REPRESENTATIVES FOR PETITIONER:
Roy Michael Roush, Attorney

REPRESENTATIVES FOR RESPONDENT:
Jennifer Becker, Indiana Assessment Service

BEFORE THE
INDIANA BOARD OF TAX REVIEW

Showland Entertainment Enterprises, Inc.	)	Petition No.: 50-019-05-1-4-00014
	)	Parcel No.: 504230402013000019
Petitioner,	)	
	)	County: Marshall
v.	)	
	)	Township: Center
Marshall County Assessor	)	
	)	Assessment Year: 2005
Respondent.	)	

Appeal from the Final Determination of
Marshall County Property Tax Assessment Board of Appeals

June 23, 2008

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

INTRODUCTION

1. In this assessment appeal, we must determine whether an appraiser's valuation opinion was sufficiently reliable to overcome the presumption that the taxpayer's property is correctly assessed. For a valuation opinion to be reliable, it must be formed using generally accepted appraisal principles. And Indiana's assessment regulations require the opinion to relate to the appropriate valuation date. The testimony of Showland's appraiser leaves us with serious doubts on both counts. We therefore deny Showland the relief it requests.

PROCEDURAL HISTORY

2. On August 22, 2007, the Marshall County Property Tax Assessment Board of Appeals ("PTABOA") issued its determination on Showland's assessment appeal. On October 3, 2007, Showland filed a Form 131 petition asking us to review the PTABOA's determination. We have jurisdiction to hear Showland's appeal under Ind. Code §§ 6-1.1-15 and 6-1.5-4-1.

3. We originally scheduled a hearing on Showland's Form 131 petition for February 14, 2008. At Showland's request, we vacated that date. On March 26, 2008, Jennifer Bippus, our duly designated administrative law judge, held a rescheduled hearing on Showland's Form 131 petition.

4. The following persons were sworn in as witnesses:

For Showland:

David Kinney, President, Showland Entertainment, Inc.
Ernest Bevilhymer, Appraiser, Appraisal Specialists, Inc.

For the Assessor:

Debra Dunning, Marshall County Assessor
Jennifer Becker, Indiana Assessment Service, Consultant for the County

5. Showland offered the following exhibits:

Petitioner's Exhibit 1: Estimate for removing concrete in five theaters by Lenker Services, Inc.,
Petitioner's Exhibit 1.1: Letter from Ernest Bevilhymer outlining his anticipated presentation at the hearing,
Petitioner's Exhibit 2: Estimate from Kraszyk Construction,
Petitioner's Exhibit 2.1: Estimate from Short's Concrete,
Petitioner's Exhibit 2.2: Estimate from Jones Heating and Cooling
Petitioner's Exhibit 3: Salary report from internet,
Petitioner's Exhibit 4: Employment opportunities from internet,
Petitioner's Exhibit 5: Three-Year Income and Expense Analysis,
Petitioner's Exhibit 6: Adjusted Three-year Income and Expense Analysis,
Petitioner's Exhibit 7: Sale information – Carmike Cinema 15, Raleigh, NC,
Petitioner's Exhibit 8: Sale information – Cinemark, Melrose Park, IL,
Petitioner's Exhibit 9: Sale information – Cinemark, North Aurora, IL,
Petitioner's Exhibit 10: Sale information – Rave Sport Entertainment, Peoria, IL,
Petitioner's Exhibit 11: Sale information – AMC Veterans 24, Tampa, FL,
Petitioner's Exhibit 12: Sale information – Roxy on the Square, Santa Rosa, CA,
Petitioner's Exhibit 13: Sale information – AMC 14, Phoenix, AZ,
Petitioner's Exhibit 14: Sale information – Cinemark, Woodridge, IL,
Petitioner's Exhibit 15: Sale information – Regal 16, Rancho Mirage, CA,
Petitioner's Exhibit 16: Sale information – Regal Cinema, Bonita Springs, FL,
Petitioner's Exhibit 17: Sale information – Regal Cinemas 20, Beavercreek, OH,
Petitioner's Exhibit 18: Sale information – Rave Motion Pictures, Houston, TX,
Petitioner's Exhibit 19: Non-leased theater sales,
Petitioner's Exhibit 20: Leased-fee theater sales.

6. As discussed below, we sustain the Assessor's objection to Petitioner's exhibits 4 and 7-20. Showland's remaining exhibits are admitted into evidence.

7. The Assessor offered the following exhibits, which we admit into evidence:

Respondent's Exhibit 1: Notice of Appearance for Jennifer Becker, Indiana Assessment Service
Respondent's Exhibit 2: Property record card for Showland's property,
Respondent's Exhibit 3: Sales-comparison analysis,
Respondent's Exhibit 4: Income-approach analysis.

8. The following additional items are officially recognized as part of the record of proceedings:

Board Exhibit A – Showland's Form 131 petition and attachments,
Board Exhibit B – Notice of hearing,
Board Exhibit C – Letter from Showland's counsel requesting a continuance of

the hearing scheduled for February 14, 2008,
Board Exhibit D – Order granting continuance,
Board Exhibit E – Hearing sign-in sheet.

9. The Administrative Law Judge did not inspect Showland's property.

10. For 2005, the PTABOA determined the following assessment for the subject property: Land: $202,000. Improvements: $1,844,600. Total: $2,046,600.

11. Some confusion exists about the property's assessment of record. Ms. Becker testified that Showland's property was actually assessed for $1,990,100, which is slightly lower than what the PTABOA's determination reflects. *Becker testimony*. According to Ms. Becker, the Center Township Assessor had recommended lowering the original assessment to that amount, but that change was not entered into the appropriate computer system. *Id*.

12. Ms. Becker's testimony notwithstanding, the PTABOA's determination is the assessment of record. The statutes governing assessment appeals call for the PTABOA to make the final assessment determination at the local level. *See* Ind. Code § 6-1.15-1. And taxpayers appeal to the Board from the PTABOA's decision, not from the township assessor's initial determination. *See Id.; see also* Ind. Code § 6-1.15-3. Nonetheless, we recognize that Assessor has conceded that the PTABOA's determination is too high and that it seeks only to defend the lower amount recommended by the Center Township Assessor.

13. Showland, however, believes that its property is worth substantially less than even the reduced amount conceded by the Assessor. At the hearing, Showland requested a total assessment of $1,039,000.

OBJECTIONS

14. The Assessor objected to all of Showland's exhibits on grounds that Showland failed to comply with pre-hearing exchange requirements set forth in our procedural rules. *Becker objection*. Although the Assessor's representative, Ms. Becker, timely received summaries of the anticipated testimony of Showland's witnesses, Showland didn't provide her with copies of its exhibits until one day before the hearing. *Becker testimony*.

15. We partially sustain the Assessor's objection. Our procedural rules require a party to give all other parties copies of its documentary evidence at least five business days before an administrative hearing. Ind. Admin. Code tit. 52, r. 2-7-1(b)(1). And we may exclude evidence based on a party's failure to comply with that requirement. 52 IAC 2-7-1(f). Showland failed to comply with that rule. Its failure is even more troubling given the fact that Showland's counsel sought and obtained a continuance of the originally scheduled hearing based, in part, upon his representation that he needed more time to comply with the requirements for timely exchanging witness and exhibit lists. *See Board Exs. C-D*.

16. Counsel for Showland, however, argued that he didn't know the identity of the Assessor's authorized representative until the day of the hearing. He also claimed that he faxed "some things" to "Mindy Relos," including the March 19, 2008, letter that contained Showland's witness summaries. *Roush testimony*.

17. Those arguments do not sway us. If counsel didn't know whom, if anyone, was going to represent the Assessor at the hearing, he should have given copies of Showland's exhibits to the Assessor. His unsuccessful attempt to fax documents to "Mindy Relos" is no substitute. First, we assume that counsel was referring to Mindy Relos-Whiting, the Center Township Assessor. Ms. Relos-Whiting, however, is not a party to this appeal, either individually or in her official capacity. The Marshall County Assessor—not the Center Township Assessor—is the governmental entity that is statutorily designated to defend the PTABOA's determination. Ind. Code § 6-1.1-15-3(b); P.L. 219-2007 §§ 39, 156(c). Second, even if Ms. Relos-Whiting somehow served as a proxy for the Marshall

County Assessor, counsel's claim that he faxed her "some things" doesn't show that he gave her copies of Showland's exhibits.

18. That being said, we overrule the Assessor's objection as to Petitioner's Exhibits 1, 2, 2.1, 2.2, 3, 5, and 6 because that objection was untimely. Showland identified those exhibits, and its witnesses testified about information contained in them, before the Assessor made any objection. We recognize that Showland did not formally offer the exhibits into evidence when it asked its witnesses to testify about them. Nonetheless, the Assessor's silence in the face of the witnesses' testimony about those exhibits operated to waive her objections.

19. The Assessor, however, did timely object to the balance of Showland's exhibits. Thus, we sustain the Assessor's objection to Petitioner's Exhibits 4 and 7-20.

20. Finally, while the Assessor timely objected to Petitioner's Exhibit 1.1, we nonetheless overrule that objection. That exhibit is a letter from Showland's appraiser, Ernest Bevilhymer, to Showland's counsel outlining Mr. Bevilhymer's proposed testimony at the hearing. Mr. Bevilhymer testified to most of what he outlined in the letter. Thus, the exhibit is little more than a demonstrative aid to help the Board understand Mr. Bevilhymer's testimony. And the Assessor did not object to Mr. Bevilhymer's testimony. Last, since Mr. Bevilhymer's testimony was properly admitted, petitioner has not incurred any prejudice as a result of the admission of the subject exhibit.

FINDINGS OF FACT

21. Showland operates a movie theater at the subject property, which is located at 2745 N. Oak Road in Plymouth, Indiana.

22. When Showland originally built the theater in 1998, it had only three screens. Showland struggled to obtain financing to build its theater, because local banks thought the project was too risky. According to Showland's president, David Kinney, the town already had a

theater and the banks didn't see the need for another one. Showland ultimately secured financing through a New Jersey lending institution. But it could only get a 25-year loan with an interest rate that adjusted quarterly. And Mr. Kinney had to invest 25% of the project's cost. *Kinney testimony*.

23 In 2004, Showland sought and obtained financing to build two more screens. Once again, local banks thought that the project was too risky. Showland ultimately secured a joint loan from two banks, although Mr. Kinney didn't describe the terms of that loan. *Kinney testimony*.

24. Apparently in response to a position taken by the Assessor in settlement negotiations, Showland solicited estimates for the costs to convert the theater into a general-purpose building. And those costs were substantial; Mr. Kinney identified estimates totaling $581,335 for altering the building's tiered flooring, building a second story, and modifying the building's heating, cooling, and electrical systems. *Kinney testimony; Pet'r Exs. 1, 2, 2.1, 2.2.*

25. Showland engaged Ernest Bevilhymer, an appraiser from Granger, Indiana, to provide an opinion about the property's value. Mr. Bevilhymer testified that he believed that the fair market value of Showland's property was $1,039,000. *Bevilhymer testimony*. Showland, however, did not offer an appraisal report prepared by Mr. Bevilhymer. And Mr. Bevilhymer didn't testify that he followed the Uniform Standards of Professional Appraisal Practice in forming his opinion. *See Bevilhymer testimony*.

26. Mr. Bevilhymer formed his opinion solely by applying the income approach to value. *Bevilhymer testimony.* To support his choice to forego the cost and sales-comparison approaches—the other two generally accepted appraisal methodologies—he pointed to THE BUSINESS OF SHOW BUSINESS: THE VALUATION OF MOVIE THEATERS.[1] According to Mr. Bevilhymer, that book says that most theaters sell based on the net income they

[1] While the parties referenced this work, they provided only limited excerpts and didn't identify its author(s), publisher, or publication date.

generate. *Id*. Mr. Bevilhymer also testified that he didn't believe that the cost approach was a fair way to estimate the subject property's value. He acknowledged that the authors of THE BUSINESS OF SHOW BUSINESS view the cost approach as especially relevant for valuing new theaters. But he pointed out that Showland's theater wasn't new. *Bevilhymer testimony*. Mr. Bevilhymer, however, didn't clearly explain why he decided to forego using sales-comparison approach. Like Mr. Kinney, he viewed Showland's building as a special-purpose building owing both to its "oddball" location and to the costs of converting it to other uses. *Id*. But he didn't directly offer that as a reason for eschewing the sales-comparison approach. *See Id.*

27. Mr. Bevilhymer largely used the average annual net operating income that the Assessor's representative, Jennifer Becker, derived from Showland's 2003-2005 unaudited income and expense information. *See Bevilhymer testimony; see also Becker testimony; Resp't Ex. 4*. Ms. Becker used a higher net operating income than what is reflected on Showland's income and expense statement because she viewed Showland's claimed expenses for amortization, depreciation, and taxes as inappropriate for purposes of applying the income approach. *Becker testimony*.

28. Mr. Bevilhymer departed from Ms. Becker's net income calculation in one respect—unlike Ms. Becker, he included an estimated salary for a general manager as an allowable expense. *Bevilhymer testimony*. Although Showland's income and expense analysis listed payroll expenses between $49,460 and $77,676 for the three years covered by that report, it excluded from those numbers any salary for the owner-operator. *Pet'r Exs. 5-6*. And Mr. Kinney did not actually take a salary as an "owner[] operator[] manager." *Kinney testimony*; *Becker testimony*. Because a passive investor would be the type of buyer most likely to purchase Showland's property, Mr. Bevilhymer thought it necessary to deduct as an operating expense a reasonable salary for a manager.

29. To determine an appropriate manager's salary, Mr. Bevilhymer discussed the market for managers with a manager of Kerasotes Movie Theaters. He also interviewed managers for two restaurant chains. Based on his research, he determined that Mr. Kinney would

be entitled to a salary of $60,000 per year to manage Showland's property. *Bevilhymer testimony*.

30. After subtracting a manager's salary from the Assessor's calculation, Mr. Bevilhymer determined that Showland's property generated $124,687 in annual net operating income. *Bevilhymer testimony; Pet'r Ex. 1.1.*

31. Mr. Bevilhymer next looked to the market to determine an appropriate capitalization rate. He first calculated a rate using the band-of-investment technique. Under that technique, he calculated separate mortgage and equity components and then weighted those two components at 75% and 25%, respectively, to reflect the loan-to-value ratio from Showland's adjustable-rate loan. *Bevilhymer testimony.*

32. In calculating the mortgage component, Mr. Bevilhymer used average interest rates from Showland's adjustable-rate loan for three discrete periods: (1) 1999-2005, (2) 1999 only, and (3) 2002 only. The equity component, however, remained constant; under each scenario he determined that investors would require a 20% return on equity given the risks associated with purchasing and operating a five-screen theater without existing leases. *See Bevilhymer testimony*, *Pet'r Ex. 1.1.* He settled on a capitalization rate of 12%, which was the rounded average rate for the three scenarios. *Id.*

33. To corroborate his band-of-investment rate, Mr. Bevilhymer extracted capitalization rates from the market. He determined those rates by looking at the net income and sale prices of theaters from various locations outside Indiana. He broke the sales into two groups: (1) sales of owner-operated theaters, which he termed as "fee simple" or "enterprise" sales; and (2) sales of theaters subject to long-term leases, which he described as "leased-fee" sales. In the first group, he used four sales from Illinois and North Carolina. In the second group, he looked at eight sales from Arizona, California, Florida, Illinois, Ohio, and Texas. *Bevilhymer testimony; Pet'r Ex. 1.1.* When asked on cross-examination why none of the sales was from Indiana, Mr. Bevilhymer merely said that it didn't make a difference whether or not the theaters were from Indiana. *Bevilhymer testimony*.

34. The enterprise sales produced an average capitalization rate of 11.35%, while the leased-fee sales produced an average rate of 8.34%. *Bevilhymer testimony; Pet'r Ex. 1.1.* Thus, Mr. Bevilhymer felt that his research confirmed a central theme from THE BUSINESS OF SHOW BUSINESS—that leased-fee sales, particularly those with long-term leases, yield significantly lower capitalization rates than enterprise sales, because leased-fee sales involve significantly lower risk. *Bevilhymer testimony; Resp't Ex. 4 (excerpt from THE BUSINESS OF SHOW BUSINESS).* He explained that theater leases provide investors with guaranteed income. And they are typically "triple net," which means that the renter, rather than the owner, pays all the building's expenses. *Id.*

35. The Assessor's representative, Jennifer Becker, employed the cost, sales-comparison, and income approaches to develop her own opinion of the property's value. She said nothing about her cost-approach analysis, other than to indicate that it was the same as the Center Township Assessor's recommendation to the PTABOA and that it set the property's minimum value. In applying the sales-comparison and income approaches, she examined listings and sales of theaters from Plymouth, Fort Wayne, Marion, Seymour, and South Bend. *Becker testimony; Resp't Ex. 3.* Only two of those properties actually sold—one from Seymour and one from Marion. Resp't Ex. 3. And Ms. Becker acknowledged that the Seymour theater was part of an 11-theater portfolio sale. *Becker testimony.*

CONCLUSIONS OF LAW AND ANALYSIS

A. Burden of Proof

36. A taxpayer seeking review of an assessing official's determination must establish a prima facie case proving both that the current assessment is incorrect and what the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 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). If a taxpayer meets that burden, the assessing official must offer evidence to impeach or rebut the taxpayer's evidence. *See American*

United Life Ins. Co. v. Maley, 803 N.E.2d 276 (Ind. Tax Ct. 2004); *Meridian Towers*, 805 N.E.2d at 479. But the burden of persuasion remains at all times with the taxpayer. *Thorntown Tel. Co. v. State Bd. of Tax Comm'rs*, 629 N.E.2d 962, 965 (Ind. Tax Ct. 1995).

37. The taxpayer's burden of proof must be viewed in the context of Indiana's assessment system. 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 (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, sales-comparison, and income approaches. *Id*. at 3, 13-15. Indiana assessing officials generally use a mass-appraisal version of the cost approach set forth in the Real Property Assessment Guidelines for 2002 – Version A.

38. 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 Twp. Assessor*, 836 N.E.2d 501, 505 (Ind. Tax Ct. 2005) *reh'g den. sub nom. P/A Builders & Developers, LLC,* 842 N.E.2d 899 (Ind. Tax 2006). But 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 sales information for the subject or comparable properties and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.

39. The Manual further provides that for the 2002-2005 assessment years, a property's assessment must reflect its value as of January 1, 1999. *See* MANUAL at 2, 4; *see also* Ind. Code § 6-1.1-4-4.5 (requiring the Department of Local Government Finance to adopt rules for annually adjusting assessments to account for changes to value in years between general reassessments, with such adjustments to begin in 2006). Thus, whatever method

a taxpayer uses in trying to rebut its assessment, the taxpayer must explain how its evidence relates to the appealed property's market value-in-use as of January 1, 1999. *See Long v. Wayne Township Assessor,* 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005) (holding that an appraisal indicating a property's value for December 10, 2003, lacked probative value in an appeal from a 2002 assessment).

B. Showland's Evidence

40. Showland failed to rebut the current assessment's presumption of correctness. True, Showland offered Mr. Bevilhymer's opinion that the property's market value was significantly less than its assessment. But his opinion was too unreliable to constitute probative evidence of the property's true tax value.

41. We reach that conclusion fully aware that Mr. Bevilhymer is an Indiana Certified General Appraiser. *Pet'r Ex. 1.1*. And both we and the Tax Court have said that market value-in-use appraisals prepared in conformity with USPAP often make for compelling evidence of a property's true tax value. *E.g*. *Kooshtard Property VI*, 836 N.E.2d at 505, 506 n.1. Mr. Bevilhymer, however, neither prepared a written appraisal report nor testified that he complied with USPAP in developing his valuation opinion. *See Bevilhymer testimony, passim*.

42. That does not mean that we will automatically disregard Mr. Bevilhymer's opinion. But it does detract from his opinion's reliability. Unlike Mr. Bevilhymer in this case, an appraiser who certifies that he or she complied with USPAP represents that his or her valuation opinion was grounded in generally accepted appraisal principles and practices. And that tie to generally accepted appraisal principles offers the key to transforming raw data into a reliable opinion of value. For example, data about the physical features and sale prices of nearby properties does not itself show a given property's market value. But when an appraiser, or even a lay witness, rigorously applies the sales-comparison approach to analyze that raw data, it yields a reliable value estimate. *See* MANUAL at 13-14 (describing the sales-comparison approach).

1. Mr. Bevilhymer didn't adequately explain why he eschewed the cost and sales-comparison approaches

43. With that in mind, we turn to the substance of Mr. Bevilhymer's opinion. Off the bat, Mr. Bevilhymer appears to have departed from generally accepted appraisal principles by eschewing the cost and sales-comparison approaches and instead relying solely on the income approach. *See* MANUAL at 3 ("Fee appraisers use all three approaches when appraising individual properties."). Granted, an appraiser may validly determine that one or more of the three generally accepted approaches does not apply to a particular assignment. But the appraiser must explain his or her reasons for that determination. And Mr. Bevilhymer's did little to explain decision to forego the sales-comparison and cost approaches.

44. He at least nominally explained his decision to forego the cost approach by pointing to the age of Showland's theater. Indeed, both courts and appraisal literature have recognized that, because of the difficulties of estimating depreciation, the cost approach may be unreliable where the buildings being valued are old. *See Congoleum Corp. v. Hamilton Twp.,* 7 N.J. Tax 436, 443 (N.J. Tax Ct. 1985) (giving no weight to appraisers' cost-approach estimates for buildings built between 1920 and 1950). But the theater was only seven years old as of the March 1, 2005, valuation date. In fact, a 9150-square-foot portion of the theater was only one-year old on that date. *See Resp't Ex. 2; see also Kinney testimony* (testifying that Showland built two additional screens in 2004). Mr. Bevilhymer nonetheless summarily dismissed using the cost approach, even if only to provide a basic check on his income approach analysis. That gives us at least some pause.

45. We are even more concerned by Mr. Bevilhymer's decision to forego the sales-comparison approach. Whereas he summarily explained his decision to forego the cost approach, he said nothing about why he eschewed the sales-comparison approach. We recognize that Mr. Bevilhymer characterized Showland's theater as a special-purpose property. Given the costs of converting the theater to another use, we agree. And the

Manual explicitly recognizes that the sales-comparison approach may not apply to a special-purpose property where there is no market for that property. MANUAL at 5. But Mr. Bevilhymer recognized that there was a market for owner-operated theaters. In fact, he looked to that market to corroborate his band-of-investment capitalization rate. *See Bevilhymer testimony; Pet'r Ex. 1.1.*

46. Plus, Mr. Bevilhymer didn't expressly tie his decision to forego the sales-comparison approach to the special-purpose nature of Showland's property. Instead, Showland focused on characterizing its theater as a special-purpose property solely to counter the Assessor's position during settlement discussions that investor surveys and transactional information for hotels, health and fitness facilities and golf courses provided the best source from which to estimate capitalization rates for owner-occupied theaters. *See Roush argument*; *Bevilhymer testimony; see also, Resp't Ex. 4 (November 2, 2007 letter from Jennifer Becker to Roy Michael Roush).*

47. In fact, it appears that Showland premised its entire case on responding to positions taken by the Assessor in settlement negotiations rather than independently applying generally accepted appraisal principles. Thus, in his closing argument, Showland's counsel said that Showland used the income approach because the Assessor had described that approach as the most appropriate method for valuing the property. That may be true, but if so, it is because generally accepted appraisal principles require that conclusion, not because one of the parties to the appeal has taken that position in settlement negotiations. Statements made in settlement discussions should not even be in evidence.[2] Both parties nonetheless referenced those discussions at length, largely without objection.[3]

[2] *See* Ind. Evidence Rule 408 ("Evidence of conduct or statements made in compromise negotiations is . . . not admissible."); *see also Boehning v. State Bd. of Tax Comm'rs*, 763 N.E.2d 502, 504-05 (Ind. Tax Ct. 2001) (applying Evid. Rule 408 to exclude evidence of settlement between State Board of Tax Commissioners and taxpayers in a separate appeal).

[3] Early on, the Assessor's representative, Ms. Becker, objected to a question by Showland's counsel on grounds that it referenced settlement discussions. Although the ALJ didn't rule on that objection, counsel effectively withdrew the question. Ms. Becker went on to testify in detail about positions the Assessor had taken in settlement negotiations.

2. Mr. Bevilhymer's income-approach analysis was also flawed

48. Thus far we have focused on what Mr. Bevilhymer didn't do—apply the cost or sales-comparison approaches. We now examine what he did do, *i.e.* estimate the property's value using the income approach. And we once again find significant problems.

49. For example, Mr. Bevilhymer calculated the mortgage component of his band-of-investment capitalization rate based solely on the interest rates from Showland's 1998 loan. But the income approach focuses on what potential buyers will pay for an income producing property, not what the current owner paid. Thus, in calculating a mortgage component, one must consider the interest rate and other terms available to a typical investor for the type of property at issue. In many cases, the terms negotiated by the current owner might closely approximate those available to the typical investor. Mr. Bevilhymer, however, cast doubt on the applicability of that assumption in this case when he acknowledged that Showland's loan contained extremely unusual terms. In fact, he said that he had never seen an interest rate that adjusted quarterly. *Bevilhymer testimony*.

50. Mr. Bevilhymer also relied solely on income and expense information from Showland's property rather than checking that information against the market. As Mr. Bevilhymer himself testified, the income approach attempts to simulate how potential buyers value income-producing properties as investments. *See Bevilhymer testimony; see also* MANUAL at 14. Looking at income and expense information from comparable properties helps negate the effect that a given property's current management has on that property's net income. Mr. Bevilhymer himself recognized that concept when he deducted a manager's salary as an expense, even though Showland did not pay Mr. Kinney a salary for his efforts in managing its theater operations.

51. It might appear that Mr. Bevilhymer offset any problems with his band-of-investment analysis by extracting a similar capitalization rate from the market. But in obtaining that market-extracted rate, Mr. Bevilhymer used the sale prices and net incomes of properties from states as far flung as California and Florida. *Bevilhymer testimony; Pet'r Ex. 1.1*.

Even the enterprise sales, which produced the capitalization rates most closely mirroring his band-of-investment rate, were from Illinois and North Carolina.

52. When questioned about why he looked only at out-of-state theaters, Mr. Bevilhymer summarily responded that it didn't make any difference whether the theaters were located in Indiana or not. *Bevilhymer testimony*. That isn't a particularly enlightening answer. We can envision good reasons why an appraiser might look to sales from outside a property's immediate geographical area either in a sales-comparison analysis or for a market-extracted capitalization rate. One obvious reason would be that the market for the property type at issue is regional or even national. Nonetheless, we won't simply assume that to be the case. Thus, Mr. Bevilhymer's lack of candor about his reasons for choosing theaters from as far away as North Carolina to extract a capitalization rate detracts from the reliability of his valuation opinion.

53. Similarly, Mr. Bevilhymer did not even attempt to explain how those out-of-state theaters compared to Showland's theater, other than to list the number of screens they had and whether the sales were leased-fee sales or enterprise sales. Once again, that lack of explanation detracts from the corroborative value of his market-extracted capitalization rate.

3. Mr. Bevilhymer did not relate his valuation opinion to January 1, 1999

54. Finally—and most importantly—Mr. Bevilhymer didn't adequately explain how his opinion related to the value of Showland's property as of January 1, 1999.

55. While the Tax Court's decisions require parties to relate their valuation evidence to the relevant valuation date, neither the Tax Court's decisions nor the Manual say much either about the substantive meaning of that requirement or the appropriate method for achieving it. Instead, the Tax Court has used broad language to describe a party's obligation, saying only that the party must provide "some explanation" as to how its proposed value relates to the property's value as of the relevant valuation date. *Long*,

821 N.E.2d at 471; *see also O'Donnell v. Dep't of Local Gov't Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006) ("Thus, evidence regarding the value of property in 1997 and 2003 has no bearing upon 2002 assessment values without *some explanation* as to how these values relate to the January 1, 1999 value.")(emphasis in original).

56. We have previously explained what we believe the Manual means when it speaks to the January 1, 1999, valuation date for the 2002 through 2005 assessments. For the 2002 general reassessment (and later assessment dates covered by the Manual), real property should be valued taking into account both the property's physical condition on the assessment date and the market factors in existence on that date. That value should then be trended to reflect the property's market value-in-use as of January 1, 1999. In other words, one must determine what a potential buyer would have paid on January 1, 1999, for the property as it physically looked on the assessment date given the economic conditions that existed on that date. *See Woods Edge Apartments v. Center Twp. Assessor*, Pet. Nos. 18-032-04-1-4-00134 and 18-032-05-1-4-00134 at 14 (Ind. Bd. of Tax Rev., September 25, 2007).

57. Nonetheless, we have accepted a variety of methods for relating valuation evidence to the January 1, 1999, valuation date, even when those methods don't strictly adhere to our interpretation of the valuation date's significance. For example, we have accepted sales-comparison valuations that relied strictly on 1999 sales, even though those sales did not account for market conditions prevailing on the assessment date.

58. But our expansiveness has its limits. And Mr. Bevilhymer's testimony strains those limits. Mr. Bevilhymer didn't really attempt to explain how his estimate related to the property's value as of January 1, 1999. In fact, he didn't tie his opinion to any specific date. He instead presented a mish-mash of information, using underlying data from various years. He used income and expense information from 2003-2005, mortgage interest rates from 1999-2005, and out-of-state theater sales from 2003-2006. We recognize that one of Mr. Bevilhymer's scenarios for computing the mortgage component of his band-of-investment analysis used solely the average interest rate on Showland's

loan for 1999. But he ultimately chose his capitalization rate by averaging all three scenarios, two of which relied predominately or exclusively on interest-rate information from later years. And he checked the reasonableness of his capitalization rate by looking to market sales from 2003-2006, without adjusting those sale prices to 1999 values. Thus, even under the most liberal reading of the relation-back requirement, Mr. Bevilhymer did very little to relate his valuation opinion to the property's market value-in-use as of the relevant January 1, 1999, valuation date.

C. The Assessor's Concession

59. Even though Showland failed to offer probative evidence to rebut the presumption of correctness afforded to the PTABOA's determination, the Assessor itself conceded that the PTABOA determination is too high. According to Ms. Becker, the correct assessment is the amount recommended by the Center Township Assessor—$1,990,100. We therefore find that the assessment should be reduced from $2,046,600 to $1,990,100.

SUMMARY OF FINAL DETERMINATION

60. We find the opinion of the Showland's expert too unreliable to rebut the presumption that Showland's property is correctly assessed. Nonetheless, based on the Assessor's concession, we find that the property's total assessment must be reduced to $1,990,100.

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

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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>