

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

Petitions: 73-002-06-1-4-72425
73-002-07-1-4-10224
Petitioner: Kooshtard Property VIII LLC
Respondent: Shelby County Assessor
Parcel: 73-07-34-300-017.000-002
Assessment Years: 2006 and 2007

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

Procedural History

1. The Petitioner initiated the 2006 assessment appeal by filing a Petition to the Property Tax Assessment Board of Appeals for Review of Assessment (Form 130) on May 19, 2008. The Petitioner initiated the 2007 assessment appeal by filing a Form 130 on February 18, 2009.
2. The Property Tax Assessment Board of Appeals (PTABOA) mailed its Notification of Final Assessment Determination (Form 115) for the 2006 appeal on September 29, 2008. The PTABOA mailed the Form 115 for the 2007 appeal on November 2, 2009.
3. The Petitioner appealed the 2006 assessment to the Board by filing a Petition for Review of Assessment (Form 131) on November 7, 2008. The Petitioner appealed the 2007 assessment to the Board by filing a Form 131 on December 14, 2009. The Petitioner elected to have both appeals heard according to small claims procedures.
4. The Board issued notices of hearing for both appeals dated April 20, 2010.
5. Administrative Law Judge Paul Stultz held the Board's administrative hearing in Shelbyville on July 14, 2010. He did not inspect the property.
6. Certified tax representative Milo E. Smith represented the Petitioner and also was sworn as a witness. Attorney Marilyn Meighen represented the Shelby County Assessor. Bradley A. Berkemeier, an employee of the Nexus Group, was sworn as a witness for the Respondent.

Facts

7. The property is a Bigfoot convenience market located at 2509 East State Road 44 in Shelbyville.
8. The PTABOA determined the assessed value is \$1,007,900 for land and \$100,700 for improvements (total \$1,108,600) for both 2006 and 2007.
9. The Petitioner disputed only the land valuation, claiming its total for each year should be \$607,900.

Contentions

10. Summary of the Petitioner's case:
 - a. The parcel has a total area of 8.93 acres. Two acres were classified as primary commercial land with a base rate of \$200,000 per acre. Then a positive influence factor of 100% was put on those two acres, bringing their valuation to \$400,000. The 100% positive influence factor violates the Petitioner's right to an equal and uniform assessment. The remaining 6.93 acres were assessed as undeveloped usable land with a negative 50% influence factor to account for a utility easement. The Petitioner is not contesting the negative 50% influence factor on that part.¹ *Smith testimony; Pet'r Ex. 4.*
 - b. The 2002 Real Property Assessment Manual requires that mass appraisal methods produce uniformity in assessments. To have uniform assessments of similar commercial properties in the neighborhood, all the commercial properties must be assessed either with or without the 100% positive influence factor. Three similar commercial properties located near the subject property are not assessed with an influence factor. The 100% positive influence factor should be removed from the Petitioner's primary land valuation to conform to those other assessments. *Smith testimony; Pet'r Ex. 3.*
 - c. A 1.72 acre property located at 2405² East State Road 44 is valued at \$344,000. *Smith testimony.*
 - d. The Shelby County Farm Bureau property located at 2915 East State Road 44 is adjacent to the Petitioner's property. It is a 0.93 acre parcel that is assessed with a primary land base rate of \$200,000 per acre. It has no influence factor. *Smith testimony; Pet'r Ex. 4, property 1.*

¹ On its Form 131, the Petitioner also claimed "almost 3 acres of the subject parcel is unusable." The Petitioner offered no probative evidence or substantial argument on this point.

² Petitioner Exhibit 1 indicates this number should be 2450. Neither party discussed the discrepancy or provided any evidence that might have indicated which number actually is correct. This difference is unimportant because the record lacks sufficient evidence or explanation to establish the relevance of this statement regardless of which number is correct.

- e. Hubler Chevrolet is located at 2605 East State Road 44. It is on a parcel that is almost four acres and its primary land is assessed at \$200,000 per acre with no influence factor. *Smith testimony; Pet'r Ex. 4, property 2.*
 - f. Mr. Smith testified about a Fortune Enterprises property located at 2450 East State Road 44 that he identified as property 3 on Petitioner Exhibit 4. His testimony is consistent with part of his statement in Petitioner Exhibit 1 describing a property with 0.95 acres and a land value of \$197,600. But it is inconsistent with the documentation he submitted—a property record card that shows BEF REIT, Inc. as the owner and 2541 East State Road 44 as the location. No explanation for these differences was provided. The BEF REIT property record card, however, does show 0.95 acres of primary land with a \$200,000 base rate, no influence factor and a land assessment of \$197,600. *Smith testimony; Pet'r Ex. 1; Pet'r Ex. 4, property 3.*
 - g. The correct assessment for the Petitioner's land should be \$607,900. That figure is obtained by removing the 100% positive influence factor. *Smith testimony; Pet'r Ex. 5.*
 - h. According to a Department of Local Government Finance memorandum dated July 2, 2008, summarizing Ind. Code § 6-1.1-15, the PTABOA is required to explain its decision on every issue presented to it. The Form 130 Petitions to the PTABOA claimed 2.87 acres of the subject property should be classified as unusable, but the PTABOA failed to address that issue. The PTABOA's notice simply said "no change." The Board should remand these appeals to the PTABOA with instructions to answer every issue raised on the Form 130 Petitions. *Smith testimony/argument.*
11. Summary of the Respondent's case:
- a. Land valuation considers geographic area, but it also considers use type. *Berkemeier testimony.*
 - b. Sales data indicated the neighborhood base rate should be \$200,000 per acre for primary land, but the sales prices of convenience markets and fast food restaurants in this area were higher—roughly \$400,000 per acre. The .70 acre Kroger plaza strip retail area sold for \$2,975,000 on August 18, 2004. *Berkemeier testimony; Resp't Ex. C-4.* The 2.15 acre Andreoli property (Applebee's) sold for \$2,454,203 on January 19, 2004. *Berkemeier testimony; Resp't Ex. D-1.* The parcel identified as the Shelbyville Shopping Center strip retail area sold for a total of \$630,730 (\$435,000 per acre) on February 10, 2005. At the time of that sale, it was vacant land. *Berkemeier testimony; Resp't Ex. F.* A Wendy's fast food restaurant with 1.08 acres (not the same Wendy's shown on the maps) sold for \$450,000 on February 13, 2006. *Berkemeier testimony; Resp't Ex. G.*

- c. Respondent Exhibit B is a spreadsheet that shows the parcels that were given positive 100% influence factors on primary commercial land for 2006 and 2007 assessments. The spreadsheet supplements the maps and data presented in Respondent Exhibits C through C-5 and D through D-8. *Berkemeier testimony.*
- d. The subject property is shown in green on Respondent Exhibits C and D. Other properties that also had a \$200,000 base rate and 100% influence factor on primary commercial land are shown in yellow on those maps. The 100% influence factor was primarily tied to convenience market and fast food restaurant use types. Except for a few isolated cases, market data did not support it for other use types. *Berkemeier testimony; Resp't Ex. C through C-5, and D through D-8.*
- e. Although the property record card for the subject property is in evidence, the 2006 and 2007 values shown are not what the PTABOA determined. The computer software used by the county would not permit those figures to be changed to correspond with the PTABOA determination as shown on the Form 115. There is no property record card that matches the numbers on the Form 115, but the PTABOA value is what the Petitioner is being taxed on. *Berkemeier testimony; Meighen argument.*
- f. When contesting an assessment, the Petitioner is required to show the total assessment is incorrect, but here the Petitioner presented no evidence establishing a market value-in-use of the property. *Meighen argument.*
- g. Regardless of what the PTABOA decision said, the Petitioner had an opportunity to present its claims at the Board's *de novo* hearing. The Board's hearing satisfies all due process requirements. The Petitioner's request for a remand to the PTABOA should be denied. *Meighen argument.*

Record

- 12. The official record for this matter is made up of the following:
 - a. Form 131 for each year,
 - b. Notice of Hearing,
 - c. Hearing Sign-In Sheet,
 - d. Digital recording of the hearing,
 - e. Petitioner Exhibit 1 – Summary,
 Petitioner Exhibit 2 – Board Final Determination for the subject property's 2002 assessment,
 Petitioner Exhibit 3 – Manual at 7,

Petitioner Exhibit 4 – Map of the area, property record cards with data sheets for three neighboring properties and property record card for the subject property,

Petitioner Exhibit 5 – Subject property record card with Smith’s notes,

Respondent Exhibit A – Property record card for the subject property,

Respondent Exhibit B – Summary spreadsheet regarding parcels with 100% positive influence factor,

Respondent Exhibit C – Map of 2006 assessments with 100% influence factor,

Respondent Exhibit C-1 – Property record card for Andreoli (Applebee’s),

Respondent Exhibit C-2 – Property record card for Radcliff (Long John Silver’s),

Respondent Exhibit C-3 – Property record card for F & M of Shelbyville (Wendy’s),

Respondent Exhibit C-4 – Property record card and sales disclosure form for Pine Tree Indiana (Kroger plaza),

Respondent Exhibit C-5 – Property record card for TKC Properties (BP/USA Gas),

Respondent Exhibit D – Map of 2007 assessments with 100% influence factor,

Respondent Exhibit D-1 – Property record card and sales disclosure form for Andreoli (Applebee’s),

Respondent Exhibit D-2 – Property record card for Dukatt (Arby’s),

Respondent Exhibit D-3 – Property record card for Wal-Mart,

Respondent Exhibit D-4 – Property record card for Radcliff (Long John Silver’s),

Respondent Exhibit D-5 – Property record card for F & M of Shelbyville (Wendy’s),

Respondent Exhibit D-6 – Property record card for Topvalco (Kroger service station),

Respondent Exhibit D-7 – Property record card and sales disclosure form for Pine Tree Indiana (Kroger plaza),

Respondent Exhibit D-8 – Property record card for TKC Properties (BP/USA Gas),

Respondent Exhibit E – 50 IAC 21-3-3,

Respondent Exhibit F – Sales disclosure form for parcel 041-74019-20 dated February 10, 2005,

Respondent Exhibit G – Sales disclosure form for parcel 041-90063-70 a/k/a 73-07-29-100-042.000-002 dated February 13, 2006,

Respondent Exhibit H – List of Indiana Tax Court cases,

f. These Findings and Conclusions.

Analysis

13. A Petitioner seeking review of a determination of an assessing official has the burden to establish a prima facie case proving that the current assessment is incorrect and specifically what the correct assessment would 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). In making its case, the

taxpayer must explain how each piece of evidence is relevant to the requested assessment. *See Indianapolis Racquet Club, Inc. v. Washington Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) (“[I]t is the taxpayer’s duty to walk the Indiana Board . . . through every element of the analysis”).

14. The Board is a creation of the legislature and it has only those powers conferred by statute. Therefore, the Board has limited authority to remand appeals to the PTABOA. It may do so upon specific instructions from the Indiana Tax Court. *See* Ind. Code § 6-1.1-15-8. It may also remand appeals to the PTABOA when a new issue is presented at the Board’s hearing and the parties and the PTABOA consent to a remand. 52 IAC 2-5-3(c). Neither of those situations is present here. Accordingly, the Board lacks authority to grant the request for a remand.
15. Even if the Board had the authority to remand these appeals, the Petitioner presented no reason to do so. The Board’s proceedings are *de novo*. The Board owes no deference to the PTABOA determination. The PTABOA’s purportedly insufficient or incomplete determination about the claim that part of the parcel is unusable did not hinder the Petitioner’s ability to present relevant evidence and argument about that part of the parcel during the Board’s hearing. *See* Ind. Code § 6-1.1-15-4.
16. 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); MANUAL at 2. Indiana promulgated Guidelines for assessing officials that are based on the cost approach. REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002—VERSION A (incorporated by reference at 50 IAC 2.3-1-2). The value established by use of those Guidelines, while presumed to be accurate, is merely a starting point. A taxpayer is permitted to offer evidence relevant to market value-in-use to rebut that presumption. 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.
17. The cost approach in the Guidelines is only a starting point for determining market value-in-use. Accordingly, when taxpayers challenge the accuracy of their assessments, they must do more than complain that the method by which their assessment was computed was incorrect; rather, they must present objectively verifiable evidence demonstrating what their property’s market value-in-use actually is. *See, e.g., Westfield Golf Practice Ctr. v. Washington Twp. Assessor*, 859 N.E.2d 396, 399 (Ind. Tax Ct. 2007); *O’Donnell v. Dep’t of Local Gov’t Fin.*, 854 N.E.2d 90, 94 (Ind. Tax Ct. 2006); *P/A Builders & Developers, LLC v. Jennings Co. Assessor*, 842 N.E.2d 899, 900 (Ind. Tax Ct. 2006); *Eckerling v. Wayne Twp. Assessor*, 841 N.E.2d 674, 677 (Ind. Tax Ct. 2006).
18. In this case the Petitioner offered no such evidence. Rather than focusing on what the market value-in-use of the subject property actually is, the Petitioner focused entirely on the purportedly improper influence factor. The Petitioner simply argued that uniformity

and equality demand the 100% positive influence factor to be removed because it was not used for all the commercial parcels in the neighborhood.³

19. Even though arguing about the proper application of the Guidelines alone will not make a prima facie case, it also should be noted that the nature of influence factors will cause them to vary from one property to another. An influence factor is “[a] multiplier that is applied to the value of land to account for characteristics of a particular parcel of land that are peculiar to that parcel.” Guidelines, Glossary at 10. Criteria for the application of an influence factor include “identifying and determining the existence of unique features that are inconsistent with the norm for the neighborhood....” Guidelines, Ch. 2 at 11. Parcels receive influence factors when they differ from the typical neighborhood parcel. The Petitioner failed to establish how its position that every commercial parcel in a neighborhood must receive an identical influence factor (or none at all) might be consistent with the Guidelines.
20. The Petitioner’s case relies on the fact that three other commercial properties in the same area were assessed without a positive influence factor. In *Westfield Golf*, however, a similar argument did not establish that an assessment should be changed. *Westfield Golf* based its claim on the fact that the landing area for its driving range was assessed using a different base rate than several other driving range landing areas. 859 N.E.2d at 397. *Westfield Golf* argued that its assessment was not uniform and equal. *Id.* The court’s decision explained the change in Indiana’s assessment system from one where true tax value was based solely on correct application of assessment regulations, to the current system that measures true tax value based on the external benchmark of market value-in-use. *Id.* at 398-399. Previously, the only way to determine whether assessments were uniform and equal was to determine whether the assessment regulations were applied similarly to comparable properties. *Id.* at 398. Properties within each assessment neighborhood in a land order were presumed to be comparable, both in distinguishing characteristics and market value. And under that system, principles of uniformity and equality were violated when parcels of land in the same assessment neighborhood were assessed and taxed differently. *Id.* In contrast, since 2002 the market value-in-use system’s “overarching goal” is “to measure a property’s value using objectively verifiable data.” *Id.* at 399. While the end result must be a uniform and equal rate of assessment, the procedures used to arrive at that result need not be the same. *Id.* Rather than focusing on that end result by comparing the actual market value-in-use of its property to the market values-in-use of the other driving ranges, *Westfield Golf* focused solely on the methodology used to compute the assessments. *Id.* In doing so, *Westfield Golf* did not establish a violation of the requirements for uniformity and equality. *Id.*

³ The Petitioner failed to cite it as authority, but apparently the claim is based (at least in part) on the requirement in the Indiana Constitution for the General Assembly to provide for a uniform and equal rate of property assessment and taxation. It also requires regulations that secure a just valuation for taxation of all property, both real and personal. IND. CONST. art. 10, §1(a). “This provision has long been held to require: (1) uniformity and equality in assessment, (2) uniformity and equality as to the rate of taxation, and (3) a just valuation for taxation of all property.” *Westfield Golf*, 859 N.E.2d at 397.

21. Here the Petitioner presented virtually the same kind of case that was determined to be insufficient in *Westfield Golf*. While it is clear that only a limited number of properties in the area have assessments that used a 100% positive influence factor, the Petitioner failed to offer any evidence that its existing assessments for 2006 and 2007 exceed the actual market value-in-use of the land.
22. When a taxpayer fails to provide probative evidence supporting its position that an assessment should be changed, the Respondent's duty to support the assessment with substantial evidence is not triggered. See *Lacy Diversified Indus. v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003); *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113, 1119 (Ind. Tax Ct. 1998).

Conclusion

23. The Petitioner failed to make a prima facie case. The Board finds in favor of the Respondent.

Final Determination

In accordance with the above findings and conclusions, the assessments will not be changed.

ISSUED: _____

Commissioner, 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, as amended effective July 1, 2007, by P.L. 219-2007, and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. The Indiana Tax Court Rules are available on the Internet at <<http://www.in.gov/judiciary/rules/tax/index.html>>. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. P.L. 219-2007 (SEA 287) is available on the Internet at <<http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>>