

REPRESENTATIVE FOR PETITIONER:

Tom Terry, *pro se*

REPRESENTATIVE FOR RESPONDENT:

Kelly Hisle, Deputy Assessor

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Tom Terry,	)	Petition No.:	18-003-07-1-5-00014
)		
Petitioner,	)	Parcel No.:	11-21-179-003.000
)		
v.	)	County:	Delaware
)		
Delaware County Assessor,	)	Township:	Center
)		
Respondent.	)	Assessment Year:	2007

November 20 , 2014

FINAL DETERMINATION

The Indiana Board of Tax Review (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

ISSUE

1. Does the Petitioner have standing to appeal the subject property's March 1, 2007, assessment? If so, did he prove the 2007 assessment is incorrect?

PROCEDURAL HISTORY

2. The Petitioner initiated his 2007 appeal with the Delaware County Assessor on November 24, 2008. The Delaware County Property Tax Assessment Board of Appeals (PTABOA) failed to hold a hearing within 180 days of the Petitioner's request. Thus, it was proper to bring the 2007 appeal to the Board. *See* Ind. Code § 6-1.1-15-1(k) and (o) (allowing a taxpayer to seek review by the Board if a county PTABOA does not hold a hearing within 180 days of the taxpayer filing its notice of review with the county or township assessor). The Petitioner filed his Form 131 petition with the Board on August 28, 2009.
3. On July 9, 2014, the Board's administrative law judge, Patti Kindler (ALJ), held a hearing on the petition. Neither the Board nor the ALJ inspected the subject property.

HEARING FACTS AND OTHER MATTERS OF RECORD

4. Tom Terry and Deputy Assessor Kelly Hisle were sworn and testified.
5. The Petitioner submitted the following exhibits:
 - Petitioner Exhibit 1: Form 130 petition,
 - Petitioner Exhibit 2: Subject property record card (PRC),
 - Petitioner Exhibit 3: Board's Final Determination for Nelson Whitt, Pet. No. 18-003-06-1-5-01166, issued on August 5, 2009,
 - Petitioner Exhibit 4: "List of damages to the subject property" dated January 1, 2006,
 - Petitioner Exhibit 5: Photographs of the subject property prior to remodel dated January 1, 2006, including photographs of the kitchen walls, a furnace, an interior door, areas missing baseboard heating and missing water heater, debris left by prior owners, damage to the interior ceiling, and bathroom,
 - Petitioner Exhibit 6: Interior and exterior photographs of the subject property after remodel was completed,
 - Petitioner Exhibit 7: Calculation of the Petitioner's requested 2007 assessment,
 - Petitioner Exhibit 8: Table B-1, Appendix B, from the Real Property Assessment Guideline,
 - Petitioner Exhibit 9: Table B-4, Appendix B, from the Real Property Assessment Guideline,

- Petitioner Exhibit 10: “Transactions by Account, as of December 30, 2009,” expenses and profit data for the subject property,
Petitioner Exhibit 11: Purchase agreement for the subject property dated March 9, 2009.

6. The Respondent submitted the following exhibits:

- Respondent Exhibit A: 52 IAC 2-7-1,
Respondent Exhibit 1: Small claims hearing information from the Board’s website,
Respondent Exhibit 2: Spreadsheet of sales from the subject property’s neighborhood,
Respondent Exhibit 3: PRC for 1917 West 17th Street,
Respondent Exhibit 4: PRC for 1206 West 15th Street,
Respondent Exhibit 5: PRC for 1813 West Memorial Drive,
Respondent Exhibit 6: Copy of the Board’s Order “On Motion to Dismiss and Motions for Summary Judgment” for *Tom Terry, et al*, issued September 4, 2012.

7. The Board recognizes the following additional items as part of the record:

- Board Exhibit A: Form 131 Petition with attachments,
Board Exhibit B: Hearing notice, dated May 28, 2014,
Board Exhibit C: Hearing sign-in sheet.

8. The subject property is single family home located at 1123 West 17th Street in Muncie.

9. The 2007 assessment is \$3,800 for the land and \$30,400 for the improvements (\$34,200 total).

10. The Petitioner requested a total assessment of \$7,840.16 at the hearing.¹

OBJECTIONS

11. The Respondent objected to the Petitioner’s exhibits on the grounds that they were not provided to her at least five business days prior to the hearing. Ms. Hisle testified that she received the Petitioner’s exhibits on July 2, 2014; however, because Friday, July 4,

¹ The Petitioner requested a total assessed value of \$6,800 on his Form 131.

2014, was a holiday, she did not receive the exhibits five *business* days prior to the hearing.

12. Mr. Terry thought the delivery of his pre-hearing evidence was timely. Furthermore, Mr. Terry argued the Respondent did not object to the evidence at the time he delivered it. The ALJ took the Respondent's objection under advisement.
13. The Petitioner elected the Board's non-small claims procedures. These procedural rules require the parties to exchange witness and exhibit lists at least 15 business days before a scheduled hearing and to exchange copies of their documentary evidence at least five business days before the hearing. *See* 52 IAC 2-7-1(b)(1). Although the Board may exclude evidence based on a party's failure to comply with those deadlines, it is not required to do so. *See* 52 IAC 2-7-1(f) ("Failure to comply with subsection (b) *may* serve as grounds to exclude the evidence...at issue.") (emphasis added).
14. There is no dispute that the Respondent received the evidence at least by July 2, 2014, for the hearing held on July 9, 2014. Because of the July 4th holiday, the Board agrees that the Respondent only had four *business* days to preview the evidence. Still, the Board fails to see how the Respondent was prejudiced by the inability to view Petitioner's Exhibits 1, 2, 4, 8, 9, and 11, five business days prior to the hearing.² With regards to Petitioner Exhibit 3, the Board's Final Determination for Nelson Whitt, the Respondent has access to the Board's final determinations through the Board's website. Moreover, the Respondent was a party to the Whitt case. The Respondent was not prejudiced by Petitioner Exhibit 3. Thus, the Respondent's objections to Petitioner's Exhibits 1, 2, 3, 4, 8, 9, and 11 are overruled.

² These exhibits include the Form 130 petition, the subject property record card, pages from the Real Property Guidelines, and the purchase data that was also included on the subject property record card.

15. The Board, however, sustains the Respondent's objection to Petitioner Exhibits 5, 6, 7, and 10.³ The Respondent did not have access to those exhibits prior to receiving them from the Petitioner. Nevertheless, these exclusions have no bearing on the outcome of the case.

PETITIONER'S CONTENTIONS

16. The Petitioner is the proper party to bring this appeal. The subject property was purchased at a tax sale in October 2006. The Petitioner received title to the property on July 16, 2008. According to the Board's final determination in *Whitt*, it is not required that one be the legal owner of the property on the assessment date to have standing to appeal, but the party must be responsible for the taxes resulting from that assessment date. As part of the statutory requirements for obtaining the tax deed, the Petitioner was required to pay the taxes based on the 2007 assessment. *Terry testimony (citing Nelson Whitt v. Delaware Co. Ass'r (Pet. No. 18-003-06-1-5-01166, issued August 5, 2009)), Pet'r Ex. 3.*
17. The subject property is assessed too high. When the property was purchased, it was "in shambles." Specifically, there were holes in the drywall, exposed or missing electrical wiring, a nonfunctional furnace, a door off its hinges, missing baseboard heating, a missing water heater, debris and trash, evidence of a roof leak, and a dirty nonfunctional bathroom. *Terry testimony; Pet'r Ex. 5.*
18. The Respondent, however, assessed the home as being in "average" condition. Given the home is in "very poor condition" the depreciation factor for this home should be increased from 50% to 95%. The replacement cost of the home should be decreased from \$32,710 to \$3,271. Further, applying the correct "neighborhood factor" to that figure would lower the value of the home to \$3,140.16. Finally, after adding the value of a

³ These exhibits consist of the photographs of the subject property, the Petitioner's calculation of his requested 2007 assessment, and the Petitioner's accounting statement.

shed, and the value of the land, the 2007 assessment should be \$7,840.16. *Terry argument; Pet'r Ex. 2, 4, 7, 8, 9.*

19. After extensive repairs and remodeling were completed, the subject property was sold on March 9, 2009, for \$25,000. The cost of the repairs was over \$20,000. The Petitioner only realized a profit of \$3,366.45. *Terry testimony; Pet'r Ex. 6, 10, 11.*
20. The Respondent's comparables are in much better condition than the subject property. One of the comparables was in average condition while the other two were in good condition. *Terry testimony; Resp't Ex. 3, 4, 5.*
21. Finally, according to the property record card, the home is assessed as having a basement. There is no basement. The Petitioner admits he is not sure if it has a crawl space. *Terry testimony; Pet'r Ex. 2.*

RESPONDENT'S CONTENTIONS

22. The Petitioner lacks standing to appeal. Mr. Terry failed to offer any evidence that he made the tax payments due for the 2007 assessment. The 2007 tax bill was sent to Teresa Brenner, the previous owner, who owned the property until July 16, 2008. The Petitioner only purchased a "certificate" at the 2006 tax sale. He did not petition for tax deed until 2008. *Hisle argument.*
23. The Respondent referenced a prior Board determination where the petitioners in that case lacked standing to appeal the assessment of a property they did not own on the assessment date.⁴ Here, the Petitioner is appealing the 2007 assessment, but he did not own the property on March 1, 2007. Further, Mr. Terry failed to show that he timely filed his Form 130. Finally, he has not shown that he paid any taxes, and therefore he would not be entitled to any refund. *Hisle argument; Resp't Ex. 6.*

⁴ The Respondent is referring to a final determination of an Order issued by the Board on September 4, 2012, for *Tom Terry, et al.*, which includes Mr. Terry and M Jewell as two of the Petitioners. The other Petitioner to that appeal was M Doed, LLC, one of Mr. Terry's real estate companies.

24. Regardless, the subject property is correctly assessed. The Respondent presented sales for three properties located in the subject property's neighborhood:

- 1917 West 17th Street sold for \$69,900 on March 24, 2006. This property consists of a 1,782 square-foot home and a lot size of 40-feet by 124-feet.
- 1206 West 15th Street sold for \$40,000 on November 3, 2005. It has a 1,326 square-foot home and a lot size of 40-feet by 125-feet.
- 1813 West Memorial Drive sold for \$39,900 on June 22, 2006. This property has a 2,020 square-foot home and a 40-foot by 124-foot lot.

The subject property consists of a 1,728 square-foot home located on a 32-foot by 125-foot lot. The subject property's 2007 assessment was \$34,200. This assessment is lower than the comparables' sale prices even though they have similar house sizes and lot sizes. *Hisle argument; Resp't Ex. 3, 4, 5.*

25. The Respondent also offered a list of sales for the neighborhood that were used in determining the 2007 assessment. The neighborhood sales were approved by the Department of Local Government Finance (DLGF). *Hisle testimony; Resp't Ex. 2.*

26. Finally, Mr. Terry failed to offer any proof that the subject property does not have a basement and his photographs are dated January 1, 2006. *Hisle testimony; Pet'r Ex. 5.*

BURDEN OF PROOF

27. Generally, the taxpayer has the burden to prove that an assessment is incorrect and what the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Ass'r*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). The burden-shifting statute as recently amended by P.L. 97-2014 creates two exceptions to that rule.

28. First, Ind. Code § 6-1.1-15-17.2 “applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal is an increase of more than five percent (5%) over the assessment for the same property for the prior year.” Ind. Code § 6-1.1-15-17.2(a). “Under this section, the county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or the Indiana tax court.” Ind. Code § 6-1.1-15-17.2(b).
29. Second, Ind. Code section 6-1.1-15-17.2(d) “applies to real property for which the gross assessed value of the real property was reduced by the assessing official or reviewing authority in an appeal conducted under IC 6-1.1-15.” Under those circumstances, “if the gross assessed value of real property for an assessment date that follows the latest assessment date that was the subject of an appeal described in this subsection is increased above the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase, the county assessor or township assessor (if any) making the assessment has the burden of proving that the assessment is correct.” Ind. Code § 6-1.1-15-17.2(d). This change is effective March 25, 2014, and has application to all appeals pending before the Board.
30. Here, no evidence was presented to indicate that the 2007 assessment increased by more than 5% over the 2006 level. According to the property record card, the 2007 assessment decreased. Further, the Petitioner failed to offer any argument that the burden should shift to the Respondent. Thus, the burden shifting provisions of Ind. Code § 6-1.1-15-17.2 do not apply, and the burden rests with the Petitioner.

STANDING TO APPEAL AND REFUNDS

31. The Board must first determine whether the Petitioner has standing to appeal. Both Ind. Code § 6-1.1-15-1 and Ind. Code § 6-1.1-15-3 provide for review of the “taxpayer’s tangible property.” According to the Respondent, just holding the tax sale certificates during the redemption period does not satisfy that requirement.

32. The tax sale statutes, together with case law applying those statutes, establish that one who holds a tax sale certificate during the redemption period is not a legal or equitable owner of the property. *See Geller v. Meek*, 496 N.E.2d at 106-107 (explaining that at a tax sale a buyer acquires a lien on the subject real estate, but does not get legal or equitable title). “The tax sale creates a lien against the property that may ripen into full ownership *at some later time by the issuance of a tax deed.*” *Id.* at 107 (quoting *Fields v. Evans*, 484 N.E.2d 36, 38 (Ind. Ct. App. 1985) (*emphasis added*)).
33. On September 4, 2012, the Board granted summary judgment where the evidence indicted the tax deeds for some of the Petitioner’s other properties were issued *after* the Petitioner initiated tax appeals for those properties.
34. Here, both parties acknowledged that the subject property was originally purchased at tax sale in October of 2006. The Petitioner received the tax deed for the subject property on July 16, 2008. Mr. Terry did not initiate his Form 130 until November 24, 2008, four months after he had received the tax deed. To obtain the tax deed, Mr. Terry would have been required to pay the taxes for the 2007 assessment. Thus, these circumstances establish Mr. Terry’s standing to appeal the 2007 assessment of the subject property.
35. Regarding the timeliness of the Petitioner’s Form 130, Mr. Terry testified that he initiated his appeal within 45 days of the 2007- pay-2008 fall tax statement. The Respondent did not offer any evidence to contradict that testimony. The response was that the office does not keep records for more than five years. The fact that the Respondent does not keep records for more than five years does not place an additional burden on the Petitioner. It simply means that the Petitioner’s testimony is undisputed. The Board finds the Petitioner’s testimony is sufficient.
36. Finally, the Board lacks jurisdiction to review refunds or order a refund. The Board is a creation of the legislature. It only has those powers conferred by statute. *Matonovich v.*

State Bd. of Tax Comm'rs, 705 N.E.2d 1093, 1096 (Ind. Tax Ct. 1999). The relevant statute, Ind. Code § 6-1.5-4-1, provides as follows:

(a) The Indiana board shall conduct an impartial review of all appeals concerning:

- (1) the assessed valuation of tangible property;
- (2) property tax deductions;
- (3) property tax exemptions;
- (4) property tax credits;

that are made from a determination by an assessing official or county property tax assessment board of appeals to the Indiana board under any law.

(b) Appeals described in this section shall be conducted under IC 6-1.1-15.

Ind. Code § 6-1.5-4-1.

ANALYSIS

37. Indiana assesses real property on the basis of its true tax value, which the Department of Local Government Finance (DLGF) has defined as the property's market value-in-use. Ind. Code § 6-1.1-31-6(c); MANUAL at 2. To show market value-in-use, a party may offer evidence that is consistent with the DLGF's definition of true tax value. A market-value-in-use appraisal prepared according to the Uniform Standards of Professional Appraisal Practice (USPAP) often will be probative. *Kooshtard Property VI v. White River Twp. Ass'r*, 836 N.E.2d 501, 506 n.6. (Ind. Tax Ct. 2005). A party may also offer actual construction costs for the property under appeal, sales information for that property or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.
38. Regardless of the valuation method used, a party must explain how its evidence relates to market value-in-use as of the relevant valuation date. *See O'Donnell v. Dep't of Local Gov't Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *Long v. Wayne Twp. Ass'r*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). The valuation date for a 2007 assessment was January 1, 2006. 50 IAC 21-3-3 (2006). Any evidence of value relating to a different

date must also have an explanation about how it demonstrates, or is relevant to, that required valuation date. *Long*, 821 N.E.2d at 471.

39. Here, the Petitioner focused on the condition of the subject property. His testimony and photographs established that the subject property was in less than average condition. The Assessment Guidelines have six condition ratings from excellent to very poor. REAL PROPERTY ASSESSMENT GUIDELINES for 2002—Version A, app. B at 7 (incorporated by reference at 50 IAC 2.3-1-2). Determining a condition rating for the subject property, however, is just one of the many steps in the Guidelines. It does not directly answer the essential question of value.
40. The Petitioner failed to address the property's market value-in-use in either his testimony or documentary evidence. Even if the Board finds the value of the property the property's condition was "very poor," that does nothing to prove what a more accurate value should be. One cannot make a case based on whether the Guidelines were applied properly. *Eckerling v. Wayne Twp. Ass'r*, 841 N.E.2d 674, 677 (Ind. Tax Ct. 2006). Again, to successfully make his case, the Petitioner needed to show the assessment does not accurately reflect the market value-in-use. *Id.*; see also *P/A Builders & Developers, LLC v. Jennings Co. Ass'r*, 842 N.E.2d 899, 900 (Ind. Tax Ct. 2006) (explaining that proper focus is not on methodology, but rather, on what the correct value actually is).
41. The Petitioner failed to offer probative evidence of what a more accurate market value-in-use should be for the 2007 assessment. That being said, the Petitioner did offer testimony of an objective error in the assessment. Specifically, it is undisputed that the home does not have a basement. Thus, the Board orders that the Respondent correct that portion of the assessment.
42. Where the Petitioner has not supported his claim with probative evidence, the Respondent's duty to support the assessment with substantial evidence is not triggered.

Lacy Diversified Indus. v. Dep't of Local Gov't Fin., 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003).

SUMMARY OF FINAL DETERMINATION

43. The Petitioner did not make a prima facie case for reducing the 2007 assessment. The Petitioner did prove the subject property is erroneously assessed as having a basement. The Board orders the Respondent to correct the property record card to indicate no basement. Nevertheless, the assessment will not be changed.

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

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days after the date of this notice. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. The Indiana Tax Court's rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.