BEFORE THE INDIANA BOARD OF TAX REVIEW

STONE HARBOUR MASTER ASSOCIATION, INC.	)	Petition Nos.: *see* attached
Petitioner,	)	
v.	)	Parcel Nos.: *see* attached
HAMILTON COUNTY ASSESSOR	)	
Respondent.	)	Assessment Year(s): *see* attached

Appeals from Determinations of the Hamilton County Property Tax Assessment Board of Appeals

FINAL DETERMINATION DISMISSING APPEAL PETITIONS

I. Introduction

If a taxpayer acts within Indiana Code 6-1.1-15-1's relatively short deadline for appealing an assessment, the taxpayer may assert all grounds upon which he believes the assessor erred in valuing his property. Those appeals are filed with the Board on Form 131 petitions. Even if the taxpayer misses Ind. Code 6-1.1-15-1's deadline, he may still appeal the assessment using a Form 133 petition. But the taxpayer may only raise objective errors; he may not challenge qualitative or discretionary decisions that require the exercise of subjective judgment. Here, the Petitioner used Form 133 petitions to claim that its parcels, which the Petitioner describes as common areas of a residential neighborhood that are subject to restrictions on their transfer and use, have zero market value-in-use. That, however, differs from simply adding or subtracting pre-determined costs from assessment regulations—the type of straightforward objective

determination for which the Form 133 process was designed. Instead, the Petitioner's claims require applying evidence external to those assessment regulations to make a qualitative decision about the value of its property. And that inherently requires subjective judgment. The Board therefore dismisses the Petitioner's Form 133 petitions.

II. Procedural History

The Petitioner filed a Form 133 Petition for Correction of an Error for each parcel referenced in the attachment to this Final Determination claiming that there was a mathematical error in computing the parcel's assessment. In the part of the Form 133 that the Petitioner addressed to local officials, the Petitioner pointed to the Board's decision in *Brenwick TND Communities, LLC & BDC Cardinal Associates, LP v. Clay Twp. Assessor, et al.* pet. nos. 29-003-03-1-5-00034 *et al*. (Ind. Bd. Tax Rev. May 15, 2006) and a recent decision from the county assessor and claimed that the Petitioners common areas should have been valued at zero for the years preceding those decisions.

The Hamilton County Property Tax Assessment Board of Appeals ("PTABOA") denied the petitions and the Petitioner filed them with the Board. In the portion of the petition addressed to the Board, the Petitioner again claimed that its common areas had zero market value-in-use due to restrictions on their use and transfer. The Petitioner further claimed that similarly situated property had been assessed at zero value using the same market-value-in-use standard that applied to the assessments under appeal.

On January 13, 2012, the Board issued an Order to Show Cause Why Petitions Should Not Be Dismissed on Grounds That They Allege Errors in Subjective Judgment ("Show Cause Order"). The Show Cause Order covered all the petitions at issue in this Final Determination. In the Show Cause Order, the Board explained why it believed that the petitions did not allege

objective errors that could be corrected under the Form 133 procedure outlined in Ind. Code § 6-1.1-15-12. To the extent that the Petitioner believed that its claims were properly raised on Form 133 petitions, the Board gave the Petitioner until March 1, 2012, to file a memorandum and any other materials to support its position. The Petitioner did not file a response.

Various other homeowners' associations and developers in Boone, Decatur, Hamilton, Hendricks, Marion, and Morgan counties[1] filed similar petitions, and the Board issued similar show cause orders in those appeals. Because of the similarities in the petitions and in the parties' responses to the show cause orders, the Board consolidated the appeals for purposes of a hearing on the show cause orders.[2] Despite the Petitioner's failure to file a response to the Show Cause Order, the Board included the Petitioner's appeals in the consolidated hearing. The Board held that hearing on August 29, 2012 through its designated administrative law judge, David Pardo ("ALJ"). The Petitioner, however, failed to appear at the hearing.

All pleadings and documents filed in the above-captioned appeals as well as all orders and notices issued by the Board or its ALJ are part of the record, as is the digital recording of the August 29, 2012 hearing. Other Petitioners offered the following three exhibits at the August 29 hearing, all of which were admitted without objection:

Petitioner Exhibit 1:	Property Record Card ("PRC") for a property owned by Brenwick TND Communities, LLC,
Petitioner Exhibit 2;	PRC for a property owned by Countryside Homeowner's Ass'n,
Petitioner Exhibit 3:	PRC for a property owned by Springmill Villages Homeowners Ass'n.[3]

[1] One taxpayer from Boone County and one taxpayer from Morgan County each filed appeal petitions alleging that its common areas should be assessed at zero value. The Morgan County taxpayer withdrew its petitions before the Board scheduled a hearing on the Show Cause Orders. Similarly, the Boone County taxpayer notified the Board that the parties had agreed to settle its appeals and that it would dismiss those appeals upon receiving appropriate refund documents from local officials.

[2] The responses filed by five taxpayers in Marion County differed significantly from the other responses. The Board therefore held a separate consolidated hearing on the show cause orders issued in those appeals.

[3] At the consolidated hearing, the Hendricks County Assessor offered a document on her letterhead with what appeared to be her responses to interrogatories. The ALJ sustained the other Petitioners' objection on grounds that the responses were not signed. The Petitioners, however, indicated that they would withdraw their objection if the

III. Analysis

A. The Form 133 procedure is only available to correct objective errors.

As the Board explained in its Show Cause Order, there are two basic avenues for contesting a property's assessment before state and local agencies: (1) the appeal procedure under Ind. Code § 6-1.1-15-1 through -4, which for purposes of this Final Determination the Board will refer to as the "general appeal procedure," and which is prosecuted before the Board using a Form 131 petitions; and (2) a more substantively restrictive procedure under Ind. Code § 6-1.1-15-12, which is prosecuted both locally and before the Board using a Form 133 petition. *See Bender v. Indiana State Bd. of Tax Comm'rs,* 676 N.E.2d 1113, 1114 (Ind. Tax Ct. 1997).

The subsections of Ind. Code § 6-1.1-15-1 that set forth the general appeal procedure's deadline for initiating an appeal at the local level have been amended several times since 2002. *See* 2004 Ind. Acts 1, § 3; 2005 Ind. Acts 199, § 6; 2006 Ind. Acts 162, § 2; 2007 Ind. Acts 219, § 38; 2009 Ind. Acts 136, § 5; *see also*, I.C. § 6-1.1-15-0.6 (codifying previously un-codified acts concerning appeals of 2002-2004 assessments). Nonetheless, in cases where a taxpayer is notified of a change in assessment (including notice via a tax bill), a taxpayer has always had to file an appeal within 45 days of that notice. *See id*. Although the deadline for appealing other assessments has varied, it has never extended past the later of following: (1) May 10; or (2) 45 days from the date of a tax statement based on the assessment and, in one year, 45 days from a county auditor's statement under Ind. Code § 6-1.1-17-3(b). *Id*. By contrast, a taxpayer seeking the Form 133 procedure's more-limited substantive relief may file a petition up to three years

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assessor submitted signed responses. The ALJ set a deadline of September 5, 2012, for the assessor to submit signed responses. She failed to do so, and the Board adopts the ALJ's ruling sustaining the objection.

after the date on which taxes for the challenged assessment were first due. *See Will's Far-Go v. Nusbaum*, 847 N.E.2d 1074 (Ind. Tax Ct. 2006).

Although the Form 133 procedure's filing deadline is more generous than the filing deadline under the general appeal procedure, the relief available under the Form 133 procedure is far more circumscribed. While a taxpayer may use the general appeal procedure to address objective errors as well as errors that arise from an assessing official exercising subjective judgment, the Form 133 procedure may only be used to correct narrowly defined errors, including that "[t]he taxes, as a matter of law, were illegal" and "[t]here was a mathematical error in computing the assessment." I.C. § 6-1.1-15-12 (a)(6) and (7).[4] The Indiana Tax Court has interpreted Ind. Code § 6-1.1-15-12 to mean that the Form 133 procedure may only be used to correct objective errors; it may not be used to correct "qualitative or discretionary decisions by assessors." *E.g. Bender* 676 N.E.2d at 1115; *Hatcher v. State Bd. of Tax Comm'rs,* 561 N.E.2d 852, 857 (Ind. Tax Ct. 1990). Thus, "where the decision under review is automatically dictated by a simple true or false finding of fact, it is considered objective and properly challenged via Form 133." *Bender,* 676 N.E.2d at 1115. While most of the Tax Court's decisions have addressed claims alleging mathematical errors, the Tax Court has applied the same test to a taxpayer's claim under Ind. Code § 6-1.1-15-12(a)(6) that its taxes, as a matter of law, were illegal. *Rott Development Co. v. State Bd. of Tax Comm'rs*, 647 N.E.2d 1157, 1160 (Ind. Tax Ct. 1995) (explaining that "[t]he State Board is correct in its assertion that the Form 133 procedure can be used only to correct objective errors" in a case where the taxpayer alleged, in part, that its taxes were illegal as a matter of law under Ind. Code § 6-1.1-15-12(a)(6)).

[4] In its appeal petitions, the Petitioner claimed only that there was a mathematical error in computing the common areas' assessments. Thus, the Petitioner may have waived any claim that its taxes, as a matter of law, were illegal. But the Petitioner addressed both grounds its response to Board's Show Cause Order, and the Respondent did not assert waiver. The Board therefore addresses the Petitioner's arguments under both subsections (a)(6) and (a)(7) of Ind. Code § 6-1.1-15-12.

B. Under Indiana's current law governing real property assessment, using external evidence to determine a property's market value-in-use is a qualitative decision that requires subjective judgment.

After the Board decided *Brenwick*, various developers and homeowners' associations filed almost 2,000 Form 133 petitions alleging that their common areas should be assessed at zero value. The post-*Brenwick* appeals present a threshold question about whether a taxpayer may use a Form 133 petition as the vehicle to assert claims that a subdivision's common areas lack any market value-in-use because of restrictions imposed on their use and transfer. The Board finds that such claims may not be brought on a Form 133 petition.

Indiana assesses property based on its true tax value. I.C. § 6-1.1-31-6(c). For most real property, true tax value is the value determined by the Department of Local Government Finance's rules. *Id.*[5] Those rules, in turn, define true tax value 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 2 (incorporated by reference at 50 IAC 2.3-1-2) (2009).

That has not always been Indiana's valuation standard. Under Indiana's old property tax system, true tax value was determined solely under Indiana's assessment regulations and bore no relation to any external benchmark. *Westfield Golf Practice Center, LLC v. Washington Twp. Assessor,* 859 N.E.2d 396, 398 (Ind. Tax Ct. 2007). That changed in response to the landmark *Town of St. John* litigation where the Indiana Supreme Court ultimately held that the State Board of Tax Commissioners' then-existing cost schedules violated Ind. Const. Art. 10 § 1. *See State*

[5] The General Assembly has chosen to define the true tax value of certain types of property statutorily without reference to administrative regulations. For example, the true tax value of property regularly used as a golf course is "the valuation determined by applying the income capitalization appraisal approach." I.C. §6-1.1-4-42(c). *See also, e.g.*, I.C. § 6-1.1-4-39(a) (defining the true tax value of property with four or more units that is regularly used to furnish rental accommodations for 30 days or more as the lowest valuation determined by applying the cost, sales-comparison, and income capitalization approaches).

Bd. of Tax Comm'rs v. Town of St. John, 702 N.E.2d 1034, 1042-43 (Ind. 1998). Effective beginning in 2002, the State Board of Tax Commissioners ("State Board"), and its successor, the Department of Local Government Finance ("DLGF"), overhauled Indiana's property tax system. In doing so, they adopted market value-in-use as the standard for measuring true tax value. By adopting that standard, the DLGF incorporated an external benchmark for true tax value that includes market concepts. *See Westfield Golf,* 859 N.E.2d at 399 ("Beginning in 2002, however, Indiana's overhauled property tax assessment system incorporates an external, objectively verifiable benchmark—market value-in-use.").

Under the new system, an assessment determined using the 2002 Real Property Assessment Manual and the accompanying guidelines adopted by the DGLF (the Real Property Assessment Guidelines for 2002 – Version A) 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 Ct. 2006). A taxpayer, however, may rebut that presumption with evidence that is consistent with the Manual's definition of true tax value. MANUAL at 5. The Manual points to various types of market-based evidence, such as market value-in-use appraisals, sales information both for the property under appeal and comparable properties, and other information compiled according to generally accepted appraisal principles. *Id.; see also, Kooshtard Property VI,* 836 N.E.2d at 506 n. 6 (describing a market-value-in-use appraisal performed in accordance with the Uniform Standards of Professional Appraisal Practice as the most effective way to rebut the presumption that a property was assessed accurately).

Using external, market-value-in-use evidence—as opposed to simply adding or subtracting pre-determined costs from assessment regulations—to determine a property's market

value-in-use requires subjective judgment. The Tax Court has recognized as much, saying the following: "A calculation of the effect of real world evidence on an individual assessment will typically require subjective judgment. . . . The court does not foresee any opportunity to apply real world evidence retroactively by using the Form 133 process." *Town of St. John, et al. v. State Bd. of Tax Comm'rs,* 698 N.E.2d 399, 400 (Ind. Tax Ct. 1998).[6] Indeed, as the Tax Court has explained "[t]he valuation of property is the formulation of an opinion; it is not an exact science." *Stinson v. Trimas Fastners, Inc.*, 923 N.E. 2d 496, 502 (Ind. Tax Ct. 2010).

The valuation determinations at issue in these appeals differ materially from the types of determinations that the Tax Court has recognized as proper subjects for a Form 133 petition. The Tax Court decided those cases under the old assessment system. To the extent they address assessments, the Tax Court's opinions involve simple, straightforward factual questions about whether an assessor properly applied some objective component of the assessment regulations. For example, in *Rinker Boat Co. v. State Bd. of Tax Comm'rs*, 722 N.E.2d 919 (Ind. Tax Ct. 1999), the assessor valued the taxpayer's building as having forced-air heat when it really had only unit heaters, high-intensity lighting instead of its actual florescent lighting, and more partitioning than actually existed. *Rinker Boat Co. v. State Bd. of Tax Comm'rs*, 722 N.E.2d 919, 921-23 (Ind. Tax Ct. 1999). The Tax Court found that those were objective errors, at least to the extent that the costs of the correct components could be determined from assessment regulations.

[6] Although the Indiana Supreme Court reversed a related decision from the Tax Court, the holding that the Board has cited remains legally viable. In a decision that pre-dated the decision cited by the Board, the Tax Court had found that the Indiana Constitution required the State Board of Tax Commissioners to consider "real world evidence" in property tax appeals. *Town of St. John et. al. v. State Bd. of Tax Comm'rs*, 690 N.E.2d 370 (Ind. Tax Ct. 1997). The Tax Court issued the decision that the Board has cited in order to clarify when the State Board of Tax Commissioners would have to begin considering real world evidence. *See Town of St. John*, 698 N.E.2d at 400. The Indiana Supreme Court ultimately reversed the Tax Court's earlier order in part, holding that there was no state constitutional right to offer "competent real world evidence" in property tax appeals. *State Bd. of Tax Comm'rs v. Town of St. John* 702 N.E.2d 1034, 1043 (Ind. 1998). The Supreme Court, however, did not grant review of or otherwise address the clarification decision that the Board has cited. And under Indiana's current system, parties to individual tax appeals have the right to offer the type of real world evidence that the Tax Court discussed, even if the source of that right is not the Indiana Constitution. *See* MANUAL at 5. So the language that the Board has quoted from the Tax Court's clarification order is on point and persuasive.

Id.; *see also, Wareco Enterprises, Inc. v. State Bd. of Tax Comm'rs*, 689 N.E.2d 1299 (Ind. Tax Ct. 1997) (finding the following to be objective errors: (1) improperly calculating perimeter-to-area ratio, (2) failing to subtract the costs of components included in the model that was used to assess the building but that were not actually included in the building, and (3) applying the wrong depreciation table).

None of the Tax Court's decisions address a taxpayer challenging whether an assessor properly recognized or quantified an influence factor. Yet the effect of easements and other restrictions that burden a particular property, such as the ones that are the focus of this dispute, are expressed as negative influence factors. *See* REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A, ch. 2 at 61-62, 78-79, 94-95 (setting forth an influence factor code for "Restrictions," described as "a decrease based on encumbrances, restrictive covenants, or obstructions that limit the use of the land."); *see also*, *Talesnick v. State Bd. of Tax Comm'rs,* 756 N.E.2d 1104, 1108 (Ind. Tax Ct. 2001) ("The use of influence factors are appropriate for making adjustments to the value of land that is encumbered by an easement."). Even under the old self-referential assessment system, influence factors were quantified using market evidence. *Talesnick*, 756 N.E.2d at 1108.

Although the Petitioner's appeal petitions cite to the Board's *Brenwick* decision, that case does not stand for the proposition that all common areas must be assessed as having zero market value-in-use. In *Brenwick*, the developers of two residential subdivisions claimed that the subdivisions' common areas should be assessed as having zero value. *Brenwick*, slip op. at 7. Because that was a question of first impression in Indiana, the Board surveyed decisions from other states. *Id*. at 12-15. Based on the majority view, which the Board found to be generally consistent with Indiana law, the Board explained:

> [c]ommon areas within a subdivision may be so encumbered as to deprive them of any market value-in-use. Clearly, the encumbrances must be severe and the taxpayer seeking to demonstrate that real property is devoid of any market value-in-use bears a heavy burden. Nonetheless, it is a factual question.

Id. at 17. Turning to the specific evidence before it in that case, which included the specific covenants and restrictions burdening the developer's common areas and an appraiser's expert opinion, the Board concluded that the common areas lacked any market value-in-use. *Id*. at 17-23. But the Board "emphasiz[ed]" that it was basing its finding on the "unique facts" presented in that case. *Id*. at 23.

Thus, the Board did not decide that land held as common area inherently and objectively lacks any market value-in-use, but rather that based on the specific evidence before it, the particular common areas at issue in that case had zero value. The same is true for *Lakes of the Four Seasons Prop. Owners' Ass'n v. Dep't of Local Gov't Fin.*, 875 N.E.2d 833 (Ind. Tax Ct. 2007). In that case, a homeowner's association appealed from the Board's final determination upholding the assessment of streets owned by the association. The streets had been assessed at $70,290, or approximately $650 per acre. *Lakes of the Four Seasons*, 875 N.E.2d at 834. The Board rejected the association's claim that its streets should have been valued at zero. While the Board recognized that the streets were burdened with easements and other restrictions that likely affected their market value-in-use, the Board noted that the association had offered neither an appraisal nor other evidence compiled in accordance with generally accepted appraisal principles to quantify the effect of the easements and restrictions. *Id*.

In front of the Tax Court, the DLGF[7] argued that, without an appraisal, the association's claim that its streets had zero value was merely a conclusory statement. *Id*. at 836. The Tax

[7] The DLGF, through its contractor, had assessed the taxpayer's property and therefore was the respondent in the taxpayer's appeal. *See Lakes of the Four Seasons*, 875 N.E.2d at 834.

Court disagreed, explaining "an owner's testimony as to the value of his or her property will carry probative force if it is based upon facts and not speculation." *Id*. By contrast, explained the court, if the owner fails to identify the objective bases for his opinion, that opinion gives no way for an adjudicator to assess whether it is rationally based on the owner's perceptions. *Id*. In the case before it, the Tax Court found that the association's evidence provided:

> an objective, factual basis for its opinion that its streets have no value: it derives no benefit from owning the streets (the benefit is to the individual property owners within Lakes of the Four Seasons), it cannot sell or convey the streets to another party, the streets generate no income, and the streets cost at least $200,000 annually to maintain.

Id.

Because the association's evidence sufficed to make a prima facie case, the burden shifted to the DLGF to rebut that evidence. *Id*. at 837. The DLGF responded by simply explaining that it had assessed the streets using the neighborhood valuation form and then assigned a negative influence factor, and indicated its belief that "all property has value to it." *Id*. Given the association's evidence about how the specific restrictions deprived its streets of any independent value, however, the DLGF's explanation did not show that the assessment accurately reflected the streets' market value-in-use. *Id*. The Tax Court therefore reversed the Board's determination. *Id*.

Like the Board in *Brenwick*, the Tax Court relied on an un-rebutted valuation *opinion*. The Tax Court did not hold that once property is classified as the common area of a subdivision, that fact automatically and objectively dictates that the property has zero market value-in-use. And the Board cannot help but note that the taxpayers in *Brenwick* and *Lakes of the Four*

Seasons both used the general appeal procedure—not the Form 133 procedure—to bring their claims.[8]

Thus, for the reasons the Board has explained both in its Show Cause Order and in this Final Determination, the Petitioner has not alleged claims for which the Board may grant relief under the Form 133 procedure.

IV. Conclusion

The Petitioner brought its claims using the Form 133 procedure, which affords relief only for objective errors. The Petitioner alleged that the common areas of its subdivision have zero market value-in-use because of restrictions on their use and transfer. But making that determination requires one to do more than apply easily identifiable facts to mechanical calculations under the assessment regulations. It is instead a qualitative decision that requires subjective judgment, and it is beyond the scope of relief available through the Form 133 procedure. The Board therefore dismisses all of the Form 133 petitions listed in the attachment to this Final Determination.

[8] In *Lakes of the Four Seasons*, the taxpayer filed a Form 139L petition. The Board promulgated that form for appeals from DLGF determinations under Ind. Code §§ 6-1.1-4-33 and -34. Those statutes dealt with appeals generated by the 2002 general reassessment in Lake County that the DLGF performed through a contractor. Although those statutes did not entitle taxpayers to a hearing before the Lake County PTABOA, they otherwise largely mirrored the general appeal procedure. Thus, a taxpayer needed to seek an informal hearing with the DLGF's contractor within 45 days after having been given notice that the taxpayer's property had been reassessed, and if the taxpayer was unhappy with the results of that informal hearing, he needed to appeal to the Board within 30 days. I.C. § 6-1.1-4-33(g) (2004); I.C. § 6-1.1-4-34(c) (2004).

Dated: _____

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Chairman, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

IMPORTANT NOTICE

- REHEARING AND APPEAL RIGHTS -

Within 15 days of the date of this notice, a party to the proceeding may request a rehearing before the Indiana Board. The Indiana Board MAY conduct a rehearing and affirm or modify the final determination. A petition for rehearing does not toll the time in which to file a petition for judicial review unless the petition for rehearing is granted (Ind. Code § 6-1.1-15-5)

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>.

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