

REPRESENTATIVE FOR PETITIONER:
Richard Werner, Tax Representative

REPRESENTATIVE FOR RESPONDENT:
Brian A. Cusimano, Attorney

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

JAFFE FAZOLI PROPERTY, LLC,)	Petition Nos.: 89-030-16-1-4-00389-17
)	89-030-17-1-4-00287-18
Petitioner,)	
)	Parcel No.: 89-16-35-440-206.003-030
v.)	
)	Wayne County
WAYNE COUNTY ASSESSOR,)	Center Township
)	
Respondent.)	Assessment Years: 2016 and 2017

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

September 7, 2018

FINAL DETERMINATION

The Indiana Board of Tax Review (Board), having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUE

1. The Respondent accepted the burden of proof and conceded the 2016 and 2017 assessments should be reduced to the 2015 level. The Petitioner sought a lower assessment. Did the Petitioner prove it was entitled to a further reduction?

PROCEDURAL HISTORY

2. The Petitioner initiated its 2016 and 2017 assessment appeals with the Wayne County Assessor on July 11, 2016, and July 9, 2017, respectively. The Wayne County Property Tax Assessment Board of Appeals (PTABOA) issued determinations for each year denying the Petitioner relief. The Petitioner timely filed Petitions for Review of Assessment (Form 131s) with the Board for both years and opted out of the Board's small claims procedures.
3. On June 12, 2018, the Board's administrative law judge (ALJ), Joseph Stanford, held a consolidated hearing on the petitions. Neither the Board nor the ALJ inspected the subject property.

HEARING FACTS AND OTHER MATTERS OF RECORD

4. Certified tax representative Richard Werner appeared for the Petitioner and was sworn as a witness. Attorney Brian Cusimano appeared for the Respondent. Consultant Bradley Berkemeier was sworn as a witness for the Respondent.¹
5. The Petitioner offered the following exhibit:

Petitioner Exhibit 1: 2017 Property Tax Assessment Appeal Report (pages 20-27 marked CONFIDENTIAL).²
6. The Respondent did not offer any exhibits.
7. The record also includes the following: (1) all pleadings, briefs, motions, and documents filed in these appeals; (2) all notices and orders issued by the Board or our ALJ; and (3) a digital recording of the hearing.

¹ Joseph L. Kaiser, Betty Smith-Henson, and Timothy G. Smith were also present at the hearing, but they were not sworn as witnesses.

² Even though the ALJ described the procedure for identifying and notifying the Board of confidential evidence, Mr. Werner did not specifically identify anything in his report as confidential. Upon further inspection it appears several pages may disclose, or could be used to compute, the taxpayer's actual income and expenses, and includes details regarding the taxpayer's lease. Accordingly, the Board has marked pages 20-27 as confidential.

8. The property under appeal is a fast-food restaurant located at 4711 National Road East in Richmond.
9. For 2016, the PTABOA determined an assessment of \$1,138,300 (land \$61,300 and improvements \$1,077,000). For 2017, the PTABOA determined an assessment of \$1,138,500 (land \$61,300 and improvements \$1,077,200).
10. For 2016, the Petitioner requested an assessment of \$275,500 (land \$38,200 and improvements \$237,300). And for 2017, the Petitioner requested an assessment of \$327,800 (land \$38,200 and improvements \$289,600).

OBJECTIONS

11. Mr. Cusimano objected to the admission of Petitioner's Exhibit 1 because the Petitioner failed to exchange it before the hearing. Mr. Cusimano argued the Respondent would be prejudiced if the exhibit were allowed because she did not have time to review it prior to the hearing.
12. The exhibit in question is a report purporting to compute the subject property's value using the cost, assessment-comparison, sales-comparison, and the income-capitalization approaches. Mr. Werner testified that, while he offered a similar report at the PTABOA hearing, "it has changed significantly" since then. Specifically, he testified that the sales-comparison, assessment-comparison, and income-capitalization approaches contained within the report had changed since he submitted it at the PTABOA hearing. Mr. Werner also admitted that he did not provide the amended report to the Respondent before the hearing. As a result of Mr. Werner's admission, the ALJ sustained the objection and excluded the exhibit from the record.
13. Because the Petitioner opted out of the Board's small claims procedures, both parties were required to exchange copies of their documentary evidence at least five business days prior to the hearing. 52 IAC 2-7-1(b)(1). This requirement allows parties to be better informed and to avoid surprises. It also promotes an organized, efficient, and fair

consideration of the issues at a hearing. The Board may exclude evidence based on a party's failure to comply with the exchange rule where it appears that admitting the exhibit would prejudice the opposing party. 52 IAC 2-7-1(f). However, the rules allow the Board to waive the exchange deadlines for materials previously submitted at a PTABOA hearing. 52 IAC 2-7-1(d).

14. We find the significant differences between the report the Petitioner relied on at the PTABOA hearing and the amended report it offered at our hearing produced the type of unfair surprise the exchange rule is intended to prevent. Admitting the amended report when the Respondent had no opportunity to review it would clearly prejudice the Respondent's case. Accordingly, we adopt the ALJ's ruling sustaining the objection and Petitioner's Exhibit 1 is excluded from the record.

JURISDICTIONAL FRAMEWORK

15. The Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property, (2) property tax deductions, (3) property tax exemptions, and (4) property tax credits that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Board under any law. Ind. Code § 6-1.5-4-1(a). All such appeals are conducted under Ind. Code § 6-1.1-15. *See* Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.

PETITIONER'S CONTENTIONS

16. As discussed above, Petitioner's Exhibit 1 is excluded from the record based on the Petitioner's failure to provide it to the Respondent at least five business days before the hearing. The Petitioner failed to offer any other documentary evidence, testimony, or argument in support of reducing its 2016 and 2017 assessments.

RESPONDENT'S CONTENTIONS

17. The Respondent conceded the 2016 and 2017 assessments should be reduced to the 2015 level of \$1,016,900. With the exclusion of Petitioner's Exhibit 1, the Petitioner failed to make a prima facie case for any further reduction. *Cusimano argument*.

BURDEN OF PROOF

18. 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. Ass'r*, 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). The burden-shifting statute as amended by P.L. 97-2014 creates two exceptions to that rule.
19. 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 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 the Indiana tax court.” Ind. Code § 6-1.1-15-17.2(b).
20. 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). This change was effective March 25, 2014, and has application to all appeals pending before the Board.

21. Here, Mr. Cusimano conceded the Respondent has the burden of proof because the assessment increased by more than 5% from 2015 to 2016. Further, he acknowledged that both years under appeal should revert to the 2015 total assessment of \$1,016,900. But the Petitioner sought an even lower value. According to Ind. Code § 6-1.1-15-17.2(b) the Petitioner has the burden of proving it is entitled to any further reduction in the assessments.

ANALYSIS

22. Real property is assessed based on its market value-in-use. Ind. Code § 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. Assessing officials primarily use the cost approach, but other evidence is permitted to prove an accurate 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.
23. Regardless of the method used, a party must explain how its evidence relates to the relevant valuation date. *See 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). For 2016 and 2017 assessments, the assessment and valuation dates were January 1 of each respective year. *See* Ind. Code § 6-1.1-2-1.5.
24. As discussed above, the Respondent accepted the burden of proof. Additionally, the Respondent conceded each year under appeal should revert back to the 2015 total assessment of \$1,016,900. The Board will accept both concessions. Accordingly, the Petitioner is entitled to have each year under appeal reduced to \$1,016,900. However, the Petitioner sought a further reduction in the assessment. The Petitioner has the burden of proving that lower value. Therefore, the Board turns to the Petitioner's evidence.

25. As discussed above, the Board excluded the Petitioner's only exhibit, the 2017 Property Tax Assessment Appeal Report. The Petitioner failed to offer any other documentary evidence, testimony, or argument. Thus, the Petitioner failed to make a prima facie case supporting any further reduction in the assessments.

SUMMARY OF FINAL DETERMINATION

26. The Respondent accepted the burden of proof and conceded to lower the 2016 and 2017 total assessments to the 2015 level of \$1,016,900. The Petitioner sought an even lower value, but failed to make a case for any further reduction.

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

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

- 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 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's rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.