

REPRESENTATIVE FOR PETITIONER: Douglas C. Holland, Attorney-at-Law

REPRESENTATIVE FOR RESPONDENT: Robert Ewbank, Attorney-at-Law

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Robert & Philma Kuebel,)	Petition No.:	15-016-06-1-4-00113
)		15-016-06-1-4-00114
Petitioners,)		
)	Parcel:	15-07-02-304-001.000-016
)		15-07-02-304-002.000-016
v.)		
)	Dearborn County	
Dearborn County Assessor,)	Lawrenceburg Township	
)	2006 Assessment	
Respondent.)		

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

December 18, 2008

FINAL DETERMINATION

The Indiana Board of Tax Review (Board) has reviewed the evidence and arguments presented in this case. The Board now enters its findings of fact and conclusions of law.

ISSUES

The Petitioners focused on claims that the Board should change the land classification and apply negative influence factors to reduce the assessments on their property. Those assessment methodology issues, however, are not the fundamental, determinative questions. The real issues are as follows: Did the Petitioners prove that the current assessments of \$149,900 for one parcel and \$283,200 for the other fail to accurately reflect the market value-in-use of the subject property and did they prove specifically what the correct assessment amounts should be?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HEARING FACTS AND OTHER MATTERS OF RECORD

1. The subject property is two contiguous, but separate parcels located on Eads Parkway (U.S. Highway 50). Parcel 15-07-02-304-001.000-016 is 4.995 acres of vacant, unimproved commercial land (Vacant Property). Parcel 15-07-02-304-002.000-016 is 1.03 acres of commercial land with an apartment building (Apartment Property).
2. On May 5, 2008, the Dearborn County Property Tax Assessment Board of Appeals (PTABOA) issued its determination that the 2006 assessment on the Vacant Property is \$149,900 (land only) and the 2006 assessment on the Apartment Property is a total of \$283,200 (land \$226,600 and improvements \$56,600). On May 22, 2008, the Petitioners filed a Form 131 Petition seeking the Board's review of that determination. They opted out of small claims procedures.
3. The Petitioners contend the assessed value should be \$56,250 for the Vacant Property and \$81,100 for the Apartment Property.
4. The Board's designated Administrative Law Judge, Kay Schwade, held the hearing in Lawrenceburg on September 30, 2008. She did not conduct an on-site inspection of the property.
5. Philma Kuebel, Maurice Kuebel, Aaron Durwin, Wayne House, and County Assessor Gary Hensley were sworn as witnesses and testified at the hearing.
6. The Petitioners presented the following exhibits:
 - Exhibit 1 – Proposed findings for Robert and Philma Kuebel,
 - Exhibit 2 – Aerial plat map with the subject properties highlighted in green,
 - Exhibit 4 – Property record card for the Apartment Property,
 - Exhibit 5 – Property record card for the Vacant Property,
 - Exhibit 9 – Transcript of testimony from the PTABOA hearing,
 - Exhibit 10 – Various pages from the 2002 Assessment Guidelines,
 - Exhibit 11 – Table 2-17, Influence Factors for Commercial and Industrial Land,

Exhibit 12 – Table 2-14, Categories of Commercial and Industrial Land.

7. The Respondent presented the following exhibits:
 - Exhibit 3 – Appraisal for the Apartment Property,
 - Exhibit 4 – Appraisal for the Vacant Property.
8. The following additional items are recognized as part of the record of proceedings:
 - Board Exhibit A – The 131 Petition,
 - Board Exhibit B – Notice of Hearing,
 - Board Exhibit D – Motion for Evidence.
9. The Petitioners requested to submit a brief following the hearing. The Respondent declined the opportunity to respond. The Petitioner’s brief and proposed findings were received timely. They are recognized as part of the record.

OBJECTIONS

10. The Respondent objected to Mr. House’s testimony about things a buyer would consider in deciding how much to pay for a commercial property. The Respondent argued that he was not qualified as an expert in the area of land purchasing or valuation. The Petitioners argued that Mr. House has purchased other commercial property along Highway 50 and that fact gives him experience and some expertise. Much of his testimony was simply confined to general conclusions that do not require particular expertise. The objection to Mr. House’s testimony is denied. The real question about all of his testimony is how much weight it has, not its admissibility.
11. The Petitioners objected to the admission of two appraisals of the subject property (Respondent’s Exhibits 3 and 4) because the appraiser who did them, Jeffrey Thomas, was not present to testify and be cross-examined. That point is essentially a hearsay objection.¹ The Respondent argued that the appraisals are admissible under Indiana administrative rules, which is correct. Hearsay evidence is admissible, but with significant limitations:

¹ “Hearsay” is a statement, other than one made while testifying, that is offered to prove the truth of the matter asserted. Such a “statement” can be either oral or written. These appraisals are hearsay.

Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. If the hearsay evidence is not objected to, the evidence may form the basis for a determination. However, if the evidence: (1) is properly objected to; and (2) does not fall within a recognized exception to the hearsay rule; the resulting determination may not be based solely upon the hearsay evidence.

52 IAC 2-7-3. Therefore, the appraisals are admitted into the record. But because the Petitioner objected, they cannot serve as the sole basis for the Board's decision.

SUMMARY OF THE PETITIONERS' CASE

12. The Vacant Property is not developed and has never been used for commercial purposes. It does not have utilities, road frontage, or direct access. It would require an easement for access. *P. Keubel testimony; Durwin testimony.* It is zoned for local business rather than for commercial/industrial use. The land classification should be changed to unuseable/undeveloped because, without direct access and road frontage, it cannot be developed. The value should be \$12,500 an acre with a negative 10% influence factor to account for lack of access, road frontage, and utilities. *Holland argument.* A value of \$10,000 an acre for the Vacant Property would be reasonable. *House testimony.*
13. The Apartment Property has an eight unit residential efficiency apartment building. It is fifty years old and highly depreciated. The age of the apartment building negatively affects the land value. The Apartment Property lacks paved parking. Its location along Highway 50 is a high traffic area with considerable noise. The zoning is for local business, rather than commercial/industrial. All these things are major factors negatively affecting the value of the Apartment Property. *P. Kuebel testimony; Durwin testimony.*
14. The Apartment Property's income stream is approximately \$17,000. *M. Kuebel testimony.* A property's income stream would be considered if one were considering the purchase of a commercial property. The income stream of \$17,000 is not enough to raise interest in purchasing the Apartment Property. *House testimony.*

15. The Respondent's appraisal suggests that the Apartment Property would have greater value without the existing building, but demolition costs "a lot." Such a cost has an effect on land value. It would be a component of development costs if the property were valued as vacant land. *Durwin testimony; House testimony.*
16. The land value of the Apartment Property should be \$30,000 an acre with a negative 20% influence factor to account for the age and condition of the apartment building. *Holland argument.*

SUMMARY OF THE RESPONDENT'S CASE

17. The county hired Mr. Jeffrey D. Thomas, a certified Indiana general appraiser, to perform appraisals for the subject properties. His appraisal valued the Apartment Property at \$271,000 as of March 1, 2007. His appraisal valued the Vacant Property at \$129,000 as of March 1, 2007. *Hensley testimony; Resp't Ex. 3 and 4.*

ADMINISTRATIVE REVIEW AND BURDEN

18. 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).
19. In making a 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").
20. 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. 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.

ANALYSIS

21. Real property is assessed on the basis of its “true tax value,” which does not mean fair market value. It means “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.” 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 value-in-use is the cost approach. MANUAL at 3. To that end, Indiana promulgated a series of guidelines that explain the application of the cost approach. Real Property Assessment Guidelines for 2002—Version A. 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.
22. Regardless of the approach used to prove a property's value-in-use, a 2006 assessment must reflect its value as of January 1, 2005. An appraisal or any other evidence of value must have some explanation as to how it demonstrates or is relevant to value as of the required valuation date. *See Long v. Wayne Twp. Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005).
23. The Tax Court has stated “the most effective method to rebut the presumption that an assessment is correct is through the presentation of a market value-in-use appraisal, completed in conformance with the Uniform Standards of Professional Appraisal Practice (USPAP).” *O'Donnell v. Dep't of Local Gov't Fin.*, 854 N.E.2d 90, 94 (Ind. Tax Ct.

2006); *Kooshtard Prop. VI, LLC v. White River Twp. Assessor*, 836 N.E.2d 501, 506 n.6 (Ind. Tax Ct. 2005). The Petitioners offered the testimony of an Indiana certified general appraiser, Aaron Durwin. But there is no evidence that Mr. Durwin appraised the subject property and he did not offer an opinion about the specific value of either parcel. To the extent that his testimony and conclusions have any probative value, the weight is far less under such circumstances. Primarily, Mr. Durwin’s testimony provides a mixture of facts and conclusions that age, location, noise, traffic, and lack of paved parking are detrimental to the value of the subject property. These points probably are “negative influence factors” that reduce value. None of his testimony, however, establishes what a more accurate value-in-use for the property might be. Such testimony did little, if anything, to help make the Petitioners’ case.

24. The Petitioners’ other witnesses contributed similar evidence about things that probably lower the value of the subject property. The zoning is for local business and not for commercial/industrial use. The Vacant Property has never been developed or used for commercial purposes. It lacks utilities and road frontage. Access would be a problem for developing the Vacant Property separately or selling it to someone else. The Apartment Property is contiguous and has frontage on Highway 50, which is a high traffic area. The apartments are old, lack paved parking, and have noise problems. They do not produce much income. But no probative evidence established a more accurate number for the assessments—conclusory statements about value are not probative evidence. *Whitley Products v. State Bd. of Tax Comm’rs*, 704 N.E.2d 1113, 1119 (Ind. Tax Ct. 1998). The totality of the evidence fails to overcome the presumption in favor of the existing assessment *and to prove what a more accurate value-in-use might be*.
25. Even if an assessment does not fully comply with the Guidelines, a taxpayer must show that the assessment is not a reasonable measure of market value-in-use in order to prevail. *See Ind. Admin. Code tit. 50, r.2.3-1-1(d); Westfield Golf Practice Center v. Washington Twp. Assessor*, 859 N.E.2d 396, 399 (Ind. Tax Ct. 2007)(explaining that Indiana overhauled its property tax system and the new benchmark is value-in-use, which shifts the focus from examining how regulations were applied to examining whether an

assessed value actually reflects that external benchmark); *O'Donnell*, 854 N.E.2d at 94-95 (explaining that a taxpayer who focuses on alleged errors in applying the Guidelines misses the point of Indiana's new assessment system).

26. Much of the Petitioners' case focused on assessment methodology issues such as proper land classification and negative influence factors. The evidence and arguments regarding strict application of the Guidelines are not enough to rebut the presumption that the assessment is correct. *See Eckerling v. Wayne Twp. Assessor*, 841 N.E.2d 674 (Ind. Tax Ct. 2006) (stating that a taxpayer must show that the assessor's assessed value does not accurately reflect the property's value-in-use and strict application of the regulations is not enough to rebut the presumption that the assessment is correct). The Petitioners did not show the assessor's methodology failed to result in accurate assessments.

27. When taxpayers fail to provide probative evidence supporting the position that an assessment should be changed, the Respondent's duty to support the assessment with substantial evidence is not triggered. *See Lacy Diversified Indus. v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003); *Whitley Products*, 704 N.E.2d at 1119. Nevertheless, in this case the Respondent offered two appraisals as evidence of what the value-in-use should be. One appraisal is for the Vacant Property and the other is for the Apartment Property. The final estimates of value on both appraisals are less than the current assessments. As previously discussed, the Petitioner objected to these appraisals because the appraiser who did them did not appear at the hearing to be cross examined—the appraisals are hearsay. Although they were admitted as evidence, the rules are specific that “the resulting determination may not be based solely upon the hearsay evidence.” 52 IAC 2-7-3. There is no other evidence to support the values that the appraisals suggest. In addition, the appraisals purport to establish values as of March 1, 2007, and there is nothing relating those values to the required valuation date for this case, which would be January 1, 2005. Consequently, the assessments cannot be changed to the appraised values.

SUMMARY OF FINAL DETERMINATION

28. The Petitioners failed to make a prima facie case for a lower assessed value on either parcel. The Board finds in favor of the Respondent. The assessments will not be changed.

This Final Determination of the above captioned matter is issued on the date first written above.

Commissioner, Indiana Board of Tax Review

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- 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>