

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

Petition No.: 20-032-11-1-5-00009
Petitioners: Thomas J & Deborah J Gorski
Respondent: Elkhart County Assessor
Parcel No.: 20-04-25-278-012.000-032
Assessment Year: 2011

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

Procedural History

1. The Petitioners initiated their 2011 assessment appeal with the Elkhart County Assessor on August 24, 2011.
2. The Elkhart County Property Tax Assessment Board of Appeals (PTABOA) issued its determination on November 5, 2012.
3. The Petitioners timely filed their Form 131 petition with the Board on December 14, 2012. The Petitioners elected the Board's small claims procedures.
4. The Board issued a notice of hearing on September 20, 2013.
5. Administrative Law Judge (ALJ) Jennifer Bippus held the Board's administrative hearing on November 14, 2013. She did not inspect the property.
6. Thomas Gorski appeared *pro se*. Attorney Beth Henkel represented the Respondent. County Assessor Cathy Searcy and Gavin Fisher were sworn as witnesses.

Facts

7. The property under appeal is a single family home located at 53427 Forest Lakes Drive in Middlebury.
8. The PTABOA determined the following assessment:
Land: \$101,000 Improvements: \$216,900 Total: \$317,900
9. The Petitioners requested the following assessment:
Land: \$90,000 Improvements: \$170,000 Total: \$260,000

Record

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

- a) Petition for Review of Assessment (Form 131) with attachments,
- b) A digital recording of the hearing,
- c) Exhibits:

- Petitioners Exhibit 1: Property record card for the subject property for assessment years 2009, 2010, and 2011,
- Petitioners Exhibit 2: Property record card for subject property for assessment years 2011, 2012, and 2013,¹
- Petitioners Exhibit 3: Property Assessment detailed report for the subject property,
- Petitioners Exhibit 4: Appraisal report for the subject property performed by Alex Antonelli, with an effective date of January 6, 2010,
- Petitioners Exhibit 5: Property Assessment detail report for 53377 Forest Lakes Drive,
- Petitioners Exhibit 6: Property Assessment detail report for 10208 Forest Lakes Drive,
- Petitioners Exhibit 7: Property Assessment detail report for 10451 Cottage Grove,
- Petitioners Exhibit 8: Property Assessment detail report for 53401 Forest Lakes Drive,
- Petitioners Exhibit 9: Property Assessment detail report for 10334 State Road 120,
- Petitioners Exhibit 10: Spreadsheet showing comparable property analysis,
- Petitioners Exhibit 11: Assessors worksheet from previous PTABOA hearing.

- Respondent Exhibit 1: Property record card for the subject property,
- Respondent Exhibit 2: Aerial map of the subject property,
- Respondent Exhibit 3: Petitioners' appraisal dated January 8, 2010,
- Respondent Exhibit 4: Appraisal report for the subject property performed by Gavin Fisher with an effective date of March 1, 2011.

- Board Exhibit A: Form 131 petition with attachments,
- Board Exhibit B: Hearing notice dated September 5, 2013,
- Board Exhibit C: Request for continuance from the Respondent, dated September 13, 2013,
- Board Exhibit D: Notice of Appearance for Beth Henkel,
- Board Exhibit E: Order granting continuance dated September 16, 2013,
- Board Exhibit F: Re-scheduled hearing notice dated September 20, 2013,
- Board Exhibit G: Hearing sign-in sheet.

¹ Petitioners argue that this property record card includes a covered patio, which does not exist on the property.

d) These Findings and Conclusions.

Objections

11. The Respondent objected to Petitioners Exhibit 4 (Petitioners appraisal) based on hearsay, stating that the appraiser was not present to testify.
12. “Hearsay” is a statement, other than one made while testifying, that is offered to prove the truth of the matter asserted. Such a statement can be either oral or written. (Ind. R. Evid. 801(c)). The Board’s procedural rules specifically address hearsay evidence:

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

52 IAC 3-1-5(b). The word “may” is discretionary, not mandatory. In other words, the Board can permit hearsay evidence to be entered in the record, but it is not required to allow it.

13. Aside from arguing the appraisal was accepted by the Elkhart County PTABOA, the Petitioners made no attempt to argue that the appraisal was not hearsay. Further, the Petitioners failed to offer any argument that the appraisal should be allowed under any recognized hearsay exception.
14. Petitioners Exhibit 4 is hearsay. Nevertheless, the exhibit is admitted, subject to the limitations in the Board’s procedural rules.
15. The Petitioners objected to Respondent Exhibit 4 (Respondent appraisal) on the basis that the appraiser, Mr. Fisher, was previously employed by the Respondent. Further, the Petitioners contend Mr. Fisher was an employee of the Respondent at the time of the Petitioners’ PTABOA hearing.² The Petitioners contend this is a conflict of interest. The Petitioners also objected to the testimony of Mr. Fisher for the same reasons.
16. In response to the Petitioners’ objection, the Respondent stated that Mr. Fisher left the Respondent’s employment on June 1, 2012, and now currently works as a partner with Fisher Appraisals as a licensed property appraiser as well as a tax consultant. Further, the Respondent stated that the appraisal was performed on October 14, 2013, after Mr. Fisher was an employee with the Respondent. Finally, the Respondent stated that Mr. Fisher

² According to the Form 115, the Petitioners PTABOA hearing was held on June 28, 2012, which is after Mr. Fisher’s employment with the Respondent. Further, Mr. Fisher testified “I don’t think my exact role was specified at the PTABOA hearing.”

was paid a flat fee for the appraisal and Mr. Fisher is paid by the hour for his testimony. *Searcy and Fisher testimony.*

17. Indiana Code § 6-1.1-15-17.3(d) sets out that:

(d) An individual who is a former county assessor, former township assessor, *former employee* or contract employee of a county assessor or township assessor, or an independent contractor formerly employed by a county assessor or township assessor may not serve as a tax representative for *or otherwise assist another person* in an assessment appeal before a county board or the Indiana board if:

(1) the appeal involves the assessment of property located in:

(A) the county in which the individual was the county assessor or *was an employee*, contract employee, or independent contractor of the county assessor; *or*

(B) the township in which the individual was the township assessor or was an employee, contract employee, or independent contractor of the township assessor; *and*

(2) *while the individual* was the county assessor or township assessor, *was employed* by or a contract employee of the county assessor or the township assessor, *the individual personally and substantially participated in the assessment of the property.*

Ind. Code § 6-1.1-15-17.3(d) (emphasis added).

18. The Petitioners failed to provide any evidence to prove that Mr. Fisher “personally and substantially participated in the assessment to the property.” Ind. Code § 6-1.1-15-17.3(d). No evidence was presented that Mr. Fisher was biased. Further, the appraisal was completed according to the Uniform Standards of Professional Appraisal Practices (USPAP). Even if Mr. Fisher was biased, the bias would go to the weight of his testimony and appraisal, not its admissibility. Accordingly, Respondent Exhibit 4 is admitted along with his testimony.

Contentions

19. Summary of the Petitioners case:

a) The Petitioners submitted an appraisal prepared in connection with a home equity loan. The appraisal was performed by Alex Antonelli, certified licensed appraiser in Indiana, in accordance with USPAP. Mr. Antonelli used the sales comparison approach to value, estimating the value of the subject property at \$270,000, as of January 6, 2010. An adjustment was made given the subject property’s proximity to the lake. An age adjustment was also made due to the subject property’s recent construction. In response to the Assessor’s question regarding the age of the improvements, Mr. Gorski responded that the home was built in 2008. *Gorski testimony; Pet’r Ex. 4.*

- b) In addition to the appraisal, the Petitioners presented their own sales comparison analysis. In the Petitioners analysis, all of the comparables were located on Hunter Lake, except for the sale on Cottage Grove. The sales prices ranged from \$267,000 to \$400,000, with varying square footages. The comparable sales finished square footages ranged from 3,685 square feet to 5,114 square feet. All of the comparables measured larger than the subject property. The subject property has only 2,613. The average price per finished square foot of the sales comparables ranged from \$34.88 to \$59.95 a square foot. *Gorski testimony; Pet'r Ex. 10.*
- c) The Petitioners also presented an assessor's sales comparison worksheet. This exhibit was from their previous PTABOA hearing. It indicates that the subject property was valued at \$83.01 per square foot while the average value of other comparable properties was \$40.71 per square foot. *Gorski testimony; Pet'r Ex. 11.*
- d) Finally, the Petitioners pointed out that the subject property's most recent property record card included a covered porch, which does not exist. This porch increased the assessment value by \$2,800. *Gorski testimony; Pet'r Ex. 2.*

20. Summary of the Respondents case:

- a) The Respondent offered an appraisal performed by Mr. Gavin Fisher, a certified Indiana appraiser. Mr. Fisher performed the appraisal according to USPAP. Mr. Fisher utilized both the cost approach and sales approach to determine the appraised value, placing the most weight on the sales approach.³ The cost approach valued the subject property at \$367,600. While the sales-comparison approach valued the subject property at \$340,000 as of March 1, 2011. *Fisher testimony; Resp't Ex. 4.*
- b) Mr. Fisher explained that the value was extracted by figuring the depreciated cost of the improvements and subtracting that from the initial sales price, leaving an allocation for land. Mr. Fisher went on to explain that, as for adjustments, he did not need to make any lake front adjustments, except for his third comparable property, as all of the other comparables were, like the subject property, on the lake.⁴ Mr. Fisher also noted that the Petitioners' appraiser did not make adjustments or breakdowns for the main level square footage and the below grade square footage. Mr. Fisher made adjustments in his appraisal to reflect the living areas in the below grade area, citing that the below grade area had a substantial finish. *Fisher testimony; Resp't Ex. 4.*
- c) Mr. Fisher testified that he also included a detailed analysis of the Petitioners' appraisal in his report. Discrepancies were noted in the body of Mr. Fisher's

³Mr. Fisher stated, "[h]istorically the direct sales comparison approach to value is the most reliable indicator of value. Given the overall quality of the available sales data the figure arrived at through the sales comparison approach was given the most consideration in the final estimate of value with support from the cost approach." *Resp't Ex. 4.*

⁴Comparable #3 received a \$10,000 adjustment because it was channel front and not a lake front property. *Resp't Ex. 4.*

appraisal. Mr. Fisher noted that the Petitioners appraisal was not accurate in that their appraiser should have made larger adjustments for the land considering the Petitioners paid \$130,000 for the land. *Fisher testimony; Resp't Ex. 4.*

- d) In response to the Petitioners' questions, Mr. Fisher explained that the basement area was valued keeping in mind the pouring of the foundation and cost of finishing the basement. In this case, it was partially finished. The variances in the price per square foot can be in the type and quality of interior finish. In addition, the land was based on sales of vacant lots in the area. Mr. Fisher declared that assessed values and appraised values may not be the same and that "the purpose of the appraisal is to determine market value whether that lines up with an assessment or not." *Fisher testimony.*
- e) The Respondent argued that water front property is stable in value and that is reflected in Mr. Fisher's appraisal. The Respondent argued further that Mr. Fisher's testimony and analysis has more weight in this appeal. *Searcy argument.*

Burden of Proof

- 21. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that its property's assessment is wrong and what its correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). Nevertheless, the Indiana General Assembly enacted a statute that in some cases shifts the burden of proof:

This section applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal increased the assessed value of the assessed property by more than five percent (5%) over the assessed value determined by the county assessor or township assessor (if any) for the immediately preceding assessment date for the same property. The county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court.

Ind. Code § 6-1.1-15-17.2.

- 22. The evidence in this case indicates that the assessed value of the subject property did not increase by more than 5% from 2010 to 2011. Accordingly, the burden shifting provision of Ind. Code § 6-1.1-15-17.2 does not apply.

Analysis

23. The Petitioners failed to make a prima facie case for reducing the subject property's 2011 assessment.
- a) In Indiana, assessors value real property based on the property's true tax value, which the Department of Local Government Finance (DLGF) defines as the property's market value-in-use. Thus, a party's evidence in a tax appeal must be consistent with that standard. A market value-in-use appraisal prepared according to the Uniform Standards of Professional Appraisal Practice (USPAP) often will be probative. *Kooshtard Property VI v. White River Twp. Assessor*, 836 N.E.2d 501, 506 n. 6. (Ind. Tax Ct. 2005). A party may also offer actual construction costs or sales information for the property under appeal, sales or assessment information for comparable properties, and any other information compiled according to generally accepted appraisal principles.
 - b) Regardless of the method used, a party must explain how its evidence relates to the appealed property's 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). Otherwise, the evidence lacks probative value. *Id.* For March 1, 2011, assessments, the assessment and valuation dates were the same. *See* Ind. Code § 6-1.1-4-4.5(f).
 - c) Because the Respondent objected to the appraisal, a final determination cannot rest entirely on it. In other words, even though the appraisal appears to support a significantly lower value for the subject property, the Board cannot change the assessment unless other evidence that is not hearsay also would support such a change. The non-hearsay evidence in the record includes the Petitioners' comparable analysis.⁵ This evidence, however, does not prove that the current assessment is wrong nor does it support a specific lower value.
 - d) The Petitioners attempted to support their position by comparing the subject property's assessment to the assessments of purportedly comparable properties. Indiana Code § 6-1.1-15-18 allows parties to introduce assessments of comparable properties to prove the market value-in-use of a property under appeal. But where an appeal involves a residential property, those comparable properties must be located in the same taxing district or within two miles of the taxing district's boundary. Ind. Code § 6-1.1-15-18(c)(1). Here, all of the comparable properties presented by the Petitioners are within the same taxing district as the subject property.
 - e) Even if one assumes that the comparable properties meet Ind. Code § 6-1.1-15-18's taxing-district requirements, other properties' assessments do not necessarily prove

⁵ The Petitioners argue that the property record card incorrectly indicates a covered porch on the subject property. But, the Petitioners failed to provide any evidence to prove this point, or to prove how this point influences the market value-in-use of the subject property.

the market value-in-use of a property under appeal. The party relying on those assessments must show that the other properties are comparable to the property under appeal and how relevant differences affect their relative values. *See* Ind. Code § 6-1.1-15-18(c)(2) (requiring the use of generally accepted appraisal and assessment practices to determine whether properties are comparable); *see also Long*, 821 N.E.2d at 471 (finding sales data lacked probative value where they did not explain how purportedly comparable properties compared to their property or how relevant differences affected the properties' relative market values-in-use).

- f) Granted, the Petitioners chose properties in the same taxing district, but the comparison of the properties ended there. They did not explain how any relevant differences between the properties affected their relative values. Perhaps most importantly, the Petitioners explained that all of the comparable properties were much larger than the subject property, and this alone would affect value.
- g) The Petitioners presented sales information for their comparable properties as well in an attempt to show that the subject property was over-assessed. In making this argument the Petitioners essentially rely on a sales comparison approach to establish the market value-in-use of the property. *See* MANUAL at 3 (stating that the sales comparison approach “estimates the total value of the property directly by comparing it to similar, or comparable, properties that have sold in the market.”) In order to effectively use the sales comparison approach as evidence in a property assessment appeal, however, the proponent must establish the comparability of the properties being examined. Conclusory statements that a property is “similar” or “comparable” to another property do not constitute probative evidence of the comparability of the properties. *Long*, 821 N.E.2d at 470. Instead, the proponent must identify the characteristics of the subject property and explain how those characteristics compare to the characteristics of the purportedly comparable properties. *Id.* at 471. Similarly, the proponent must explain how any differences between the properties affect their relative market values-in-use. *Id.* The Petitioners did not do this. No adjustments were made on the properties. Further, the majority of the sales were from 2008 and the Petitioners failed to show how they related to the relevant valuation date.⁶
- h) To further elaborate on the Petitioners' appraisal, even had the appraisal not been objected to, there were still multiple flaws. The appraisal had an effective date of January 1, 2010, with no explanation of how it would relate to the subject property's valuation date. Further, the sales used in the appraisal were from 2009. Again, nothing in the appraisal related these sales to the relevant valuation date. Therefore, the appraisal would not be sufficient evidence on its own even without the hearsay objection. The hearsay objection was properly made and served an important purpose here. The Petitioners were allowed the opportunity to cross examine Mr. Fisher on his training and on the work he completed for his appraisal. The Respondent, however, was not provided with the same opportunity to question Mr. Antonelli. The Respondent most likely would have questioned Mr. Antonelli on the same items Mr.

⁶ One sale was from January 2009 and the other sale was from December 2012. But again, the Petitioners did not show how these sales related to the relevant valuation date.

Fisher was questioned on. Thus, it is important to have the appraiser present to answer various questions and properly justify the completed appraisal.

- i) The Petitioners failed to make a prima facie case that the 2011 assessment is incorrect.
- j) Where the Petitioners have not supported their claim with probative evidence, the Respondent's duty to support the assessment with substantial evidence is not triggered. *Lacy Diversified Indus. v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003).

Conclusion

24. The Board finds in favor of the Respondent.

Final Determination

In accordance with the above findings and conclusions of law, the 2011 assessment will not be changed.

ISSUED: February 4, 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>>.