REPRESENTATIVE FOR PETITIONER:
Matthew T. Ehinger, Ice Miller LLP

REPRESENTATIVE FOR RESPONDENT:
F. John Rogers, Thompson & Rogers

BEFORE THE
INDIANA BOARD OF TAX REVIEW

Yum Brands, a/k/a Taco Bell of America, Inc. (4339) (Lessee), Petitioner,	)	Petition No.: 02-076-12-1-4-00002
	)	Parcel No.: 02-12-18-152-004.000-076
v.	)	County: Allen
	)	Township: Wayne
Allen County Assessor, Respondent.	)	Assessment Year: 2012

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

April 8, 2014

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. The Assessor, who has the burden of proof as the result of the significant increase in the subject parcel's assessment between 2011 and 2012, relied on her deputy's valuation opinion to prove the subject parcel's value. The deputy, however, failed to account for a

significant restriction on the parcel's use. He similarly failed to explain a significant part of his qualitative analysis or to otherwise assure the Board that his opinion conformed to generally accepted appraisal principles. His valuation opinion is therefore too unreliable to make a prima facie case supporting either the parcel's assessment or the Assessor's request for an increase to that assessment.

Procedural History

2. On July 16, 2012, Yum Brands a/k/a Taco Bell of America, Inc. (4339), appealed the subject property's assessment for 2012. On January 11, 2013, the Allen County Property Tax Assessment Board of Appeals ("PTABOA") issued its determination upholding the assessment. Yum then timely filed a Form 131 petition with the Board.

3. On October 10, 2013, the Board's administrative law judge, Dalene McMillen ("ALJ"), held a hearing on Yum's petition. Rob Williamson, commercial real estate deputy for the Allen County Assessor, testified under oath.

4. Yum offered the following exhibit:

Petitioner Exhibit A:	Warranty Deed from George P. Broadbent D/B/A The Village At Time Corners to Taco Bell Corp., dated October 12, 1990.

5. The Assessor offered the following exhibits:

Respondent Exhibit 1:	2012 property record card ("PRC") for the subject property,
Respondent Exhibit 2:	Aerial map with per square foot land rates,
Respondent Exhibit 3(a):	Sales-comparison analysis with sales data and other information for the subject property and six other properties,
Respondent Exhibit 3(b):	PRCs and sales disclosure forms for 1414 Apple Glen Boulevard, 1702 Apple Glen Boulevard, and 8230 Glencarin Boulevard, PRCs and pages from Gateway website for 4728 Illinois Road and 6527 West Jefferson Boulevard, and PRC and one page from a warranty deed for 6839 West Jefferson Boulevard,
Respondent Exhibit 3(c):	One page showing the 2003-2013 "Consumer Price Index" from the Bureau of Labor Statistics Data,

Respondent Exhibit 3(d): Explanation of quantitative and qualitative adjustments from sales comparison analysis,
Respondent Exhibit 4: Rob Williamson's qualifications and education,
Respondent Exhibit 5: Respondent's position statement.

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

Board Exhibit A: Form 131 petition,
Board Exhibit B: Hearing notice dated August 16, 2013,
Board Exhibit C: Order Granting Petitioner's Motion for Determination Concerning Burden of Proof and Petitioner's Motion for Determination Concerning Burden of Proof,
Board Exhibit D: Hearing sign-in sheet
Board Exhibit E: Notice of Appearance by Paul Jones and Matthew Ehinger
Board Exhibit F: Notice of Appearance by F. John Rogers

7. The PTABOA determined the following assessment for 2012:

Land: $474,800 Improvements: $12,000 Total: $486,800

8. At the Board hearing, Yum requested that the parcel's 2012 assessment be reduced to its 2011 level. The parcel was assessed as follows for 2011:

Land: $284,900 Improvements: $13,200 Total: $298,100

9. The Assessor requested that the land portion of the property's assessment be increased to $501,800, which would result in a total value of $513,800.

10. Neither the Board nor the ALJ inspected the property.

Objections

A. Failure to timely exchange witness and exhibit lists

11. Yum objected to all of the Assessor's evidence on grounds that the Assessor did not provide Yum with her list of witnesses and exhibits at least 15 business days before the Board's hearing. According to counsel for both parties, the Assessor mailed her witness and exhibit list on September 23, 2013, and Yum received that list two days later. *Ehinger objection; Rogers response.*

12. The Assessor acknowledged that she did not timely serve Yum with her witness and exhibit list, but noted that she barely missed the deadline and that she timely provided Yum with copies of her exhibits on October 1, 2013. Yum acknowledged having timely received copies of the exhibits. *Rogers response; Ehinger reply*. In addition, the Assessor's witness, Rob Williamson, testified that the information contained in the Assessor's exhibits was "inherently similar" to what was offered at the PTABOA hearing, although he acknowledged that exhibits were not "exactly" the same. *Williamson testimony*.

13. The Board's procedural rules require each party to provide all other parties a list of the witnesses and exhibits it intends to offer at least 15 business days before a hearing and copies of its documentary evidence at least five days before a hearing. 52 IAC 2-7-1(b)(2). The Board may exclude evidence based on a party's failure to comply with those deadlines. 52 IAC 2-7-1(f).

14. Nevertheless, the Board overrules the Assessor's objection. The Assessor failed to timely provide Yum with her witness and exhibit list. But she did provide the list by the hearing, and Yum did not even attempt to explain how it was prejudiced by her tardiness. The Assessor's only witness, Rob Williamson, is an employee from her office who works with commercial properties. The fact that he or someone like him might testify at the Board's hearing could hardly have surprised Yum. And Williamson testified without contradiction that the exhibits were similar to what was offered at the PTABOA hearing. These circumstances weigh against a finding of significant prejudice, particularly in light of the fact that Yum ultimately received copies of the Assessor's exhibits in a timely manner. Finally, had Yum felt hampered in its ability to prepare for the hearing because the Assessor failed to comply with Board's exchange rule, it could have requested a continuance.

15. None of that excuses the Assessor's actions. She missed the exchange rule's clear deadline and did not offer any reason for doing so. The rule exists for a reason, and the Board does not tolerate parties simply disregarding it. Had Yum shown any real

prejudice, the outcome might be different. But on these facts, the Board will not exercise the extreme sanction of excluding the Assessor's evidence.

B. Best evidence rule

16. Yum, however, also objected to specific exhibits offered by the Assessor. First, it objected to the portions of Respondent's Exhibit 3(b). More specifically, Yum objected to references to the sale prices for three properties. Those references are contained in property record cards and in printouts from what Williamson described as the Gateway database.[1] Because that information was taken from sales disclosure forms, Yum objected to the admission of the property record cards and Gateway printouts on "best evidence" grounds. *Ehinger objection*. To emphasize its point, Yum pointed to the following notation contained in the Gateway printouts: "Data displayed within the online search is based on sales disclosure filings. Data displayed in this search is reported by county assessors and may not completely reflect the signed form. . . ." *Resp't Ex. 3(b)*.

17. In response, the Assessor elicited Williamson's testimony that the sales disclosure forms for the two sales had been disposed of to free up space. According to Williamson, the forms were maintained for an appropriate length of time under relevant recordkeeping rules. The sale prices from those disclosure forms, however, are reflected in the portion of each property's record card that covers the property's transfer history as well as in the Gateway database. *Williamson testimony*.

18. Yum appears to predicate its objection on Rule 1002 of the Indiana Rules of Evidence, which is often referred to the "best evidence" rule. The rules of evidence do not strictly apply in Board proceedings. *See* 52 IAC 2-7-2(a)(2) ("The administrative law judge shall regulate the course of proceedings in . . . a manner without recourse to the rules of evidence."). But they exist for a reason—to promote determining the truth and justly resolving proceedings. *See* Ind. Evid. R. 102. Those rules therefore inform the Board's decisions about the admissibility and weight of evidence.

[1] According to Williamson, the Department of Local Government Finance maintains the Gateway database, which is searchable through the internet. *See Williamson testimony*.

19. Under the best evidence rule, "An original writing, recording, or photograph is required in order to prove its content *unless [the Indiana Rules of Evidence] or a statute provides otherwise.*" Ind. Evid. R. 1002 (emphasis added). The original is not required, and other evidence may be used to prove a writing's contents, where all originals have been lost or destroyed, other than where the proponent lost or destroyed them in bad faith. Ind. Evid. R. 1004(1). Similarly, if a certified copy of an official record cannot be obtained by the exercise of reasonable diligence, other evidence of the record's contents may be admitted. Ind. Evid. R. 1005.

20. Even if the Board were to strictly apply the best evidence rule, it appears that the property record cards and Gateway printouts would be admissible to prove the contents of the sales disclosure forms for the properties in question. The original sales disclosure forms were destroyed and there is no evidence that the Assessor acted in bad faith. In any case, the exhibits are sufficiently reliable to be admissible under the Board's more relaxed standards. The lack of the originals or authentic copies of the sales disclosure forms therefore goes to the weight to be afforded to the exhibits' recitation of sale prices taken from those forms.

C. Hearsay

21. Yum offered an additional ground for objecting to the property record card for one of the properties (6839 West Jefferson Boulevard). According to Yum, the card's reference to the property's sale price is hearsay.

22. Yum is right. *See* Ind. R. Evid. 801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). But the Board's procedural rules allow it to admit hearsay, albeit with a significant caveat: if an opponent properly objects to the hearsay and it does not fall within a recognized exception to the hearsay rule, the Board cannot base its determination solely on that hearsay. 52 IAC 2-7-3. The Board often receives and relies upon property record cards in its determinations. The Board therefore overrules Yum's objection and admits the property record card. It is unnecessary to

decide whether any recognized exception to the hearsay rule applies, because the Board ultimately does not rely on the hearsay statement in reaching its ultimate determination.

Parties' Contentions

A. Summary of the Assessor's case

23. The subject parcel consists of commercial land with a parking lot. It is used in the operation of a Taco Bell restaurant located on an adjacent parcel. It has a dumpster for the restaurant's waste disposal and the restaurant's customers and employees park on the subject parcel. MAI appraisers from Fort Wayne did a land study, which led the Assessor to increase the land rate used to assess the subject parcel. It is now being assessed at the same land rate as the adjacent Taco Bell parcel. *Williamson testimony; Resp't Exs. 1- 2, 5.*

24. Williamson, who is certified by the Department of Local Government Finance ("DLGF") as a Level III assessor/appraiser, used the sales-comparison approach to analyze the subject parcel's value. He looked at sales of six vacant properties that he characterized as similar to the subject parcel. The properties were all developed into restaurants post sale. They sold between December 6, 2004, and April 30, 2012, for prices ranging from $550,000 to $1,304,800. *Williamson testimony; Resp't Ex. 3(a).*

25. Williamson used the Consumer Price Index ("CPI") for the Midwest Urban Area to adjust each sale price to reflect a value as of the March 1, 2012, assessment date. He then qualitatively compared each property to the subject parcel along several lines: average daily traffic count, ingress/egress, location (in terms of association with nearby commercial properties, such as anchored or un-anchored strip centers), shape, size, topography, visibility, and zoning. He rated the comparable properties as inferior, equal, or superior to the subject parcel for each characteristic. *Williamson testimony; Resp't Exs. 3(a), 3(c)–3(d).*

26. After applying his qualitative adjustments, Williamson determined that three of the comparable properties were superior to the subject parcel, one was inferior, and two were

equal. He ultimately reached his opinion that the subject parcel's land was worth $501,800 by taking the median of the time-adjusted sale prices ($10.57/sq. ft.) for the properties that he judged to be inferior or equal to the subject parcel and multiplying that value by the subject parcel's total area. *Williamson testimony; Resp't Ex. 3(a)*.

27. Williamson testified as follows on cross examination:

- With the exception of the ethics rule and code of conduct, he did not necessarily complete his valuation opinion in conformance with Uniform Standards of Professional Appraisal Practice ("USPAP"). He did not conform to the parts of USPAP that apply to appraisers.
- He did not use the income approach because he was not provided with any income information for the subject parcel and there was more data available for the sales-comparison approach. When asked whether the parcel was used to produce income, he responded that he was unsure whether it was leased.
- He did not confirm any information with the parties to his comparable sales, such as whether the parties were related, whether there were special considerations, or how long the properties were on the market. He instead simply looked at the sales disclosure forms, or where those forms were not available, at documents containing information that was taken from those forms. On re-direct, he testified that the DLGF does not require assessors to contact the parties to a sale. The sales disclosure form asks questions that relate to the sale's validity, and the parties must complete and sign the form under oath.
- His six comparable properties are typically shaped lots that are more conducive to new development than the subject property, which makes them more desirable.
- A warranty deed for the adjacent Taco Bell parcel shows that the subject parcel is burdened by a non-exclusive perpetual easement for the benefit of the Taco Bell parcel. The easement permits vehicular parking, driveway facilities, a drive-through lane, a menu board, garbage enclosures, pedestrian traffic, and underground utilities. With limited exceptions, no barriers to pedestrian or vehicular traffic can be built on the subject parcel. Thus no buildings can be constructed on the parcel.

Williamson testimony.

28. Despite Yum's argument that the subject parcel is a vacant lot that cannot be compared to properties that were bought to construct restaurants, the parcel supports and provides access to a high-performing fast-food restaurant. Indeed that restaurant is part of the property that benefits from the easement on the subject parcel. *Rogers argument.*

B. Summary of Yum's case

29. Indiana Code § 6-1.1-15-18 allows parties to offer evidence of comparable properties' assessments to prove the market value-in-use of a property under appeal. The 2012 assessment for one of Williamson's comparable properties—1414 Apple Glen Boulevard—supports a value for the subject parcel that is much closer to its 2011 assessment of $284,900 than to its inflated 2012 assessment. *Ehinger argument.*

30. In any case, the Board should not give Williamson's sales-comparison analysis any weight. One of his sales occurred after the March 1, 2012, assessment date, which violates a basic appraisal principle. Another sale occurred eight years before the assessment date, which is too remote to provide a reliable indication of value. Williamson also failed to confirm important information about the sales, such as the sale prices, whether the parties were typically motivated, how long the properties were exposed to the market, and whether the properties were sold with any easements or other restrictions on their use. *Ehinger argument*.

31. Finally, because Williamson's comparable properties were bought for uses different from the subject parcel's current use, they cannot be used to show its value. A property's market value-in-use is defined as the value for its current use as reflected by the utility received by the owner or by a similar user from the property. In each sale that Williamson relied on, the new owner constructed a building after buying the property. The Tax Court has recognized that developing a vacant lot into an income-producing property represents a change in the property's use. *Ehinger argument (citing Aboite Corporation v. State Board of Tax Commissioners,* 762 N.E.2d 254 (Ind. Tax Ct. 2001)). By contrast, the subject parcel has remained vacant land with minor improvements.

Williamson himself acknowledged that it is subject to a perpetual easement preventing any buildings from being constructed on it. *Ehinger argument*; *Pet'r Ex. A*.

Discussion

A. Burden of Proof

32. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that his property's assessment is wrong and what its 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). Indiana Code § 6-1.1-15-17.2, however, shifts the burden of proof to the assessor in certain circumstances, including where the assessment under appeal represents an increase of more than 5% over the same property's assessment for the previous year. *See* I.C. § 6-1.1-15-17.2 (2014).

33. Yum filed a motion asking the Board to rule in advance of the hearing that the Assessor had the burden of proof on grounds that the subject parcel's assessment increased from $298,100 to $486,800 between 2011 and 2012. The Board granted the motion. At the hearing, the Assessor agreed that she had the burden of proof.[2]

B. Analysis

34. The Assessor did not meet her burden of proof. The Board reaches this conclusion for the following reasons:

    a. Indiana assesses real property based on its true tax value, which the 2011 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, for the property." 2011 REAL PROPERTY ASSESSMENT MANUAL 2 (incorporated by reference

[2] The Board's determination was based on Ind. Code § 6-1.1-15-17.2 as it existed at the time. Following the hearing, the Indiana General Assembly passed P.L. 97-2014, which became effective with the Governor's signature on March 25, 2014. That act amends Ind. Code § 6-1.1-15-17.2 in several respects, none of which affects the Board's determination that the Assessor has the burden of proof in this appeal.

at 50 IAC 2.4-1-2). Three standard approaches are used to determine market value-in-use—the cost, sales-comparison, and income approaches. *Id.* Those approaches and the reconciliation of values under them "shall be applied in accordance with generally recognized appraisal principles." *Id.* In an assessment appeal, a party may offer "[a]ny evidence relevant to the true tax value of the property as of the assessment date. . . ." *Id.* at 3. Although not required, a USPAP-compliant market-value-in-use appraisal often will be probative. *See Kooshtard Property VI, LLC v. White River Township Assessor*, 836 N.E.2d 501, 506 n.6 (Ind. Tax Ct. 2005).

b. The Assessor relied on Williamson's analysis of the sales of six properties that he described as being comparable to the subject property. The sales-comparison approach "estimates the total value of the property directly by comparing it to similar, or comparable, properties that have sold in the market." MANUAL at 2. For such an analysis to be probative, however, it must comply with generally accepted appraisal principles. The Board therefore looks more closely both at Williamson's analysis and at Yum's criticisms of it.

c. Williamson followed the sales-comparison approach in form, if not always in substance. He identified vacant properties that were generally similar to the subject property in terms of characteristics that tend to affect value. For example, he compared average daily traffic counts for the roads bordering the properties and the quality of access to the properties. Both those factors likely affect the comparability of the properties. The same is true for other characteristics he examined, such as zoning and topography.

d. Williamson qualitatively adjusted each property's sale price by rating the property as superior, inferior, or equal to the subject parcel for each element of comparison. He then determined an overall rating for the property. But Williamson did not explain how he arrived at his overall ratings. For example, he did not describe the relative significance of his various elements of comparison.

e. He also overlooked an important factor that likely affects the subject parcel's market value-in-use—it is burdened by an easement that prohibits any building being constructed on it. Williamson admitted that he did not know whether any of his comparable properties were burdened by similar restrictions on their use. It is unlikely that they were; the buyers all built restaurants after they bought the properties.

f. Nonetheless, Williamson did not feel that the restrictions were significant. As he testified, the subject parcel is not used independently but rather as part of the operations of the Taco Bell restaurant on an adjoining parcel. It is not entirely clear whether that is an accurate characterization—the Assessor offered little information about the Taco Bell parcel. For example, it is unclear whether the same entity owns both parcels. But if one takes Williamson's characterization that the parcels are operated together as essentially one property at face value, the subject parcel's value cannot easily be divorced from the market value-in-use of the larger property as a whole. Yet Williamson sought to value the subject parcel independently of the rest of the property.

g. Granted, Yum may have steered Williamson in that direction by appealing only the subject parcel's assessment and not the Taco Bell parcel's assessment. But that does not change how the subject parcel was being used,[3] and the Assessor might have presented both properties as a single economic unit for valuation purposes.

h. Questions about easements and the relationship between parcels aside, Williamson's failure to investigate the sales that he used in his analysis further detracts from the reliability of his valuation opinion. At most, Williamson consulted either sales disclosure forms or other records that reflect sale prices taken from those forms. He did not confirm the sales with the parties or brokers or otherwise investigate the circumstances surrounding the sales. For example, he had no idea about the extent to which the properties were exposed to the market. Indeed, Williamson gave little assurance that he followed generally accepted appraisal principles in forming his

[3] Again, this takes Williamson's characterization of the parcels' relationship at face value.

valuation opinion. When asked if he complied with USPAP, Williamson replied only that he followed USPAP's ethics rule and code of conduct but not the provisions that apply to appraisers.

i. Taken as a whole, Williamson's valuation opinion is too unreliable to be probative of the subject parcel's market value in use. The only other evidence that the Assessor offered was Williamson's testimony that the parcel was assessed using a land rate taken from a study performed by MAI appraisers. But he offered no details about how the appraisers reached their conclusions or how those conclusions apply to the subject parcel. His vague testimony about that land study therefore lacks probative value.

j. Because the Assessor offered no probative evidence to show the subject parcel's market value-in-use, she failed to meet her burden of proving that its 2012 assessment was correct. That assessment must therefore be reduced to the previous year's level of $298,100.

SUMMARY OF FINAL DETERMINATION

35. Because the subject parcel's assessment for 2012 increased by more than 5% over the previous year's value, the Assessor had the burden of proof. The Assessor failed to meet her burden and the assessment must therefore be reduced to its 2011 level of $298,100.

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>.