*, 568 N.E.2d 1116, 1124 (Ind. Tax Ct. 1991)). But it has nonetheless applied the doctrine in certain property tax appeals. *See id*.

75. Fisher cites to *Lindeman v. Wood*, 799 N.E.2d 1230 (Ind. Tax Ct. 2003), one of the rare cases in which the Tax Court applied the doctrine. The Marion County Board of Review had reduced the quality grade for the taxpayers' home from "B+2" to "B-1." *Lindeman v. Wood*, 799 N.E.2d 1230, 1231-32 (Ind. Tax Ct. 2003). For the 2000 tax year, the Washington Township Assessor raised the grade back to "B+2 based on a comparison to other homes from the same neighborhood, and the taxpayers appealed. *Id*. The Court held that the Board of Review's prior adjudication barred the parties from re-litigating the "same cause of action" before the next general reassessment. *Id*. at 1233. *Lindemann* was decided under Indiana's old system where, absent a change to a property justifying an interim reassessment, values generally rolled forward from year to year between general reassessments. *Id*. at 1233 n.6. Thus, the Court explained, its holding did not conflict with the principle that "each tax year stands alone, to be assessed separately." *Id*. (quoting *Glass Wholesalers*, 568 N.E.2d at 1124).

76. That is not true under our current system. Assessments are adjusted annually between years of general reassessment. *See* I.C. § 6-1.1-4-4.5. Also, unlike the system under which *Lindemann* was decided, we now resolve appeals through market-based evidence rather than by applying a self-referential set of administrative regulations. Thus, the issue Fisher claims was decided in her previous appeal—the property's true tax value in 2010—is not necessarily relevant to, much less controlling over, any issue in her appeals for the 2012 and 2014 assessment years. In any case, we did not actually decide the property's true tax value in the 2010 appeal. We instead found that the Assessor's failure to prove the assessment was correct mandated reversion to the previous year's level.

77. Based on Webster's appraisal, we find the subject property's true tax value was at least equal to its assessment. Given the weaknesses in his appraisal, however, we reject the Assessor's request to raise the assessment.

The 2014 Appeal.

78. Fisher had the burden of proof for 2014. She relied on the same valuation evidence as she did for 2012, and we reach the same conclusion—that she failed to offer probative evidence to show either the property's true tax value or an actionable lack of uniformity and equality. In any case, the Assessor once again offered an appraisal from Webster valuing the property at significantly above the amount for which it was assessed. His appraisal for 2014 suffers from similar shortcomings as his appraisal for 2012. Our conclusion is therefore the same—the appraisal demonstrates that the property was worth at least what it was assessed for, but it does not support increasing the assessment.

FINAL DETERMINATION

79. Based on the foregoing, we order no change to the 2012 or 2014 assessments.

ISSUED: _____

_____
Chairman, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

_____
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 within 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 Rules are available at <http://www.in.gov/judiciary/rules/tax/index.html>.