

INDIANA BOARD OF TAX REVIEW
Small Claims
Final Determination
Findings and Conclusions

Petition No.: 45-012-09-1-4-00001
Petitioner: Novogroder/Lowell, LLC
Respondent: Lake County Assessor
Parcel No.: 45-20-26-226-001.000-012
Assessment Year: 2009

The Indiana Board of Tax Review (the Board) issues this determination in the above matter, and finds and concludes as follows:

Procedural History

1. The Petitioner initiated the 2009 assessment appeal with the Lake County Property Tax Assessment Board of Appeals (PTABOA) on November 6, 2010.
2. The PTABOA issued notice of its decision on April 2, 2012.
3. The Petitioner filed the Form 131 petition with the Board on May 17, 2012. The Petitioner elected the Board's small claims procedures.
4. The Board issued a notice of hearing to the parties dated August 16, 2013.
5. Administrative Law Judge (ALJ) Ellen Yuhan held the administrative hearing on September 16, 2013. She did not inspect the property.
6. Petitioner's tax representative Rex Hume, and Lake County Hearing Officer Debra Johnson were sworn as witnesses.

Facts

7. The property under appeal is a 25,000 square-foot commercial retail center located at 2970 E. 181st Place in Lowell.
8. The PTABOA determined the 2009 assessed value is \$77,000 for the land and \$697,700 for the improvements (total \$774,700).
9. The Petitioner requested an assessed value of \$77,000 for the land and \$554,400 for the improvements (total \$631,400).

Contentions

10. Summary of the Petitioner's case:

- a. The property is a 25,000 square-foot strip center at the southeast corner of Interstate 65 and State Road 2. It was built by the Petitioner, who is primarily a developer and investor in this type of property. *Hume testimony; Pet'r Ex. 1.*
- b. In 2006, when the economy was booming, the shell of the building was built and ready for build-out to assume tenants at the end of 2006 or early 2007. The Petitioner negotiated with the state highway department and the Town of Lowell for a water line extension to the property. The highway department promised the Petitioner an easement to run a water line under I-65. After a couple of years without having access to water, the Petitioner installed its own water system. The system was approved by the Indiana Department of Environmental Management (IDEM) in February, 2010. *Hume testimony; Pet'r Exs. 1 and 5.*
- c. From late 2006 until early 2010, the building was vacant, with minimal build-out. The property had heat and lights sufficient to provide security and protection from the elements. The first build-out for a tenant was completed in 2010 for a Subway franchise, which occupies one-fourteenth of the total area. *Hume testimony; Pet'r Exs. 1 and 6; Resp Ex. 12.*
- d. True tax value is defined as the market value-in-use of a property for its current use, as reflected by the utility received by its owner or a similar user, from the property. While the building was unfinished, vacant, and ineligible for occupancy permits for all of 2007, 2008, and 2009, there was no utility. In fact, there was negative utility due to the amount of expenses and lost income. The Petitioner did not receive income until 2010. *Hume testimony; Pet'r Exs. 1, 4, and 7.*
- e. Under the true tax value definition, it is difficult to see how the improvements have any value. If they do, the value should not be different from the preceding year's assessment because there was no change to the property. The increase in assessed value from 2008 to 2009 is unwarranted. *Hume testimony; Pet'r Ex. 1.*
- f. The property is also erroneously assessed as having fire-proof steel framing, but it is actually ordinary steel. *Hume testimony; Pet'r Ex. 1.*
- g. One corner of the building was occupied on March 10, 2010, but that was a year after the assessment date under appeal. That occupancy and build-out is not relevant to the 2009 assessment. *Hume testimony; Pet'r Exs. 1 and 6.*
- h. The Petitioner's representative believed there was an agreement between the parties that the Respondent would carry the 2008 assessed value forward to 2009. That agreement was not reduced to writing. The Petitioner's representative believed the

matter was settled and did not object to values proposed during the PTABOA hearing. *Hume testimony; Johnson testimony; Pet'r Ex. 3; Resp Ex. 8.*

11. Summary of the Respondent's case:

- a. A prudent investor should have noticed the lack of water before he started building the improvement. The property sat idle during the beginning of 2006 when the permits were issued. For 2007, the Respondent measured the building and assessed it as utility/storage, being 50% complete. Each year that the building was inspected, the percentage of completion changed. Between March 1, 2009, and March 1, 2010, the building went from 65% to 85% complete. It was fully completed by March 1, 2010. The photograph taken on March 9, 2010, clearly shows the Subway store was open. *Johnson testimony; Resp Ex. 6.*
- b. The Petitioner argues that the 2009 value should not be based on 85% completion, but had no objection to a 50% value for 2007 when the shell of the building was assessed. The Petitioner also did not object to the increase to 65% completion in 2008. For 2009, the percentage of completion was increased to 85%. The Petitioner would like the 2009 assessed percentage of completion changed, despite the fact that the building was 100% complete and open for business on March 9, 2010. *Johnson testimony.*
- c. The appeals were settled. During the PTABOA hearing, the Petitioner's representative agreed to the Respondent's recommended values. As a result, the PTABOA's final assessment determinations for 2007, 2008, and 2009 were processed. *Johnson testimony; Resp Exs. 7 and 8.*

Record

12. The official record of this matter contains the following:

- a. The Form 131 petition,
- b. A digital recording of the hearing,
- c. Petitioner Exhibit 1 – Discussion of the issues,
Petitioner Exhibit 2 – Power-of-Attorney issued to Innovative Property Tax Solutions on May 10, 2013,
Petitioner Exhibit 3 – Form 131 with attachments,
Petitioner Exhibit 4 – 2009 Income and expense statement,
Petitioner Exhibit 5 – Water system approval dated February 17, 2010,
Petitioner Exhibit 6 – March 10, 2010 statement of occupancy,
Petitioner Exhibit 7 – 2002 REAL PROPERTY ASSESSMENT MANUAL, pg 2,

Respondent Exhibit 1– Denial of continuance, dated September 12, 2013,
Respondent Exhibit 2 – September 12, 2013 Continuance request and Power-of-Attorney for Innovative Property Tax Solutions,

Respondent Exhibit 3 – IBTR Notice of Hearing dated August 16, 2013,
Respondent Exhibit 4 – Request for preliminary conference,
Respondent Exhibit 5 – Property record card for the subject property,
Respondent Exhibit 6 – March 9, 2010 Photograph of subject property,
Respondent Exhibit 7 – 2009 Form 115 dated April 2, 2012,
Respondent Exhibit 8 – Hearing Officer’s letter of recommendation dated March 16, 2013, and minutes from the PTABOA meeting of March 28, 2012,
Respondent Exhibit 9 – Form 131 filed by Rex D. Hume, Uzelac & Assoc.,
Respondent Exhibit 10 – Letter from Mr. Novogroder to Lake County Planning Commission Director,
Respondent Exhibit 11 – Letter from Apple Valley Utilities to Lake County Planning Commission Director,
Respondent Exhibit 12 – Certificate of Occupancy for Subway dated February 1, 2010,
Respondent Exhibit 13 – Certificate of Occupancy for Bedding Experts dated June 23, 2010,
Respondent Exhibit 14 – Certificate of Occupancy for Tiquila Si dated November 10, 2010,

Board Exhibit A – Form 131 petition,
Board Exhibit B – Notice of Hearing dated August 16, 2013,
Board Exhibit C – Hearing sign-in sheet,

d. These Findings and Conclusions.

Burden of Proof

13. Generally, a taxpayer seeking review of an assessing official’s determination has the burden of proving an assessment is wrong and what a 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). Nevertheless, the Indiana General Assembly enacted a statute that in some cases shifts the burden of proof:

This section applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal increased the assessed value of the assessed property by more than five percent (5%) over the assessed value determined by the county assessor or township assessor (if any) for the immediately preceding assessment date for the same property. 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.

14. In this case, the property's assessed value decreased from 2008 to 2009. Therefore, Ind. Code § 6-1.1-15-17.2 does not apply. The Petitioner has the burden of proof.

Analysis

15. The Petitioner failed to make a case.
- a. Real property is assessed based on its "true tax value," which means "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." Ind. Code § 6-1.1-31-6(c); 2002 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.3-1-2). There are three generally accepted techniques to calculate market value-in-use: the cost approach, the sales comparison approach, and the income approach. The primary method for assessing officials to determine market value-in-use is the cost approach. *Id.* at 3. Indiana promulgated Guidelines that explain the application of the cost approach. REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 - VERSION A (incorporated by reference at 50 IAC 2.3-1-2). The value established by use of the Guidelines, while presumed to be accurate, is merely a starting point. A taxpayer is permitted to offer evidence relevant to market value-in-use to rebut that presumption. Such evidence may include actual construction costs, sales information regarding the subject or comparable properties, appraisals, and any other information compiled in accordance with generally accepted appraisal principles. MANUAL at 5.
 - b. Regardless of the method used, a party must explain how its evidence relates to 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 Twp. Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). For a 2009 assessment, the valuation date was January 1, 2008. 50 IAC 21-3-3.
 - c. The income approach is "used for [valuing] income producing properties that are typically rented. It converts an estimate of income, or rent, the property is expected to produce into value through a mathematical process known as capitalization." MANUAL at 3. In valuing a property under the income approach, it is appropriate to consider the historic and projected income and expense data of the property in question. It is also necessary to consider that same kind of data from other comparable properties in order to make accurate, realistic projections about the income stream a property should be expected to produce. Where the income and expense data for the subject property is out of step with what the market data shows, generally accepted appraisal principles require further examination and analysis. For example, considering both types of income and expense data helps to protect against distortions and inaccurate value estimates that might be caused by extraneous factors (such as bad management or poor business decisions) that have nothing to do with the inherent value of a property. *See Indiana MHC, LLC v. Scott County Assessor*, 987 N.E.2d 1182, 1186 (Ind. Tax Ct. 2013).

- d. The Petitioner submitted a list of expenses showing the property operated at a loss, but did not present an income approach with market information that conforms to generally accepted appraisal principles to prove value as of January 1, 2008.
- e. Although the Petitioner contends the 2009 value should be the same as for 2008, each assessment and each tax year stands alone. *See Quality Stores, Inc. v. State Bd. of Tax Comm'rs*, 740 N.E.2d 939, 942 (Ind. Tax Ct. 2000).
- f. Finally, even if the property record card contains an error concerning the framing, merely contesting the methodology used to compute the assessment misses the mark as well. *Eckerling v. Wayne County Assessor*, 841 N.E.2d at 674, 677-78 (Ind. Tax Ct. 2006). Rather, to successfully make a case, the Petitioner needed to show the assessment does not accurately reflect market value-in-use. *Id.*; *see also P/A Builders & Developers, LLC v. Jennings County Assessor*, 842 N.E.2d 899, 900 (Ind. Tax Ct. 2006) (explaining that proper focus is on what the correct value actually is, not on methodology). The Petitioner did not do so.
- g. The Petitioner failed to establish a prima facie case. Where the Petitioner has not supported its claims 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).

Conclusion

- 16. The Petitioner failed to make a case for any assessed value change. The Board finds for the Respondent.

Final Determination

In accordance with the above findings of fact and conclusions of law, the 2009 assessment will not be changed.

ISSUED: November 18, 2013

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>>.