

REPRESENTATIVES FOR PETITIONERS:

Michael E. Duff, DuCharme, McMillen & Associates, Inc.
Aaron Stout, DuCharme, McMillen & Associates, Inc.

REPRESENTATIVE FOR RESPONDENT:

Lisa Garoffolo, Boone County Assessor

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Charles L. and Verlene Schooler,	)	Petition No:	06-003-07-1-5-00444
)		
Petitioners	)	Parcel No:	003-14740-00
)		
v.)		
	)	County:	Boone
Boone County Assessor,	)	Township:	Eagle
)		
Respondent.	)	Assessment Year:	2007

Appeal from the Final Determination of
Boone Property Tax Assessment Board of Appeals

May 7, 2010

FINAL DETERMINATION

The Indiana Board of Tax Review (the Board) having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUES

1. The issue presented for consideration by the Board is whether the assessed value of the land is overstated and, if the land is over-valued, whether the fee simple interest or the lease fee interest of the land should be used to determine the land value for tax purposes.

PROCEDURAL HISTORY

2. Charles L. and Verlene Schooler (the Petitioners), through Michael E. Duff of DuCharme, McMillen & Associates, Inc., initiated an assessment appeal by written document dated October 13, 2008. The Boone County Property Tax Assessment Board of Appeals (the PTABOA) issued its determination denying the Petitioners' appeal on January 9, 2009. On February 2, 2009, Mr. Duff filed a Form 131 Petition for Review of Assessment with the Board on behalf of the Petitioners.

HEARING FACTS AND OTHER MATTERS OF RECORD

3. Pursuant to Indiana Code § 6-1.1-15-4 and § 6-1.5-4-1, Dalene McMillen, the duly designated Administrative Law Judge (the ALJ), conducted a hearing on December 3, 2009, in Lebanon, Indiana.
4. The following persons were sworn and presented testimony at the hearing:

For the Petitioners:

Michael Duff, DuCharme, McMillen & Associates, Inc.
Aaron Stout, DuCharme, McMillen & Associates, Inc.
Hank Rassel, Appraiser, Don R. Scheidt & Co., Inc.
Shaun Wilson, Appraiser, Don R. Scheidt & Co., Inc.
Jeff Somers, Vice President of Operations, Crystal Flash Petroleum Corporation
Stephen L. Schooler, Witness
Michael Andreoli, Attorney, Andreoli & Jacob¹

¹ Mr. Andreoli appeared as a witness for the Petitioners rather than in any representative capacity.

For the Respondent:

Lisa C. Garoffolo, Boone County Assessor
Peggy Lewis, PTABOA Member
Dan Spiker, County Representative, Government Utilities Technology Service
Cliff Hardy, County Representative, Government Utilities Technology Service

5. The Petitioner presented the following exhibits:

- Petitioner Exhibit 1 – Plat map of the subject property and the Petitioners’ proposed assessed value worksheet,
- Petitioner Exhibit 2 – Summary appraisal report prepared by Shaun Wilson and Hank Rassel of Don R. Scheidt & Co., Inc., dated April 30, 2009,
- Petitioner Exhibit 3 – Amendment of Leases between Olive and Charles Schooler and Oil, Incorporated, dated March 2, 1996, and Memorandum of Lease between Charles and Verlene Schooler and Crystal Flash Petroleum Corporation, dated March 2, 1996,
- Petitioner Exhibit 4 – Letter from Michael Duff to Lisa Garoffolo, dated October 13, 2008; property record card for Parcel No. 003-14740-00 located at 6416 East State Road 334, Zionsville; 2007 pay 2008 property tax bill for 6416 East State Road 334, Zionsville; Boone County appeal worksheets for Parcel No. 003-1470-00 and Parcel No. 003-12030-00; rent schedule, dated November 29, 1995; and Petitioners’ proposed assessed value worksheet,
- Petitioner Exhibit 5 – Letter from Michael Duff to the Indiana Board of Tax Review, dated January 26, 2009; Petition to the Indiana Board of Tax Review for Review of Assessment – Form 131; Notification of Final Assessment Determination – Form 115, dated January 9, 2009; Boone County appeal worksheet for Parcel No. 003-14740-00; Power of Attorney from Charles and Verlene Schooler to DuCharme, McMillen & Associates, Inc., dated September 29, 2008; tax representative certification letter for Michael Duff from the Department of Local Government Finance (DLGF), dated August 20, 2003; and an excerpt of the 2002 Real Property Assessment Manual,
- Petitioner Exhibit 6 – Property record card for Parcel No. 003-14740-00, located at 6416 East State Road 334, Zionsville.

6. The Respondent presented the following exhibits:

- Respondent Exhibit 1 – Boone County appeal worksheet for Parcel No. 003-14740-00, dated October 16, 2008; aerial map of the subject property; property record card for Parcel No. 003-14740-01; and aerial map for 6490 East 650 South, Zionsville,
- Respondent Exhibit 2 – 2007 pay 2008 property tax bill for 6416 East State Road 334, Zionsville; Power of Attorney from Charles and Verlene Schooler to DuCharme, McMillen & Associates, Inc., dated September 29, 2008; property record card for Parcel No. 003-14740-00, located at 6416 East State Road 334, Zionsville; Petitioners’ proposed assessed value worksheet; rent schedule, dated November 29, 1995; Realty Rates website pages for retail – convenience storage/gas stations; and North Central – class A and B neighborhood, community and strip retail centers for 1st quarter 2006 and 2007,
- Respondent Exhibit 3 – Property record card for Parcel No. 003-14740-000 located at 6416 East State Road 334, Zionsville,
- Respondent Exhibit 4 – Notice of Hearing on Petition – Real Property by County Property Tax Assessment Board of Appeals – Form 114, dated November 19, 2008,
- Respondent Exhibit 5 – Notification of Final Assessment Determination – Form 115, dated January 9, 2009,
- Respondent Exhibit 6 – Petition to the Indiana Board of Tax Review for Review of Assessment – Form 131, dated February 2, 2009,
- Respondent Exhibit 7 – Indiana Board of Tax Review Notice of Hearing on Petition, dated October 5, 2009,
- Respondent Exhibit 8 – Petitioners’ revised list of witnesses and exhibits; Amendment of Leases between Olive and Charles Schooler and Oil Incorporated, dated March 2, 1996; rental schedule, dated November 29, 1995; and Memorandum of Lease and Right of First Refusal, dated March 2, 1996,
- Respondent Exhibit 9 – Petitioners’ summary of witnesses’ testimony and exhibits,
- Respondent Exhibit 10 – Petitioners’ objection to witnesses’ testimony and exhibits,
- Respondent Exhibit 11 – 2005 to 2006 comparable sales for Neighborhood No. 26334; property record cards for Parcel No. 003-05000-00 located at 6537 East State Road 334, Zionsville, Parcel No. 003-05000-03 located at 6511 East State

Road 334, Zionsville, Parcel No. 003-05000-02 located at 6529 East State Road 334, Zionsville, Parcel No. 003-12660-00 located at 7150 East State Road 334, Zionsville, Parcel No. 003-12690-00 located at 7105 East State Road 334, Zionsville, Parcel No. 003-05020-02 located in Zionsville, Parcel No. 003-13220-01 located in Zionsville, Parcel No. 003-14740-00 located at 6419 East State Road 334, Whitestown and Parcel No. 021-14740-00 located at 6416 East State Road 334, Whitestown; Comparable sales for Neighborhood No. 26334; 2007 neighborhood descriptions for Anson land; and Anson neighborhoods and Parcel List Report for Neighborhood No. 26334.

7. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits:

Board Exhibit A – Form 131 petition with attachments,
Board Exhibit B – Notice of Hearing, dated October 5, 2009,
Board Exhibit C – Hearing sign-in sheet.

8. The subject property is 16.37 acres of land located at 6416 East State Road 334, Zionsville, Eagle Township in Boone County. The parties agree that only 5.662 acres of that parcel are at issue in this appeal.
9. The ALJ did not conduct an on-site inspection of the subject property.
10. For 2007, the PTABOA determined the assessed value of the land to be \$3,500,800.
11. At the hearing, the Petitioners' representative requested an assessed value of \$715,500 for the land.

JURISDICTIONAL FRAMEWORK

12. The Indiana Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property, (2) property tax deductions,

and (3) property tax exemptions, that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Indiana Board under any law. Ind. Code § 6-1.5-4-1(a). All such appeals are conducted under Indiana Code § 6-1.1-15. *See* Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.

ADMINISTRATIVE REVIEW AND THE PETITIONER'S BURDEN

13. A Petitioner seeking review of a determination of an assessing official has the burden to establish a prima facie case proving, by a preponderance of the evidence, 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).
14. 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”).
15. 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 evidence. *Id; Meridian Towers*, 805 N.E.2d at 479.

PETITIONERS’ CONTENTIONS

16. The Petitioners’ representative contends the subject property was assessed in error because 5.662 acres of the property’s 16.37 acres were assessed in excess of their market

value-in-use.² *Duff testimony*. The Petitioners' witness, Stephen Schooler, testified that the property under appeal was purchased by Charles and Verlene Schooler in the 1930's. *Schooler testimony*. In 1995, the Petitioners entered into a twenty-five year lease with Oil, Inc., to lease a portion of the Petitioners' land and to operate a Crystal Flash truck stop and convenience store on the site.³ *Petitioner Exhibit 3; Duff, Schooler and Somers testimony*.

17. In support of their position that the leased acreage is over-valued, the Petitioners submitted a summary appraisal report prepared by Shaun Wilson and Hank Russel of Don R. Scheidt & Co., Inc. *Petitioner Exhibit 2*. Mr. Wilson and Mr. Hassel are Indiana Certified General Real Estate Appraisers. *Id.* In their appraisal report, Mr. Wilson and Mr. Hassel estimated the leased fee value of the 5.662 acres at issue in this appeal to be \$700,000 and the fee simple value of the land to be \$1,360,000 as of January 1, 2006. *Petitioner Exhibit 2; Wilson testimony*.
18. For the leased fee value, Mr. Wilson contends he calculated the land value by using two methods of the income approach: direct capitalization and discounted cash flow analysis. *Petitioner Exhibit 2; Wilson testimony*. According to the appraisers, under the direct capitalization method, the value of the leased land as of January 1, 2006, was \$720,000.⁴ *Petitioner Exhibit 2*. Under the discounted cash flow analysis, the appraisers estimated

² The Petitioners' property record card shows 11.62 acres of agricultural land, a .40 acre public road, .50 acres of primary commercial land and 4.35 acres of commercial undeveloped usable land. *Petitioner Exhibit 4*. The lease, on the other hand, purports to lease "6.9 gross acres less Highway Right-of-Way, being net 5.963 acres." *Petitioner Exhibit 3*. Thus, the boundaries of the 5.662 acres at issue here are not clear from either the property record card or the Petitioners' lease. However, the Respondent did not dispute that the remaining property was agricultural and both parties agreed that the value of the remaining acreage was \$15,500.

³ The Petitioners' Amendment of Leases shows Crystal Flash originally entered into a lease with the Schoolers on July 26, 1977. *Petitioner Exhibit 3*.

⁴ The value was calculated by using one year of the Petitioners' rental income and by applying a capitalization rate of 7%. *Petitioner Exhibit 2*. According to the appraisers, no deductions were taken for expenses because the tenant was responsible for all expenses related to the property. *Id.*

the value of the land to be \$696,207.⁵ *Petitioner Exhibit 2*. The appraisers reconciled the income approach of the leased land to be \$700,000 as of January 1, 2006. *Petitioner Exhibit 2; Wilson testimony*. The appraisers admitted in their report that “the subject’s ground rent is below market,” but they chose to use site-specific rent information because “the subject site is encumbered by a long-term lease with 14 years and 3 months remaining (as of the date of value).” *Petitioner Exhibit 2 at 30*.

19. Mr. Wilson testified that the appraisers also valued the property’s fee simple interest using the sales comparison approach. *Petitioner Exhibit 2; Wilson testimony*. According to the appraisal, the appraisers compared five properties for location, size, frontage and access, zoning, functional utility and utilities. *Petitioner Exhibit 2*. The appraisers determined that the subject property was the most similar to a 36.89 acre tract of land that sold in Greenwood for \$234,108 per acre, but the property was inferior to a 10.23 acre tract of land that sold in Carmel for \$317,693 per acre. *Id.* Based on the comparable sales, the appraisers determined that the subject property should be priced at \$230,000 to \$250,000 per acre and concluded the fee simple value of the 5.662 acres of land at issue in this appeal was \$1,360,000 as of January 1, 2006. *Id.; Wilson testimony*.
20. The Petitioners’ representative argues that the difference in the appraised values between the lease fee value of \$700,000 and the fee simple value of \$1,360,000 is due to the encumbrance of the long term lease between the Petitioners and Crystal Flash. *Duff testimony*. According to Mr. Duff, the property’s value is negatively impacted by the lease because potential buyers would have to honor the agreement which gives the tenant the right to use and control the property. *Id.* As an example, Mr. Andreoli testified that

⁵ The appraisers forecasted the income of the property beginning on January 1, 2006, and assumed the property would be sold at the end of a ten year holding period. *Petitioner Exhibit 2*. Using the projected yearly income from the lease agreement from January 1, 2006, through 2015, capitalized at a discount rate of 8.75%, the appraisers arrived at a value of \$347,386. *Petitioner Exhibit 2*. For the 11th year, the appraisers capitalized the net operating income of \$62,400 using a terminal rate of 7.50% – from which 3% was deducted for sales expenses – to arrive at a final reversion value of \$807,040. *Id.* The appraiser then applied the discount rate of 8.75% to the \$807,040 and concluded the property has a \$348,821 reversion value. *Id.* Finally, the reversion value of the property was added to the ten year discounted value of \$347,386 to estimate the present value of the property as of January 1, 2006. *Id.*

Duke Realty purchased all of the land adjacent to the 5.662 tract, but failed to purchase the leased land at issue in this appeal because of the long-term lease.⁶ *Andreoli testimony.*

21. Mr. Schooler further testified that a nearby property known as the “Crane property” was appealed to the county and the county reduced the property’s assessed value based on its lease value. *Schooler testimony.* According to Mr. Schooler, the Crane property is similar to the Petitioners’ property because it has been family owned for many years and it is similarly encumbered by a long term lease. *Id.* Thus, Mr. Schooler argues, the Board should value the subject property based on its encumbered value rather than its fee simple value. *Id.*
22. Finally, the Petitioners’ witness, Jeff Somers, testified that Crystal Flash is required to pay property taxes on the 5.662 acres of land it leases. *Somers testimony; Petitioner Exhibit 3.* According to Mr. Somers, Crystal Flash is currently paying \$11,700 per month in property taxes. *Somers testimony.* Mr. Somers argues that Crystal Flash owns a comparable property in Shelbyville, Indiana, but the taxes on that property are only \$12,110 per year. *Id.* According to Mr. Somers, both the subject property and the Shelbyville property are the same size, both properties are located off an interstate and both properties have Subway restaurants. *Id.* However, the tax liability on the Shelbyville property is \$128,290 less per year than the property at issue in this appeal. *Id.*
23. In his rebuttal argument, the Petitioners’ representative contends the sales data used by the county to calculate land base rates was flawed. *Duff testimony.* According to Mr. Duff, the county failed to adjust the sales prices for the smaller size of its comparable properties. *Id.* Moreover, the county’s sales were properties purchased by national

⁶ In response to the Respondent’s question, Mr. Andreoli testified that any lease can be broken by mutual agreement if the money is right. *Andreoli testimony.* In the case of the subject property, however, Mr. Andreoli testified that Crystal Flash has leased the property at a good price and they have no desire to break their lease with the Petitioners. *Andreoli testimony.*

operations looking for certain locations. *Id.* Further, five of the six sales occurred after the January 1, 2006, valuation date. *Id.* Thus, Mr. Duff argues, the sales do not accurately translate into a fair price per acre to be applied to the subject property. *Id.*

RESPONDENT'S CONTENTIONS

24. The Respondent contends the property under appeal is correctly assessed at \$3,500,800. *Spiker testimony.* According to the Respondent's representatives, the value of the property was determined based on vacant land sales on or around State Road 334 that occurred between 2004 and 2007.⁷ *Spiker and Hardy testimony.* Based on these sales, ranging from \$825,000 to \$5,448,589, the assessor calculated the value of primary land to be \$787,500 per acre; the value of secondary land to be \$738,100 per acre; the value of usable undeveloped land to be \$710,000 per acre; and the value of unusable undeveloped land to be \$5,000 per acre. *Hardy testimony.*
25. The Respondent's representative further contends that the leased land has value despite its encumbrance, because it borders the Anson development and is part of a retail area. *Spiker testimony.* According to Mr. Spiker, the Petitioners' representatives portray a distorted image of the leased land while they disregard the value derived from the property's location and desirability. *Id.*
26. Finally, the Respondent's representatives argue that the Petitioners' appraisal is flawed. *Spiker and Lewis testimony.* According to Mr. Spiker, two of the five sales used in the Petitioners' sales comparison approach sold in 2004 without any time adjustments being made to the sales prices. *Spiker testimony.* Moreover, the Respondent's witness argues, a five acre parcel would sell for more per acre than a 36.89 acre tract. *Lewis testimony.* Thus, Ms. Lewis concludes, the appraisers' use of the sales price of a 36.89 acre tract to

⁷ According to Mr. Hardy, the 2007 sales were time adjusted. *Hardy testimony.*

establish a price per acre for the land at issue here, greatly under-values the subject property. *Lewis testimony*.⁸

ANALYSIS

27. 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 (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. 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).
28. 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 often will suffice. *Id.*; *Kooshtard Property VI*, 826 N.E.2d at 505, 506 n.6. 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
29. Regardless of the method used to rebut an assessment’s presumption of accuracy, a party must explain how its evidence relates to the subject property’s market value-in-use as of the relevant valuation date. *O’Donnell v. Department of Local Government Finance*, 854

⁸ Ms. Lewis testified she is a licensed appraiser. *Lewis testimony*.

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 date, the valuation date is January 1, 2006. 50 IAC 21-3-3.

30. Here, the Petitioners presented an appraisal, dated April 30, 2009, that estimated the lease fee value of the property under appeal to be \$700,000 and the fee simple value to be \$1,360,000 as of January 1, 2006. *Petitioner Exhibit 2*. The appraisers are Indiana Certified Appraisers that prepared the appraisal in accordance with the Uniform Standards of Professional Appraisal Practices (USPAP). *Id.* The appraisal conforms to the correct valuation date and otherwise provides probative evidence of the estimated value of the property. An appraisal performed in accordance with generally recognized appraisal principles is often sufficient to establish a prima facie case. *See Meridian Towers*, 805 N.E.2d at 479. The Board therefore finds that the Petitioners raised a prima facie case that the property is over-valued.

31. Once the Petitioners establish a prima facie case, the burden shifts to the assessing official to rebut the Petitioners' evidence. *See American United Life Insurance Co. v. Maley*, 803 N.E.2d 276 (Ind. Tax Ct. 2004). To rebut or impeach the Petitioners' case, the Respondent has the same burden to present probative evidence that the Petitioners faced to raise their prima facie case. *Fidelity Federal Savings & Loan v. Jennings County Assessor*, 836 N.E.2d 1075, 1082 (Ind. Tax Ct. 2005). In support of its assessment, the Respondent presented property record cards and an analysis of comparable sales. *Respondent Exhibit 11; Spiker and Hardy testimony*. Based on sales in the area, the Respondent's witness concluded that the average price per acre of land in the State Road 334 business corridor is \$787,500. *Respondent Exhibit 11; Hardy testimony*.

32. Here, the Respondent presented evidence of sales located near the subject property. The Petitioners' comparable properties, on the other hand, were located all across central Indiana. However, the Assessor's witnesses failed to make any meaningful comparison

between the properties; whereas the Petitioners' appraiser identified the similarities between the subject property and the comparable properties and valued the differences between them. In addition, the Respondent argues that the Petitioners' comparable properties were too large to be comparable, but the Respondent's sales reflect a similar, yet opposite, problem: most of the parcels are much smaller than the subject property. Thus, while the evidence suggests that the property may, in fact, be more valuable than its appraised value,⁹ the Respondent's evidence was simply not sufficient to overcome the probative value of the Petitioners' USPAP-compliant appraisal. *See Kooshtard Property VI, LLC v. White River Township Assessor*, 836 N.E.2d 501, 505 n. 6 (Ind. Tax Ct. 2005) ("the most effective method to rebut the presumption that an assessment is correct is through the presentation of a market value-in-use appraisal, completed in conformance with the Uniform Standards of Professional Appraisal Practice.")

33. The Petitioners' appraisers, however, presented two alternative calculations of value in their appraisal report – a lease fee value and a fee simple value. Therefore the Board must determine which calculation best reflects the subject property's market value-in use as of the January 1, 2006, valuation date.

34. The appraisers first valued the lease fee interest of the property using two methods of the income approach to valuation: the direct capitalization approach and the discounted cash flow analysis. *Petitioner Exhibit 2*. The Petitioners' appraisal used the property's 2006 rent information and estimated the market value-in-use of the subject property to be \$700,000. *Id.* The Petitioners' appraisers admit that the property rent is "below market," but the Petitioners' representative argues that the lease is an encumbrance on the property and therefore the property should be assessed based on its leased fee value. *Id.*

⁹ The two properties closest in size to the property at issue in this appeal were a 2.36 acre parcel that sold for \$2 million or \$847,458 per acre presented by the Respondent and an 8.07 acre parcel in the Petitioners' appraisal that sold for \$508,055 per acre. The Petitioners' appraisal, however, valued the property at approximately \$240,000 per acre based on the sale of a 36.89 acre parcel.

35. “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, therefore, focuses on the intrinsic value of the property, rather than 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 lack thereof to the aggregate data”).
36. The Petitioners did not cite to any cases to support its argument that the Board should value the property based on its lower lease fee value. Nor was the Board able to find any Indiana cases on point. However, the Indiana Tax Court issued at least two decisions denying economic obsolescence for properties encumbered by long-term lease agreements that yielded below-market rent. See *Sandor v. Department of Local Government Finance*, 2003 Ind. Tax LEXIS 9 (Feb. 10, 2003) (unpublished decision), and *Lake County Trust Co. No. 1163 v. State Board of Tax Commissioners*, 694 N.E.2d 1253 (Ind. Tax Ct. 1998). In *Sandor v. Department of Local Government Finance*, the property owner entered into a long term lease in 1964 for a rent amount that, by the time of the appeal over thirty years later, fell far short of market rent. The Indiana Tax Court held that economic obsolescence was not warranted simply because the property owner could not realize as much net income from the leased property as it should. 2003 Ind. Tax LEXIS 9 at *7-9. In his decision, Judge Fisher held that “all Sandor has proven is that in 1964 it made a business decision that it would now like to change. This does not constitute a prima facie case for economic obsolescence.” *Id.* Similarly, in *Lake County Trust Co. No. 1163 v. State Board of Tax Commissioners*, 694 N.E.2d 1253 (Ind. Tax Ct. 1998), the Tax Court held that a property encumbered by an unfavorable lease was not

entitled to economic obsolescence. 694 N.E.2d at 1258. These cases suggest that the Court would not reduce the assessed value of the property solely based on the Petitioners' poor business decision to enter into a long-term lease at lease rates that later resulted in the property being leased for below market rents. However, both *Sandor* and *Lake County Trust* were decided under Indiana's former "true tax value" system.¹⁰

37. The Board also looked to other states and found that the majority of jurisdictions hold that the value of a property for assessment purposes is based on the value of the fee simple interest in a property as if the property was unencumbered by a lease. *Town of Sanford v. J & N Sanford Trust*, 694 A.2d 456, 460 (Me. 1997). *See, e.g., Board of Supervisors v. Nassif*, 290 S.E.2d 822, 824 (Va. 1982) (The property subject to taxation is the fee simple and not the reversion after the expiration of a lease.); *Alliance Towers, Ltd. v. Stark County Bd. of Revision*, 523 N.E.2d 826, 832 (Ohio 1988) (It is the fair market value of the property in its unrestricted form of title which must be valued. It is to be valued free of the ownerships of lesser estates such as leasehold interests, deed restrictions and restrictive contracts with the government.); and *People ex rel. Gale v. Tax Comm. of New York*, 233 N.Y.S.2d 501, 507 (N.Y. App. Div. 1962) (The true value of the property for assessment purposes is to be ascertained as if unencumbered by a long-term lease so that there is a single assessment of all interests in the property.). *But see, e.g. CAF Investment Co. v. Saginaw Twp. Mich. State Tax Comm.*, 221 N.W.2d 588 (Valuing a property as if "the property was available to rent in the market place" was impermissible because it would ignore "the existence of the long-term lease.").
38. The Board finds these determinations persuasive for several reasons. First, valuing property based on its actual rent rather than market rent could result in unintended consequences such as tax manipulation. For example, a lessor could escape the tax burden that justly falls on its property by merely entering into a lease with below-market rent. *See Valencia Center, Inc. v. Bystrom*, 543 So.2d 214, 217 (Fla. 1989) (Valuing

¹⁰ In *Lake County Trust Co. No. 1163 v. State Board of Tax Commissioners*, 694 N.E.2d 1253 (Ind. Tax Ct. 1998), Judge Fisher suggested that the result might be different under a market value system.

property without reflecting both the lessor's and lessee's interests would allow the owner to simply transfer a large part of the property's value to the lessee resulting in an assessment below fair market value.); and *Leavell-Rio Grande Cent. Associates v. Board of Assessment Appeals*, 753 P.2d 797, 800 (Colo. App. 1988) (Rent abatement provisions are bargained for by the parties to commercial leases. Inclusion of rent abatements as a factor of value under the income approach could foster taxpayer-manipulated artificially depressed property values.).

39. Moreover, using actual rent from a long-term, below-market lease could result in non-uniform values for properties within the same class and cause identical properties to have different values for tax purposes in violation of constitutional uniformity requirements.¹¹ Courts in other jurisdictions have noted the absurd results of employing such a system of valuation and have concluded that owners who enter into prudent leases are in effect penalized for good negotiating skills, while the lessors with the below-market leases are rewarded for bad management and poor negotiations by a lower valuation. *See, Merrick Holding Corp. v. Board of Assessors*, 382 N.E.2d 1341, 1344 (N.Y. App. Div. 1978); *Sanford*, 694 A.2d 456 (“valuations of properties for local taxation cannot vary with the managerial successes or failure of the owners.”); and *Martin v. Liberty Cty. Bd. of Tax Ass’rs*, 262 S.E.2d 609, 612 (Ga. Ct. App. 1979) (“if tax assessments on the same property were to fluctuate according to the varying terms of a lease, the computation of ad valorem taxes on the basis of such assessments would result in a tax penalty for one who, through business acumen or fortuity, succeeds in leasing his property for an amount in excess of its ‘fair market value’ and a tax windfall to one who, through bad business judgment, leases far below his property's ‘fair market value.’”).

¹¹ Assume, for instance, there are two identical gas stations adjacent to each other. The first one has a lease for \$3.00 per square foot, while the lessor of the second gas station negotiated a market rent of \$7.00 per square foot for the property. If these actual income streams were capitalized to determine the properties’ values under the income approach, the first gas station would have a significantly lower value than the second gas station even though the properties are identical in all respects. Thus, two physically identical, adjacent properties would have different values merely because the lease terms were different.

40. Finally, using actual rents from a long-term, below-market lease does not reflect the value of all of the interests in a property. When a property is leased for below market rent, some property value is transferred from the lessor to the lessee. “If the contract rent is equal to fair market rent, the value of a leasehold interest is zero. If the contract rent is less than fair market rent, the leasehold interest will have a positive value.” *See e.g. Pollin v. Dep’t of Rev.*, 13 OTR 478 (Ore. Tax Ct. 1996) (citing THE APPRAISAL OF REAL ESTATE, 126 (10th ed. 1992)). Thus, unless or until the leaseholder is taxed for the value of his leasehold estate, the property owner must be taxed for the value of the property in total. *See e.g. Schultz v. TM Florida-Ohio Realty LTD.*, 577 So. 2d 573, 575 (Fla. 1991) (“The assessed value of the land must represent all the interests in the land. Despite the mortgage, lease, or sublease of the property, the landowner will still be taxed as though he possessed the property in fee simple.”). The illogic of the Petitioners’ position here is highlighted by the facts of its case. The leaseholder who benefits from the below market rent is also responsible for paying the taxes on the leased property. In essence, therefore, it is the leaseholder arguing that it got such a good deal on its lease that the Board should reduce its tax burden too.
41. Absent clear direction from the legislature or the Tax Court, the Board will not reduce the value of a property based on a taxpayer’s execution of an unfavorable lease.¹² Thus, the Board rejects the Petitioners’ lease fee value and holds that the fee simple market value of the property for \$1,360,000 as of January 1, 2006, is the best evidence of the subject property’s market value-in-use for the March 1, 2007, assessment date.

SUMMARY OF FINAL DETERMINATION

42. The Petitioners raised a prima facie case that the 5.662 acres at issue in this appeal are over-valued. The Respondent failed to sufficiently rebut or impeach the Petitioners’ evidence. Thus, the Board finds in favor of the Petitioners and holds that the market

¹² This is consistent with the Board’s ruling in *Kerasotes Showplace Theatres, LLC v. Grant County Assessor*, Petition No. 27-023-06-1-4-00825 (July 15, 2009). In that case, the Board refused to value the property based on its leased value where the leased fee *exceeded* the fee simple value.

value-in-use of the 5.662 acres is \$1,360,000. Because the parties agreed that the remaining acreage is agricultural land to be assessed for \$15,500, the assessed value of the Petitioners' property totals \$1,375,500.

The Final Determination of the above captioned matter is issued this by the Indiana Board of Tax Review on the date written above.

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>.