

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

Petition: 71-005-09-1-4-01613
Petitioner: Full Service Dining, Inc.
Respondent: St. Joseph County Assessor
Parcels: 71-04-33-201-012.000-005
Assessment Year: 2009

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

Procedural History

1. The Petitioner initiated a 2009 assessment appeal by filing a written document with the St. Joseph County Assessor on April 23, 2010.
2. The St. Joseph County Property Tax Assessment Board of Appeals (PTABOA) issued its determination on September 21, 2011.
3. The Petitioner filed a Form 131 petition with the Board on November 7, 2011. The Petitioner elected for his appeal to be heard under the Board's small claims procedures.
4. The Board issued a notice of hearing to the parties dated January 24, 2014.
5. Administrative Law Judge Patti Kindler held the administrative hearing on March 5, 2014. Neither she nor the Board inspected the property.
6. Joseph Taylor, certified tax representative, appeared as the representative and witness for the Petitioner. Frank Agostino, attorney, represented the Respondent. Rosemary Mandrici, St. Joseph County Assessor, and John Leader, appraiser, appeared as witnesses. All three witnesses were sworn.

Facts

7. The subject property is a retail restaurant located at 5110 Edison Lakes Parkway in Mishawaka, Indiana.
8. The PTABOA determined the 2009 assessed value is \$1,077,800 for land and \$672,200 for improvements (total \$1,750,000).

9. The Petitioner requested a total assessment of \$1,160,000.

Record

10. The official record for this matter contains the following:

a) The Form 131 petition,

b) A digital recording of the hearing,

c) Exhibits:

Petitioner Exhibit 1: Power of Attorney,
Petitioner Exhibit 2: Form 131 petition, PTABOA's determination, and the letter initiating the appeal,

Petitioner Exhibit 3: Sales-comparison analysis summary,
Petitioner Exhibit 4: Adjustment data and methodology used in the sales-comparison analysis summary,

Petitioner Exhibit 5: Comparable property sales and listing data,
Petitioner Exhibit 6: Property record cards for the comparable properties,
Petitioner Exhibit 7: Sales to Asking Price Differential from CoStar Group (CoStar),¹

Petitioner Exhibit 8: State of Indiana Restaurant Historical Asking Rents,
Petitioner Exhibit 9: Traffic data from Indiana Department of Transportation and CoStar,

Petitioner Exhibit 10: Structural and depreciation charts and cost schedules from the 2012 Real Property Assessment Guidelines, Appendix F (pages 22, 28), Appendix G (page 12).

Respondent Exhibit 1: Retrospective appraisal report prepared by John Leader,

Board Exhibit A: Form 131 petition with attachments,
Board Exhibit B: Hearing notice dated January 24, 2014,
Board Exhibit C: Hearing sign-in sheet,
Board Exhibit D: Notice of appearance for Frank Agostino.

d) These Findings and Conclusions.

Objection

11. The Petitioner's representative, Mr. Taylor, objected to the admission of Mr. Leader's appraisal. Mr. Taylor argued that the Respondent did not provide the appraisal report in advance of the hearing even though Mr. Taylor requested it more than ten days before the

¹ According to its website, CoStar Group is an online provider of websites for commercial real estate information, analysis, and marketing. CoStar Group is available at <http://www.costar.com>.

hearing, by e-mail. According to Mr. Taylor, when he requested the pre-hearing evidence, an employee of the Assessor's office responded with a list of witnesses and the 2009 and 2012 property record cards, but Mr. Leader's appraisal was not exchanged.² *Taylor testimony; Resp't Ex. 1.*

12. The Respondent's attorney, Mr. Agostino, argued that there is no requirement in a small claims hearing, as is the case in a plenary hearing, for the definite exchange date of information. Furthermore, because hearsay is allowed in small claims appeals, the appraisal should be admissible notwithstanding the delivery of the item prior to the hearing. *Agostino argument.* The ALJ took Mr. Taylor's objection under advisement.
13. Mr. Agostino's arguments evince a willful disregard of the rules governing appeals before the Board. In a small claims matter, a party is expressly required to furnish the opposing party with copies of documentary evidence and the names of witnesses if that information is requested at least ten days prior to the hearing. 52 IAC 3-1-5(d). Failure to do so may serve as grounds to exclude evidence or testimony that has not been timely provided. 52 IAC 3-1-5(d). Mr. Agostino's arguments to the contrary are nonsensical. The purpose of this rule is to prevent litigation by ambush or gamesmanship.
14. In fact, Mr. Agostino's actions in this matter display the exact bad faith behavior that the small claims rules are intended to prevent. Having received the Petitioner's documentation, the Respondent prepared its Exhibit 1 directly incorporating and challenging Petitioner's assertions, but then refused the Petitioner the same opportunity to incorporate Respondent's assertions. This type of gamesmanship will not be countenanced by the Board.
15. In further illustration, Mr. Agostino went to great lengths to challenge the Petitioner's use of a comparable restaurant characterized as formerly a Texas Land & Cattle Steakhouse, and most recently a Lone Star Steakhouse. Mr. Agostino even went so far as to assert that Petitioner's photograph was of a different building. Had Petitioner received Respondent's Exhibit 1 prior to the hearing, its representative would have likely noted that Respondent's own exhibit confirms that the restaurant was a "Former Texas Land & Cattle restaurant." Respondent Exhibit 1, A-4.
16. Petitioner's objection is sustained and the Respondent Exhibit 1 is excluded.

Contentions

17. Summary of the Petitioner's case:
 - a) The subject property is assessed too high in light of sales and listings of comparable restaurant-type properties. Mr. Taylor, through his sales-comparison analysis, estimates that the property's value is \$1,160,000. *Taylor testimony; Pet'r Ex. 6* at 1; *Pet'r Ex. 3.*

² Mr. Taylor did not indicate whether Mr. Leader was listed on witness list sent to him prior to the hearing.

- b) Mr. Taylor's analysis includes six comparable properties. The first of those, located at 4725 Grape Road in Mishawaka, sold on March 24, 2010, for \$900,000, or \$141.33 per square foot. Mr. Taylor applied positive adjustments for this property's inferior location, age, construction use-type, and time of sale. He applied negative adjustments for this comparable's smaller building and larger land size. *Taylor testimony; Pet'r Exs. 3, 5 at 1.*
- c) The second comparable property, a 5,267-square foot restaurant located at 303 South Dixie Way in South Bend, sold on July 16, 2009, for \$565,691, or \$107.40 per square foot. Mr. Taylor applied positive adjustments for this comparable's smaller land size, inferior location, and age. He applied negative adjustments for this comparable's smaller building, construction use-type, and time of sale. *Taylor testimony; Pet'r Exs. 3, 5 at 3-9.*
- d) The third comparable property sold on December 10, 2010 for \$700,000, or \$122.16 per square foot. This 5,730-square foot restaurant is located at 22858 Lincoln Way in Mishawaka. Mr. Taylor applied positive adjustments for this comparable's inferior location, age, construction use-type and time of sale. He applied negative adjustments for this comparable's smaller building size and larger land size. *Taylor testimony; Pet'r Exs. 3, 5 at 10.*
- e) The fourth comparable property, a restaurant with 10,500 square feet, located at 512 West Cleveland in Mishawaka, was listed for sale on July 21, 2006, for \$1,500,000, or \$142.86 per square foot. Mr. Taylor applied positive adjustments for this comparable's larger building size, inferior location, and its older age. He applied negative adjustments for its larger land size and because it was a listing rather than a sale. *Taylor testimony; Pet'r Exs. 3, 5 at 11-12.*
- f) The fifth property, a restaurant with 9,343 square feet, located at 4811 Grape Road, Mishawaka, was listed on August 27, 2009, for \$1,300,000, or \$139.14 per square foot. Mr. Taylor applied positive adjustments for this comparable's smaller land size, inferior location, and older date of construction. He applied negative adjustments for its smaller size and because it was a listing rather than a sale. *Taylor testimony; Pet'r Exs. 3, 5 at 13-14.*
- g) The sixth property, a restaurant with 5,288 square feet, located at 52554 IN-933, South Bend, was listed on November 20, 2009, for \$695,000, or \$131.43 per square foot. Mr. Taylor applied positive adjustments for this comparable's smaller land size, inferior location, and its older date of construction. He applied negative adjustments for its smaller size and because it was a listing rather than a sale. *Taylor testimony; Pet'r Exs. 3, 5 at 15.*
- h) From his analysis, Mr. Taylor derived a value of \$140 per square foot of building space. Thus the appropriate value for the subject property for the 2009 assessment is \$1,160,000 (8,286 square feet x \$140 = \$1,160,040, rounded to \$1,160,000). That

requested assessment was then allocated based on the subject's property record card with the land at 35.7% of the total value and the improvements at 64.3% of the total value. Thus, the proposed land value for the subject is \$414,100 and the proposed improvement value is \$745,900 (total \$1,160,000). *Taylor testimony; Pet'r Exs. 3, 6 at 1.*

- i) Mr. Taylor offered supportive documentation for his adjustments. The size adjustment, derived from CoStar, shows a 7% difference in restaurants that sold in the 5,000 to 7,000 square foot range compared to restaurant sales in the 7,000 to 9,000 square foot range. *Taylor testimony; Pet'r Ex. 4.*
- j) To account for differences between the subject and comparables' land size, Mr. Taylor relied on the property record cards of each property. He multiplied each comparable's land price by that difference in size to determine the dollar value of the adjustment. He then divided the dollar-value adjustment by each comparable's sale or list price to determine the percentage of adjustment applicable to it. The land size adjustments ranged from -29% to 34%. *Taylor testimony; Pet'r Exs. 4, 6, 9.*
- k) Mr. Taylor used traffic count data from the Indiana Department of Transportation (INDOT) and CoStar to determine the location adjustment for each of the comparables. He based the adjustment on the percentage of variance in traffic counts between each comparable's location and the subject property's location. He then multiplied the percent of variance by the percentage of land value from the comparable's property record card to determine the total location adjustment applicable to the comparable. *Taylor testimony; Pet'r Exs. 4, 9.*
- l) Mr. Taylor based the age adjustment on the incremental differences in depreciation schedules from the Department of Local Government Finance's (DGLF) 2012 Real Property Assessment Guidelines for each comparable multiplied by the percent of value attributable to the improvement from the property record card. *Taylor testimony; Pet'r Exs. 4, 6, 10.*
- m) The construction adjustment was based on the percentage of difference in the weighted average of construction base rates from each comparable's 2013 property record card. Mr. Taylor then applied that percentage of difference to the comparable's improvement value for the indicated adjustment. For example, on the first comparable's property record card, it was priced as having 65% dining area and 35% utility storage. The replacement cost new was determined by finding the appropriate pricing for "Utility/Storage" and "Dining/Lounge" from the Guidelines, Appendix G, the Commercial and Industrial Cost Schedules, and then applying the weighted average to that pricing. *Id.*
- n) In applying adjustments to comparables that are listings rather than sales, Mr. Taylor relied on CoStar data, which details sale price to asking price differentials. *Taylor testimony; Pet'r Ex. 7.*

- o) Finally, Mr. Taylor derived his time adjustment from a CoStar chart showing the percentage of change in asking rents for restaurants between the fourth quarter of 2007 and the fourth quarter of 2013. *Taylor testimony; Pet'r Exs. 4, 8.*
- p) Mr. Taylor argues that his sales-comparison analysis should carry more probative weight than Mr. Leader's appraisal, which includes sales from all over the state and country. Mr. Taylor relied solely on local sales that were documented and adjusted according to market data. Further, the fact that the properties were vacant does not require an adjustment, because only the value of the real estate, and not the business, is relevant. *Taylor argument.*

18. Summary of the Respondent's case:

- a) The Petitioner did not meet its burden to prove that the assessment was wrong. Mr. Taylor is not a licensed appraiser, and only one of his six comparable properties sold within the timeframe relevant to the 2009 assessment. And Mr. Taylor made no adjustments to account for the fact that all of his comparable properties were vacant. It greatly affects value when a property has no "live" going concern occupying it. *Agostino, Leader argument.*
- b) The comparable data that Mr. Taylor used is questionable. While his first comparable is the purported Lone Star Steakhouse located in Mishawaka, his comparable data sheet and photograph identify this comparable as the Texas Land & Cattle Steakhouse. There has never been a Texas Land & Cattle Steakhouse in Mishawaka. *Id.; Pet'r Ex. 5 at 1.*
- c) There are also discrepancies between the sale and listing prices of Mr. Taylor's comparables and sale prices for those properties listed on the property record cards. Mr. Taylor claims his first comparable sold for \$900,000, but according to the property record card its most recent sale was for \$825,000. Mr. Taylor claims his third comparable sold for \$700,000 but the only sale price shown on the property record card is for \$91,400. And Mr. Taylor listed the last comparable's list price at \$695,000 while the property record card shows a sale price of \$461,778. *Agostino argument.*
- d) Regardless of the probative value of Mr. Taylor's analysis, the Respondent offered an appraisal completed by John Leader, a certified general appraiser. Mr. Leader estimated the property's value at \$1,700,000. While the effective date of Mr. Leader's value is not entirely clear, his letter of transmittal indicates that the value is effective for 2009. *Leader testimony; Resp't Ex. 1.*
- e) Mr. Leader relied mainly on the sales-comparison approach in developing his value. He chose several comparables, and ran a linear regression analysis because the size of his comparables did not match what he needed. Mr. Leader certified that his appraisal conforms to USPAP. *Id.*

Burden of Proof

19. Generally, the taxpayer has the burden to prove that an 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 Ind. Code § 6-1.1-15-17.2 and Public Law 97-2014.
20. First, Ind. Code § 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.” Ind. Code § 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.” Ind. Code § 6-1.1-15-17.2(b).
21. Second, Ind. Code § 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 IC 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.” Ind. Code § 6-1.1-15-17.2(d).
22. 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. Ind. Code § 6-1.1-15-17.2(c) and (d).
23. In this appeal, both parties agreed that the assessment did not increase by more than 5% over the previous year, and nothing in the record indicates a reason for the burden to shift to Respondent. Therefore, the Petitioner has the burden to prove the assessment is correct.

Analysis

24. The Petitioner did not make a prima facie case for reducing the assessment.
 - a) Real property is assessed 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." Ind. Code § 6-1.1-31-6(c); 2002 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.3-1-2). The cost approach, the sales comparison approach, and the income approach are three generally accepted techniques to calculate market value-in-use. *Id.* Assessing

- officials primarily use the cost approach. 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.* A taxpayer is permitted to offer evidence relevant to market value-in-use to rebut an assessed valuation. Such evidence may include actual construction costs, sales information regarding the subject or comparable properties, appraisals, and any other information compiled in accordance with generally accepted appraisal principles. MANUAL at 5.
- b) Regardless of the method used to rebut the presumption of accuracy, one must explain how the evidence relates to market value-in-use as of the relevant valuation date. *O'Donnell v. Department of Local Government Finance*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also Long v. Wayne Township Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). The valuation date for a 2009 assessment was March 1, 2008. 50 IAC 21-3-3. Any evidence of value relating to a different date must have an explanation about how it demonstrates, or is relevant to, value as of that date. *Long*, 821 N.E.2d at 471.
 - c) Here, the Petitioner relies solely on Mr. Taylor's analysis in attempting to prove that the subject property's assessment is too high. Mr. Taylor based his value estimate on the sales and listings of six purportedly comparable St. Joseph County restaurant properties. Thus, the Petitioner recognizes that, through the sales-comparison approach, one can estimate the value of a property by analyzing the sales of comparable properties. A party offering such evidence must show that the properties are generally comparable to each other, and also must show how any relevant differences affect the relative values. *See Long*, 821 N.E.2d at 470-71 (holding that, in applying the sales-comparison approach, the taxpayers needed to explain how any differences between their property and the properties to which they sought to compare it affected the properties' relevant market values-in-use).
 - d) Mr. Taylor did attempt to compare the properties to the subject and adjust for differences. Further, he documented the various types of data he relied on to make those adjustments, which he expressed in percentage form. He relied on current property record cards to make land size and land-to-building ratio adjustments. In making his adjustments for age and weighted use types, Mr. Taylor relied on cost and depreciation tables from the 2012 Guidelines. And he relied on traffic count data to make adjustments for location.
 - e) However, Mr. Taylor's hodgepodge of assessment, appraisal, and mathematical methodology does not persuade the Board the evidence is based on generally accepted appraisal or assessment practices. Mr. Taylor's testimony does not sufficiently flush out the details of the adjustments. Furthermore, he does not reference any authorities that might confirm that the methodology and data were applied according to accepted appraisal practices. The Board therefore finds that the Petitioner's sales comparable analysis is insufficiently reliable to be probative of the property's market value-in-use.

- f) Where a Petitioner has not supported its claim with probative evidence, the Respondent's duty to support the assessment with substantial evidence is not triggered. *Lacy Diversified Indus. LTD v. Dept' of Local Gov't Fin.*, 799 N.E.2d 1215, 1221-22 (Ind. Tax Ct. 2003). Thus, the outcome is not affected by the Board's ruling on whether to admit the Respondent's appraisal.

Conclusion

The Petitioner failed to make a prima facie case. The Board therefore finds for the Respondent.

Final Determination

In accordance with the above findings of fact and conclusions of law, there is no change to the March 1, 2009 assessment.

ISSUED: May 30, 2014

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 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>>.