

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

Petition: 53-017-14-1-4-00022
Petitioner: Kooshtard Property I, LLC
Respondent: Monroe County Assessor
Parcel: 53-02-33-100-017.000-017
Assessment Year: 2014

The Indiana Board of Tax Review (“Board”) issues this determination in the above matter, finding and concluding as follows:

INTRODUCTION

1. Kooshtard Property I, LLC, challenged the valuation of the subject property’s land. The Monroe County Assessor submitted a restricted appraisal report that, despite some problems, is generally probative of the land’s true tax value, and Kooshtard did not offer any probative valuation evidence of its own. We therefore find that the land portion of the property’s assessment should be changed to reflect the value from the appraisal.

PROCEDURAL HISTORY

2. Kooshtard filed a Form 130 petition challenging its assessment. On November 5, 2014, the Monroe County Property Tax Assessment Board of Appeals (“PTABOA”) issued its determination upholding the assessment.
3. Kooshtard responded by timely filing a Form 131 petition with the Board. It elected to proceed under our small claims procedures. On October 5, 2016, Jacob Robinson, our designated administrative law judge (“ALJ”), held a hearing. Neither he nor the Board inspected the property.
4. Milo E. Smith, a certified tax representative, appeared for Kooshtard. Heather A. Scheel appeared as counsel for the Assessor. The following people were sworn as witnesses: Smith; Judith A. Sharp, Monroe County Assessor; Wayne F. Johnson, II, MAI, RM, First Appraisal Group, Inc.; and Ken Surface, vice president, Nexus Group.
5. The subject property consists of a gas station and convenience store on 2.634 acres (115,129 square feet) of land. It is located at 7340 N. Wayport Road, Bloomington.
6. The PTABOA determined the following values:
Land: \$1,200,000 Improvements: \$367,300 Total: \$1,567,300

7. Kooshtard did not ask for any specific value on its Form 131 petition. At the hearing, it challenged only the land component of the assessment, asking that a portion of the land that it viewed as unusable be valued at \$2,500 per acre.
8. The official record includes the following:
 - a. A digital recording of the hearing
 - b. Petitioner Exhibit 1: Property record card (“PRC”) for subject property, printed 6/20/2013
 Petitioner Exhibit 2: PRC for subject property, printed 5/31/2014
 Petitioner Exhibit 3: PRC for subject property, printed 6/19/2015
 Petitioner Exhibit 4R: *Kooshtard Property I, LLC v. Monroe County Ass’r*, 38 N.E.3d 750 (Ind. Tax Ct. 2015)
 Petitioner Exhibit 5R: *Kooshtard Property I, LLC v. Monroe County Assessor*; Petition No. 53-017-10-1-4-00001, et al. (IBTR March 14, 2014)
 Petitioner Exhibit 6R: GIS aerial view of subject property
 Petitioner Exhibit 7R: Monroe County GIS Slope Map of the subject property dated 10/3/2016
 Petitioner Exhibit 8R: Chapter 804 – Monroe County Zoning Ordinance, revised 4/29/2016
 Petitioner Exhibit 9R: PRC and GIS aerial view – Parcel No. 53-01-10-602-000.000-017
 Petitioner Exhibit 10R: PRC – Parcel No. 53-02-33-100-022.000-017
 Petitioner Exhibit 11R: GIS aerial view of subject property measuring undeveloped unusable land
 Petitioner Exhibit 12R: Parcel information, PRC and GIS aerial view of 301 N. Gates Drive

 Respondent Exhibit I: Restricted Real Estate Appraisal Report prepared by Wayne F. Johnson, II, MAI, RM, MRICS, First Appraisal Group, Inc., dated 9/22/2016
 Respondent Exhibit M: *Kooshtard Property I, LLC v. Monroe County Assessor*, 38 N.E.3d 750 (Ind. Tax Ct. 2015)¹
 - c. All motions, briefs, and documents filed in these appeals, and all orders and notices issued by the Board or our ALJ.

¹ The assessor provided the Board with a three-ring binder containing exhibits marked A-M, but she only offered Exhibits I and M at the hearing.

OBJECTIONS

A. Objections to Exhibits

9. The Assessor objected to Kooshtard's Exhibits 4R through 12R because it failed to exchange those documents before the hearing even though the Assessor served a request on Kooshtard more than 10 business days before the hearing asking for copies of all its documentary evidence. Kooshtard did not claim that it complied with the Assessor's request. The ALJ took the objection under advisement.
10. Under our small claims procedures, if no later than 10 business days before a scheduled hearing, a party requests copies of the opposing parties documentary evidence, the opposing must provide those copies at least five business days before the hearing. 52 IAC 3-1-5(d). The exchange requirement allows parties to be better informed and to avoid surprises, and it promotes an organized, efficient, and fair consideration of the issues at a hearing. We may exclude evidence for failure to timely comply with such a request. 52 IAC 3-1-5(f).

Petitioner's Exhibits 4R-6R and 12R

11. We overrule the Assessor's objection as to Petitioner's Exhibits 4R-6R and 12R. The Petitioner did not actually discuss or otherwise rely on Exhibits 4R and 5R—copies of a Tax Court decision and our determination for prior years' appeals. In any case, the Assessor cannot claim to have been unfairly surprised. The Assessor actually offered the Tax Court decision as her own exhibit.
12. Exhibit 6R is an aerial photograph of the subject property that is similar to an aerial photograph contained in the restricted appraisal report offered by the Assessor. Admitting the exhibit would not unfairly surprise or prejudice the Assessor.
13. The same is true for Petitioner's Exhibit R12. That exhibit includes an excerpt from an appraisal report that the Assessor's witness, Wayne Johnson, prepared in connection with Kooshtard's appeal of the 2012 assessment year. The excerpt references a property at 301 North Gates Drive. The exhibit also includes a property record card for the Gates Drive property. Johnson explained that his restricted appraisal report for the 2014 appeal at issue in this case supplements that earlier report. Without further explanation, which the Assessor did not provide, we fail to see how the Assessor could be unfairly surprised or prejudiced by admitting an excerpt from that prior appraisal report or a property record card her own office prepared for one of the properties referenced in that report.

Petitioner's Exhibits 7R-11R

14. We sustain the Assessor's objection as to Petitioner's Exhibits 7R-11R. Those exhibits include: (1) a GIS map denoting slope percentages on the subject property, (2) excerpts from Monroe County's zoning ordinance, (3) property record cards and an aerial view for two properties that were not addressed in Johnson's appraisal reports, and (4) a GIS aerial

map purporting to measure the portion of the subject land Kooshtard claims is undeveloped and unusable. Kooshtard's representative, Milo Smith, testified that the property's slope had not been an issue in previous appeals, so we cannot assume that the Assessor was prepared to address that issue or the specific documents offered by Kooshtard. The same is true for the property record cards for the two purportedly comparable properties. Thus, admitting those exhibits would pose the type of unfair surprise that our exchange rule is meant to avoid.

B. Other Objections

15. The Assessor also objected to a portion of Smith's testimony, which the ALJ sustained, and to one question posed to Johnson during cross-examination, which the ALJ overruled. We need not revisit those objections, and we adopt the ALJ's rulings.

CONTENTIONS

16. Summary of the Assessor's case:
 - a. Wayne F. Johnson, II, an MAI appraiser, prepared a restricted appraisal report estimating the market value-in-use of subject land at \$1,035,000 as of March 1, 2014.² He prepared the report in conformity with USPAP. *Johnson testimony; Resp't Ex. I.*
 - b. Johnson described the property's location as north of Bloomington along State Road 37. The property had not sold in the previous three years, but in February 2014, the Indiana Department of Transportation ("INDOT") acquired 0.357 acres of the property's northwest corner to use as right-of-way for I-69. It paid \$420,000. He determined that the site has excess or surplus area that provides "extra room for possible expansion." He found that the highest and best use of the land as if vacant was as a commercial site. The property is zoned LB (limited business), which Johnson explained discourages single-family residential use and protects environmentally sensitive areas. According to Johnson, zoning for non-residential use will continue to be "very limited" along S.R. 37 because the plan commission wants to preserve the corridor into Bloomington. *Johnson testimony; Resp't Ex. I.*
 - c. Johnson developed his opinion of value using the sales comparison approach. He did not find regional sales to be appropriate because there were local sales available. He identified four sales of commercial parcels from Bloomington that ranged from .5 to 3.2 acres. They sold between November 28, 2011, and October 20, 2015, for unadjusted prices ranging from \$5.03/sq. ft. to \$13.77/sq. ft. All four sales transferred a fee simple interest, and they were arms-length transactions with cash or cash-equivalent financing. *Johnson testimony; Resp't Ex. I.*
 - d. Next, Johnson considered adjusting his comparable properties' sale prices to account for relevant ways in which they differed from the subject property. He adjusted the prices by .17% per month (or 2% per year) to account for the time that had lapsed between the

² His report actually covered three different valuation dates: March 1, 2013, March 1, 2014, and March 1, 2015.

assessment date and their sale dates. He also made adjustments to account for differences in location, visibility and frontage, and site size. He premised his size adjustment on the fact that larger sites typically sell for less per square foot than smaller sites. *Johnson testimony; Resp't Ex. I.*

- e. Kooshtard did not give Johnson permission to inspect the property, so he did not “walk” it. He instead viewed it from the street. Johnson acknowledged that the property slopes downward north of the parking lot. But he did not believe that much of the area with what he would characterize as “extreme topography” remained after the sell-off to INDOT. At different points in his report, he characterized the property as having either “level” or “[l]evel to sloping” topography. He also characterized Comparable 3’s topography as “generally level” and “level to sloping.” In his adjustment grid, he described the topography of all the properties as “level.” He did not adjust any of the sale prices for differences in topography. *Johnson testimony; Resp't Ex. I.*
- f. Although the subject property had a septic field as opposed to sewer access like his comparable properties, Johnson did not adjust any of the sale prices to account for that difference. On cross-examination, Kooshtard asked Johnson whether the access to utilities meant that the comparable properties did not need as much land to support a commercial use as the subject property did. Johnson explained that he could not answer the question because of differences between zoning requirements for the City of Bloomington and Monroe County. When asked why he applied a uniform rate to assess the entire property, he testified that it is unnecessary to segregate land when comparing commercial sites unless there is “an unusual amount of surplus or excess land.” *Johnson testimony.*
- g. Johnson calculated median and mean adjusted sale prices of \$8.41 and \$8.55/sq. ft., respectively. After weighing the sales, he settled on a value of \$9.00/sq. ft. for the subject property, which when multiplied by the property’s 115,129 square feet, indicated a value of \$1,035,000 (rounded). *Johnson testimony; Resp't Ex. I.*

17. Summary of Kooshtard’s case:

- a. Kooshtard claims that 51,238 square feet of the property is unusable because of its slope and believes that Johnson should have adjusted the sale prices of his comparable properties, all of which he described as having level topography, to account for that difference. We have excluded the exhibits underpinning Kooshtard’s argument—site maps with slope percentages and calculations of area, and excerpts from Monroe County’s zoning ordinance. *Smith testimony and argument; Pet'r Exs. 7R-8R, 11R.*
- b. In a related argument, Kooshtard contends that the Assessor erred by pricing 1.643 acres of its property as *usable*/undeveloped instead of *unusable*/undeveloped. Once again, we have excluded the exhibits on which Kooshtard premises that argument. *Smith testimony; Pet'r Exs. 7R-8R, 11R.*

- c. Kooshtard also points to assessments for three other properties, apparently in an attempt both to prove a lower value for the subject property and to show a lack of uniformity and equality in assessments. First, it claims that the subject property should be assessed like 301 North Gates Drive, which Johnson used as a comparable sale in his appraisal report for 2012. According to Kooshtard, Johnson's reliance on that sale shows that the Gates Drive property is comparable to the subject property. The Assessor classified 1.1 acres of the Gates Drive property as unusable/undeveloped, and she assessed it at \$2,500/acre. Kooshtard believes the unusable part of the subject property should be assessed at \$2,500/acre as well. *Pet'r Ex. 12R*.
- d. Second, Kooshtard points to two nearby commercial properties that were assessed using a lower base rate than the rate the Assessor used to value the subject property. As is the case with much of Kooshtard's other evidence, we have excluded the property records for those two properties. *Smith testimony and argument; Pet'r Exs. 9R-10R*.

BURDEN OF PROOF

- 18. Generally, a taxpayer seeking review of an assessing official's determination has the burden of making a prima facie case both that the current assessment is incorrect and what the correct assessment should be. If the taxpayer makes a prima facie case, the burden shifts to an assessor to offer evidence to impeach or rebut the taxpayer's evidence.
- 19. Indiana Code § 6-1.1-15-17.2 creates an exception to that general rule and assigns the burden of proof to the assessor in two circumstances. Where the assessment under appeal represents an increase of more than 5% over the prior year's assessment for the same property, the assessor has the burden of proving the assessment under appeal is correct. Ind. Code § 6-1.1-15-17.2(a) and (b). The assessor similarly has the burden where a property's gross assessed value was reduced in an appeal and the assessment for the following date represents an increase over "the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase..." Ind. Code § 6-1.1-15-17.2(d). In any case, if an assessor has the burden and fails to meet it, the taxpayer may offer evidence to prove the correct assessment. If neither party offers evidence that suffices to prove the property's correct assessment, it reverts to the previous year's value. I.C. § 6-1.1-15-17.2(b).
- 20. The parties agreed that the 2014 assessment did not increase by more than 5% over the 2013 assessment as determined by the PTABOA. The ALJ therefore preliminarily ruled that Kooshtard had the burden of proof in this appeal. However, the PTABOA's ruling for 2013 was not the last determination of that year's assessment. In an appeal heard the same day as this appeal, we determined that Kooshtard's 2013 assessment must be reduced to \$1,488,300,³ which is less than the 2014 assessment at issue in this appeal. The Assessor therefore has the burden.

³ We are issuing separate findings of fact and conclusions of law for that appeal.

ANALYSIS

21. Indiana assesses property based on its “true tax value,” which does not mean “fair market value” or “the value of the property to the user.” I.C. § 6-1.1-31-6(c) and (e). For most types of real property, true tax value is determined under the rules of the Department of Local Government Finance (“DLGF”).⁴ I.C. § 6-1.1-31-6(f). The DLGF defines “true tax value” as “[t]he market value-in-use of a property for its current use, as reflected by the utility received by the owner or by a similar user, from the property.” 2011 REAL PROPERTY ASSESSMENT MANUAL 2.
22. The cost, sales-comparison, and income approaches are three generally accepted ways to determine true tax value. 2011 MANUAL at 2. In an assessment appeal, parties may offer any evidence relevant to a property’s true tax value, including appraisals prepared in accordance with generally recognized appraisal principles. 2011 MANUAL at 3; *Eckerling v. Wayne Twp. Ass’r*, 841 N.E.2d 674, 678 (Ind. Tax Ct. 2006) (reiterating that a USPAP-compliant market-value-in-use appraisal is the most effective method for rebutting the presumption that an assessment is correct).
23. As discussed above, Ind. Code § 6-1.1-15-17.2 shifts the burden of proof to the Assessor in this appeal. In applying that statute, we look at whether a property’s overall assessment has increased between years rather than focusing on individual components, such as land or improvements. That being said, if a taxpayer limits its appeal to one component, an Assessor may meet its burden by offering evidence addressing only that component.⁵
24. That is what the Assessor attempted to do here by offering Johnson’s appraisal of the land only. Although Kooshtard’s appeal petition was not limited to the land portion of its assessment, that is all it challenged at the hearing. Under these circumstances, the Assessor could make her case by addressing only the value of the land.
25. With that in mind, we turn to the Assessor’s evidence. She offered Johnson’s USPAP-compliant appraisal report in which he applied a generally accepted appraisal methodology—the sales-comparison approach—to estimate the subject land’s value at \$1,035,000 as of March 1, 2014.

⁴ The legislature has specifically defined true tax value for various property types, including certain rental properties (I.C. § 6-1.1-4-39), casinos (I.C. § 6-1.1-4-39.5), low-income rental properties (I.C. § 6-1.1-4-41), and golf courses (I.C. § 6-1.1-4-42).

⁵ Just because parties may make a case by focusing on only one component of an assessment does not mean it is advisable to do so. Countervailing evidence of the property’s overall value will normally be more persuasive. And there are other less obvious pitfalls. The 2011 Real Property Assessment Guidelines, on which assessments are usually based, represent a mass-appraisal approach that may not always mirror how appraisers normally appraise individual properties. For example, when appraising land as if vacant, appraisers may not include things like the costs associated with sewers, utility lines, grading, and landscaping. But those things are included in determining the base rate for primary commercial land that has been improved. *See* 2011 GUIDELINES, ch. 2 at 66. If a land-only appraisal of an improved property does not account for those costs, it will understate the property’s value. In this case, it is unclear whether Johnson’s appraisal included those costs. To the extent it did not, the error benefited Kooshtard.

26. Kooshtard mainly criticizes Johnson's appraisal on grounds that he did not adjust the sale prices for his comparable properties to account for differences between their level topography and the subject property's sloping topography. We agree that Johnson's treatment of the subject property's topography was less than ideal. We have excluded Kooshtard's specific evidence about slope percentages and the effect of Monroe County's zoning ordinance on its ability to develop the land north of the parking lot. Nonetheless, although Johnson did not believe there were extreme problems with the property's topography, he acknowledged that part of the property slopes. Yet he used a uniform rate to value the entire property. Because he took that rate from his comparable sales, the degree of comparability between the topographies of those properties and the subject property's topography matters.
27. Although Johnson was admittedly imprecise about topography in his restricted appraisal report, he explicitly recognized that the subject property was not entirely level, and he characterized one of the four comparable properties in similar terms. More importantly, Kooshtard did not offer any evidence to show that the subject property's topography differed significantly from the topographies of Johnson's comparable properties. Thus, although Johnson's terminology may have been imprecise, there is nothing in the record to show that actual differences in topography were significant enough to require an adjustment.
28. There is a second potentially troubling aspect to Johnson using a uniform rate to value the entire property. It is larger than three of his four comparable properties, and his restricted appraisal report is unclear as to how much of the land was necessary to support the property's current use as a gas station convenience store. He addressed that matter at the hearing, and testified that it is unnecessary to segregate land when comparing commercial sites unless there is "an unusual amount of surplus or excess land." While that is not a particularly compelling explanation, Kooshtard failed to rebut it.
29. On cross-examination, Kooshtard asked Johnson whether his comparable sales, which had sewer access and therefore did not need septic fields, required as much land to support a commercial use as the subject property. Johnson explained that he could not answer the question because of differences between zoning requirements for the City of Bloomington and Monroe County. Although his inability to answer the question detracts a little from his credibility, Kooshtard did not offer any evidence on the point either. It certainly did not show that Johnson should have adjusted any of his comparable sale prices on those grounds.
30. In sum, Johnson's appraisal is far from perfect. But it is generally probative of the subject land's true tax value.
31. Our inquiry does not end there, however, because Kooshtard offered its own valuation evidence. It also alleged a lack of uniformity and equality in assessments. In both instances, it relied on the assessment of the Gates Drive property (we have excluded the exhibits showing the assessments for two other properties Kooshtard identified). Kooshtard argues that Johnson's use of the Gates Drive property in his earlier appraisal

report shows that it is comparable to the subject property. Because the Assessor characterized a portion of the Gates Drive land as unusable/undeveloped and assessed it at \$2,500/acre, Kooshtard argues that the 51,238-square-foot portion of the subject property that it claims is also unusable should be valued at that same rate.

32. We disagree. A taxpayer may offer evidence of comparable properties' assessments to show the market value-in-use of a property under appeal. I.C. § 6-1.1-15-18. But "the determination of whether properties are comparable shall be made using generally accepted appraisal and assessment practices." I.C. § 6-1.1-15-18(c). At most, Johnson's inclusion of the Gates Drive property in his original appraisal report might show that it is generally comparable to the subject property. However, accepted appraisal and assessment practices require more than general comparability. One must explain how relevant differences between the properties affect value. *See Long v. Wayne Twp. Ass'r*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005) (holding that taxpayers needed to explain how any relevant differences between their property and purportedly comparable properties affected values). Presumably, Johnson did that in his original appraisal report. Kooshtard, however, did not offer that part of the report or otherwise show what adjustments Johnson made to the Gates Drive sale price. The Gates Drive assessment therefore lacks probative value.
33. In any case, the Gates Drive assessment is one data point, and there is nothing to show that the Gates Drive property is more comparable to the subject property than were the four properties Johnson used in his sales-comparison analysis for 2014. Even if the Gates Drive assessment had any probative weight, it would be less persuasive than Johnson's appraisal.
34. We now turn to Kooshtard's claim that the subject property's assessment was not uniform and equal compared to other assessments. As the Tax Court has explained, "when a taxpayer challenges the uniformity and equality of his or her assessment one approach that he or she may adopt involves the presentation of assessment ratio studies, which compare the assessed values of properties within an assessing jurisdiction with objectively verifiable data, such as sales prices or market value-in-use appraisals." *Westfield Golf Practice Center v. Washington Twp. Ass'r*, 859 N.E.2d 396, 399 n.3 (Ind. Tax Ct. 2007) (emphasis in original). Such studies, however, should be prepared according to professionally acceptable standards. *See Kemp v. State Bd. of Tax Comm'rs*, 726 N.E.2d 395, 404 (Ind. Tax Ct. 2000). They should also be based on a statistically reliable sample of properties that actually sold. *See Bishop v. State Bd. of Tax Comm'rs*, 743 N.E.2d 810, 813 (Ind. Tax Ct. 2001) (citing *Southern Bell Tel. and Tel. Co. v. Markham*, 632 So.2d 272, 276 (Fla. Dist. Co. App. 1994)).
35. Kooshtard failed to explain how a sample size of one is sufficient to draw any meaningful inference about the uniformity or equality of assessments within an assessing jurisdiction. Even if it were, Kooshtard did not compare the Gates Drive assessment to objectively verifiable data, such as sale price or a market value-in-use appraisal. Although the excerpt from Johnson's 2012 appraisal report shows what the Gates Drive land sold for in May 2011, Kooshtard did not relate that price to a value as of March 1, 2014—the

assessment date at issue in this appeal. *See Long*, 821 N.E.2d at 471 (holding that taxpayers' appraisal and insurance policy lacked probative value where the taxpayers did not explain how they related to their property's value as of the relevant valuation date).

36. In any case, Kooshtard did not seek an adjustment based on the ratio between the Gates Drive property's assessment and its sale price, but instead wanted the Assessor to use the same methodology (apply the same base rate) to assess a portion of the subject property as she used to assess the Gates Drive property. The Tax Court has rejected that type of claim. *See Westfield Golf*, 859 N.E.2d at 398-399 (rejecting taxpayer's uniformity and equality claim where taxpayer argued that its golf-ball-landing area was assessed using a different base rate than the base rates used to assess landing areas at other driving ranges). Kooshtard therefore failed to make a prima facie case showing a lack of uniformity and equality in assessments.⁶

CONCLUSION

37. Johnson's appraisal is the most credible evidence of the subject land's true tax value. Accordingly, we find the subject property's 2014 land assessment must be change do \$1,035,000. That results in a total assessment of \$1,402,300.

FINAL DETERMINATION

In accordance with the above findings and conclusions, the Board orders the subject property's 2014 land assessment reduced to \$1,035,000. That results in a total assessment of \$1,402,300.

ISSUED: March 1, 2017

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

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⁶ We would reach the same conclusion even if we had overruled the Assessor's objection to the property record cards for two other properties Kooshtard offered in support of its uniformity and equality claim. Kooshtard did not explain why using three properties would be a statistically meaningful sample. It similarly failed to compare the assessments for those properties to sales information or market value-in-use appraisals. One of the properties apparently sold in 2014, but the Assessor deemed the sale invalid for use in a ratio study and there is no sale or appraisal information for the other property. *See Pet'r Exs. 9R-10R*.

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>>.