

INDIANA BOARD OF TAX REVIEW

Final Determination Findings and Conclusions Lake County

Petition #: 45-001-02-1-4-00617, 45-001-02-1-4-00618, 45-001-02-1-4-00619,
45-001-02-1-4-00620, 45-001-02-1-4-00621, 45-001-02-1-4-00631,
45-001-02-1-4-00632, 45-001-02-1-4-00633, 45-001-02-1-4-00634

Petitioners: Jeffery A. & Clara Cleary

Respondent: Department of Local Government Finance

Parcel #: 001-01-39-0070-0014, 001-01-39-0070-0015, 001-01-39-0070-0016,
001-01-39-0161-0001, 001-01-39-0070-0028, 001-01-39-0070-0010,
001-01-39-0070-0011, 001-01-39-0070-0012, 001-01-39-0070-0013

Assessment Year: 2002

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 informal hearing as described in Ind. Code § 6-1.1-4-33 was held on February 17, 2004, in Lake County, Indiana. The Department of Local Government Finance (the DLGF) determined that the Petitioners' property tax assessment for the subject properties is \$8,700 for parcel # 001-01-39-0070-0014 (Lot 14), \$8,700 for parcel # 001-01-39-0070-0015 (Lot 15), \$9,100 for parcel # 001-01-39-0070-0016 (Lot 16), \$49,200 for parcel # 001-01-39-0161-0001 (Lot 1), \$92,300 for parcel # 001-01-39-0070-0028 (Lot 28), \$5,200 for parcel # 001-01-39-0070-0010 (Lot 10), \$5,200 for parcel # 001-01-39-0070-0011 (Lot 11), \$17,400 for parcel # 001-01-39-0070-0012 (Lot 12), and \$8,700 for parcel # 001-01-39-0070-0013 (Lot 13), and notified the Petitioners on March 31, 2004.
2. The Petitioners filed a Form 139L for each parcel on April 30, 2004.
3. The Board issued a notice of hearing to the parties for each parcel dated June 28, 2005.
4. Special Master Peter Salveson held a hearing on July 28, 2005, in Crown Point, Indiana.

Facts

5. The subject properties are located at 4453, 4455, 4457, 4459, 4461, 4469, 4473 and 4520, Hayes Street and 4472 Grant Street, Gary, in Calumet Township.
6. The subject properties include seven contiguous parcels and two additional parcels assessed as commercial land with various improvements.
7. The Special Master did not conduct an on-site visit of the property.
8. The DLGF determined the assessed values of the parcels to be \$5,000 for the land and \$3,700 for the improvements, for a total assessed value of \$8,700 for Lot 14; \$5,000 for the land and \$3,700 for the improvements, for a total assessed value of \$8,700 for Lot 15; \$5,000 for the land and \$4,100 for the improvements, for a total assessed value of \$9,100 for Lot 16; \$33,000 for the land and \$16,200 for the improvements, for a total assessed value of \$49,200 for Lot 1; \$29,500 for the land and \$62,800 for the improvements, for a total assessed value of \$92,300 for Lot 28; \$5,000 for the land and \$200 for the improvements, for a total assessed value of \$5,200 for Lot 10; \$5,000 for the land and \$200 for the improvements, for a total assessed value of \$5,200 for Lot 11; \$5,000 for the land and \$12,400 for the improvements, for a total assessed value of \$17,400 for Lot 12; and \$5,000 for the land and \$3,700 for the improvements, for a total assessed value of \$8,700 for Lot 13.
9. The Petitioners requested the following assessed values: \$1,500 for the land and \$0 for the improvements, for a total assessed value of \$1,500 for Lot 14; \$1,500 for the land and \$0 for the improvements, for a total assessed value of \$1,500 for Lot 15; \$1,500 for the land and \$0 for the improvements, for a total assessed value of \$1,500 for Lot 16; \$15,000 for the land and \$16,200 for the improvements, for a total assessed value of \$31,200 for Lot 1; \$15,000 for the land and \$62,800 for the improvements, for a total assessed value of \$77,800 for Lot 18; \$1,500 for the land and \$0 for the improvements, for a total assessed value of \$1,500 for Lot 10; \$1,500 for the land and \$0 for the improvements, for a total assessed value of \$1,500 for Lot 11; \$1,500 for the land and \$12,000 for the improvements, for a total assessed value of \$13,500 for Lot 12; and \$1,500 for the land and \$3,000 for the improvements, for a total assessed value of \$4,500 for Lot 13.
10. Jeffrey A. Cleary, one of the owners of the subject parcels, Melvin J. Cleary, a witness for the Petitioner, and Phillip E. Raskosky, II, representing the DLGF, appeared at the hearing and were sworn as witnesses. Jon A. Schmaltz, Attorney, represented the Petitioners at the hearing.

Issues

11. Summary of Petitioners' contentions in support of an alleged error in the assessment:

- a) The Petitioners contend that some of the parcels at issue in this appeal have no access to sewer, water, electricity and gas. *Cleary testimony; Petitioner Exhibits 2 and 5.*
- b) The Petitioners also contend that all of the subject properties except one are zoned residential and should be valued as such even though they are used for commercial use. *Cleary testimony.* The Petitioners argue that a fair market in exchange value would be negatively impacted by potential use restrictions resulting from the residential zoning in place. *Id.* In addition, due to zoning restrictions, according to the Petitioners, only two of the parcels meet the current zoning requirements for residential construction. *Id.* The Petitioners request that the subject properties be valued as residential land. *Id.*
- c) Finally, the Petitioners contend that the area surrounding the subject parcels has suffered such severe and widespread economic depression that the value of the subject parcels is negatively affected. The Petitioners testified that no parcels in the immediate surrounding area have experienced new construction or have been sold to purchasers intending to construct new buildings. *Schmaltz Argument*

12. Summary of Respondent's contentions in support of the assessment:

- a) The Respondent testified that the availability of utilities would not affect how the land was valued for purposes of the assessment. *Raskosky testimony.*
- b) The Respondent also contends that even though the subject properties are zoned for residential use, they are currently used for commercial purposes and were properly valued as such. *Raskosky testimony.*
- c) Finally, the Respondent argues that the subject properties were valued in use as commercial properties and that the land values were given adjustments where appropriate for being contiguous parcels and for being used as a single property. *Raskosky testimony.*

Record

13. The official record for this matter is made up of the following:

- a) The Petition,
- b) The tape recording of the hearing labeled Lake County 1917,
- c) Exhibits:

Petitioner Exhibit 1: Form 139L Petitions,
Petitioner Exhibit 2: Summary of Petitioner's Arguments,
Petitioner Exhibit 3: Property record cards,
Petitioner Exhibit 4: Plat map,

Petitioner Exhibit 5: Zoning information¹,

For parcel numbers 001-01-39-0070-0014, 001-01-39-0070-0015,
001-01-39-0070-0016, 001-01-39-0070-0012,
001-01-39-0070-0028

Respondent Exhibit 1: Subject property record card,
Respondent Exhibit 2: Subject photograph,
Respondent Exhibit 3: Incremental/Decremental Land Summary,

For parcel numbers 001-01-39-0161-0001, 001-01-39-0070-0010

Respondent Exhibit 1: Subject property record card,
Respondent Exhibit 2: Subject photographs,
Respondent Exhibit 3: Incremental/Decremental Land Summary,
Respondent Exhibit 4: Plat map,

For parcel numbers 001-01-39-0070-0013, 001-01-39-0070-0011

Respondent Exhibit 1: Subject property record card,
Respondent Exhibit 2: Incremental/Decremental Land Summary,

Board Exhibit A: Form 139L Petition,
Board Exhibit B: Notice of Hearing,
Board Exhibit C: Sign-In Sheet,

d) These Findings and Conclusions.

Analysis

14. The most applicable governing cases are:

- a) A Petitioner seeking review of a determination of an assessing official has the burden to establish a prima facie case proving that the current assessment is incorrect, and specifically what the correct assessment would 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).
- b) In making its case, the taxpayer must explain how each piece of evidence is relevant to the requested assessment. *See Indianapolis Racquet Club, Inc. v. Washington Twp Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004) (“[I]t is the taxpayer's duty to walk the Indiana Board . . . through every element of the analysis”).
- c) Once the Petitioner establishes a prima facie case, the burden shifts to the assessing official to rebut the Petitioner’s evidence. *See American United Life Ins. Co. v.*

¹ The Special Master requested documentation to support the Petitioners’ claims concerning the zoning.

Maley, 803 N.E.2d 276 (Ind. Tax Ct. 2004). The assessing official must offer evidence that impeaches or rebuts the Petitioner’s evidence. *Id.*; *Meridian Towers*, 805 N.E.2d at 479.

15. The Petitioners failed to provide sufficient evidence to support the Petitioners’ contentions. This conclusion was arrived at because:
- a) The Petitioners contend that all but one of the subject properties are zoned R-3 and should be assessed as residential land. The Petitioners further contend that due to the size of the R-3 parcels they are unbuildable. The Petitioners claim that water and sewer are not available to all of the properties and that the location of the parcels has a negative impact on the subject properties’ value. In support of their contentions, the Petitioners presented property record cards for the subject properties, a plat map, and a zoning map. *Petitioner Exhibits 3, 4 and 5.*

Zoning

- b) The Petitioners contend that the properties are zoned residential and that the land should be valued accordingly. The Petitioners’ zoning maps show that two of the subject properties, 001-01-39-0161-0001 located at 4472 Grant Street and 001-01-39-0070-0028 located at 4520 Hayes Street, are zoned B-3. The other seven parcels are contiguous and zoned R-3. The Respondent argued that the properties are used for commercial purposes and were valued correctly as such.
- c) The 2002 Real Property Assessment Manual (“Manual”) defines the “true tax value” of real estate as “the market value-in-use of a property for its current use, as reflected by the utility received by the owner or similar user, from the property.” 2002 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.3-1-2). Here, the properties that are zoned R-3 are used as part of a commercial enterprise. The Petitioners testified that fencing and asphalt are present on the parcels. Further, all of the subject parcels are located in neighborhood ‘00197’, which is described as “commercial property located in residential/rural areas in Calumet Township.” Finally, all of the parcels zoned R-3 have a negative 74% influence factor applied for the parcels being contiguous parcels with a single use. The Petitioners failed to show an error in the assessment.
- d) Even if the Respondent’s failure to assess the subject properties as residential was in error, however, the Petitioners failed to show that the assessment was not a reasonable measure of true tax value. *See* Ind. Admin. Code tit. 50, r.2.3-1-1(d) (2002 Supp.) (“failure to comply with the ... Guidelines ... does not in itself show that the assessment is not a reasonable measure of ‘True Tax Value[.]’”). The Petitioners have presented no market evidence to show that the assessment is not a reasonable measure of the property’s true tax value and the Petitioners’ arguments regarding a strict application of the GUIDELINES are not enough to rebut the presumption that the assessment is correct. *See Eckerling v. Wayne Township Assessor*, 841 N.E.2d 764 (Ind. Tax Ct. 2006) (“Therefore, when a taxpayer chooses

to challenge an assessment, he or she must show that the assessor's assessed value does not accurately reflect the property's market value-in-use. Strict application of the regulations is not enough to rebut the presumption that the assessment is correct.”) Thus, the Petitioners must show through the use of market-based evidence that the assessed value does not accurately reflect the property’s market value-in-use. Here, the Petitioners did not. Therefore, the Petitioners have failed to raise a prima facie case. *See Eckerling*, (“In challenging their assessment, the Eckerlings have offered [no] market value-in-use evidence. Rather, they have focused strictly on the Assessor's methodology. The Eckerlings have not shown, however, that the Assessor's methodology resulted in an assessment that failed to accurately reflect their property's market value-in-use. Accordingly, the Court cannot say that the Eckerlings presented a prima facie case that their assessment was in error.”).

Negative Influence Factors

- e) The Petitioners also contend that not all of the subject properties have water, sewer and gas available to them as utilities. *Cleary testimony; Petitioner Exhibits 1-5*. Further, the Petitioners allege that the properties zoned residential are too small to be developed. *Id.*
- f) Generally, land values in a given neighborhood are determined through the application of a Land Order that was developed by collecting and analyzing comparable sales data for the neighborhood and surrounding areas. *See Talesnick v. State Bd. of Tax Comm'rs*, 693 N.E.2d 657, 659 n. 5 (Ind. Tax Ct. 1998). However, properties often possess peculiar attributes that do not allow them to be lumped with each of the surrounding properties for purposes of valuation. The term "influence factor" refers to a multiplier “that is applied to the value of land to account for characteristics of a particular parcel of land that are peculiar to that parcel.” REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 - VERSION A, (incorporated by reference at 50 IAC 2.3-1-2) (the GUIDELINES), glossary at 10. A Petitioner has the burden to produce "probative evidence that would support an application of a negative influence factor and a quantification of that influence factor." *See Talesnick v. State Bd. of Tax Comm'rs.*, 756 N.E.2d 1104, 1108 (Ind. Tax Ct. 2001).
- g) Here the Petitioners allege that the properties individually were too small to build upon and some properties did not have water, sewer and gas lines available to them. While a property’s lack of utilities and zoning restrictions may be relevant to the issue of whether a negative influence factor should apply here, the Petitioners failed to show how this condition would impact the market value-in-use of the subject property, or show what the actual market value of the property is. *See Talesnick*, 756 N.E.2d at 1108. The Respondent testified that all of the parcels zoned R-3 have a negative 74% influence factor applied due to the size and contiguous nature of the properties. In addition, the parcels together are used for a single purpose. The Respondent further alleged that the parcels without utilities would not have been valued differently. Therefore, according to the Respondent, there is no inequity among assessments as a result of the property record card showing that the utilities

are available when they may not be. Further, we note that even though the individual parcels may not be large enough to build upon or have limited utilities available to them, the Petitioners own multiple parcels. The Petitioners entire property at issue in this appeal meets the zoning requirements for construction and has utility access as a whole. Thus, the Petitioners have failed to raise a prima facie case that any additional or different negative influence factor should apply to the properties

External Obsolescence

- h) Finally, the Petitioners contend that external obsolescence exists due to severe and widespread economic depression in the area of the subject properties.
- i) The GUIDELINES provide for the determination of the replacement cost new of structures through reference to cost tables. The cost tables have been developed from objectively verifiable data by drawing cost information from publications of Marshall & Swift, L.P. *Id.* However, the calculation of cost only sets the upper limit of value for improvements. *Id.* The GUIDELINES also require that accrued depreciation be accounted for in valuing an improvement. GUIDELINES, app. F at 4. Under the GUIDELINES, depreciation consists of physical depreciation, functional obsolescence and external obsolescence. *Id.* Physical depreciation is a loss in value caused by building materials wearing out over time. *Id.* Functional obsolescence is a loss in value caused by inutility within the improvement. *Id.* External obsolescence represents a loss in value caused by an influence outside of the property's boundaries. *Id.* The GUIDELINES account for normal obsolescence through the assignment of typical life expectancies and structure condition classifications. GUIDELINES, app. F at 4 – 7. This normal depreciation includes both typical physical deterioration and typical obsolescence. *Id.* at 8. Any additional loss in value from atypical forms of obsolescence will be referred to as abnormal obsolescence and is estimated separately from normal depreciation. *Id.*
- j) External obsolescence may be temporary or permanent. Permanent obsolescence is caused by the subject property's location to an encroaching land use. Examples of this would be location in proximity to an environmental hazard, inharmonious land uses surrounding the property, and the absence of zoning or land use controls. REAL PROPERTY ASSESSMENT GUIDELINES, VERSION A, app. F at 13 (incorporated by reference at 50 IAC 2.3-1-2). Market data must be used in estimating external obsolescence. Therefore, it becomes necessary to isolate the effect that external obsolescence has on land value separately from building value. Its effect on land value is demonstrated in the land value assigned to the subject property. *Id.*
- k) However, for a Petitioner to show that he is entitled to receive an adjustment for obsolescence, the Petitioner must both identify the causes of obsolescence he believes is present in his improvement and also quantify the amount of obsolescence he believes should be applied to its property. *Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230, 1241 (Ind. Tax Ct. 1998). Thus, the Petitioner must present probative evidence that the causes of obsolescence identified by the Petitioner are resulting in

an actual loss in value to its property. *See Miller Structures, Inc. v. State Bd. of Tax Comm'rs*, 748 N.E.2d 943, 954 (Ind. Tax Ct. 2001). Further, the Petitioner's quantification of the amount of obsolescence must be converted into a percentage reduction and applied against the structure's overall value. *See Clark*, 694 N.E.2d at 1238. It is not sufficient for a Petitioner to merely identify random factors that may cause the property to be entitled to an obsolescence adjustment. The Petitioner must explain how those purported causes of obsolescence cause the property's improvements to suffer an actual loss in value. *See Champlin Realty Co. v. State Bd. of Tax Comm'rs*, 745 N.E.2d 928, 936 (Ind. Tax Ct. 2001), *review denied*.

- l) Here, the Petitioners raised the issue of economic depression in the area of the subject property. However, the Petitioners provided no evidence of such economic depression other than testimony that no new construction had occurred. This is insufficient to show that external obsolescence exists at the subject property. Further, the Petitioners made no attempt to quantify the external obsolescence that the Petitioners allege exists on the subject property. Because "the Petitioner must both identify the causes of obsolescence he believes is present in his improvement and also quantify the amount of obsolescence he believes should be applied to its property" (*Clark*, 694 N.E.2d at 1238), the Petitioners have failed to raise a prima facie case that the subject properties are entitled to the application of an obsolescence factor.

- m) Where the Petitioner has not supported the 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 Gov't Fin.*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003).

Conclusion

- 16. The Petitioners failed to raise a prima facie case. The Board finds in favor of Respondent.

Final Determination

In accordance with the above findings and conclusions the Indiana Board of Tax Review now determines that the assessment should not be changed.

ISSUED: _____

Commissioner,
Indiana Board of Tax Review

IMPORTANT NOTICE

- APPEAL RIGHTS -

You may petition for judicial review of this final determination pursuant to the provisions of Indiana Code § 6-1.1-15-5. The action shall be taken to the Indiana Tax Court under Indiana Code § 4-21.5-5. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. You must name in the petition and in the petition's caption the persons who were parties to any proceeding that led to the agency action under Indiana Tax Court Rule 4(B)(2), Indiana Trial Rule 10(A), and Indiana Code § 4-21.5-5-7(b)(4), § 6-1.1-15-5(b). The Tax Court Rules provide a sample petition for judicial review. The Indiana Tax Court Rules are available on the Internet at <http://www.in.gov/judiciary/rules/tax/index.html>, The Indiana Trial Rules are available on the Internet at http://www.in.gov/judiciary/rules/trial_proc/index.html. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>.