

REPRESENTATIVE FOR PETITIONER:

Brian Thomas, Integrity Financial & Tax Consulting, Inc.

REPRESENTATIVE FOR RESPONDENT:

Beth H. Henkel, Attorney

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Trinity Development Group, LLC	)	Petition No.:	20-015-13-1-4-20407-15
)		
Petitioner,	)	Parcel No.	20-11-23-276-024.000-015
)		
v.	)	County:	Elkhart
)		
Elkhart County Assessor,	)	Township:	Elkhart
)		
Respondent.	)	Assessment Year:	2013

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

Issued: May 26, 2017

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

INTRODUCTION

1. Did Petitioner prove the 2013 assessment was incorrect?

PROCEDURAL HISTORY

2. Trinity Development Group, LLC (“Petitioner”) initiated its 2013 assessment appeal on April 7, 2015. On July 16, 2015, the Elkhart County Property Tax Assessment Board of Appeals (“PTABOA”) issued its Notification of Final Assessment Determination. Petitioner then timely filed a Form 131 petition on August 28, 2015, with the Board.
3. On March 9, 2017, the Board’s designated administrative law judge (“ALJ”), Dalene McMillen, held a hearing. Neither the Board nor the ALJ inspected the property.

HEARING FACTS AND OTHER MATTERS OF RECORD

4. The property under appeal is a Wings Etc. restaurant located at 2815 Gateway Drive in Goshen.
5. Brian Thomas of Integrity Financial and Tax Consulting, Inc. was sworn for Petitioner. Elkhart County Assessor Cathy Searcy and witness Gavin Fisher were sworn for Respondent.¹
6. Petitioner offered the following exhibits:

Petitioner Exhibit 1-1C – Sales comparison, income approach and assessment comparison submitted to the PTABOA,
Petitioner Exhibit 2 – Two email correspondence from Teresa Dorohoff and Robert Hensmann, Assessor’s evidence request form, sales verification process prepared by Randy Barnes and Petitioner’s asset list,
Petitioner Exhibit 3 – March 1, 2013, and March 1, 2014, Notifications of Final Assessment Determination – Form 115,
Petitioner Exhibit 4 – Aerial map for the subject property,
Petitioner Exhibit 5 – Petitioner’s assessment comparable analysis,
Petitioner Exhibit 6 – Aerial map for the subject property,

¹ Ms. Searcy did not testify. Tylan Miller of Equi-Val was present to observe the hearing.

- Petitioner Exhibit 7 – Commercial and Industrial Cost Schedules from Real Property Assessment Guideline – Version A (“Guideline”), Appendix G,
- Petitioner Exhibit 8 – Photographs of the subject property and comparable properties,²
- Petitioner Exhibit 9 – Commercial and Industrial Grade from Guideline, Appendix E,
- Petitioner Exhibit 10 – Property record card (“PRC”) for 105 West County Road 6 in Elkhart,
- Petitioner Exhibit 11 – PRC for 4644 Elkhart Road in Elkhart,
- Petitioner Exhibit 12 – Memorandum from Barrett McNagny, LLP, Integrity’s corporate attorney,
- Petitioner Exhibit 13 – Petitioner’s proposed 2013 PRC,³
- Petitioner Exhibit 15 – LoopNet general information sheets,
- Petitioner Exhibit 16 – CoStar general information sheets,
- Petitioner Exhibit 17 – Summary of Petitioner’s testimony,
- Petitioner Exhibit 18 – Qualifications for Brian Thomas.⁴

7. Respondent offered the following exhibits:

- Respondent Exhibit 1 – Summary of Respondent’s witness testimony,
- Respondent Exhibit 2 – The Board’s “Evidence in Property Tax Appeal” information sheets,
- Respondent Exhibit 3 – Elkhart County township map and list of township/taxing district associations,
- Respondent Exhibit 4 – Respondent’s assessment comparison chart,
- Respondent Exhibit 5 – Google map, property information and PRC for 1829 Rieth Boulevard in Goshen,
- Respondent Exhibit 6 – Google map, property information and PRC for 4644 Elkhart Road in Elkhart,
- Respondent Exhibit 7 – Google map, property information and PRC for 105 West County Road 6 in Elkhart,
- Respondent Exhibit 8 – Google map and property information for the subject parcel.

8. The following additional items are part of the record:

- Board Exhibit A – Form 131 petition with attachments,
- Board Exhibit B – Hearing notice,
- Board Exhibit C – Hearing sign-in sheet.

² Mr. Fisher testified that Petitioner’s photographs identified in Petitioner Exhibit 8 of the subject property are actually Trinity Development’s property located on 105 West County Road 6 in Elkhart.

³ Petitioner did not submit Petitioner Exhibit 14 into the record.

⁴ Petitioner’s Exhibits 17 and 18 were not included in Petitioner’s exhibit packet.

9. The assessed value for 2013 is \$280,800 for the land and \$518,600 for the improvements, for a total of \$799,400.
10. Petitioner requested an assessed value of \$187,900 for the land and \$341,300 for the improvements for a total assessment of \$529,200.

OBJECTION

11. Respondent objected to Petitioner's Exhibit 12 because the exhibit was prepared by a law firm. Respondent contends that the drafter of the memorandum failed to enter a notice of appearance, provide an attorney number, or show that he or she is permitted to practice law in Indiana.
12. Petitioner stated Petitioner's Exhibit 12 is a memorandum provided by the firm of Barrett McNagny, Integrity's corporate attorney. The memorandum provided Indiana statutes, court cases, and opinion on "whether an appraisal is required to support a request for a reduction in assessed value."
13. Respondent's objection goes to the weight and credibility of the evidence rather than its admissibility. Thus, Respondent's objection is overruled. Furthermore, the Board's final determination is not dependent on Petitioner's Exhibit 12.

BURDEN OF PROOF

14. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that a property's assessment is wrong and what the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 465, 468 (Ind. Tax Ct. 2003); *see also Clark v. State Bd. of Tax Comm'rs*, 594 N.E.2d 1230 (Ind. Tax Ct. 1998). A burden-shifting statute creates two exceptions to that rule.

15. 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 tax 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 to the Indiana tax court.” Ind. Code § 6-1.1-15-17.2(b).
16. Second, Ind. Code § 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,” except where the property was valued using the income capitalization approach in the appeal. Under subsection (d), “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).
17. These provisions many not apply if there was a change in improvements, zoning, or use. Ind. Code § 6-1.1-15-17.2(c).
18. The parties agreed that the assessment did not increase by more than 5% between 2012 and 2013 and that Petitioner has the burden of proof.

SUMMARY OF PETITIONER’S CONTENTIONS

19. Mr. Thomas first presented a sales comparison analysis that purportedly compares five properties to the subject property. To support each purported comparable property, Petitioner presented CoStar listings, PRCs, sales disclosure forms, and traffic information. He used three sales from various counties and two listings from Elkhart County. The properties sold between May 16, 2012, and January 18, 2013. The sales

prices and listings ranged from \$99.40 per square foot to \$166.00 per square foot, with a median of \$142.42 per square foot. That translates to a value of approximately \$531,369.02 for the subject property. *Thomas testimony; Pet'r Ex. 1 & 1A.*

20. Mr. Thomas developed an income approach based on restaurant market lease rates from current lease listings for the surrounding area. In that approach, he used \$13.50 per square foot per year and actual square footage of 3,731 square feet. He used CoStar to calculate a vacancy loss of 4.5%. This yielded an effective gross income of \$48,101.44. He then adjusted the expenses by removing management fees and reserves. The net operating income was \$43,291.30. For the capitalization rate, he consulted the Assessor's witness, Mr. Fisher, who suggested a capitalization rate of 6% to 9%. He felt a capitalization rate of 8% was reasonable for the subject property. The value of the property based on the income approach is \$541,141. *Thomas testimony; Pet'r Ex. 1 & 1B.*
21. Petitioner also contends the subject property was over-valued based on the assessed values of three dine-in and four fast-food restaurants within the same jurisdiction. Mr. Thomas selected facilities that would purportedly compete for the same clientele as the subject. The comparable assessment analysis shows the subject property has the highest land base rate, grade factor, and improvement per square foot value. *Thomas testimony; Pet'r Ex. 1C, 5, 7 & 8.*
22. The comparable properties are located directly on US Highway 33. The subject property has no direct access to US Highway 33 and is located to the rear of the Taco Time restaurant. The comparable properties are assessed at a primary land rate of \$185,000 per acre, while the subject property's land is assessed at \$215,000 per acre. *Thomas testimony; Pet'r Ex. 1C & 4-6.*
23. Petitioner contends that the subject property is constructed with lower quality materials. It has metal siding with decorative brick trim, pine paneling, laminate flooring, and drop tile ceiling. Petitioner contends that Taco Time is the only purportedly comparable property with inferior construction. The remaining comparable properties are of superior

construction with concrete exterior with ceramic tile, terrazzo, and painted and designed drywall with decorative ceilings. In addition, five of the comparable properties are national franchises that are required to update and upgrade their properties. The subject property, on the other hand, is not a national franchise. The subject property has a grade factor of 1.40, while the comparable properties have grade factors of 1.00 and 1.20.

Thomas testimony; Pet'r Ex. 5 & 8-9.

24. The assessments per square foot ranged from \$95.06 to \$175.64 for the comparable properties. The subject property's assessment per square foot equates to \$214.26. Petitioner argues this shows inaccuracies in assessed values in the area. That translates to a value of \$481,142. *Thomas testimony; Pet'r Ex. 1C & 5.*
25. Petitioner finally offered an analysis using the cost approach to value. The PRC shows the land base rate changed to \$185,000 per acre for primary land and \$9,250 per acre for undeveloped unusable. Next, it changed the building classification from dining/lounge to general retail, reduced the plumbing fixtures from 22 to 15, removed four-person sink, and reduced the grade factor to 1.10 or C+2. Based on the cost approach, the land value is reduced to \$187,900 and the improvement value to \$341,300, for a total value of \$529,200. *Thomas testimony; Pet'r Ex. 13.*
26. Mr. Thomas reconciled his sales comparison approach, income approach, assessment comparison approach, and cost approach. He argued that he gave the cost approach the most weight. Therefore, Petitioner requested the 2013 assessment be reduced to \$529,200. *Thomas testimony; Pet'r Ex. 17.*

SUMMARY OF RESPONDENT'S CONTENTIONS

27. Gavin Fisher, an Indiana licensed appraiser and certified Level III Assessor/Appraiser, reviewed Petitioner's various analyses and claims to have found numerous flaws. Mr. Fisher found that the analyses did not conform to Uniform Standards of Professional Appraisal Practice ("USPAP"), appraisal standards, or assessment standards. *Fisher testimony.*

28. Mr. Fisher contends that there are multiple flaws with the sales comparison approach:⁵

- Comparable #1 is 6636 Logan Drive in Evansville, comparable # 2 is 2912 Getz Road in Fort Wayne, comparable #5 is 9318 Indianapolis Boulevard in Highland, comparable #6 is 1130 West 7th Street in Auburn, and comparable #7 is 5540 Main Street in Mishawaka. Petitioner failed to show adjustments for differences in construction style, design, age, and style of restaurant. No analysis was done on the difference between the subject property and comparable properties' physical location or market conditions.
- Comparable #3 is 57968 County Road 7 in Elkhart County. This property was a residential property converted to a restaurant. The property is different in construction style, design, and age. The property also has notable condition issues.
- Comparable #4 is 5104 West County Line Road in Fort Wayne. This property was a Subway that sold to National Oil & Gas Inc. No analysis was provided on the conditions of the sale. Whether a gas station was added or the station was always there is unclear. The property is also different in construction style, design and location.
- Comparable #8 is 1305 Lincolnway East in Goshen. It is similar to the subject property in location. This is an authentic Mexican restaurant that serves a specific clientele and is different in age and decor style. There are also notable condition issues. This property would require additional capital to make it a more "well-rounded" facility if sold to another potential investor.
- Comparable #9 is 2820 Elkhart Road in Goshen. This is a hibachi style restaurant and would require reconfiguring of the kitchen space and seating to convert it to a

⁵ Fisher analyzed the sales submitted by Petitioner at the PTABOA hearing. At the Board hearing, Petitioner only submitted five of the original nine sales. *Pet'r Ex. 1A; Resp't Ex. 1.*

different style of restaurant. The property is also different in construction style, design, and age.

Fisher testimony; Resp't Ex. 1.

29. Mr. Fisher contends Petitioner just looked at raw sales on a per square foot basis and he failed to make the necessary adjustments between the subject property and comparable properties to constitute a reliable sales comparison approach. *Fisher testimony.*
30. Respondent contends that Petitioner's income approach is also flawed. Mr. Fisher claims Petitioner used unverified third party information from CoStar and LoopNet in developing the income approach. It is thus unclear if the properties had triple net leases, gross leases, or modified gross leases. It is also unclear whether or not the properties are similar or situated in the same geographical location as the subject property. *Fisher testimony; Resp't Ex. 1.*
31. With regard to Petitioner's assessment comparison approach, Respondent concedes Petitioner did select properties in close proximity to the subject property. However, close geographical location is only one factor to consider when selecting comparable properties. *Fisher testimony; Resp't Ex. 1.*
32. The assessment comparison approach is flawed because Petitioner failed to show how the subject property, which is a sports bar featuring family dining, compares to the five fast food restaurants he selected. The fast food comparable properties don't have the similar market influence as the subject property. *Fisher testimony; Resp't Ex. 1.*
33. Petitioner's two remaining comparable assessment properties are both full service restaurants. While they are slightly more comparable to the subject property than the fast food restaurants, they are nonetheless buffet type restaurants and would attract a different investor and user than the subject property. *Fisher testimony; Resp't Ex. 1.*

34. Petitioner also submitted two PRCs of other Wings Etc. properties located in Elkhart County. Respondent concedes that these two properties would be similar to the subject in terms of use, quality, construction style, user, purchaser and investor. However, the first property at 105 County Road 6 in Elkhart is located approximately 22 miles from the subject property and is a multi-unit facility. Respondent argues there would be more risk to an investor because of the additional operating expenses surrounding a multi-unit facility. The second property at 4644 Elkhart Road in Elkhart is located in Concord Township approximately 8 miles from the subject property. In an assessment comparison analysis, these two comparable properties would fail to qualify, because, according to Ind. Code § 6-1.1-15-18, they are not within the same taxing district and they are not located within two-miles of the boundary of the taxing district. *Henkel argument; Fisher testimony; Resp't Ex. 6-8.*

Analysis

35. 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); 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2). To show a property’s 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 often will be probative. *Kooshtard Property VI v. White River Twp. Assessor*, 836 N.E.2d 501, 506 (Ind. Tax Ct. 2005) Parties may also offer evidence of actual construction costs, sales information for the property under appeal, sale or assessment information for comparable properties, and any other information compiled according to generally acceptable appraisal principles. *See Id; see also*, I.C. § 6-1.1-15-18 (allowing parties to offer evidence of comparable properties’ assessments to determine an appealed property’s market value-in-use).
36. Regardless of the method used to prove a property’s true tax value, 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. Dep't of Local Gov't Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also Long v. Wayne Township Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). The valuation date for a 2013 assessment was March 1, 2013. Ind. Code § 6-1.1-4-4.5 (f); 50 IAC 27-5-2 (c).

37. Here, Petitioner developed four approaches to value: the sales comparison approach, the income approach, the assessment comparison approach, and the cost approach. While Mr. Thomas assigns the greatest weight to the cost approach, the Board will examine all four approaches, beginning with the sales comparison approach.
38. Petitioner offered a sales comparison analysis relying on a median price per square foot. In doing so, Petitioner essentially relies on a sales comparison approach to establish the market value-in-use. *See* 2011 REAL PROPERTY ASSESSMENT MANUAL at 9 (incorporated by reference at 50 IAC 2.4-1-2) (stating that the sales-comparison approach relies on “sales of comparable improved properties and adjust the selling prices to reflect the subject property’s total value.”); *see also Long*, 821 N.E.2d 466, 469.
39. To effectively use the sales comparison approach as evidence in an appeal, the proponent must establish the comparability of the properties being examined. Conclusory statements that a property is “similar” or “comparable” to another property are not sufficient. *Long*, 821 N.E.2d at 470. Instead, the proponent must identify the characteristics of the subject property and explain how those characteristics compare to the characteristics of the purportedly comparable properties. *Id.* at 471. Similarly, the proponent must explain how any differences between the properties affect their relative market values-in-use. *Id.*
40. Here, the type of analysis required is lacking from Petitioner’s case. The evidence fails to provide enough information for the Board to conclude the purportedly comparable properties are indeed comparable to the property under appeal. Petitioner did not adequately identify or quantify specific differences between the purportedly comparable properties and the subject property.

41. The Petitioner's income capitalization approach fails to comply with generally accepted appraisal principles for several reasons. First, Petitioner attempted to develop a market rent for various types of restaurants, but the determination of the rent rate is unreliable. To develop its rate, Petitioner used properties from all over Indiana. Because petitioner failed to make any adjustments for location, size, or any other factor, it is unclear how those rent rates are relevant to the subject property.
42. Similarly, Mr. Thomas failed to explain his vacancy loss, expenses, and capitalization rate. In fact, his capitalization rate was chosen from a range of capitalization rates from a discussion with Respondent's witness. *See Grabbe v. Carroll County Ass'r*, 1 N.E.3d 226, 231 (Ind. Tax Ct. 2013) (upholding determination that income approach lacked probative value where taxpayer failed to provide evidence demonstrating why 20% capitalization rate was proper). Thus, the Board is unable to determine if the calculations are representative of the market.
43. Mr. Thomas also developed an assessment comparison approach.⁶ Indeed, parties can introduce assessments of comparable properties to prove the market value-in-use of the property under appeal. Ind. Code § 6-1.1-15-18(c). Here, Petitioner merely observed that the seven comparable properties were dine-in or carry-out restaurants in the same area. Simply because a property is in the same area does not show that it is comparable. The lot size, age, size, quality of construction, condition and amenities all play a role in the value of the property. *See, Long*, 821 N.E.2d at 470-71. Because Petitioner made no attempt to identify specific similarities in the properties or value the differences between the properties, the assessed values of the comparable properties do not support a finding that Petitioner's property was assessed incorrectly.

⁶ Petitioner raised the issue of a lack of uniformity and equality in the assessment. As the Tax Court explained in, *Westfield Golf Practice Center*, the focus of Indiana's assessment system has changed from the application of a self-referential set of regulations to a question of whether a property's assessment reflects the external benchmark of market value-in-use. *See, Westfield Golf Practice Center, LLV v. Washington Twp. Ass'r*, 859 N.E.2d 396, 398-99 (Ind. Tax Ct. 2007). One way to prove a lack of uniformity and equality under Article X, Section 1 of the Indiana Constitution is to present assessment ratio studies comparing the assessments of properties within an assessing jurisdiction with objectively verifiable data, such as sale prices or market value-in-use appraisals. *Id.* at 399 n.3. The taxpayer in *Westfield Golf Practice Center* lost its appeal because it focused solely on the base rate used to assess its driving-range landing area compared to the rates used to assess other driving ranges and failed to show the actual market value-in-use for any of the properties. *Id.* at 399. Here, Petitioner also focused only on the subject property and did not make a showing for a change in the assessment based on lack of uniformity and equality.

44. Finally, Petitioner offered a cost approach to value by applying the REAL PROPERTY ASSESSMENT GUIDELINES to an updated PRC. Petitioner changed the land base rate, land classifications, building classification, plumbing fixture count, removed a four-person gang sink and reduced the grade factor.
45. In using the method described above, Petitioner is essentially relying on the REAL PROPERTY ASSESSMENT GUIDELINES to arrive at an assessed value. Such evidence has little or no probative weight. As the Tax Court has explained, strictly applying assessment regulations does not necessarily prove a property's true tax value in an assessment appeal. *Eckerling v. Wayne Twp. Ass'r*, 841 N.E.2d 674 (holding that taxpayers failed to make a case by simply focusing on the assessor's methodology instead of offering market value-in-use evidence).
46. With regard to the changes in the land classifications and grade, Petitioner contends the land classification should be changed to primary land and undeveloped unusable land and a C+2 grade factor. Petitioner presented no evidence to support this contention. Statements that are unsupported by probative evidence are conclusory and of little value to the Board in making its determination. *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113, 1118 (Ind. Tax Ct. 1998); and *Herb v. State Bd. of Tax Comm'rs*, 656 N.E.2d 890, 893 (Ind. Tax Ct. 1995).
47. Consequently, Petitioner failed to make a prima facie case that the assessment should be reduced. Where a petitioner has not supported its claim with probative evidence, a 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, 1221-22 (Ind. Tax Ct. 2003).

SUMMARY OF FINAL DETERMINATION

48. Petitioner failed to make a prima facie case for reducing the 2013 assessment and the Board finds for Respondent.

The Final Determination of the above captioned matter is issued 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

- 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>>.