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

Petition: **20-031-12-1-5-00014**
Petitioners: **Brian and Velma Rodgers**
Respondent: **Elkhart County Assessor**
Parcel: **20-03-27-129-014.000-031**
Assessment Year: **2012**

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

Procedural History

1. The Petitioners initiated their 2012 assessment appeal by filing a letter with the Elkhart County Assessor.[1]

2. On February 24, 2014, the Elkhart County Property Tax Assessment Board of Appeals (PTABOA) issued its determination denying the Petitioners relief.

3. The Petitioners filed a Petition for Review of Assessment (Form 131) with the Board on March 24, 2014. They elected the Board's small claims procedures.

4. The Board issued a notice of hearing on August 8, 2014.

5. Administrative Law Judge (ALJ) Jennifer Bippus held the Board's administrative hearing on September 10, 2014. She did not inspect the property.

6. Brian Rodgers appeared *pro se* and was sworn as a witness. Attorney Beth Henkel represented the Respondent. County Assessor Cathy Searcy and Gavin Fisher were sworn as witnesses for the Respondent.

Facts

7. The property under appeal is a 6.204-acre unimproved parcel located at West Vistula in Bristol.

8. The PTABOA determined the 2012 assessment is $20,500.

9. On the Form 131 petition, the Petitioners requested $7,500.

[1] The Petitioners' letter to the Elkhart County Assessor is neither dated nor date-stamped.

Record

10. The official record for this matter is made up of the following:

a) Petition for Review of Assessment (Form 131) with attachments,

b) A digital recording of the hearing,

c) Exhibits:

Petitioner Exhibit 1:	Flood plain map from the Elkhart County Planning Division,
Petitioner Exhibit 2:	Photograph of the subject property,
Petitioner Exhibit 3:	Sales valuation analysis prepared by Gavin Fisher with notations made by the Petitioners.
Respondent Exhibit A:	2012 Subject property record card,
Respondent Exhibit B:	Memorandum from Department of Local Government Finance (DLGF) regarding Woodlands Guidance, dated November 9, 2010,
Respondent Exhibit C:	Memorandum from DLGF regarding Classification and Valuation of Agricultural Land, dated February 12, 2008,
Respondent Exhibit D:	"2012 Ad Valorem Appeal Analysis" prepared by Gavin Fisher,
Respondent Exhibit E:	Letter from Vicki Myers to Brian Rodgers, dated November 6, 2013,
Respondent Exhibit F:	*Harry L. Davis, III v. Jasper Co. Ass'r*, Ind. Bd. of Tax Rev., pet. no. 37-031-12-1-1-00001 (Jan. 10, 2014),
Respondent Exhibit G:	Text of Ind. Code § 6-1.1-15-17.2.
Board Exhibit A:	Form 131 petition with attachments,
Board Exhibit B:	Notice of appearance from Beth Henkel,
Board Exhibit C:	Notice of hearing dated August 8, 2014,
Board Exhibit D:	Hearing sign-in sheet.

d) These Findings and Conclusions.

Objections

11. Ms. Henkel raised a hearsay objection to the Petitioners' testimony regarding what an employee with the Elkhart County Planning Division told them about the "753" flood mark, because no one from that office was present during the Board's hearing. "Hearsay" is a statement, other than one made while testifying, that is offered to prove the truth of the matter asserted. Such a statement can be either oral or written. (Ind. R. Evid. 801(c)). The Board's procedural rules specifically address hearsay evidence:

> Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. If not objected to, the hearsay evidence may form the basis for a determination. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting determination may not be based solely upon the hearsay evidence.

52 IAC 3-1-5(b). The word "may" is discretionary, not mandatory. In other words, the Board can permit hearsay evidence to be entered in the record, but it is not required to allow it.

12. Because no one from the Planning Division was present to testify, the Petitioners' testimony in this regard is hearsay. But the Respondent's witness, Mr. Fisher, also testified that about 60% of the subject property floods, which roughly confirms the same fact. Therefore, the Petitioners' testimony about the 753 flood mark is admitted.

Contentions

13. Summary of the Petitioners' case:

a) The subject property is assessed too high. Further, the property's classification was improperly changed from agricultural to excess residential. Consequently, the Petitioners lost their "woodlands discount." The property has been in the Petitioners' family for over 50 years, During that time the use has never changed. Mr. Rodgers' father "logged out" the property 50 years ago. Though he personally has never harvested timber on the property, Mr. Rodgers stated he has "been thinking about logging it out because it is getting too dense." *Rodgers testimony.*

b) Much of the property is covered by trees. Because it is next to the river, the lower portion floods and is wet the majority of the time. The Petitioners sometimes utilize the portion of the property not prone to flooding for family events and camping. They also go down to the river to fish with their grandkids. *Rodgers testimony; Pet'rs Ex. 1.*

c) The Petitioners obtained a flood plain map from the Elkhart County Planning Division. Someone with the Planning Division informed the Petitioners the flood plain mark was denoted by a "753" mark on the map. The water level on the property, however, reached the "764" mark in 2014. *Rodgers testimony; Pet'rs Ex. 1, 2.*

d) In the Elkhart County Sales Analysis performed by Mr. Fisher, the only property he selected from Bristol does not contain any wetland. And that assessment decreased in 2012, while the Petitioners' assessment increased. *Rodgers testimony; Pet'rs Ex. 3.*

14. Summary of the Respondent's case:

a) The subject property is correctly assessed. The Respondent's decision to change the classification from agricultural to excess residential was triggered by a memorandum from the DLGF dated February 12, 2008. That memorandum addressed the proper classification and valuation of agricultural land. It includes the following statements:

> [T]he Indiana Code provide[s] a list of various agricultural activities that may be helpful to the assessor; including forage, wildlife, timber, forest products, vineyards, bees, and fish.
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> ***
>
> [L]and "***purchased for***" an industrial, commercial, or residential uses shall not be assessed as agricultural land. Additionally, *** "[a]ll land ***utilized*** for agricultural purposes is valued" using a statewide base rate and a soil productivity index system. *** [T]he parcel's size does not determine the property classification or pricing method for the parcel. Rather, "the property classification and pricing method are determined by the property's use or zoning." [Footnotes omitted.]

Henkel argument; Resp't Ex.C.

b) According to the Respondent, the subject property was incorrectly "receiving the woodland deduction" prior to the 2012 reassessment. The Respondent delayed classification changes until the 2012 reassessment so that all misclassified land could be changed at once. Upon inspection of the property, the Respondent determined that the property was misclassified as agricultural, and should be classified as excess residential land. (The inspection was based on aerial photographs and oblique imagery, which did not show "farming" activity on the subject property or the surrounding parcels. Mr. Fisher specifically admitted that he had never physically been on the subject property.) According to the Respondent, this change is proper because the taxpayers did not prove they were enrolled in one of the Department of Natural Resources' programs or stewardship plans indicating that they used the property for timber. *Searcy testimony; Fisher testimony; Resp't Ex. A, B, C.*

c) Gavin Fisher is a licensed residential appraiser and an Indiana Level III Assessor-Appraiser, but there is no evidence that he actually prepared an appraisal of the subject property. Instead, the Respondent presented a sales-comparison analysis prepared by Mr. Fisher. The properties utilized in his analysis were marketed as residential, even though some had portions of their land dedicated to agricultural use. According to Mr. Fisher, the best comparable sale he included is located at 52028 County Road 25 in Bristol. It has recreational-water frontage, making it similar to the subject property. It sold for $38,438 per acre. Utilizing this sale, Mr. Fisher determined that the market value of the subject property is approximately $238,000. *Fisher testimony; Resp't Ex. D.*

d) According to Mr. Fisher, even the lowest valued property on his list of comparables indicates the subject property is under-assessed. While the Respondent is not seeking an increase in the assessment, the subject property is undervalued. *Henkel argument; Fisher testimony; Resp't Ex. D.*

e) The subject property record card indicates that two acres are assessed at $6,900 per acre. This is the value for excess residential acreage that does not contain a dwelling/home site. Another 4.01 acres is designated as residential excess acreage, but it is valued at $1,630 per acre to mirror agricultural values. That value may be too low.[2] *Fisher testimony; Resp't Ex. A, C.*

f) Mr. Fisher was not hired to do a "full-blown appraisal." Had he done one, his starting point in valuing the subject property would have been $38,000 per acre. This value is based on the only other waterfront sale utilized in his sales-comparison analysis. He went on to state that the "high ground," approximately 35-40% of the property, would be valued at $38,000 per acre. The remaining 60% "does suffer from flood influence, [and] that $38,000 would have been reduced by 40 to 50 percent." *Fisher testimony.*

g) There are no instructions in the Guidelines or county land order for valuing water coverage on residential land. The negative influence factors that can be utilized are only for agricultural land. *Searcy testimony.*

h) Further, the Petitioners hired Vicki Myers, a realtor broker, to determine a value for the property. In a letter to the Petitioners, Ms. Myers concluded that the value of the subject property is $40,000. Again, this value is more than the current assessment. *Henkel argument; Resp't Ex. E.*

Burden of Proof

15. Generally, the taxpayer has the burden to prove that an assessment is incorrect and what the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Ass'r,* 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). The burden-shifting statute as recently amended by P.L. 97-2014 creates two exceptions to that rule.

16. First, Ind. Code § 6-1.1-15-17.2 "applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal is an increase of more than five percent (5%) over the assessment for the same property for the prior tax year." Ind. Code § 6-1.1-15-17.2(a). "Under this section, the county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court." Ind. Code § 6-1.1-15-17.2(b).

17. Second, Ind. Code section 6-1.1-15-17.2(d) "applies to real property for which the gross assessed value of the real property was reduced by the assessing official or reviewing

[2] The final 0.1 acres is not given any value because it is a public roadway.

authority in an appeal conducted under IC 6-1.1-15." Under those circumstances, "if the gross assessed value of real property for an assessment date that follows the latest assessment date that was the subject of an appeal described in this subsection is increased above the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase, the county assessor or township assessor (if any) making the assessment has the burden of proving that the assessment is correct." Ind. Code § 6-1.1-15-17.2(d). This change is effective March 25, 2014, and has application to all appeals pending before the Board.

18. The property record card shows the total 2011 assessment for this parcel was $7,500. That figure increased to $20,500 for 2012. Clearly that increase was more than 5%. And there appears to be no real dispute that the 2011 assessment and the 2012 assessment were for the same property (unimproved land). The initial requirements for shifting the burden of proof in Ind. Code § 6-1.1-15-17.2(a) and (b) are satisfied in this case. Indiana Code section 6-1.1-15-17.2(c)(3), however, specifically excludes application of the burden-shifting provisions if the disputed assessment is based on a use that was not considered in the assessment for the prior tax year. The Respondent argued that the use of the subject property was new because the DLGF directed her to change the classification from agricultural woodland to residential excess acreage, thereby exempting this matter from the new burden statute. While the Respondent changed the classification of the property, she failed to prove a different use to support that change. In fact, the evidence shows the Petitioners used the property in 2012 just as they had used it in 2011.[3] Therefore, we conclude that the burden shifting provisions of Ind. Code § 6-1.1-15-17.2 apply and the burden rests with the Respondent—including the burden to show that the prior agricultural use classification was wrong.

Analysis

19. The determination of whether or not land is properly classified as "agricultural" is fundamental. As explained in the DLGF memorandum that the Respondent purportedly relied on in this case, all land utilized for agricultural purposes is valued using a statewide base rate and soil productivity index system. The Board has considered several other cases where assessors have changed the use classification of land from agricultural woodlands to excess residential. Inevitably, such a reclassification leads to a much higher assessed value that is more than a 5% increase. Those cases have established that analysis must begin with the land classification question, which may be the determining issue. *See Orange Co. Assessor v. Stout*, 996 N.E.2d 871, 875-876 (Ind. Tax Ct. 2013). It was in *Stout* and it is in this case.

[3] As part of her argument, the Respondent pointed to *Harry L. Davis, III v. Jasper Co. Ass'r*, Ind. Bd. of Tax Rev. pet. no. 37-031-12-1-1-00001 (January 10, 2014). In that case, the assessor discovered a cell tower on the property that had not been previously considered, added a value for that cell tower, and therefore was not assessing the same property in the year of appeal as in the previous year. In the current appeal, the Respondent made no similar claim about a newly discovered use of the property for some other purpose. Furthermore, the Respondent noted nothing had changed.

20. According to the DLGF's memorandum, the determination should be made based on use and zoning. Nevertheless, nothing about zoning was presented in this case.

21. In fact, the Respondent presented very little evidence regarding this fundamental issue. The Respondent mainly relied on conclusory statements that the subject property should no longer be classified as agricultural land. Indiana Code § 6-1.1-4-13 states that "[I]n assessing or reassessing land, the land shall be assessed as agricultural *only* when it is devoted to agricultural use." Ind. Code § 6-1.1-4-13(a) (emphasis added). The word "devote" means "to attach the attention or center the activities of (oneself) wholly or chiefly on a specified object, field, or objective." WEBSTER'S THIRD NEW INTERNATIONAL UNABRIDGED DICTIONARY at 620. Because the burden was on the Respondent, it was her duty to provide the Board with probative evidence supporting her notion that the subject property was incorrectly classified. Statements such as "in reviewing a number of parcels in our county it was discovered that parcels were receiving the woodland deduction that were not associated with agricultural land" do not constitute probative evidence. The onus was on the Respondent to prove that the property previously had been incorrectly classified as agricultural.

22. The Respondent relied on testimony that aerial photographs and oblique imagery showed no evidence of "farming" on the subject parcel or on any contiguous parcel belonging to the Petitioners. The Respondent failed to offer any aerial photographs or oblique images as evidence to support that point or any other conclusions about the subject property. She only offered Mr. Fisher's statement about seeing no farming in the photographs or images. For the sake of argument, we will assume the accuracy of his statement on that point, but that evidence has very little, if any, probative value in this case. Not being able to see evidence of "farming" from those sources does not disprove the Petitioners' claim to be raising timber on this parcel that they eventually intend to "log."

23. The Respondent also attempted to put significance on the fact that the Petitioners provided no proof this parcel is enrolled in one of the Department of Natural Resources' programs or stewardship plans indicating they used the property to produce timber. We agree that such proof would make the Petitioners' claim even stronger, but the Respondent provided no authority that the Petitioners were required to do so, particularly where the Respondent has the burden of proof.

24. Based on all the evidence, we believe that Mr. Rodgers' father logged this property approximately 50 years ago and now the trees have grown back to the point that Mr. Rogers is able to contemplate doing so again. (This testimony was essentially undisputed.)

25. This case is similar to *Stout* in that the magnitude of the assessed value increase put the burden of proof on the assessors. In both cases the assessors needed to prove the properties were not used as agricultural woodlands in order to support their changes to excess residential classifications. In other words, neither the *Stout* determination nor this one turn on whether the taxpayers proved the agricultural woodlands classification is actually correct.

26. As a result of the conclusion regarding the proper classification of the subject property, the remaining portions of the Respondent's evidence and argument are irrelevant because they have nothing to do with the assessed valuation for agricultural woodland property.

Conclusion

27. The Respondent had the burden of proving the 2012 assessment is correct, but she failed to do so. Therefore the Petitioners are entitled to have their assessment returned to its 2011 value.

Final Determination

In accordance with these findings and conclusions, the 2012 assessment must be changed to $7,500.

ISSUED: May 1, 2015

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Chairman, 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 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 of 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>.