

REPRESENTATIVE FOR PETITIONER: Rex D. Hume, Uzelac & Associates, Inc.

REPRESENTATIVES FOR RESPONDENT: Laurie Renier, Kosciusko County Assessor; Kristy Mayer, Wayne Township Assessor; Darby Davis, Commercial/Industrial Appraiser for Kosciusko County; and Shelly McKee, Commercial/Industrial Assistant for Kosciusko County.

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

In the matter of:

LAKELAND PROPERTIES, LLC,)	Petition No.: 43-032-01-3-4-00037
)	
Petitioner)	County: Kosciusko
)	
v.)	Township: Wayne
)	
THE WAYNE TOWNSHIP)	Parcel No.: 004-078-052.B
ASSESSOR, KOSCIUSKO)	
COUNTY)	Assessment Year: 2001
Respondent.)	
)	

Appeal from the Final Determination of
Wayne Township Assessor, Kosciusko County

March 7, 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

Issue

1. The issue presented for consideration by the Board was:
ISSUE – Whether the four subject apartment buildings are incorrectly classified as three story apartments instead of two story apartments over a basement.

Procedural History

2. Pursuant to Ind. Code § 6-1.1-15-12 Rex Hume, Uzelac & Associates, Inc., filed a Form 133 on behalf of Lakeland Properties, LLC, (Petitioner) petitioning the Board to conduct an administrative review of the above petition. Laurie Renier, Kosciusko County Assessor, and Kristy Mayer, Wayne Township Assessor, denied the Form 133 petition on May 30, 2002. The Form 133 was filed for review by the Board on June 14, 2002.

Hearing Facts and Other Matters of Record

3. Pursuant to Ind. Code § 6-1.1-15-4 a hearing was held on December 11, 2002, in Warsaw, Indiana before Patti Kindler, the duly designated Administrative Law Judge authorized by the Board under Ind. Code § 6-1.5-5-2.
4. The following persons were present at the hearing:
For the Petitioner: Rex D. Hume, Uzelac & Associates, Inc.

For the Respondent: Laurie Renier, Kosciusko County Assessor;
Kristy Mayer, Wayne Township Assessor;
Darby Davis, Commercial/Industrial Appraiser for
Kosciusko County; and
Shelly McKee, Commercial/Industrial Assistant.

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

For the Petitioner: Rex D. Hume¹

For the Respondent: Kristy Mayer
Darby Davis

6. Neither the Petitioner nor the Respondents presented exhibits at the Board hearing. The Petitioner referred to attachments to the Form 133 (Board's Exhibit A), which include: a proposed pricing ladder; a notarized affidavit signed by Mr. Hume; disclosure statement; exterior photographs of the property with Petitioner's contentions; and property record cards with exterior photographs for two purportedly comparable properties.

7. Prior to the hearing, the following exhibits were presented:

For the Petitioner: Petitioner's Exhibit 1 – List of Witnesses and Exhibits including the following attachments: photographs of the subject property and a copy of 50 IAC 2.2-16-2(5), which defines "basement".

For the Respondents: Respondents' Exhibit 1: - List of Witnesses and Exhibits including the following attachments: property record cards and pictures of property owned by Levi's Rentals, Inc.; property record card and pictures of property known as Camp Mack (page 8 of 8); property record card and pictures of property owned by First Security Bank National, also known as Kosciusko Community Hospital; property record cards and pictures of property owned by Paul D & Paul J Pontius; property record card and pictures of property owned by Otto Burchett; property record card and pictures of property owned by Robert E. Biggs; the property record card and two pictures of the subject property.

¹ Mr. Hume testified that he is being compensated on a contingency basis. Compensation based upon the outcome of a case may result in improper motivation of a witness and may adversely affect the reliability of certain testimony. It is for this reason that the Board will take the fee arrangement between Mr. Hume and the Petitioner into consideration when weighing the testimony of this witness. *Wirth v. State Board of Tax Commissioners*, 613 N.E. 2d 874 (Ind. Tax 1993); *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230 (Ind. Tax 1998).

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

Board's Exhibit A – Subject Form 133 Petition.

Board's Exhibit B – Notice of Hearing on Petition.

Board's Exhibit C – Request for Additional Information.

8. On December 12, 2002, the Petitioner submitted, via e-mail, the resume of Mr. Hume. This evidence is labeled Petitioner's Exhibit 2.
9. The Administrative Law Judge did not view the subject property, which is assessed as general commercial-residential apartments and located at 100, 200, and 300 Lakeland Drive and 100 Kinney Street in Warsaw, Wayne Township, Kosciusko County.

Jurisdictional Framework

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

Indiana's Property Tax System

12. The Indiana Constitution requires Indiana to create a uniform, equal, and just system of assessment. See Ind. Const. Article 10, §1.
13. 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.

14. True Tax Value does not precisely equate to fair market value. See Ind. Code § 6-1.1-31-6(c).
15. An appeal cannot succeed based solely on the fact that the assessed value does not equal the property's market value. See *State Board of Tax Commissioners v. Town of St. John*, 702 N.E. 2d 1034, 1038 (Ind. 1998) (*Town of St. John V*).
16. 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 at 1039 – 40.
17. 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.
18. 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

19. 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).
20. 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.]

21. 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.]
22. 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.]
23. 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).
24. 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 the Issue

ISSUE: *Whether the four subject apartment buildings are incorrectly classified as three story apartments instead of two story apartments over a basement.*

25. The Petitioner contends that the four subject apartments buildings are at least four feet below grade and should be priced as two story apartments over a finished divided basement.
26. The Respondents contend that, because the lower levels of the apartments are more than fifty percent above grade, they were correctly assessed as first floor area from Schedule A.3 (General Commercial Residential [GCR] schedule) of the commercial and industrial cost schedules, 50 IAC 2.2-11-6.
27. The applicable rules governing the Issue are:

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 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 2.2-10-6.1(g)(Step Seven)

Assessors are advised to enter (on the property record card) "the basement size, if applicable, by writing in the estimated percentage of basement beside the column label. Reference is to basement areas that are not priced as individual building

sections. Depending upon its contribution to value, a partial basement may be priced as an individual building section. . . If the basement size exceeds the base ground floor area, it is priced as an individual building section. However, if the area in excess of the base ground floor area is valueless, it may be priced as a full or partial basement.”

50 IAC 2.2-10-6.1(3)

“Floor Level” represents the corresponding floor level being valued. Basement, first floor, and upper floor prices are given for the various use types. The unit rates for each of these floor levels are independent components that make the schedules applicable to both one (1) story and multiple story buildings. The base square foot rates for each floor level include the cost of the exterior walls, exterior wall openings, and the interior components. Interior components consist of interior finish, partitioning, and built-ins and mechanical features typical to that particular use.

50 IAC 2.2-11-3(1), (2), & (3)

These sections contain the GCR apartment models for basement, first and upper floors.

50 IAC 2.2-11-6, Schedule A.3

This section contains the GCR pricing schedules for basement, first, and upper floor levels.

50 IAC 2.2-16-2(5)

Defines basement as “a building story which is wholly or partially below the grade level.”

28. Evidence and testimony considered particularly relevant to this determination include the following:
 - a. The four subject apartment buildings, constructed in 2000, are priced as three story apartments. Part of the lowest level, which is currently priced as first floor area, is below the grade level of the lot.

- b. The Petitioner contended that the lowest story of each of the four apartment buildings on this parcel is partially underground, and is a basement under the definition provided in 50 IAC 2.2-16-2(5). *Hume Testimony*.
- c. The Petitioner supported its contentions with: photographs of the subject apartments to demonstrate the areas below grade level; photographs and property record cards for two comparable properties, which were priced as two story apartments over basements; a proposed pricing grid; and a copy of 50 IAC 2.2-16-2(5) (defining the term “basement”). (See Petitioner’s Exhibit 1).
- d. The Petitioner contended that the evidence indicated the two comparable properties are nearly identical to the subject in design with approximately four feet below grade; these properties were built by the same developer. (See Board’s Exhibit A, Attachments to Form 133). The comparable properties are located in Marshall County. No comparable apartments with below grade living areas were located in Kosciusko County. *Hume Testimony*.
- e. The local officials contended that regulations and statues regarding commercial basement area are not “black and white.” *Davis Testimony*. The County’s interpretation of the manual and statutes has been applied to the most useful extent, which is that the lowest level is more than half above grade and therefore should not be priced as basement area. *Davis and Mayer Testimony*.
- f. The County has consistently priced commercial areas as first floor levels if they are less than fifty percent below grade. *Davis Testimony*.
- g. Two properties were discussed in which the Respondents have priced the story that is partially below grade level as first floor area. (See photographs and property record cards for the Camp Alexander Mack and Robert Biggs properties from Respondent’s Exhibit 1).

Analysis of the ISSUE

- 29. The Petitioner contended that the story level that is partially below grade should be assessed as finished divided basement area. The Respondents contended that the area is more than fifty percent above grade level and should be priced as first floor area.

30. A Form 133 petition is available only for those errors that can be corrected without resort to subjective judgment. *Hatcher v. State Board of Tax Commissioners*, 561 N.E. 2d 852 (Ind. Tax 1990); *Reams v. State Board of Tax Commissioners*, 620 N.E. 2d 758 (Ind. Tax 1993); *Bender v. State Board of Tax Commissioners*, 676 N.E. 2d 1113 (Ind. Tax 1997). Therefore, a Form 133 petition is not the appropriate petition with which to challenge an alleged error made in the classification of a story level.
31. The cornerstone of the Petitioner’s argument is 50 IAC 2.2-16-2(5), which defines a basement as “a building story which is wholly or partially below the grade level.” The Petitioner contended that the story in dispute is partially below grade level and therefore should be classified as a basement.
32. However, a review of the photographs presented by the Petitioner (Board’s Exhibit A, Attachment to Form 133 petition) indicates that the property under appeal has, in effect, two different levels of grade: the grade level at the front of the buildings and the grade level at the rear, which the parties agreed is approximately four feet lower than the grade level at the front. The photographs further indicate that the rear of each of the buildings is at this lower grade level, rather than below it.
33. 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.
34. 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.
35. The plain language of 50 IAC 2.2 makes it clear that not all stories that are partially below the grade level are basements.

36. 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).
37. 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).
38. The Petitioner, therefore, may not simply assert that any story partially below the 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.²
39. The Petitioner also introduced evidence that officials in Marshall County assessed the lowest level of this type of property as basement area. However, rather than being probative of error, this evidence only illustrates that opposing interpretations of the Regulation are possible.³
40. Indeed, during testimony, even the Petitioner’s representative acknowledged that “Pricing them [this type of structure] as two story over basement is the dominant practice, but certainly not universally applied.”
41. As the Tax Court has concluded, “Although a simple disagreement between parties does not necessarily indicate ambiguity [in a statute], opposing interpretations are persuasive in suggesting that an ambiguity exists.” *Shoup Buses, Inc. v. Indiana Department of State Revenue*, 635 N.E.2d 1165, 1168 (Ind. Tax 1994).
42. Because stories below the grade level may be classified in two different ways, the assessor must again make a subjective decision as to which portion of the Regulation to apply to the Petitioner’s property.

² The improvements under appeal were priced from the General Commercial Residential association grouping. Properties in this grouping “are more typical of residential type construction as opposed to those which are more characteristic of commercial type construction.” 50 IAC 2.2-10-6.1(a)(1)(C).

³ Evidence of differing practices in only one other assessor’s office is inadequate to support a change in the assessment. *Cf. Canal Realty v. State Board of Tax Commissioners*, 744 N.E.2d 597 (Ind. Tax 2001) (Evidence of two purported comparable properties was insufficient to support a change in the assessment).

43. Summarizing, selecting the appropriate classification of a story level is not an objective finding of fact, but instead requires subjective judgment. First, as part of the assessment analysis, the assessor must decide whether the story in dispute is below the grade level. As indicated, because there is a four-foot difference between the grade level at the front of the building and that at the rear, this determination of the correct grade level is subjective. Additionally, the Regulation permits either of two classifications for story levels located partially below grade level, and the assessor must necessarily decide whether the physical attributes of the buildings under review more accurately fall within the purview of one classification or another. As discussed, errors arising from an assessor's judgment are not the type of errors that can be corrected by way of a Form 133 petition.
44. For all reasons set forth above, the classification of a story partially below grade level is a subjective determination and therefore does not qualify for review on a Form 133 petition. No change in the assessment is made as a result of this issue.

Summary of Final Determination

Determination of the ISSUE: *Whether the four subject apartment buildings are incorrectly classified as three story apartments instead of two story apartments over a basement.*

45. The classification of a story partially below grade level is a subjective determination and therefore does not qualify for review on a Form 133 petition. No change in the assessment is made as a result of this issue.

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

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.