REPRESENTATIVES FOR PETITIONER:
James K. Gilday
John J. Gilday

REPRESENTATIVES FOR RESPONDENT:
Frank Corsaro

BEFORE THE
INDIANA BOARD OF TAX REVIEW

In the matter of:

JAMES K. GILDAY,	)	Petition No.: 49-101-95-1-5-00188
Petitioner	)	County: Marion
v.	)	Township: Center
CENTER TOWNSHIP ASSESSOR,	)	Parcel No.: 1-100442
Respondent	)	Assessment Year: 1995

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

October 2, 2003

FINAL DETERMINATION

The Indiana Board of Tax Review assumed jurisdiction of this matter as the successor entity to the State Board of Tax Commissioners, and the Appeals Division of the State Board of Tax Commissioners. For convenience of reference, each entity is without distinction hereafter referred to as the "Board".

The 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

Issues

1. The issues presented for consideration by the Board were:

   ISSUE 1 – *Whether land not owned by the Petitioner is included in the assessment.*

   ISSUE 2 – *Whether the PUD land classification should be "average."*

   ISSUE 3 – *Whether a negative influence factor should be applied to the land value.*

   ISSUE 4 – *Whether the grade should be "C" instead of "B-1."*

   ISSUE 5 – *Whether the lower level of the improvement is an unfinished basement with an attached garage.*

   ISSUE 6 – *Whether the improvement has three floors.*

   ISSUE 7 – *Whether the neighborhood rating is correct.*

   ISSUE 8 – *Whether the condition rating is correct.*

Procedural History

2. Pursuant to Ind. Code § 6-1.1-15-3, James K. Gilday filed a Form 131 petitioning the Board to conduct an administrative review of the above petition. The Form 131 was filed on May 25, 2001. The determination of the PTABOA was issued on April 27, 2001. The PTABOA determined the assessed value of the subject property to be $1,270 (land) and $13,500 (improvements).

Hearing Facts and Other Matters of Record

3. Pursuant to Ind. Code § 6-1.1-15-4 a hearing was held on June 4, 2003 in Indianapolis, Indiana before Joseph Stanford, the duly designated Administrative Law Judge

authorized by the Board under Ind. Code § 6-1.5-5-2. The Administrative Law Judge did not view the property.

4. The following persons were present at the hearing:

For the Petitioner:

James K. Gilday

John J. Gilday

For the Respondent:

Frank Corsaro, Township Assessor

5. The following persons were sworn in as witnesses and presented testimony:

For the Petitioner:

James K. Gilday

John J. Gilday

For the Respondent:

Frank Corsaro, Township Assessor

6. The following exhibits were presented:

For the Petitioner:

Petitioner's Exhibit 1 – Affidavit of Glenn Cruzan

Petitioner's Exhibit 2 – Surveyor Location Report

Petitioner's Exhibit 3 – 1989 subject property record card (PRC)

Petitioner's Exhibit 4 – 1995 subject PRC prior to PTABOA changes

Petitioner's Exhibit 5 – Pages one (1) and two (2) of Marion County Land Order

Petitioner's Exhibit 6 – Form 11, Notice of Assessment, dated November 15, 1995

Petitioner's Exhibit 7 – Form 11, Notice of Assessment, undated

Petitioner's Exhibit 8 – Transcript of *James K. Gilday v. State Board of Tax Commissioners,* Case No. 49T10-9212-TA-

00100

Petitioner's Exhibit 9 – Restrictive Covenants of Lockerbie Glove Company

Petitioner's Exhibit 10 – By-Laws of Lockerbie Glove Company

Petitioner's Exhibit 11 – Form 115, Notification of Final Assessment Determination

Petitioner's Exhibit 12 – Map of Lockerbie Square Area

Petitioner's Exhibit 13 – Grade Specification Table from Regulation 17

Petitioner's Exhibit 14 – Letter dated November 13, 2000 from Petitioner to Mr. William Pierce, Center Township Deputy Assessor

Petitioner's Exhibit 15 – State Final Determination, Petition No. 49-101-89-1-5-01047R

Petitioner's Exhibit 16-19 – Photographs of subject property

For the Respondent:

Respondent's Exhibit 1 – Subject PRC

7. The following additional items are officially recognized as part of the record of proceedings:

Board's Exhibit A – Form 131 petition and related attachments

Board's Exhibit B – Petitioner's lists of witnesses, exhibits, and summary of issues

Board's Exhibit C – Hearing notice

Board's Exhibit D – Marion County Land Order, page 38

8. The following matters or facts were stipulated and agreed to by the parties:

At the hearing, it was agreed that the PTABOA had already made the corrections requested by the Petitioner, or agreed with the Petitioner, concerning the following issues:

A. The grade of the improvement is currently "C."

B. The condition of the improvement is "average."

C. The neighborhood rating is "good."

D. The PUD land classification is "average."

E. The square footage of land assessed is currently correct.

These facts, to which both parties agreed, serve as agreements for Issues 1, 2, 4, 7, and 8 above. Issues 3, 5, and 6 remain to be decided

Jurisdictional Framework

9. This matter is governed by the provisions of Ind. Code § 6-1.1-15, and all other laws relevant and applicable to appeals initiated under those provisions, including all case law pertaining to property tax assessment or matters of administrative law and process.

10. The Board is authorized to issue this final determination pursuant to Indiana Code § 6-1.1-15-3.

Indiana's Property Tax System

11. The Indiana Constitution requires Indiana to create a uniform, equal, and just system of assessment. See Ind. Const. Article 10, §1.

12. Indiana has established a mass assessment system through statutes and regulations designed to assess property according to what is termed "True Tax Value." See Ind. Code § 6-1.1-31, and 50 Ind. Admin. Code 2.2.

13. True Tax Value does not precisely equate to fair market value. See Ind. Code § 6-1.1-31-6(c).

14. An appeal cannot succeed based solely on the fact that the assessed value does not equal the property's market value. See *Town of St. John V,* 702 N.E. 2d.

15. The Indiana Supreme Court has said that the Indiana Constitution "does not create a personal, substantive right of uniformity and equality and does not require absolute and

precise exactitude as to the uniformity and equality of each individual assessment", nor does it "mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant", but that the proper inquiry in tax appeals is "whether the system prescribed by statute and regulations was properly applied to individual assessments." See *Town of St. John V,* 702 N.E. 2d.

16. Although the Supreme Court in the *St. John* case did declare the cost tables and certain subjective elements of the State's regulations constitutionally infirm, it went on to make clear that assessment and appeals must continue to be determined under the existing rules until new regulations are in effect.

17. New assessment regulations have been promulgated, but are not effective for assessments established prior to March 1, 2002. See 50 Ind. Admin. Code 2.3.

State Review and Petitioner's Burden

18. The State does not undertake to reassess property, or to make the case for the petitioner. The State decision is based upon the evidence presented and issues raised during the hearing. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs,* 704 N.E. 2d 1113 (Ind. Tax 1998).

19. The petitioner must submit 'probative evidence' that adequately demonstrates all alleged errors in the assessment. Mere allegations, unsupported by factual evidence, will not be considered sufficient to establish an alleged error. See *Whitley Products, Inc. v. State Bd. of Tax Comm'rs,* 704 N.E. 2d 1113 (Ind. Tax 1998), and *Herb v. State Bd. of Tax Comm'rs, 656* N.E. 2d 1230 (Ind. Tax 1998). ['Probative evidence' is evidence that serves to prove or disprove a fact.]

20. The petitioner has a burden to present more than just 'de minimis' evidence in its effort to prove its position. See *Hoogenboom-Nofzinger v. State Bd. of Tax Comm'rs,* 715 N.E. 2d 1018 (Ind. Tax 1999). ['De minimis' means only a minimal amount.]

21. The petitioner must sufficiently explain the connection between the evidence and petitioner's assertions in order for it to be considered material to the facts. 'Conclusory statements' are of no value to the State in its evaluation of the evidence. See *Heart City Chrysler v. State Bd. of Tax Comm'rs,* 714 N.E. 2d 329 (Ind. Tax 1999). ['Conclusory statements' are statements, allegations, or assertions that are unsupported by any detailed factual evidence.]

22. Essentially, the petitioner must do two things: (1) prove that the assessment is incorrect; and (2) prove that the specific assessment he seeks, is correct. In addition to demonstrating that the assessment is invalid, the petitioner also bears the burden of presenting sufficient probative evidence to show what assessment is correct. See *State Bd. of Tax Comm'rs v. Indianapolis Racquet Club, Inc.*, 743 N.E.2d 247, 253 (Ind., 2001), and *Blackbird Farms Apartments, LP v. DLGF* 765 N.E.2d 711 (Ind. Tax, 2002).

23. The State will not change the determination of the County Property Tax Assessment Board of Appeals unless the petitioner has established a 'prima facie case' and, by a 'preponderance of the evidence' proven, both the alleged error(s) in the assessment, and specifically what assessment is correct. See *Clark v. State Bd. of Tax Comm'rs,* 694 N.E. 2d 1230 (Ind. Tax 1998), and *North Park Cinemas, Inc. v. State Bd. of Tax Comm'rs,* 689 N.E. 2d 765 (Ind. Tax 1997). [A 'prima facie case' is established when the petitioner has presented enough probative and material (i.e. relevant) evidence for the State (as the fact-finder) to conclude that the petitioner's position is correct. The petitioner has proven his position by a 'preponderance of the evidence' when the petitioner's evidence is sufficiently persuasive to convince the State that it outweighs all evidence, and matters officially noticed in the proceeding, that is contrary to the petitioner's position.]

Discussion of Issues

ISSUE 1: *Whether land not owned by the Petitioner is included in the assessment*

24. This issue will not be discussed. The parties agreed that the square footage assessed is the same as the 1989 assessment, and therefore correct.

ISSUE 2: *Whether the PUD land classification should be "average"*

25. The Township Assessor agreed that the land classification should be "average." This agreement, however, does not change the assessment. The Marion County Land Order (Board Ex. D) shows that Center Township Planned Unit Development (PUD) Rates for land under the unit for average classification is a range between $4.00 and $5.85. The subject is priced within this range, at $5.05. Excess land for the average classification should be priced, according to the Marion County Land Order, between $0.80 and $1.17. Again, the subject is priced within the range, at $1.00. Therefore, there is no change in the assessment as a result of this issue.

ISSUE 3: *Whether a negative influence factor should be applied to the land value*

26. The Petitioner contends that a 15% negative influence factor should be applied to the land value.

27. The Respondent contends that no negative influence factor is warranted.

28. The applicable rules governing this issue are:

    50 IAC 2.2-4-10(a)(9)
    "Influence factor" refers to a condition peculiar to the lot that dictates an adjustment to the extended value to account for variations from the norm.

    50 IAC 2.2-4-12
    When the commission establishes base rates for a geographic area, it establishes rates for the normal lot. Often there are conditions peculiar to certain lots within a geographic area that must be analyzed on an individual basis. These conditions require the assessor to make an adjustment to the value of the lot. This adjustment is an influence factor. An influence factor represents the composite effect that influences the value of certain lots within the boundaries of an entire geographic area.

29. Evidence and testimony considered particularly relevant to this determination include the following:

    A. Restrictive covenants apply to the subject property. *John Gilday testimony, Petitioner's Exhibits 9-10.*

B. A settlement for a 1989 appeal of the subject property's assessment allows for a 15% negative influence factor. *James Gilday testimony, Petitioner's Exhibit 15.*

Analysis of ISSUE 3

30. The Petitioner contends that a 15% negative influence factor should be applied to the property. The reasons given for this contention are the restrictive covenants that apply to the subject property, and the fact that a 15% negative influence factor was applied as a result of a settlement to a 1989 property tax appeal.

31. The Township argues that all subdivisions have restrictive covenants, and this fact alone does not entitle a property to a negative influence factor. The Township is correct.

32. In this type of appeal, a petitioner's burden is two-fold. First, the petitioner must prove that a negative influence factor is warranted. Second, the petitioner must quantify the adjustment he seeks. *Clark v. State Board of Tax Commissioners,* 694 N.E. 2d 1230, 1233 (Ind. Tax 1998).

33. In the case at bar, Mr. Gilday has failed to meet either prong of his burden of proof. As the Township correctly argues, all subdivisions have restrictive covenants. Thus, the Petitioner has not identified anything peculiar or out of the norm to the subject property that would warrant a negative influence factor.

34. Furthermore, even if the Petitioner had identified a peculiarity of the subject property that warranted a negative influence factor, he failed to adequately quantify the adjustment he seeks. The 15% negative influence factor he requested is based solely on a settlement of a 1989 appeal. It is totally unrelated to any 1995 loss in value to the property, assuming a condition existed that caused a loss in value. Each tax year is separate and distinct. *Williams Industries v. State Board of Tax Commissioners,* 648 N.E. 2d 713 (Ind. Tax 1995).

35. For the reasons set forth above, the Petitioner has not met his burden that a negative influence factor should be applied to the land. There is no change in the assessment as a result of this issue.

ISSUE 4: *Whether the grade should be "C" instead of "B-1"*

36. This issue will not be discussed. The grade was changed to "C" as a result of the PTABOA hearing.

ISSUE 5: *Whether the lower level of the improvement is an unfinished basement with an attached garage.*

ISSUE 6: *Whether the improvement has three floors.*

37. The Petitioner contends that the dwelling should be assessed as having two (2) levels and a basement.

38. The Township contends that the dwelling has three (3) levels above ground, which includes an integral garage.

39. The applicable rule governing this issue is:

50 IAC 2.2-7-3 Story descriptions
[This sections contains illustrations of modern story height designs.]

50 IAC 2.2-7-3(9)
A bi-level dwelling is a two (2) level design in which the first floor is partially below grade and the entry or foyer is a level between the first and second floor

50 IAC 2.2-7-3(10)
A tri-level is a split-level design of three (3) levels or more exclusive of any basement. Normally, the first floor is partially below grade and partially at grade level.

50 IAC 2.2-7-4(2)
Description of an integral garage, the pricing methodology, and an illustration of an integral garage area.

50 IAC 2.2-16-2(5)
"Basement" means a building story which is wholly or partially below grade level.

50 IAC 2.2-16-4.1 Miscellaneous Information Illustrations – Modern Story Height Designs
Indicates floor levels and shows the most typical use at a particular level

40. Evidence and testimony considered particularly relevant to this determination include the following:
    a. The bottom level of the structure consists of a garage and an unfinished utility room. The entrance to the garage is at grade level with a portion of the utility room partially below grade level. *Gilday testimony and Petitioner's Exhibits 16-19.*

Analysis of ISSUES 5 and 6

41. The Petitioner contends the story level in dispute is partially below grade and therefore should be classified as a basement, and that the entire dwelling should be valued as a two (2)-story building with a basement.

42. The Petitioner's argument centers on the definition of a "basement" found in the Regulation (50 IAC 2.2-16-2(5)), photographs of the subject property (Petitioner's Exhibits 16 – 19) and a 1989 Board determination (Petitioner's Exhibit 15).

43. However, a review of the photographs submitted by the Petitioner (Petitioner's Exhibits 16 – 19) indicate that the subject structure under appeal has, in effect, two (2) different levels of grade: the grade level at the front of the building and the grade level at the rear.

44. The photographs submitted by the Petitioner consisted of one (1) interior (Petitioner's Exhibit 18) and three (3) exteriors (Petitioner's Exhibits 16, 17, and 19) of the subject structure.

45. Two (2) of the exterior pictures were photographed from Lockerbie Circle South on the north side of the structure (Petitioner's Exhibits 16 and 17). These photographs showed

an integral garage at grade level with two (2) additional stories above the integral garage as well as an entrance to the subject dwelling (east of the garage) also at grade level. The one (1) exterior picture photographed from East Vermont Street on the south side of the structure (Petitioner's Exhibit 19), showed the lower level's windows below grade level. The one (1) interior photograph showed the same windows described above below grade level (Petitioner's Exhibit 18), but taken from inside the structure.

46. In order to determine whether the story is partially below grade level, the assessor must therefore make a subjective judgment as to which level is "the grade level" referred to in the definition of basement.

47. Determining whether the story level is partially below grade is not the only subjective judgment the local officials must make when assessing this type of property.

48. The plain language of 50 IAC 2.2 makes it clear that not all stories that are partially below the grade level are basements.

49. For example, a "tri-level dwelling is a split level design of three (3) levels or more **exclusive of any basement**. Normally **the first floor is partially below grade** and partially at grade level. 50 IAC 2.2-7-3(10) (Emphasis added).

50. Similar language is used to describe a bi-level dwelling as "a two (2) level design in which the **first floor is partially below grade** and the entry or foyer is a level between the first and second floor. 50 IAC 2.2-7-3(9) (Emphasis added).

51. The Petitioner, therefore, may not simply assert that any story partially below grade level is best described as a basement. Clearly, some story levels that are partially below the grade level are more properly identified as first floor areas rather than basements.

52. The Petitioner did not submit any PRCs of similar constructed structures to show that lower levels of those properties were indeed being valued as basements. Such a comparison would show disparage treatment of the subject structure.

53. The Petitioner also submitted for review, a Board determination for tax year 1989 on the subject property. The PRC attached to the 1989 Board determination indicated that the dwelling had been valued as a two (2) story with a basement rather than three (3) stories.

54. The Board will not change the floor classifications of the dwelling under appeal on the basis of its Final Determination for the tax year 1989. The Final Determination clearly states that this determination was "due to litigation". An agreement made between parties is not evidence probative of an error in the assessment. The Form 118, submitted as evidence of an erroneous assessment, was drafted pursuant to a settlement agreement mutually agreed upon by all parties and was done to avoid the expense of further litigation. As such, it cannot be used for any other purpose that is evidentiary in nature.

55. The Petitioner's contention that the assessment of this lower level of the structure is incorrect, and that the level should be assessed as a basement, is a conclusory statement unsupported by evidence. Conclusory statements do not constitute probative evidence of error in the assessment. *Whitley,* 704 N.E. 2d at 1119.

ISSUE 7: *Whether the neighborhood rating is correct.*

56. This issue will not be discussed. The PRC shows that the neighborhood rating was changed from "very good" to "good" as the Petitioner requested, as a result of the PTABOA hearing.

ISSUE 8: *Whether the condition rating is correct*

57. This issue will not be discussed. The PRC shows that the condition rating was changed from "good" to "average" as the Petitioner requested, as a result of the PTABOA hearing.

Summary of Final Determinations

Determination of ISSUE 1: *Whether land not owned by the Petitioner is included in the assessment*

58. The parties agreed that the square footage appearing on the current PRC is correct. There is no change in the assessment as a result of this issue.

Determination of ISSUE 2: *Whether the PUD land classification should be average*

59. The parties agreed that the land classification should be changed to "average." However, this does not result in a change in the assessment. The land is valued within the range for "average" according to the Marion County Land Order.

Determination of ISSUE 3: *Whether a negative influence factor should be applied to the land value*

60. The Petitioner failed to meet his burden concerning this issue. There is no change in the assessment as a result of this issue.

Determination of ISSUE 4: *Whether the grade should be "C" instead of "B-1"*

61. As a result of the PTABOA hearing, the grade was changed to "C". There is no further change in the assessment as a result of this issue.

Determination of ISSUE 5: *Whether the lower level of the improvement is an unfinished basement with an attached garage.*
Determination of ISSUE 6: *Whether the improvement has three floors.*

62. The Petitioner failed to meet his burden concerning these issues. There are no changes in the assessment as a result of these issues.

Determination of ISSUE 7: *Whether the neighborhood rating is correct*

63. As a result of the PTABOA hearing, the neighborhood rating was changed to "good". There is no further change in the assessment as a result of this issue.

Determination of ISSUE 8: *Whether the condition rating is correct*

64. As a result of the PTABOA hearing, the condition rating was changed to "average". There is no further change in the assessment as a result of this issue.

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

____

Chairman, Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice.