

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

**Petition Nos.:** 71-005-10-1-4-01167  
71-005-10-1-4-01167A  
**Petitioner:** SWCAP, LLC  
**Respondent:** St. Joseph County Assessor  
**Parcel Nos.:** 71-04-33-251-001.000-005  
71-04-33-251-002.000-005  
**Assessment Year:** 2010

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

**Procedural History**

1. The Petitioner initiated its 2010 assessment appeal for the above-captioned parcels with the St. Joseph County Assessor on May 9, 2011.
2. For Parcel No. 71-04-33-251-001.000-005, the St. Joseph County Property Tax Assessment Board of Appeals (PTABOA) issued a determination on February 13, 2012, denying the Petitioner any relief. For Parcel No. 71-04-33-251-002.000-005, however, the record lacks any evidence that the PTABOA ever held a hearing. Thus, it was proper to bring the 2010 appeal for this parcel to the Board. *See* Ind. Code § 6-1.1-15-1(k) and (o) (allowing a taxpayer to seek review by the Board if a county PTABOA does not hold a hearing within 180 days of the taxpayer filing its notice of review with the county or township assessor).
3. The Petitioner filed Petitions for Review of Assessment (Form 131) for both parcels with the Board on March 14, 2012. The Petitioner elected the Board's small claims procedures.
4. The Board issued notices of hearing on February 25, 2014.
5. Administrative Law Judge (ALJ) Patti Kindler held the Board's administrative hearing on April 22, 2014. She did not inspect the property.
6. Certified tax representative Joseph Taylor represented the Petitioner. Attorney Frank Agostino represented the Respondent. Mr. Taylor, certified appraiser Douglas Edison, and County Assessor Rosemary Mandrici were sworn.

## **Facts**

7. The two parcels under appeal generally function as one property, a commercial restaurant.<sup>1</sup> Therefore, the Board will refer to both parcels collectively as “the subject property” unless otherwise indicated. The property is located at 4810 Grape Road and Edison Lake Parkway, in Mishawaka.
  
8. The PTABOA determined the following assessment for Parcel No. 71-04-33-251-001.000-005:  
Land: \$617,000      Improvements: \$761,000      Total: \$1,378,000.
  
9. The Respondent determined the following assessment for Parcel No. 71-04-33-251-002.000-005:  
Land: \$168,100      Improvements: \$16,200      Total: \$184,300.
  
10. At the hearing, the Petitioner requested a total assessment of \$765,000 for both parcels.

## **Record**

11. The official record for this matter is made up of the following:
  - a) Petitions for Review of Assessment (Forms 131) with attachments,
  - b) A digital recording of the hearing,
  - c) Exhibits:  
  
Petitioner Exhibit 1:      Power of Attorney for Joseph Taylor,  
Petitioner Exhibit 2:      Form 131 petitions,  
Petitioner Exhibit 3:      Appraisal report performed by Douglas Edison,  
Petitioner Exhibit 4:      Notice of Appearance for Joseph Taylor,  
Petitioner Exhibit 5:      E-mail communications from Joseph Taylor to Frank Agostino and Sue Tranberg,  
Petitioner Exhibit 6:      Corrected comparable sales grid prepared by Mr. Edison with corrections highlighted in yellow.  
  
Respondent Exhibit 1:      Property record card for parcel 71-04-33-251-002.000-005,  
Respondent Exhibit 2:      Property record card for parcel 71-04-33-251-001.000-005.  
  
Board Exhibit A:      Form 131 petitions with attachments,  
Board Exhibit B:      Hearing notices, dated February 25, 2014,

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<sup>1</sup> The building housing the restaurant is located on Parcel No. 71-04-33-251-001.000-005. Parcel No. 71-04-33-251-002.000-005 is a vacant lot located behind the restaurant that is utilized for additional parking. According to the appraisal report presented by the Petitioner, the subject property operates as a Chili's.

Board Exhibit C: Hearing sign-in sheet,  
Board Exhibit D: Notice of Appearance for Mr. Agostino.

d) These Findings and Conclusions.

### Objections

12. The Respondent's counsel objected to the admission of Petitioner Exhibit 3, appraisal report prepared by Mr. Edison, arguing the Respondent did not receive a copy of the report prior to the hearing.
13. The Petitioner's representative offered copies of e-mails sent to Mr. Agostino and Ms. Tranberg prior to the hearing.<sup>2</sup> These e-mails were dated February 17, 2014, April 7, 2014, and April 14, 2014. Mr. Taylor testified that the appraisal in question was attached to the emails. *See Pet'r Ex. 5*. The ALJ took Mr. Agostino's objection under advisement.
14. In a small claims matter, a party is required to furnish the opposing party with copies of documentary evidence and the names of witnesses prior to the hearing *if that information is requested*. 52 IAC 3-1-5(d) (emphasis added). The Respondent offered no argument, testimony, or documentation indicating she requested copies of documentary evidence from the Petitioner prior to the hearing. The Petitioner provided evidence that it provided the appraisal to the Respondent prior to the hearing. Thus, the Respondent's objection is overruled, and the appraisal is admitted.
15. The Petitioner's representative objected to the admission of Respondent Exhibits 1 and 2, property record cards for each of the two parcels. Mr. Taylor argued he requested the Respondent's evidence and witness list be provided at least five days prior to the hearing. According to Mr. Taylor, the Respondent did not comply with this request. *Taylor testimony; Pet'r Ex. 5*.
16. Mr. Agostino responded to the Petitioner's objection by stating there is no requirement in a small claims hearing for the definite exchange of information. Furthermore, Mr. Agostino argued that Respondent exhibits 1 and 2 consist solely of the property record cards for the parcels under appeal. *Agostino argument*. The ALJ took Mr. Taylor's objection under advisement.
17. Mr. Agostino's argument in response to the Petitioner's objection is troubling. The Board's procedural rules apply to all parties.
18. Again, 52 IAC 3-1-5(d) expressly requires a party to furnish the opposing party with copies of documentary evidence and the names of witnesses if that information is requested at least ten days prior to the hearing. Failure to do so may serve as grounds to

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<sup>2</sup> The email address utilized by Ms. Tranberg indicates that she is an employee in the St. Joseph County Assessor's office.

exclude evidence or testimony that has not been timely provided. 52 IAC 3-1-5(d). The purpose of this rule is to prevent litigation by ambush or gamesmanship.

19. Here, the Petitioner requested copies of the Respondent's documentary evidence prior to the hearing, and the Respondent failed to comply. The Petitioner's objection is sustained. Respondent Exhibits 1 and 2 are excluded.<sup>3</sup>

### Contentions

20. Summary of the Petitioner's case:
- a) The subject property's 2010 assessment is too high. The Petitioner presented an appraisal performed by Douglas Edison, a licensed certified residential appraiser. The appraisal was performed in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP). Mr. Edison completed the appraisal under the supervision of Robert H. Dorsam, a licensed certified general appraiser. *Taylor argument; Edison testimony; Pet'r Ex. 3, 6.*
  - b) Mr. Edison developed all three approaches to value in his appraisal. First, under the cost approach, Mr. Edison analyzed vacant commercial land sales in the area estimating a land value for the subject property at \$590,800. He used the Real Property Guideline's cost tables and considered items such as the square footage, condition, use of the building, and paving in determining the value of the improvements. He applied 55% depreciation to the restaurant based on its condition and age, and 80% depreciation to the paving because it requires continual resurfacing. Based on the cost approach, Mr. Edison estimated the total value of the subject property at \$824,000. *Edison testimony; Pet'r Ex. 3.*
  - c) Next, Mr. Edison estimated the value of the subject property utilizing the income approach to value. Although he was not able to find leases for any restaurants in the subject property's immediate neighborhood, he was able to find several other comparable leased properties. Mr. Edison chose comparable leases from T.J. Maxx, Manpower, and Salsa's restaurant. From these comparable leases he derived an income estimate of \$16 per square foot for the subject property. Using a loaded cap rate of 13.448%, Mr. Edison estimated the subject property's value under the income approach at \$675,000. *Edison testimony; Pet'r Ex. 3.*
  - d) Finally, Mr. Edison developed the sales-comparison approach to value. Mr. Edison assigned the most weight to this approach because he found several quality comparable sales. In fact, one of the comparable sales was located directly across the street from the subject property. All of the comparable properties were within the local market area. Two of the properties were utilized as restaurants, and one was utilized for retail. The property being used for retail could be converted to a restaurant, as several other properties on Grape Road have been converted.

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<sup>3</sup> The Board has not always strictly enforced the duty to exchange evidence in regard to property record cards for the subject property, but each case depends on its own facts; and in discovery disputes, the conduct of the parties.

Nevertheless, the comparables are a good measure of the value for the subject property, even if one of them was not being used as a restaurant. Under the sales-comparison approach, Mr. Edison concluded that the subject property should be valued at \$765,000. *Edison testimony; Pet'r Ex. 3, 6.*

- e) Mr. Edison stated he did not rely solely on properties that were of “going-concerns” in his sales comparison approach. As an appraiser, Mr. Edison stated he is qualified to value only the real estate. According to Mr. Edison, how a property is being utilized is not relevant, because the business value is not supposed to be included in the analysis. *Edison argument.*
- f) Mr. Edison did agree that the comparable sales he utilized in his sales comparison approach occurred outside the timeframe required for the 2010 valuation date. However, Mr. Edison stated the reason behind this was because the appraisal was completed for the purpose of appealing two assessment years.<sup>4</sup> While he could have utilized comparable sales that occurred prior to March 1, 2010, he determined that the three he used represented the most accurate value for the subject property. Mr. Edison went on to state that his opinion of value would be the same whether he reported the valuation date as of March 1, 2010, or March 1, 2011, because no substantial market changes had occurred between those valuation dates. *Edison testimony; Pet'r Ex. 3, 6.*

21. Summary of the Respondent’s case:

- a) The Petitioner’s appraisal is flawed. The January 1, 2011, effective date listed on the appraisal is outside the timeframe for a 2010 assessment. Further, the sales comparables all occurred outside of the relevant valuation period for a 2010 assessment. The relevant valuation period for a 2010 assessment was January 1, 2009, to March 1, 2010. *Agostino argument.*
- b) The following unanswered questions indicate flaws in Mr. Edison’s income approach: (1) Why he did not utilize data from neighboring restaurant leases; (2) why two of the leases Mr. Edison chose were from retail properties rather than restaurants; (3) why he multiplied his \$16 per square foot market rent by the subject restaurant’s entire square footage rather than its leasable square footage; (4) where Mr. Edison derived his vacancy and collection losses and replacement reserves; and (5) what publications or appraisal service Mr. Edison relied on in determining his capitalization rate. *Agostino argument.*
- c) Finally, as to Mr. Edison’s cost approach, the vacant land sales he used were not located on Grape Road. Further, these vacant land sales were not sold for the purpose of building a restaurant. It is also questionable how Mr. Edison derived his costs, how he developed the physical depreciation for the building and the paving, and what “effective life” he assigned to the building. *Agostino argument.*

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<sup>4</sup> Mr. Edison is referring to appeals for 2010 and 2011. However, only the 2010 assessment year is currently before the Board.

## **Burden of Proof**

22. 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.
23. First, Ind. Code section 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).
24. 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 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.
25. Here, the parties agreed that the assessments did not change from 2009 to 2010. Thus, the burden shifting provisions of Ind. Code § 6-1.1-15-17.2 do not apply, and the burden rests with the Petitioner.

## **Analysis**

26. The Petitioner made a prima facie case for reducing the assessment. The Respondent failed to rebut or impeach the Petitioner’s case.
  - a) Indiana assesses real property on the basis of its true tax value, which the Department of Local Government Finance (DLGF) has defined as the property’s market value-in-use. To show a property’s market value-in-use, a party may offer evidence that is consistent with the DLGF’s definition of true tax value. A market-value-in-use appraisal prepared according to the Uniform Standards of Professional Appraisal Practice (USPAP) often will be probative. *Kooshtard Property VI v. White River Twp. Ass'r*, 836 N.E.2d 501, 506 n.6. (Ind. Tax Ct. 2005). A party may also offer actual construction costs for the property under appeal, sales information for that

- property or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.
- b) Regardless of the method used, a party must explain how its evidence relates to the appealed property's market value-in-use as of the relevant valuation date. *O'Donnell v. Dep't of Local Gov't Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also Long v. Wayne Twp Ass'r*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). For March 1, 2010, assessments, the assessment and valuation dates were the same. *See* Ind. Code § 6-1.1-4-4.5(f).
  - c) The Petitioner offered an appraisal prepared by Mr. Edison, a certified residential appraiser. Mr. Edison performed the appraisal according to USPAP guidelines under the supervision of Robert Dorsam, a certified general appraiser. Mr. Edison considered all three approaches to value, and estimated the subject property's value at \$765,000, as of January 1, 2011.
  - d) While not exact, the appraisal's January 1, 2011, effective date is close to March 1, 2010. Moreover, Mr. Edison testified that he observed no changes in the market between March 1, 2010, and January 1, 2011, and that his estimate of value would be the same for both dates. Therefore, the Petitioner made a prima facie case that the 2010 assessment should be reduced to \$765,000.
  - e) Once the Petitioner establishes a prima facie case, the burden shifts to the assessing official to rebut the Petitioner's evidence. *See American United Life Insurance Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). To rebut or impeach the Petitioner's case, the Respondent has the same burden to present probative evidence that the Petitioner faced to raise its prima facie case. *Fidelity Federal Savings & Loan v. Jennings County Ass'r*, 836 N.E.2d 1075, 1082 (Ind. Tax Court 2005).
  - f) The Respondent attempted to impeach Mr. Edison's appraisal in several ways. First, the Respondent argued that the appraisal's effective date was outside the timeframe for 2010 assessments. As explained above, however, the appraisal is sufficiently related to the subject property's 2010 market value-in-use, particularly when considering Mr. Edison's testimony that there were no measurable changes in the market between the assessment valuation date and the appraisal date.
  - g) Next, the Respondent found purported flaws in the comparable sales utilized by Mr. Edison. While assessors operate under rules and regulations regarding the dates of sales when determining assessments, the Respondent failed to offer any authority that similarly limits licensed appraisers. Further, as to the Respondent's concerns regarding whether the purported comparables were currently being utilized as restaurants, the Respondent offered no authority or evidence indicating that utilizing properties that did not house existing restaurants is contrary to generally accepted appraisal practices, or led to an incorrect value.

- h) The Respondent also attempted to find fault with Mr. Edison’s income and cost approaches. Specifically, the Respondent “questioned” Mr. Edison’s choice of vacancy, collection loses, replacement reserves, and capitalization rate. The Respondent argued the vacant-land sales Mr. Edison used were located too far away from the subject property. Further, the Respondent argued the vacant-land sales were not sold for the purpose of constructing restaurants. Finally, the Respondent “questioned” Mr. Edison’s method of developing physical depreciation and the subject property’s “effective life.”
- i) Impeaching a value estimate from an expert witness requires more than simply labeling certain items as “questionable.” Here, Mr. Edison relied mainly on the sales-comparison approach for his value estimate, and he only developed the income and cost approach to strengthen his appraisal. In completing the sales-comparison approach, Mr. Edison chose comparable properties and made adjustments for differences as he deemed appropriate, which is well within the expertise of a licensed appraiser. The Respondent offered no evidence of any specific errors that would have led to a different value conclusion. Moreover, the Respondent offered no competing market-based evidence of her own. Consequently, the Respondent’s arguments that Mr. Edison’s appraisal is flawed are unpersuasive and unsupported. Further, the Respondent’s arguments do nothing to rebut the Petitioner’s case or support the current assessment.
- j) For the reasons set forth, the Petitioner made a case that the 2010 assessment should be reduced to \$765,000. The Respondent failed to impeach or rebut the Petitioner’s case.

### **Conclusion**

27. The Board finds for the Petitioner.



## Final Determination

In accordance with these findings and conclusions of law, the 2010 combined assessment for both parcels must be changed to \$765,000.

ISSUED: July 18, 2014

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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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>>.