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

Petition #: **69-021-12-1-5-00001**
Petitioners: **Jeff & Patricia Fleming**
Respondent: **Ripley County Assessor**
Parcel #: **69-09-36-000-006.005-021**
Assessment Year: **2012**

The Indiana Board of Tax Review (the "Board") issues this determination in the above matter, and finds and concludes as follows:

Procedural History

1. The Petitioners initiated an assessment appeal with the Ripley County Property Tax Assessment Board of Appeals (PTABOA) by filing a Form 130 on October 25, 2012.

2. The Ripley County PTABOA issued its determination on March 21, 2013.

3. The Petitioners timely filed an appeal to the Board by filing a Form 131 petition on May 7, 2013. Petitioners elected the Board's small claims procedures.

4. The Board issued a notice of hearing on January 14, 2014.

5. Administrative Law Judge Paul Stultz held the Board's administrative hearing on March 11, 2014. He did not inspect the property.

6. Jeff Fleming appeared *pro se.* Ripley County Assessor Shawna Bushhorn appeared for the Respondent with appraiser Clint Nuhring. All were sworn as witnesses.

Facts

7. The property under appeal is a single-family residential property located at 1665 N. County Road 625 E., Milan, Indiana. *Resp't Ex. 1 at 8, 9.*

8. The taxpayer appealed the initial assessment of $103,400 to the PTABOA and the PTABOA lowered the assessment as follows for 2012:

   Land: $31,000 Improvements: $62,800 Total: $93,800

9. The Petitioners contend the total assessed value should be:

   Land: $31,000 Improvements: $33,000 Total: $64,000

Record

10. The official record for this matter is made up of the following:

    a. Petitioners' Exhibit 1: Appraisal of subject property by Kenneth McIntosh,

    b. Respondent's Exhibit 1: Appraisal of subject property by Clint Nuhring,

    c. Board Exhibit A: Form 131 petition with attachments,
    Board Exhibit B: Notice of Hearing (rescheduled),
    Board Exhibit C: Hearing sign-in sheet,

    d. These Findings and Conclusions.

Objection

11. The Respondent objected to the admission of the Petitioners' appraisal of the subject property (Petitioner Exhibit 1) because the appraiser, Kenneth McIntosh, was not present to testify or be cross-examined about the appraisal.

12. The Respondent's objection is essentially a hearsay objection. The appraisal is admissible under administrative law rules. Hearsay evidence is admissible, but with significant limitations:

> Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. If the hearsay evidence is not objected to, the evidence may form the basis for a determination. However, if the evidence: (1) is properly objected to; and (2) does not fall within a recognized exception to the hearsay rule; the resulting determination may not be based solely upon the hearsay evidence.

52 IAC 2-7-3. The Board finds the appraisal should be admitted, but because the Petitioner objected, it cannot serve as the sole basis for the Board's decision.

13. Mr. Fleming objected to the admission of the Respondent's appraisal of the subject property (Respondent Ex.1). Mr. Fleming contends Mr. Nuhring's appraisal may be biased because he was a member of the PTABOA and the Assessor paid for the appraisal. Further, Mr. Nuhring did not do an interior inspection of the subject property. The Petitioners' objections go to the weight and credibility of the evidence, not its admissibility. The objection is overruled and Respondent Exhibit 1 is admitted into the record.

Burden of Proof

14. Generally, a taxpayer seeking review of an assessing official's determination has the burden to prove that a property's assessment is incorrect and what the 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). A burden-shifting statute creates two exceptions to that rule in Indiana Code § 6-1.1-15-17.2 as amended by P.L.97-2014.

15. First, I.C. § 6-1.1-15-17.2 "applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal is an increase of more than five percent (5%) over the assessment for the same property for the prior tax year." I.C. § 6-1.1-15-17.2(a) "Under this section, the county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court." I.C. § 6-1.1-15-17.2(b).

16. Second, I.C. § 6-1.1-15-17.2(d) "applies to real property for which the gross assessed value of the real property was reduced by the assessing official or reviewing authority in an appeal conducted under I.C. § 6-1.1-15." Under those circumstances, "if the gross assessed value of real property for an assessment date that follows the latest assessment date that was the subject of an appeal described in this subsection is increased above the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase, the county assessor or township assessor (if any) making the assessment has the burden of proving that the assessment is correct." This change is effective March 25, 2014, and has application to all appeals pending before the Board. These provisions may not apply if there was a change in improvements, zoning, or use, or if the assessment was based on an income capitalization approach.

17. The parties agreed that the Respondent has the burden of proof. The 2013 Property Record Card shows the assessment for 2011 was $89,000. *Resp't Ex. 1.* The Form 115 for 2012 shows the PTABOA assessed the property at $93,800 for 2012, an increase of more than 5%. *Board Ex. A.* Respondent has the burden of proof.

Contentions

18. Summary of the Respondent's case:

    a. The Respondent engaged a certified appraiser, Clint Nuhring, to appraise the property. *Bushhorn testimony; Resp't Ex. 1.*

    b. Mr. Nuhring testified that he inspected the property on December 9, 2013. When engaged for an appraisal assignment, the client has the opportunity to ask for an interior or exterior inspection. In this case, the client asked him to do an external inspection. Photos were taken of both sides of the dwelling and the front. The

improvements appeared to be average condition and he assumed the interior was also in similar condition. The appraisal states an interior inspection could change that assumption. *Nuhring testimony; Resp't Ex.1.*

c. Mr. Nuhring used comparable properties that sold on or before the end of the assessing period except for one; comparable 3, which sold six days after the assessment date. He estimated the value of the subject property at $87,000 as of March 1, 2012. The appraised value is lower than the PTABOA assessed value of $93,800. *Nuhring testimony; Resp't Ex.1*

d. Mr. Nuhring was not hired to review the Petitioners' appraisal. He did not address its quality. *Nuhring testimony.*

e. Some of the comparable properties used in the Petitioners' appraisal are distressed sales. One or two of the comparable properties are outside of Ripley County. Further, the valuation date for Mr. Fleming's appraisal is February 14, 2013. It is not a retrospective appraisal like the county's appraisal. *Bushhorn testimony; Pet'r Ex. 1.*

f. The appraiser is not biased. He was paid just like any other appraiser. His opinion of value is lower than the PTABOA determination. Further, neither Mr. Nuhring nor the Respondent would have Mr. Nuhring risk losing his license by doing this appraisal. *Bushhorn testimony*.

19. Summary of the Petitioners' case:

a. Mr. McIntosh's appraisal is more accurate than the Respondent's appraisal. Mr. McIntosh inspected the interior whereas the Respondent's appraiser only performed an exterior inspection and did not inspect the interior of the subject property. The upstairs of the dwelling is mostly unfinished. Mr. McIntosh is not present at this hearing today, but his work and his certifications are here. *Fleming testimony; Pet'r Ex. 1*.

b. If some of the comparables are from distressed sales, and he does not know if they are or not, they still set the market. *Fleming testimony; Pet'r Ex. 1*.

c. Mr. McIntosh's appraisal has an opinion of value of $64,000, which is less than the Respondent's appraised value. *Fleming testimony; Pet'r. Ex.1; Resp't. Ex. 1*.

d. The Respondent's appraiser is biased. The appraiser is a member of the PTABOA that made the original determination in this appeal. The Assessor paid the appraiser for his appraisal assignment. *Fleming testimony.*

Analysis

20. The Respondent provided sufficient evidence to support the assessed value of $87,000. This conclusion was arrived at for the following reasons:

a. In Indiana, assessors value real property based on its "true tax value," which means "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." I. C. § 6-1.1-31-6(c); 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2). The cost approach, the sales comparison approach, and the income approach are three generally accepted techniques to calculate market value-in-use. *Id.* at 2. Assessing officials primarily use the cost approach. *Id.* at 3. The cost approach estimates the value of the land as if vacant and then adds the depreciated cost new of the improvements to arrive at a total estimate of value. *Id.* at 2. Any evidence relevant to the true tax value of the property as of the assessment date may be presented to rebut the presumption of correctness of the assessment, including an appraisal prepared in accordance with generally recognized appraisal standards. *Id.* at 3.

b. Regardless of the method used to challenge an assessment's presumption of accuracy, a party must explain how its evidence relates to market value-in-use 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. Assessor,* 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). For the 2012 assessment, the valuation date was March 1, 2012.

c. The Respondent engaged Mr. Nuhring to appraise the subject property after the Petitioners appealed their assessment. Mr. Nuhring is a certified appraiser who attested he prepared the appraisal in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP). Mr. Nuhring estimated the value of the property at $87,000 as of March 1, 2012. The appraiser stated the market sales comparison approach is given the greatest weight as it reflects prices paid by buyers for housing with similar utility and amenities. *See Resp't Ex. 1 at 5.* The Respondent established a prima facie case that the correct value is $87,000. Thus, the burden shifted to the Petitioners.

d. The Petitioners submitted an appraisal prepared by a certified appraiser, Mr. McIntosh. His appraisal is arguably probative of the subject property's market value-in-use. As explained above however, Mr. McIntosh's appraisal report is hearsay, to which the Assessor properly objected. If hearsay "is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting determination may not be based solely upon the hearsay." 52 IAC 2-7-3. That rule essentially restates the "modified residuum rule" that Indiana courts have applied to administrative hearings in general. *See CTS Corp. v. Shoulton*, 270 Ind. 34, 383 N.E.2d 293, 296 (1978) ("If properly objected to at the hearing and preserved on review and not

falling within a recognized exception to the Hearsay Rule, then an award may not be based solely upon such hearsay.") (quoting *CTS Corp. v. Shoulton*, 354 N.E.2d 324, 332 (Ind. Ct. App. 1976) (Buchanan, J. dissenting).

e. In response to the Assessor's objections, Mr. Fleming did not claim that Mr. McIntosh's appraisal report fit into a generally recognized exception to the hearsay rule, arguing instead that the appraisal included the appraiser's work and certifications. So although hearsay is admissible in administrative proceedings, it cannot form the sole basis of the Board's decision. Given that the Petitioners offered no other probative evidence of the subject property's market value-in-use, the Board finds that the Petitioners failed to make a case for any further reduction.

f. Another issue with Mr. McIntosh's appraisal is that his opinion of value is based on an effective valuation date of February 14, 2013, approximately one year after the relevant assessment date. The Petitioners failed to explain how the appraisal relates to market value-in-use as of the relevant valuation date of March 1, 2012.

g. Mr. Fleming attempted to impeach Mr. Nuhring's appraisal on three points. First, he claimed Mr. McIntosh's appraisal was more accurate because Mr. McIntosh used better comparables. This is not supported by the evidence in the record. The gross adjustments between the subject property and the comparables used by Mr. McIntosh are 35.9%, 32.3%, 36.5%, 43.8%, and 19.2%. The same gross adjustments used by Mr. Nuhring are 30.9%, 25.8%, and 29.3%. This information indicates that Mr. Nuhring's comparables needed smaller adjustments, except for Mr. McIntosh's comparable # 5; therefore Mr. Nuhring's comparables were more similar to the subject property than were the comparables offered by Mr. McIntosh.

h. Second, Mr. Fleming testified that the second floor is mostly unfinished, but he did not state how much of the second floor was unfinished or demonstrate how this fact would affect the market value-in-use of the subject property. The Petitioners' appraiser does not make note of any unfinished area in the interior of the dwelling, and states the condition of the home is fair. Pe*t'r Ex. 1 at 4.* That is the same conclusion the Respondent's appraiser reached based upon his exterior inspection of the subject property. *Resp. Ex. 1 at 5.*

i. Third, Mr. Fleming contended Mr. Nuhring was not impartial due to the fact he was paid for his appraisal assignment, and that he was a PTABOA member. As for the fact that Mr. Nuhring was paid to perform the appraisal, it is customary and standard professional practice for appraisers to accept a fee for an appraisal assignment.

j. The Board has previously expressed its disapproval of a member of a PTABOA, who participated in the decision, testifying before the Board on behalf of an Assessor. *See Utilimaster Corp. v. Elkhart Co. Assessor*, Pet. Nos. 20-017-06-1-3-00001, *et. seq.*, Ind. Bd. Tax Rev., February 24, 2010. The Board has noted that it creates the appearance of a conflict of interest and demeans the entire appeals process. It calls into question whether Mr. Nuhring conducted the appraisal in accordance with the

Uniform Standards of Professional Appraisal Practice and Advisory Opinions (USPAP). The Uniform Standards of Professional Appraisal Practice and Advisory Opinions (USPAP) ethics rules are clear:

> Conduct
> An appraiser must perform assignments ethically and competently, in accordance with USPAP and any supplemental standards agreed to by the appraiser in accepting the assignment. An appraiser must not engage in criminal conduct. An appraiser must perform assignments with impartiality, objectivity, and independence, and without accommodation of personal interests.
> An appraiser must not accept an assignment that includes the reporting of predetermined opinions and conclusions.
>
> UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE, ETHICS RULE, (2014 ed.).

Furthermore, as of July 1, 2014, pursuant to I.C. § 6-1.1-28-1, appraisers who contract with an assessor are specifically prohibited from serving on the PTABOA in the county where the appraiser is employed.

k. However, the Board is not reviewing the bias of Mr. Nuhring in regard to the PTABOA determination. The question whether Mr. Nuhring's role on the PTABOA, and the natural inclination to defend that decision, so impacts his credibility as to find that Mr. Nuhring did not offer an assessment in accordance with generally accepted appraisal practices. The Board reluctantly finds that, in spite of the appearance of impropriety, Mr. Nuhring presents evidence that supports a case for an assessment of $87,000.

l. The Petitioner submitted an appraisal prepared by a certified appraiser valuing the property at $64,000. His appraisal is arguably probative of the market value-in-use. But, Mr. McIntosh's appraisal report is hearsay, to which the Assessor properly objected. As also explained above, if hearsay "is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting determination may not be based solely upon the hearsay." 52 IAC 2-7-3. That rule essentially restates the "modified residual rule" that Indiana courts have applied to administrative hearings in general. *See CTS Corp. V. Shoulton*, 270 Ind.34, 383 N.E.2d 293, 296 (1978). ("If properly objected to at the hearing and preserved on review and not falling within a recognized exception to the Hearsay Rule, then an award may not be based solely upon such hearsay.") (quoting *CTS Corp. v. Shoulton*, 354 N.E.2d 324, 332 (Ind. Ct. App. 1976) (Buchanan, J. dissenting). Because the Petitioner did not introduce any other evidence other than the appraisal, the Board cannot lower the assessment to $64,000 as sought by the Petitioner.

Conclusion

21. The Respondent made a case that the subject property's market value-in-use on the valuation date of March 1, 2012 is $87,000. The Petitioners failed to prove the assessment should be less.

Final Determination

In accordance with the above findings and conclusions the Indiana Board of Tax Review now determines the subject property's assessment be changed to $87,000 .

ISSUED: September 8, 2014

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days after the date of this notice. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. The Indiana Tax Court's rules are available at <http://www.in.gov/judiciary/rules/tax/index.html>.