

REPRESENTATIVE FOR PETITIONER:

Matthew J. Ehinger, Attorney

REPRESENTATIVE FOR RESPONDENT:

Robert W. Metz, Director of Appeals, Lake County

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Curtis James Investments)	Petition No.:	45-036-08-1-4-00003
(Applesauce-Applebee's))		
)		
Petitioner,)		
)		
)	Parcel No.:	45-11-16-101-009.000-036
v.)		
)		
Lake County Assessor,)		
)	County:	Lake
)		
Respondent.)	Assessment Year:	2008

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

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

PROCEDURAL HISTORY

1. The Petitioner initiated its assessment appeal by written notice to the Lake County Property Tax Assessment Board of Appeals (the “PTABOA”) on October 13, 2009.
2. The PTABOA failed to hold a hearing on the Petitioner’s appeal within the statutory time frame of 180 days. *See* Ind. Code § 6-1.1-15-1(k) (“the county board shall hold a hearing on a review under this subsection not later than one hundred eighty (180) days after the date of that notice.”)
3. The Petitioner filed an appeal to the Board by filing a Form 131 petition on June 14, 2012. *See* Ind. Code § 6-1.1-15-1(o)(1) (“If the maximum time elapses under subsection (k) for the county board to hold a hearing; the taxpayer may initiate a proceeding for review before the Indiana board by taking the action required by section 3 of this chapter at any time after the maximum time elapses.”)

HEARING FACTS AND OTHER MATTERS OF RECORD

4. On May 12, 2014, the Board’s administrative law judge (the ALJ), Ellen Yuhan, held the hearing. She did not inspect the property.
5. The Petitioner offered the following exhibits:
 - Petitioner Exhibit A – Form 130 petition,
 - Petitioner Exhibit B – Form 131 petition,
 - Petitioner Exhibit C – Assessment records showing the 2007 and 2008 assessed values.
6. The Respondent offered the following exhibits:
 - Respondent Exhibit 1 – Sales analysis for the subject property, 8425 Broadway,
 - Respondent Exhibit 2 – Sales analysis for 650 W. Lincoln Highway,
 - Respondent Exhibit 3 – 2004 and 2005 sales disclosure form and property record card for the subject property,

- Respondent Exhibit 4 – Sales disclosure form and property record card for 10343 Indianapolis Blvd.,
- Respondent Exhibit 5 – Sales disclosure form and property record card for 8455 Broadway,
- Respondent Exhibit 6 – Sales disclosure form and property record card for 1620 E. Commercial,
- Respondent Exhibit 7 – Sales disclosure form and property record card for 4651 W. 61st Avenue,
- Respondent Exhibit 8 – Sales disclosure form and property record card for 771 E. 81st Place,
- Respondent Exhibit 9 – Sales disclosure form and property record card for 200 U.S Hwy. 41,
- Respondent Exhibit 10 – Sales disclosure form and property record card for 720 E. 81st Avenue,
- Respondent Exhibit 11 – Sales disclosure form, MLS listing and property record cards for 3915 Ridge Road and 3903 Ridge Road,
- Respondent Exhibit 12 – Sales disclosure form and property record card for 31 W. Lincoln Hwy.,
- Respondent Exhibit 13 – Sales disclosure form and property record card for 7876 Broadway,
- Respondent Exhibit 14 – Sales disclosure form and property record card for 9407 Wicker,
- Respondent Exhibit 15 – Sales disclosure form and property record card for 740 E. 81st Avenue,
- Respondent Exhibit 16 – Sales disclosure form and property record card for 600 81st Avenue,
- Respondent Exhibit 17 – Sales disclosure form and property record card for 1545 W. U.S. Hwy. 30,
- Respondent Exhibit 18 – Sales disclosure form and property record card for 260 E. 84th Drive,
- Respondent Exhibit 19 – Sales disclosure form and property record card for 8455 Broadway,
- Respondent Exhibit 20 – Sales disclosure form and property record card for 10343 Indianapolis Blvd.,
- Respondent Exhibit 21 – Sales disclosure form and property record card for 650 W. Lincoln Hwy.,
- Respondent Exhibit 22 – Sales disclosure form and property record card for 8239 Georgia St.,
- Respondent Exhibit 23 – Sales disclosure form and property record card for 10685 Randolph St.,
- Respondent Exhibit 24 – Map of two sold properties.

7. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits:
 - Board Exhibit A – Form 131 petition,
 - Board Exhibit B – Notice of Hearing dated March 26, 2014,
 - Board Exhibit C – Order Granting Petitioner’s Motion for Determination Concerning Burden of Proof,
 - Board Exhibit D – Notice of Appearance by Paul Jones and Matthew Ehinger,
 - Board Exhibit E – Hearing sign-in sheet.
8. The subject property is an Applebee’s Restaurant located at 650 W. Lincoln Highway, Schererville, IN.
9. For 2008, the township assessor determined the assessed value is \$443,780 for the land and \$683,700 for improvements (total \$1,127,480).
10. The Petitioner contends the Assessor has the burden of proof and if she fails to meet that burden the total assessed value should be reduced to the 2007 assessment, \$1,001,600.

OBJECTIONS

11. On May 8, 2014, the Petitioner filed a Motion to Exclude the Respondent’s Evidence, arguing the witness and exhibit list exchange was due April 21, 2014, and the document exchange was due May 5, 2014. The Petitioner claims it did not receive a formal copy of the Respondent’s witness and exhibit list until April 28, 2014, seven days past the deadline under 52 IAC 2-7-1(b)(2). The Respondent did e-mail a copy of the witness and exhibit list on April 24, 2014, which is also past the deadline. At the time the motion was submitted, the Petitioner had not received any documentary evidence from the Respondent. Counsel argues that the Petitioner would be extremely prejudiced if the Respondent is able to present evidence, testimony, and information that the Petitioner has not had the opportunity to research and investigate.

12. At the hearing the Petitioner stated it received the witness and exhibit list and the map, Respondent Exhibit 24, was attached. The Petitioner conceded to the map being admitted, objecting only to the written text on that exhibit because it is not substantiated.
13. Mr. Metz stated that all the evidence had been sent at the same time. Mr. Metz testified that he had an overnight mail receipt with a tracking number, but because it was mailed through the county mail department he does not actually have an exact date when the packet was mailed.
14. Mr. Ehinger produced the actual envelope and the documents that were included in the original mailing they received, and it consisted of four pages. Mr. Ehinger stated that those four pages were the same as the four pages e-mailed.
15. The Petitioner also objected to any testimony related to the underlying exhibits because that information would be the same thing as the actual exhibits and the Petitioner has not had time to prepare for those.¹
16. The Board's procedural rules require each party to provide all other parties a list of witnesses and exhibits at least 15 business days before a hearing and copies of its documentary evidence at least five business days before a hearing. 52 IAC 2-7-1(b). The Board may exclude evidence based on a party's failure to comply with those deadlines. 52 IAC 2-7-1(f). The ALJ sustained the objection and excluded the exhibits with the exception of Exhibit 24. In a dispute regarding the exchange of exhibits, the Board has discretion to exclude exhibits, but is not compelled to do so. As the final resolution of the matter is not affected by the conclusion, the Board ratifies the ALJ's determination.²

¹ Because the Respondent did not present any testimony, this objection is moot.

² The Board notes that the Petitioner failed to place in the record, or attach to its Motion to Exclude Respondent's Evidence, the Assessor's allegedly deficient documents. Thus, the Petitioner has impeded the Board's ability to determine whether or not the Assessor was in substantial compliance or the Petitioner was prejudiced to such a degree that exclusion is warranted.

BURDEN OF PROOF

17. 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 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). 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 is an increase of more than five percent (5%) over the assessment for the same property for the prior tax year. In calculating the change in the assessment for purposes of this section, the assessment to be used for the prior tax year is the original assessment for that prior tax year or if applicable, the assessment for that prior tax year:

- (1) as last corrected by an assessing official;
- (2) as stipulated or settled by the taxpayer and the assessing official; or
- (3) as determined by the reviewing authority.

Ind. Code § 6-1.1-15-17.2 as amended March 25, 2014.

18. The Petitioner 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 2008 assessment increased to \$1,127,580 from the 2007 assessed value of \$1,001,600. The increase is more than 5%. The Board granted the motion.

RESPONDENT'S CONTENTIONS

19. Because the Assessor's exhibits were excluded, the Respondent opted not to present any further evidence or testimony.

PETITIONER'S CONTENTIONS

20. Because the burden of proof is on the Assessor, and the Assessor has not presented any evidence, the Petitioner requests the assessed value for the 2008 assessment be reduced to the prior year's assessment of \$1,001,600. *Ehinger argument*.

ANALYSIS

21. In Indiana, assessors value real property based on the property's true tax value, which the 2002 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, from the property." MANUAL at 2. Thus, a party's evidence in a tax appeal must be consistent with that standard. *Id.* A market-value-in-use appraisal prepared according to USPAP will often 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, sales information for the subject or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.
22. Regardless of the method used to rebut an assessment's presumption of accuracy, 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. Department of Local Government Finance*, 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). For the 2008 assessment, the valuation date was January 1, 2007. 50 IAC 21-3-3.
23. Here, the Assessor's exhibits were excluded because the Assessor failed to exchange them. However, probative evidence of the value of a property does not necessarily require evidence to be documented in exhibits. But the Assessor chose not to present any testimony.

24. The Assessor did not support the accuracy of the existing assessment with any meaningful market value-in-use evidence. Because the Assessor failed to present probative evidence that the assessment is correct, the Petitioner's duty to provide substantial evidence to support a more accurate assessment 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).
25. In previous cases where the Assessor had the burden to prove the assessment is correct and the Assessor failed to carry that burden, the Board has ordered that the assessment be returned to the assessed value of the year before. In this case doing so reduces the assessed value to \$1,001,600.

CONCLUSION

26. The Respondent failed to establish a prima facie case. The Board finds in favor of the Petitioner.

FINAL DETERMINATION

In accordance with the above findings of fact and conclusions of law, the 2008 assessment must be changed to \$1,001,600.

ISSUED: October 20, 2014

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, as amended effective July 1, 2007, by P.L. 219-2007, and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required within forty-five (45) days of the date of this notice. The Indiana Tax Court Rules are available on the Internet at <<http://www.in.gov/judiciary/rules/tax/index.html>>. The Indiana Code is available on the Internet at <<http://www.in.gov/legislative/ic/code>>. P.L. 219-2007 (SEA 287) is available on the Internet at <http://www.in.gov/legislative/bills/2007/SE/SE0287.1.html>