

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

Petition No.: 29-020-07-1-4-00160
Petitioner: Sandcreek Properties, LLC
Respondent: Hamilton County Assessor
Parcel No.: 13-11-27-00-00-022.001
Assessment Year: 2007

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

Procedural History

1. The Petitioner initiated an assessment appeal with the Hamilton County Property Tax Assessment Board of Appeals (the PTABOA) by written document.
2. The PTABOA issued notice of its decision on July 2, 2009.
3. The Petitioner filed a Form 131 petition with the Board on August 14, 2009. The Petitioner elected to have its case heard according to the Board's small claim procedures.
4. The Board issued a notice of hearing to the parties dated July 9, 2010.
5. The Board held an administrative hearing on September 23, 2010, before the duly appointed Administrative Law Judge (the ALJ) Dalene McMillen.
6. The following persons were present and sworn in at hearing:
 - a. For Petitioner: J. Brent Burton, Owner, Sandcreek Properties, LLC
Leigh Ann Balay, Employee, Sandcreek Properties, LLC
John Johantges, Property Tax Group 1, Inc.
 - b. For Respondent:¹ Debbie Folkerts, Hamilton County Assessor
Terry McAbee, Hamilton County Deputy Assessor

¹ Marilyn S. Meighen, Meighen & Associates, P.C. appeared as counsel for the Respondent.

Facts

7. The subject property is four mini-warehouse buildings with a commercial general office and a pole building on 4.69 acres located at 13111 Marilyn Road, Fishers, Fall Creek Township, in Hamilton County.
8. The ALJ did not conduct an on-site inspection of the property under appeal.
9. For 2007, the PTABOA determined the assessed value of the Petitioner's property to be \$472,500 for land and \$1,419,300 for the improvements, for a total assessed value of \$1,891,800.
10. At the hearing, the Petitioner requested an assessed value of \$1,115,800.

Issues

11. Summary of the Petitioner's contentions in support of an alleged error in its assessment:
 - a. The Petitioner contends its property is over-valued based on its market value. *Johantges testimony*. In support of this contention, the Petitioner's representative presented an income analysis. *Petitioner Exhibit G*. According to Mr. Johantges, the subject property was in its "lease-up period," so only 41.4% of its units were rented. *Johantges testimony; Petitioner Exhibit F*. In his analysis, the Petitioner's representative used the income from the units that were rented to calculate the property's gross income. *Id.* Next, Mr. Johantges testified, he subtracted the property's actual expenses such as advertising, insurance, trash hauling, utilities and an overhead allocation.² *Johantges testimony; Petitioner Exhibit A*. Finally, Mr. Johantges applied a capitalization rate of 8.5%, which he determined from the Realty Rates.com website for warehouse type property located in Indianapolis.³ *Id.; Petitioner Exhibit B*. Based on his analysis, Mr. Johantges estimated the property's value to be \$1,115,800 for the March 1, 2007, assessment date. *Johantges testimony; Petitioner Exhibit G*.
 - b. The Petitioner's representative testified he also presented an income approach calculation using the actual income and expenses of a "sister store" located in

² According to Mr. Johantges, he did not subtract expenses such as property taxes, interest expense and depreciation that he testified were not "allowable" expenses. *Johantges testimony*. In addition, Ms. Balay testified the overhead allocation is money allocated for office expenses and for employees that are leased from other companies. *Balay testimony*.

³ Mr. Johantges testified he consulted with an appraiser, Mr. John Compton, of JA Compton Real Estate, to obtain the capitalization rate for a storage facility located in the Indianapolis area. *Johantges testimony*. The Respondent's counsel objected to Mr. Johantges' testimony arguing that it is hearsay. *Meighen argument*. The Board's Procedural Rules permit hearsay to be admitted; however, if the evidence is properly objected to the resulting determination may not be based solely upon the hearsay evidence. *See 52 IAC 2-7-3*.

Noblesville to the PTABOA. *Johantges testimony; Petitioner Exhibits C and D.* According to Mr. Johantges, the PTABOA recognized his income calculation as a valid approach in determining a property's assessed value in Hamilton County. *Id.* Thus, Mr. Johantges argues, the PTABOA should have changed the subject property's assessment because the same type income calculation was presented at the PTABOA hearing. *Johantges testimony.*

- c. Finally, in response to cross examination, the Petitioner's representative admitted that he was paid on a contingency fee. *Johantges testimony.* Mr. Johantges argues, however, that being paid on a contingent fee basis is irrelevant in this case because the Petitioner owes back taxes. *Id.* Therefore, any reduction in assessed value resulting in a refund would be applied to the Petitioner's back taxes. *Id.* According to Mr. Johantges, he is only paid if "a check gets rendered." *Id.*

12. Summary of the Respondent's contentions in support of the assessment:

- a. The Respondent contends the Petitioner's property is not over-valued. *McAbee testimony; Meighen argument.* The Respondent's witness, Mr. McAbee, testified that he prepared an income approach valuation using Co-Star, which is an internet based company that compiles data on rental rates, vacancy information and listing and sales information for Hamilton County and the surrounding counties. *McAbee testimony.* Mr. McAbee testified he also used data from the Petitioner's 2006 financial statements, self storage websites articles and local market rents. *McAbee testimony; Respondent Exhibits C – O.* According to Mr. McAbee, the data shows the average per square foot market rent is \$8.71, which results in a potential gross income of \$512,984. *Id.* Mr. McAbee then applied a typical vacancy, collection and loss rate of 10% and determined the effective gross income of the Petitioner's property to be \$461,686. *Id.* Mr. McAbee testified that he then applied a 46.38% expense ratio, which resulted in a net operating income of \$247,569. *Id.* Finally, he applied a capitalization rate of 7.19% and tax rate of 1.74%, for an overall rate of 8.93%. *Id.* Mr. McAbee estimated the value of the subject property to be \$2,772,333. *McAbee testimony; Respondent Exhibit E.* Because the Petitioner's property is currently assessed at \$1,891,800, Ms. Meighen argues, the Petitioner's property is assessed below its market value. *Meighen argument.*
- b. The Respondent's counsel also argues the Petitioner's income calculation is flawed and should be given little weight. *Meighen argument.* According to Ms. Meighen, the Petitioner's income calculation used the subject property's actual income and expense information. *Id.* Ms. Meighen argues the Petitioner needed to provide evidence to establish its income and expenses are typical for comparable properties in the market. *Id.; citing Twyckenham Village, Inc. v. Tippecanoe County Assessor, Petition No. 79-160-07-1-4-00001, (issued March 10, 2010).* *Id.* Similarly, Mr. McAbee contends Mr. Johantges' income approach calculation is flawed because the income is based on only 40% of the Petitioner's

units being rented. *McAbee testimony*. According to Ms. Meighen, the income approach values a property as a long term investment so the income is based on the rent it will produce for the owner rather than the rent received during a lease up period. *Meighen argument; citing BBR-Vision III, LP v. Rushville Township Assessor*, Petition No. 70-011-05-1-4-00004, (issued January 21, 2009). In addition, Mr. McAbee contends the Petitioner's capitalization rate is based on warehouse distribution centers, not self-storage units like the Petitioner's property. *McAbee testimony*.

- c. Further, the Respondent's witness argues, the Petitioner's property's assessment is fair based on the assessment of comparable self storage facilities. *McAbee testimony*. According to Mr. McAbee, self storage facilities in Fishers are assessed on average at \$34.22 per square foot. *Id.* The Petitioner's property is assessed for only \$32.12 per square foot. *Id.* Thus, Mr. McAbee contends, the subject property is assessed consistently with other properties in its area. *Id.*
- d. Similarly, the Respondent's witness contends, the property under appeal is correctly assessed based on the sales of comparable properties. *McAbee testimony*. According to Mr. McAbee, Shurgard Storage Center, which consists of 68,794 square feet on four acres, sold on February 6, 2002, for \$2,875,000 or \$41.79 per square foot. *McAbee testimony; Respondent Exhibit P*. The Simply Storage Zionsville facility, which is 26,180 square feet on 2.07 acres, sold on May 28, 2004, for \$960,000 or \$36.67 per square foot. *Id.* In addition, SOS Storage, which is 74,226 square feet on 6.93 acres, sold on December 29, 2008, for \$4,150,000 or \$55.91 per square foot. *Id.* Mr. McAbee argues that, while the sales dates of the Respondent's evidence ranged from 2002 to 2008, the sales suggest that the price of self storage facilities in the area have increased rather than experiencing a decline in value as implied by the Petitioner's evidence. *McAbee testimony*.
- e. Finally, Ms. Meighen argues that Mr. Johantges is paid on a contingency fee basis and therefore his valuation should be given little weight. *Meighen argument*. In support of this argument, Ms. Meighen requested the Board take judicial notice of its decisions in *River Glen Country Club, LLC v. Hamilton County Assessor*, Petition No. 29-006-07-1-4-00058, (issued July 13, 2010) and *Lakeville Associates, Ltd. v. St. Joseph County Assessor*, Petition No. 71-028-06-1-4-12144, (issued February 15, 2010), concerning the credibility given to a contingent fee witness. *Id.*

Record

13. The official record for this matter is made up of the following:
 - a. The Form 131 petition and related attachments.

b. The digital recording of the hearing.

c. Exhibits:

Petitioner Exhibit A – Sandcreek Properties’ statement of revenue and expenses, dated December 31, 2006,

Petitioner Exhibit A-1 – Sandcreek Properties’ statement of revenue and expenses, dated December 31, 2006,

Petitioner Exhibit B – Indianapolis capitalization rate for 4th quarter 2007, published by Realty Rates.com,

Petitioner Exhibit C – Notification of Final Assessment Determination – Form 115 for SOS Storage, LLC, of Noblesville, dated April 14, 2010,

Petitioner Exhibit D – Petitioner’s income approach calculation for SOS Storage, LLC,

Petitioner Exhibit E – Sandcreek Properties’ Management Summary Report for Month Ending December 31, 2005,

Petitioner Exhibit F – Sandcreek Properties’ Management Summary Report for Month Ending December 31, 2006,

Petitioner Exhibit G – Petitioner’s income approach calculation, prepared by John Johantges,

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

Respondent Exhibit B – Aerial map of the property under appeal,

Respondent Exhibit C – Excerpt of the 2002 Real Property Assessment Manual,

Respondent Exhibit D – Excerpt of the International Association of Assessing Officer’s Property Assessment Valuation, 2nd edition,

Respondent Exhibit E – Respondent’s income approach calculation, prepared by Terry McAbee,

Respondent Exhibit F – “The Burning Question” article, posted September 1, 2005,

Respondent Exhibit G – Sandcreek Properties’ Management Summary Report for Month Ending February 28, 2006,

Respondent Exhibit H – “Self Storage Cost” posted by Costhelper, dated August 30, 2010,

Respondent Exhibit I – Shurgard Storage Centers’ rental rates, posted by publicstorage.com,

Respondent Exhibit J – Hamilton County warehouse vacancy rates, prepared by Co-Star,

Respondent Exhibit K – “Self-Storage 2006 in Review” posted by Inside Self-Storage Expo at insideselfstorage.com,

Respondent Exhibit L – “Self-Storage Capitalization Rates” posted by PGP Self-Storage Report, Spring 2009, at scribd.com,

Respondent Exhibit M – “Self-Storage REITs Feeling the Pinch” posed by National Real Estate Investor at printthis.clickability.com,

Respondent Exhibit N – Business Briefing article “Self Storage Delivers,” prepared by Cushman & Wakefield, dated October 2007,

Respondent Exhibit O – Hamilton County tax rates for 2005 pay 2006,

Respondent Exhibit P – List of assessed values of self-storage facilities in Hamilton County,

Board Exhibit A – Form 131 petition with attachments,

Board Exhibit B – Notice of Hearing,

Board Exhibit C – Hearing sign-in sheet.

- d. These Findings and Conclusions.

Analysis

14. The most applicable governing cases are:

- a. 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 Township Assessor*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also, Clark v. State Board of Tax Commissioners*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998).
- b. 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 Township 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”).
- c. 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 Ins. Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). The assessing official must offer evidence that impeaches or rebuts the Petitioner’s case. *Id; Meridian Towers*, 805 N.E.2d at 479.

15. The Petitioner failed to provide sufficient evidence to establish a prima facie case for a reduction in the assessed value of its property. The Board reached this decision for the following reasons:

- a. Indiana assesses real property based on its “true tax value,” which the 2002 Real Property Assessment Manual defines as “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.” 2002 REAL PROPERTY ASSESSMENT MANUAL at 2, (MANUAL) (incorporated by reference at 50 IAC 2.3-1-2). The appraisal profession traditionally has used three methods to determine a property’s market value: the cost approach, the sales comparison approach, and the income approach to value. *Id.* at 3, 13-15. In Indiana, assessing officials generally use a mass appraisal version of the cost approach, as set forth in the REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A (the GUIDELINES).
- b. A property’s market value-in-use as determined using the GUIDELINES is presumed to be accurate. *See* MANUAL at 5; *Kooshtard Property, VI, LLC v. White River Township Assessor*, 836 N.E.2d 501,505 (Ind. Tax Ct. 2005); *P/A Builders & Developers, LLC*, 842 N.E.2d 899 (Ind. Tax Ct. 2006). A taxpayer may rebut that presumption with evidence that is consistent with the Manual’s definition of true tax value. MANUAL at 5. A market value-in-use appraisal prepared according to the Uniform Standards of Professional Appraisal Practice (USPAP) often will suffice. *Id.*; *Kooshtard Property VI*, 836 N.E.2d at 505, 506 n.1. A taxpayer may also offer actual construction costs, sales information for the subject property or comparable properties and any other information compiled according to generally accepted appraisal practices. MANUAL at 5.
- c. Regardless of the method used to rebut an assessment’s presumption of accuracy, a party must explain how its evidence relates to the property’s market value-in-use as of the relevant valuation date. *O’Donnell v. Department of Local Government Finance*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also Long v. Wayne Township Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). For the March 1, 2007, assessment, the valuation date was January 1, 2006. 50 IAC 21-3-3.
- d. Here, the Petitioner contends its property is over-assessed based on an income approach valuation. *Johantges testimony*. In support of this contention, the Petitioner’s representative presented a summary income-approach analysis that he prepared. *Petitioner Exhibit G*. In response to cross examination, however, Mr. Johantges admitted that he was being paid on a contingency fee basis. *Johantges testimony*. Mr. Johantges therefore had a financial interest in the Board lowering the subject property’s assessment. While contingently paid expert witnesses are not absolutely prohibited from testifying in Indiana, it is generally inappropriate to pay an expert witness a contingent fee. *Wirth v. State Bd. of Tax Comm’rs*, 613 N.E.2d 874, 877 (Ind. Tax Ct. 1993); *see also* Ind. Professional Conduct Rule 3.4(b) (The common law rule in most jurisdictions is that . . . it is improper to pay an expert witness a contingent fee.). Some states have even held certain contracts for paying expert witnesses contingent fees void as against public policy. *Wirth*, 613 N.E.2d at

876 (citing, e.g. *Dupree v. Malpractice Research, Inc.* 179 Mich. App. 254, 445 N.W.2d 498 (1989)). As the Indiana Tax Court explained, the rationale underlying that strong judicial disfavor goes to the heart of the judicial process. A contingent witness fee raises the specter of an auctioning of the truth and casts a pall over the entire fact finding process. *Id.* at 876-77. While the potential for abuse is less in a bench trial than in a jury trial (*Wirth*, 613 N.E.2d at 877), it is still significant. Thus, Mr. Johantges' estimate of value is not as persuasive as a similar analysis made by a non-contingently paid, licensed appraiser.

- e. In addition, Mr. Johantges' analysis fails to raise a prima facie case because it is based on site-specific financial information. "The income approach to value is based on the assumption that potential buyers will pay no more for the subject property ... than it would cost them to purchase an equally desirable substitute investment that offers the same return and risk as the subject property." MANUAL at 14. The income approach thus focuses on the intrinsic value of the property, not upon the Petitioner's operation of the property because property-specific rents or expenses may reflect elements other than the value of the property "such as quality of management, skill of work force, competition and the like." *Thorntown Telephone Company, Inc. v. State Board of Tax Commissioners*, 588 N.E.2d 613, 619 (Ind. Tax Ct. 1992). See also MANUAL at 5 ("[C]hallenges to assessments [must] be proven with aggregate data, rather than individual evidence of property wealth. ... [I]t is not permissible to use individual data without first establishing its comparability or thereof to the aggregate data"). Here Mr. Johantges provided no evidence to demonstrate that the property's income and expenses were typical for comparable properties in the market. Thus, any low rental income or high expense levels may be attributed to the Petitioner's management of the property as opposed to the property's market value. See *Lake County Trust Co. No. 1163 v. State Board of Tax Commissioners*, 694 N.E.2d 1253, 1257-58 (Ind. Tax Ct. 1998) (economic obsolescence was not warranted where taxpayer executed unfavorable leases resulting in a failure to realize as much net income from the subject property). In fact, the Petitioner's representative testified that only 41.4% of the units were rented in 2006. *Johantges testimony; Petitioner Exhibit F*. There is no evidence in the record that the Petitioner's representative attempted to "normalize" the income stream to account for the property's initial lease-up period.
- f. Moreover, Mr. Johantges failed to adequately support his capitalization rate. A capitalization rate "reflects the annual rate of return necessary to attract investment capital and is influenced by such factors as apparent risk, market attitudes toward future inflation, the prospective rates of return for alternative investments, the rates of return earned by comparable properties in the past, the supply of and demand for mortgage funds, and the availability of tax shelters." See *Hometowne Associates, L.P. v. Maley*, 839 N.E.2 269, 275 (Ind. Tax Ct. 2005). Here Mr. Johantges based his capitalization rate solely on a printout from the Realty Rates website. While the rules of evidence generally do not apply in the Board's hearings, the Board requires some evidence of the accuracy and credibility of the evidence. It is not sufficient to merely

- present a print out of a website and purport to rely on the data without showing that Realty Rates website is a credible data service that is typically relied upon by appraisal professionals as representative of the local market. Similarly, Mr. Johantges used a capitalization rate that purports to be for “Class A & B Industrial Buildings.” *Petitioner Exhibit B*. Mr. Johantges did not adequately show that a storage facility falls into such a category.⁴
- g. Ultimately, Mr. Johantges failed to show that his income approach methodology conformed to the Uniform Standards of Professional Appraisal Practice (USPAP) or any other generally accepted standards. Consequently, Mr. Johantges’ income approach lacks sufficient probative value in this case. *See Inland Steel Co. v. State Board of Tax Commissioners*, 739 N.E.2d 201, 220 (Ind. Tax Ct. 2000) (holding that an appraiser’s opinion lacked probative value where the appraiser failed to explain what a producer price index was, how it was calculated or that its use as a deflator was a generally accepted appraisal technique).
 - h. Finally, the Petitioner’s representative argues the PTABOA should have reduced the assessed value of the subject property because the PTABOA reduced the assessed value of the Petitioner’s “sister store” when he presented the same type of evidence. Mr. Johantges, however, failed to explain how the PTABOA’s decision on an unrelated property is relevant to the property under appeal. More importantly, the Board’s proceedings are *de novo*. Each appeal is decided on its own facts. The Petitioner needed to present probative evidence to show the Petitioner’s assessment exceeded the property’s market value in use. Failing to do so, the Petitioner failed to raise a prima facie case its property’s assessment was in error.
 - i. Where the taxpayer fails to provide probative evidence that its assessment should be changed, the Respondent’s duty to support the assessment with substantial evidence is not triggered. *See Lacy Diversified Indus. v. Department of Local Government Finance*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003).

Conclusion

16. The Petitioner failed to raise a prima facie case. The Board finds in favor of the Respondent and holds that the assessed value of the property is \$1,891,000.

⁴ Mr. Johantges testified he also consulted an appraiser, Mr. John Compton, on the capitalization rate for a self-storage facility. *Johantges testimony*. The Petitioner, however, failed to make the appraiser available or to provide evidence as to the accuracy or credibility of applying an 8.5% capitalization rate on self-storage facilities in Fishers. Statements that are unsupported by probative evidence are conclusory and of no value to the Board in making its determination. *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E.2d 1113, 1119 (Ind. Tax Ct. 1998); and *Herb v. State Board of Tax Commissioners*, 656 N.E.2d 890, 893 (Ind. Tax Ct. 1995).

Final Determination

In accordance with the above findings of fact and conclusions of law, the Indiana Board of Tax Review now determines that the property's assessment should not be changed.

ISSUED: _____

Chairman,
Indiana Board of Tax Review

Commissioner,
Indiana Board of Tax Review

Commissioner,
Indiana Board of Tax Review

IMPORTANT NOTICE

- 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>.