

**STATE OF INDIANA  
Board of Tax Review**

|                              |   |   |
|------------------------------|---|---|
| Robert Casper                | ) | On Appeal from the Hamilton County          |
|                              | ) | Property Tax Assessment Board               |
| Petitioner,                  | ) | of Appeals                                  |
|                              | ) |   |
| v.                           | ) | Petition for Review of Assessment, Form 131 |
|                              | ) | Petition No. 29-003-99-1-5-00007            |
| HAMILTON COUNTY PROPERTY TAX | ) | Parcel No. 1713050004007000                 |
| ASSESSMENT BOARD OF APPEALS  | ) |   |
| And CLAY TOWNSHIP ASSESSOR,  | ) |   |
|                              | ) |   |
| Respondents.                 | ) |   |

**Findings of Fact and Conclusions of Law**

On January 1, 2002, pursuant to Public Law 198-2001, the Indiana Board of Tax Review (IBTR) assumed jurisdiction of all appeals then pending with the State Board of Tax Commissioners (SBTC), or the Appeals Division of the State Board of Tax Commissioners (Appeals Division). For convenience of reference, each entity (the IBTR, SBTC, and Appeals Division) is hereafter, without distinction, referred to as "State". The State having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

**Issues**

1. Whether the grade is correct.
2. Whether the neighborhood desirability rating is correct.

**Findings of Fact**

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also, if appropriate, any conclusion of law made herein shall also be considered a finding of fact.

2. Pursuant to Ind. Code § 6-1.1-15-3, Milo Smith, on behalf of Robert Casper, the Petitioner filed a petition requesting a review by the State. The Form 131 was filed on November 5, 1999. The Property Tax Assessment Board of Appeal's determination on the underlying Form 130 was mailed on October 12, 1999
3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on June 8, 2000 before Hearing Officer John Nussel. Testimony and evidence was presented. Milo Smith, Tax Consultants, Inc. represented the Petitioners. Lori Harmon represented Hamilton County. No one was present to represent Clay Township.
4. At the hearing, the subject Form 131 was made a part of the record and labeled Board Exhibit A. The Notice of Hearing is labeled Board Exhibit B. In addition, the following exhibits were submitted to the State:  
Board Exhibit C - A Continuance/Waiver Agreement dated April 6, 2000.  
Board Exhibit D – The Notice of Hearing – Reschedule.  
Board Exhibit E – A Request for Additional Evidence dated June 8, 2000.

Petitioner's Exhibit A – A copy of a request for continuance dated April 6, 2000.

Petitioner's Exhibit B – A statement of issues and response.

Petitioner's Exhibit C – A copy of the PTABOA response to the issues.

Petitioner's Exhibit D – An affidavit of Douglas J. Sweeney dated June 5, 2000 with attached grade specification table.

Petitioner's Exhibit E – A copy of the Assessment Communicator issued by the State Board in November 1987.

Petitioner's Exhibit F – A copy of 50 IAC 2.2-7-6.

Petitioner's Exhibit G – A copy of an excerpt from *Town of St. John, et al, v. State Board of Tax Commissioners*, 691 N.E. 2d 1387 (Ind. Tax 1998).

Petitioner's Exhibit H – A copy of an excerpt from *State Board of Tax Commissioners v. Town of St. John, et al. 702 N.E. 2d 1034 (Ind. 1998)*.

Petitioner's Exhibit I – Copies of pages 47 and 48, Rule 7, Real Property Assessment Manual.

Petitioner's Exhibit J – An exterior photograph of the subject residence.

Petitioner's Exhibit K – A copy of the property record card for the subject parcel.

Petitioner's Exhibit L – A copy of page 8, Rule 1, Real Property Assessment Manual.

Respondent's Exhibit 1 – A statement of issues and response.

Respondent's Exhibit 2 – The property record card for the subject property.

Respondent's Exhibit 3 – An exterior photograph of the subject residence.

Respondent's Exhibit 4 – An aerial photograph showing the subject property.

5. At the hearing, the Petitioner was asked to provide information regarding the construction cost of the residence. The Request for Additional Evidence is labeled Board Exhibit E and entered as evidence. A response to the Request for Additional Evidence was received on June 23, 2000. The Petitioner's response was not received in the time allocated by the Hearing Officer. The response is labeled Petitioner's Exhibit M and entered as evidence.
6. The Hearing Officer did not view the property. The residence under appeal is located at 10887 Sedgemoor Circle, Carmel, Clay Township, Hamilton County, Indiana.
8. The Form 115 shows the assessed value determined by the PTABOA for March 1, 1999 is land \$46,630 and improvements \$154,070.

### **Credibility of Witness**

9. Mr. Smith is a licensed real estate broker in the State of Indiana. He received the State's Level II certification. He has been a property tax consultant for approximately 11 years. Mr. Smith is a salaried employee and part (50%) owner

of the business known as Tax Consultants, Inc. Information regarding how Tax Consultants is compensated for the services rendered to the Petitioner is confidential. *Smith testimony*.

### **Regarding Grade**

7. The Petitioners contend the subject residence should not be graded above an A (160%). *Smith testimony* and *Board Exhibit A*. The property record card shows the local officials have applied the grade A +4 (240%).
8. Mr. Smith opines the grade for the subject residence should be B+2 (140%). He basis his opinion on his site visit, the affidavit of Douglas J. Sweeney, and the highlighted Grade Specification Table prepared by Douglas J. Sweeney. *Petitioner's Exhibit D* and *Smith testimony*.
9. Ms. Harmon asserts the highlighted Grade Specification Table in Petitioner's Exhibit D is not meaningful evidence because the contractor who prepared the exhibit was not present at the State's hearing to explain why he chose to mark items in the B or C column when they also appear in the A column. The Petitioners did not attend the PTABOA hearing. *Harmon testimony*.

### **Regarding Neighborhood**

14. The Petitioners contend the subject neighborhood desirability rating should be average (C). *Smith testimony* and *Board Exhibit A*. The local officials determined depreciation of five percent (5%) was appropriate for the residence based on average condition and a neighborhood desirability rating of excellent. (See the property record card.)

15. Mr. Smith contends a neighborhood desirability rating above average is a market value consideration. He asserts the State of Indiana does not determine assessments based on market value. Therefore, the neighborhood desirability rating shouldn't have anything to do with the reproduction cost of the improvement. He opines the assessment for the improvement should not be increased because of a higher than average neighborhood desirability rating because the value of the land has already been assessed. Mr. Smith opines the neighborhood desirability rating should have nothing to do with the application of depreciation. He contends it is wrong to apply an excellent neighborhood desirability rating just because the lots are expensive. *Smith testimony.*
  
16. Ms. Harmon contends neighborhood desirability is a composite judgment of overall desirability based on agreeable living benefits. An excellent neighborhood desirability rating indicates a prestigious high value area. The subject property is located in a prestigious high value area. The neighborhood desirability rating is used to determine depreciation and is not part of reproduction cost new. Excellent is a neighborhood desirability rating that may be chosen according to the Real Property Assessment Manual. In this case Harmon contends it has been properly applied. *Harmon testimony.*

### **Conclusions of Law**

1. The Petitioner is statutorily limited to the issues raised on the Form 130 petition filed with the Property Tax Assessment Board of Appeals (PTABOA) or issues that are raised as a result of the PTABOA's action on the Form 130 petition. Ind. Code §§ 6-1.1-15-1, -2.1, and -4. See also the Forms 130 and 131 petitions. In addition, Indiana courts have long recognized the principle of exhaustion of administrative remedies and have insisted that every designated administrative step of the review process be completed. *State v. Sproles*, 672 N.E. 2d 1353 (Ind. 1996); *County Board of Review of Assessments for Lake County v. Kranz* (1964), 224 Ind. 358, 66 N.E. 2d 896. Regarding the Form 130/131 process, the

levels of review are clearly outlined by statute. First, the Form 130 petition is filed with the County and acted upon by the PTABOA. Ind. Code §§ 6-1.1-15-1 and -2.1. If the taxpayer, township assessor, or certain members of the PTABOA disagree with the PTABOA's decision on the Form 130, then a Form 131 petition may be filed with the State. Ind. Code § 6-1.1-15-3. Form 131 petitioners who raise new issues at the State level of appeal circumvent review of the issues by the PTABOA and, thus, do not follow the prescribed statutory scheme required by the statutes and case law. Once an appeal is filed with the State, however, the State has the discretion to address issues not raised on the Form 131 petition. *Joyce Sportswear Co. v. State Board of Tax Commissioners*, 684 N.E. 2d 1189, 1191 (Ind. Tax 1997). In this appeal, such discretion will not be exercised and the Petitioner is limited to the issues raised on the Form 131 petition filed with the State.

2. The State is the proper body to hear an appeal of the action of the County pursuant to Ind. Code § 6-1.1-15-3.

#### **A. Indiana's Property Tax System**

3. Indiana's real estate property tax system is a mass assessment system. Like all other mass assessment systems, issues of time and cost preclude the use of assessment-quality evidence in every case.
4. The true tax value assessed against the property is not exclusively or necessarily identical to fair market value. *State Board of Tax Commissioners v. Town of St. John*, 702 N.E. 2d 1034, 1038 (Ind. 1998)(*Town of St. John V.*)
5. The Property Taxation Clause of the Indiana Constitution, Ind. Const. Art. X, § 1 (a), requires the State to create a uniform, equal, and just system of assessment. The Clause 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. *Town of St. John V*, 702 N.E. 2d at 1039 – 40.

6. Individual taxpayers must have a reasonable opportunity to challenge their assessments. But the Property Taxation Clause does not mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant. *Id.* Rather, the proper inquiry in all tax appeals is “whether the system prescribed by statute and regulations was properly applied to individual assessments.” *Id.* at 1040. Only evidence relevant to this inquiry is pertinent to the State’s decision.

### **B. Burden**

7. Ind. Code § 6-1.1-15-3 requires the State to review the actions of the PTABOA, but does not require the State to review the initial assessment or undertake reassessment of the property. The State has the ability to decide the administrative appeal based upon the evidence presented and to limit its review to the issues the taxpayer presents. *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E. 2d 1113, 1118 (Ind. Tax 1998) (citing *North Park Cinemas, Inc. v. State Board of Tax Commissioners*, 689 N.E. 2d 765, 769 (Ind. Tax 1997)).
8. In reviewing the actions of the PTABOA, the State is entitled to presume that its actions are correct. “Indeed, if administrative agencies were not entitled to presume that the actions of other administrative agencies were in accordance with Indiana law, there would be a wasteful duplication of effort in the work assigned to agencies.” *Bell v. State Board of Tax Commissioners*, 651 N.E. 2d 816, 820 (Ind. Tax 1995). The taxpayer must overcome that presumption of correctness to prevail in the appeal.
9. It is a fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr.,

*Administrative Law and Practice*, § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128.

10. Taxpayers are expected to make factual presentations to the State regarding alleged errors in assessment. *Whitley*, 704 N.E. 2d at 1119. These presentations should both outline the alleged errors and support the allegations with evidence. "Allegations, unsupported by factual evidence, remain mere allegations." *Id* (citing *Herb v. State Board of Tax Commissioners*, 656 N.E. 2d. 890, 893 (Ind. Tax 1995)). The State is not required to give weight to evidence that is not probative of the errors the taxpayer alleges. *Whitley*, 704 N.E. 2d at 1119 (citing *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230, 1239, n. 13 (Ind. Tax 1998)).
11. The taxpayer's burden in the State's administrative proceedings is two-fold: (1) the taxpayer must identify properties that are similarly situated to the contested property, and (2) the taxpayer must establish disparate treatment between the contested property and other similarly situated properties. In this way, the taxpayer properly frames the inquiry as to "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Town of St. John V*, 702 N.E. 2d at 1040.
12. The taxpayer is required to meet his burden of proof at the State administrative level for two reasons. First, the State is an impartial adjudicator, and relieving the taxpayer of his burden of proof would place the State in the untenable position of making the taxpayer's case for him. Second, requiring the taxpayer to meet his burden in the administrative adjudication conserves resources.
13. To meet his burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to establish a prima facie case, the taxpayer must introduce evidence "sufficient to establish a given fact and which if not contradicted will remain sufficient." *Clark*, 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners*, 634 N.E. 2d 882, 887 (Ind. Tax 1994).



14. In the event a taxpayer sustains his burden, the burden then shifts to the local taxing officials to rebut the taxpayer's evidence and justify its decision with substantial evidence. 2 Charles H. Koch, Jr. at §5.1; 73 C.J.S. at § 128. See *Whitley*, 704 N.E. 2d at 1119 (The substantial evidence requirement for a taxpayer challenging a State Board determination at the Tax Court level is not "triggered" if the taxpayer does not present any probative evidence concerning the error raised. Accordingly, the Tax Court will not reverse the State's final determination merely because the taxpayer demonstrates flaws in it).

### **C. Review of Assessments After *Town of St. John V***

15. Because true tax value is not necessarily identical to market value, any tax appeal that seeks a reduction in assessed value solely because the assessed value assigned to the property does not equal the property's market value will fail.
16. Although the Courts have declared the cost tables and certain subjective elements of the State's regulations constitutionally infirm, the assessment and appeals process continue under the existing rules until a new property tax system is operative. *Town of St. John V*, 702 N.E. 2d at 1043; *Whitley*, 704 N.E. 2d at 1121.
17. *Town of St. John V* does not permit individuals to base individual claims about their individual properties on the equality and uniformity provisions of the Indiana Constitution. *Town of St. John*, 702 N.E. 2d at 1040.

### **Conclusion Regarding the Credibility of the Witness**

18. The State has difficulty accepting Milo Smith as an expert in the field of study and

accepting Mr. Smith as a credible witness. The specific reasons for these conclusions are set forth throughout these Findings and Conclusions. One such reason is this: Tax Consultants, Inc. refuses to reveal if their compensation is based on the amount that Petitioners' tax assessment is reduced. Clearly, expert witnesses should not receive contingent fees. Courts agree that an expert witness whose fee is contingent upon the outcome of a case is improperly motivated and can not objectively inform the court on an issue before it. "It is the potentially adverse influence of the motivation to enhance his compensation that makes a contingent fee arrangement for an expert witness inappropriate." *City & County of Denver v. Board of Assessment*, 947 P.2d 1373, 1379 (Colo. 1997)(citing *New England Tel. & Tel. Co. v. Board of Assessors of Boston*, 392 Mass. 865, 468 N.E. 2d 263, 265 (1984)). "[A] bargain to pay compensation to an expert witness for the purpose of 'forming an opinion' is lawful 'provided that payment is not contingent on success in litigation affected by the evidence.'" *Id* (citing Arthur Linton Corbin, *Corbin on Contracts*, § 1430 (1962 & Supp. 1997)). Moreover, the Uniform Standards of Professional Appraisal Practice (USPAP) state that it is "unethical" to accept compensation that is contingent upon reporting "a direction in value that favors the cause of the client . . . [or] the attainment of a desired result." *Denver*, 947 P. 2d at 1378 (citing USPAP at 2 (1996)). See also *Wirth v. State Board of Tax Commissioners*, 613 N.E. 2d 874 (Ind. Tax 1993) (The contingent fee nature of the representative's agreement goes to the weight of the testimony). Mr. Smith's refusal to reveal the nature of the compensation Tax Consultants, Inc. receives from the taxpayer casts a shadow of doubt on the reliability of his testimony.

### **Conclusions Regarding Grade**

19. On February 14, 2001, the Tax Court issued a decision in *Garcia v. State Board of Tax Commissioners*, 743 N.E. 2d 817 (Ind. Tax 2001)(*Garcia II*). This decision by the Tax Court held there could be no grade assigned to a home above an A because there was no guidance in the Regulation for any grade above an A.
20. On August 13, 2001, the Supreme Court of Indiana granted transfer of the *Garcia II* decision.
21. On February 5, 2002, the Indiana Tax Court stayed the effect of judgment in the case of *Garcia II*, pending the decision of the Indiana Supreme Court (the *Garcia Stay*). Therefore, the Indiana Board of Tax Review has based this determination on the state of the law prior to the Tax Court's ruling in *Garcia II*. A copy of the *Garcia Stay* is attached hereto.
22. The approach to valuing residential homes is primarily found in 50 IAC 2.2-7. The approach to valuing homes is the application of various models to represent typical types of construction. "A model is a conceptual tool used to replicate reproduction costs of given structures using typical construction materials." 50 IAC 2.2-7-6. The model assumes that there are certain elements of construction defined as specifications. These specifications create an average or C grade home. *Id.*
23. "Grade" is defined as the classification of an improvement based on certain construction specifications and quality of materials and workmanship. 50 IAC 2.2-1-30.
24. Not all residences in the State are average or C grade homes. Therefore, grade factors are applied to account for differences in construction specifications and quality of materials and workmanship between the models in the Regulation and the home being assessed. *Clark*, 694 N.E. 2d at 1236, n. 6. The major grade classifications are "A" through "E". 50 IAC 2.2-7-6 (d)(1). The cost schedules in the Regulation reflect the "C" grade standards of quality and design. The

following grade factors (or multipliers) are assigned to each major grade classification:

|           |      |
|-----------|------|
| “A” grade | 160% |
| “B” grade | 120% |
| “C” grade | 100% |
| “D” grade | 80%  |
| “E” grade | 40%  |

50 IAC 2.2-7-6 (e).

25. Intermediate grade levels ranging from A+10 through E-1 are also provided for in the Regulation to adequately account for quality and design features between major grade classifications. 50 IAC 2.2-7-6 (g).
26. The determination of the proper grade factor requires assessors to make a variety of subjective judgments regarding variations in the quality of materials and workmanship and the quality of style and design. *Mahan v. State Board of Tax Commissioners*, 622 N.E. 2d 1058, 1064 (Ind. Tax 1993). The grade selected represents a composite judgment of the overall quality and design. *Mahan*, 622 N.E. 2d at 1064; 50 IAC 2.2-7 (f).
27. Subjectivity is used in the grading process. For assessing officials and taxpayers alike, however, the Regulation provides indicators for establishing grade. The text of the Regulation provides indicators for establishing grade. The text of the Regulation (see 50 IAC 2.2-7-6 (d)), the grade specification table (50 IAC 2.2-7-6 (b)), and graded photographs (50 IAC 2.2-7-10) all provide guides for establishing grade.
28. Though it may be difficult to establish whether a home has a “cheap quality interior finish with minimal built-in features” or is “devoid of architectural treatment”, this does not mean that a taxpayer is precluded from offering evidence tending to demonstrate that the home has these characteristics. *Whitley*, 704 N.E. 2d at 1119.

29. In property tax appeals, the petitioner has the responsibility to provide probative and meaningful evidence to support a claim that the grade factor assigned by the local officials is incorrect.
30. As stated previously, the taxpayer's burden in the State's administrative proceedings is two-fold: (1) the taxpayer must identify properties that are similarly situated to the contested property, and (2) the taxpayer must establish disparate treatment between the contested property and other similarly situated properties. In this way, the taxpayer properly frames the inquiry as to "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Town of St. John V*, 702 N.E. 2d at 1040.
31. The Petitioners did not identify properties that are similarly situated to the property under appeal and did not credibly establish disparate treatment between the subject property and others similarly situated. The attempted grade reduction must fail for this reason.
32. In addition, Petitioner's Exhibit D (grade specification table with highlighted features) does not establish that the local taxing officials misapplied the tax system in this case. Numerous features set forth on the grade specification table appear in more than one grade category. For example, gutters and conductors appear in grade categories A through C. There are also features on the grade specification table that do not appear in multiple grade categories. For example, a tiled bath is a feature of a B grade home while a ceramic tiled bath is a feature of an A grade home. Further, the grade specification table does not include features that are present in many homes. For example, the specification table does not include features such as skylights and built-in bookcases. Standing alone, this Exhibit does not establish an incorrect grade application. In fact, the Petitioners witness, Mr. Sweeney highlighted features in the B grade column that also are listed in the A grade column. Mr. Sweeney was not present at the hearing to testify regarding his qualifications in the assessment profession; nor to

offer testimony regarding the methodology he used to determine the grade of the home's features.

33. The Petitioners failed to provide construction cost information that the State could have dealt with in a meaningful manner. The Tax Court demands quantification techniques for grade application and the State reasonably decides that using construction cost information is appropriate when grade issues are raised in property tax appeals. *Garcia v. State Board of Tax Commissioners*, 694 N.E. 2d 94 (Ind. Tax 1998). (See Board Exhibit E and Petitioner's Exhibit L.)
34. As previously stated, the local officials assigned an A+4 grade factor to the home under appeal. For all reasons set forth above, the Petitioners failed to meet their burden of proof regarding the alleged impropriety of the grade factor assigned. Accordingly, no change is made in the assessment as a result of this issue.

### **Conclusions Regarding Neighborhood Desirability Rating**

35. Neighborhood is a composite judgment of the overall desirability based on the condition of agreeable living and the extent of residential benefits arising from the location of the dwelling. 50 IAC 2.2-7-7.1(f)(7).
36. The Petitioners contend a market value concept is applied when a neighborhood desirability rating above average is used to determine the depreciation of an improvement. Mr. Smith asserts the State of Indiana does not determine taxes based on market value. Therefore, he asserts it is wrong to apply a neighborhood desirability rating above average. He theorizes the assessment for the improvement should not be increased because of a higher than average neighborhood desirability rating because the land value has already been assessed.
37. Though the Courts have declared the cost tables and certain subjective elements of the State's regulations constitutionally infirm the assessment and appeals

process continue under the existing rules until a new property tax system is operative. *Town of St. John V*, 702 N.E. 2d at 1043; *Whitley*, 704 N.E. 2d at 1121.

38. Physical depreciation for residential dwellings **is** determined by the combination of age, condition, and neighborhood desirability. 50 IAC 2.2-7-9(c). (Emphasis added.) The Petitioner's burden in this case is to show "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Town of St. John V*, 702 N.E. 2d at 1040. The Petitioners have failed to show the local officials erred in the use of the neighborhood desirability rating to establish depreciation.
39. An excellent neighborhood rating indicates a prestigious, high value area. 50 IAC 2.2-7-7.1(f)(7)(A).
40. Ms. Harmon testified the property is located in a very high value prestigious area. The only testimony offered by Mr. Smith in regard to the desirability of the neighborhood in question indicated a "very nice neighborhood" located in a rural area with few conveniences. He also testified the lots are expensive. No other probative evidence was offered by the Petitioners regarding whether the local officials erred in the application of an excellent desirability rating for the subject neighborhood.
41. As stated previously, to meet his burden, the taxpayer must present probative evidence in order to make a prima facia case. In order to establish a prima facia case, the taxpayer must introduce evidence "sufficient to establish a given fact and which if not contradicted will remain sufficient." *Clark*, 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners*, 634 N.E. 2d 882, 887 (Ind. Tax 1994).
42. For all of the reasons set forth above, the Petitioners failed to meet their burden of proof regarding the alleged impropriety of the neighborhood desirability rating

applied by the local officials. Accordingly there is no change in the assessment as a result of this issue.

The above stated findings and conclusions are issued in conjunction with, and serve as the basis for, the Final Determination in the above captioned matter, both issued by the Indiana Board of Tax Review this \_\_\_\_ day of \_\_\_\_\_, 2002.

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Chairman, Indiana Board of Tax Review