REPRESENTATIVE FOR PETITIONER: James Gilday, Gilday & Associates, P.C.

REPRESENTATIVE FOR RESPONDENT: Jess Regan Gastineau, Office of Corporation Counsel, City of Indianapolis

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BEFORE THE INDIANA BOARD OF TAX REVIEW

MUIR WOODS SECTION ONE ASSN., INC.; MUIR WOODS, INC.; SPRUCE KNOLL HOMEOWNERS ASSOC., INC.; and OAKMONT HOMEOWNERS ASSOC., INC.,	Petition No.: 49-800-01-3-5-10001-15
Petitioners,	Parcel Nos. Various
MARION COUNTY ASSESSOR,	Assessment Years: 2001-2003
Respondent.	

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

June 13, 2019

Final Determination Dismissing Petitioners' Form 133 Petition

I. Introduction

1. Several homeowners' associations, which we refer to collectively as "the HOAs," filed a Form 133 petition claiming that the assessments of their common areas from more than a decade earlier were erroneous and that those properties should have been assessed either for $0 or for a substantially reduced rate under the then-existing land orders and neighborhood valuation forms. Because the HOAs' claims all go to the inherently

subjective question of how their properties should have been valued, we agree with the Marion County Assessor that the HOAs needed to bring those claims under the general appeal procedure rather than seeking to revive them through the correction-of-error process. We therefore dismiss the HOAs' appeal.

II. Procedural History

A. Background

2. To understand why we are addressing an appeal of assessments from so long ago, a little background is helpful. In 2006, we decided *Brenwick TND Communities, LLC et. al. v. Clay Twp. Ass'r, et. al*. pet nos. (various) (IBTR May 15, 2006). In that case, two homeowners associations sought to have common areas that were heavily encumbered by easements and restrictions assessed as having zero value. In accepting the premise that common areas within a subdivision might be so heavily encumbered as to deprive them of any market value-in-use, we explained, "[T]he encumbrances must be severe and a taxpayer seeking to demonstrate that real property is devoid of any market value-in-use bears a heavy burden." *Brenwick* at 17-18. Nonetheless, we found that it was a factual question and that the taxpayers proved their case through their expert appraiser's largely unrebutted valuation opinion and other supporting evidence. *Id*. at 17-19, 23. We emphasized that we based our findings on the unique facts of the case. *Id*. at 23.

3. Apparently mistaking our determination as standing for the proposition that subdivision common areas necessarily lack any market value-in-use, various homeowners associations filed Form 133 petitions for correction of error seeking $0 assessments for their common areas. We denied all those petitions on grounds that the claims could not be raised through the correction-of-error process. The Tax Court affirmed our determinations. *See Muir Woods*, 36 N.E.3d 1208 (Ind. Tax Ct 2015); *Pulte Homes of Ind., LLC v. Hendricks Cnty. Ass'r*, 42 N.E. 3d 590 (Ind. Tax Ct. 2015). The HOAs were among the taxpayers asserting those claims, although the petitions were for tax years 2004 and 2005. *See Muir Woods*, 36 N.E.3d at 1208 n. 1, 1209.

4. The HOAs may have chosen not to include assessment years 2001-2003 in those earlier appeals on the assumption that any Form 133 petition had to be filed within three years of the date the taxes on the assessments being challenged were first due. Indeed, the Tax Court had held that such a limitation applied to Form 133 petitions. *See Will's Far-Go Coach Sales v. Nusbaum*, 847 N.E.2d 1074, 1075 (Ind. Tax Ct. 2006).

5. Seven years after *Will's Far-Go*, on December 27, 2013, the Tax Court decided *Hutcherson v. Ward*. The Court held that following the April 1, 2000 repeal of 50 IAC 4.2-3-12, which had been in effect for the tax years covered by *Will's Far-Go*, there was no time limitation on filing a Form 133 petition. *Hutcherson v. Ward*, 2 N.E.3d 138, 142 (Ind. Tax Ct. 2013). The new regulations interpreting the correction-of-error statute did not contain any limitation period, and the Court refused to read a limitation period into that statute "where neither the legislature nor the authorized administrative agency provided one." *Id*. It similarly rejected the Hamilton County Assessor's argument that the taxpayer's claim was time-barred by Ind. Code § 6-1.1-26-1(a)(2) (2013 supp.), which required refund claims to be filed within three years of when the taxes were first due. As the Court explained, the refund and correction-of-error statutes had disparate provisions, which suggested their independence. The legislature had not expressed an intent to incorporate an isolated provision from the refund statute, and the Court reasoned that incorporating the entire refund statute would destroy the two statutes' independence. *Id*. at 143-44.

6. The Court recognized that its decision had "the potential to open the floodgates for petition to correct error appeals," and explained that it "strongly support[ed] the important public policy favoring limitation of claims." *Id*. at 144. It therefore urged the legislature or the Department of Local Government Finance ("DLGF") to "act with all haste to provide security against stale claims arising under Indiana Code § 6-1.1-15-12." *Id*.

7. The legislature promptly responded by enacting 2014 Ind. Acts 183, § 19. That act amended the correction-of-error statute to add subsection (i), which provided, "A

taxpayer is not entitled to relief under this section unless the taxpayer files a petition to correct an error . . . within three (3) years after the taxes were first due." *Id.* The amendment became effective on passage. *See id.*

8. On March 7, 2014, when the bill containing the amendment to the correction-of-error statute was close to being passed, the HOAs filed the Form 133 petitions for assessment years 2001-2003 at issue in this appeal.[1] On June 26, 2015, the Marion County Property Tax Assessment Board of Appeals ("PTABOA") notified the HOAs that it had denied all the petitions. After receiving leave to do so, the HOAs filed a single Form 133 petition with us seeking review of the PTABOA's determinations.

9. In July 2015, the HOAs filed an amended petition and later filed a motion asking us to accept it. The amended petition specified that in addition to the grounds set forth in the original petition, the HOAs were relying on Ind. Code § 6-1.1-12-37.5. The Assessor did not object to the HOAs' motion, and we hereby grant it. As explained below, however, Ind. Code § 6-1.1-12-37.5 was enacted almost 12 years after any of the assessment dates at issue and offers the HOAs no relief.

B. Motion to Dismiss

10. The Assessor files a motion to dismiss the HOAs' petition. The HOAs responded to the Assessor's motion after we granted them two extensions of time to do so.

11. The HOAs provided the following exhibits in their response to the Assessor's motion to dismiss:

Exhibit A:	Respondent's Responses to Petitioners' First Request for Admissions, Set of Interrogatories, and Request for Production of Documents
Exhibit B:	Second Revised Master Declaration of Covenants, Conditions and Restrictions of Muir Woods Section One Assn., Inc. and Muir Woods Section Two Assn., Inc.

[1] One of the HOAs, Oakmont Homeowners Assoc., Inc., only appealed assessments from 2002 and 2003.

Exhibit C: Declaration of Covenants and Restrictions of Spruce Knoll Property Ownership
Exhibit D: Declaration of Covenants and Restrictions of Oakmont
Exhibit E: Affidavit of Patricia J. Smith
Exhibit F: Affidavit of Darlene E. Lorenz
Exhibit G: Affidavit of William J. Dale, Jr.
Exhibit H: Residential Neighborhood Valuation Form for Muir Woods
Exhibit I: Residential Neighborhood Valuation Form for Spruce Knoll
Exhibit J: Residential Neighborhood Valuation Form for Oakmont
Exhibit K: Assessor's Response to Petitioners' Second Request for Admissions from Muir Woods Sec. One Ass'n, Inc.'s appeal of assessment years 2004-2005

III. Discussion

A. The HOAs' claims were timely only if cognizable under the correction-of-error process

12. The HOAs have tried to capitalize on the opening of the floodgates the Court predicted in *Hutcherson*. They filed their Form 133 petitions with the Assessor more than 12 years after the last assessment date at issue, but shortly before the legislature amended the correction-of-error statute to codify the three-year limitation period previously recognized in *Will's Far-Go*. Absent any argument from the Assessor that the petitions themselves were time-barred, we assume, without deciding, they were not.

13. But that does not mean the claims asserted in the petitions were timely. To the contrary, despite how the HOAs label their claims, we find they do not fit within the narrow category of errors that could be raised under the correction-of-error statute. Thus, the HOAs needed to bring those claims under the general appeal procedure, and the deadline for doing so had long since lapsed.

14. For the assessment years at issue in these appeals, a taxpayer had two ways to challenge an assessment: (1) the general appeal procedure laid out under Ind. Code § 6-1.1-15-1, which taxpayers typically used Forms 130 and 131 to prosecute at the local and state levels, respectively, and (2) the correction-of-error process under Ind. Code § 6-1.1-15-

12.[2] The general appeal procedure was only available to challenge a current year's assessment; taxpayers could not use it to challenge assessments from prior years. *Lake Cnty. Prop. Tax Assessment Bd. of Appeals v. BP Amoco Corp*., 820 N.E.2d 1231, 1233 (Ind. 2005). A taxpayer could use the procedure to challenge any aspect of that assessment, but it had to file its appeal within a tight deadline: the later of 45 days after a notice of a change in assessment was given or May 10. *See* I.C. § 6-1.1-15-1(c) and (d) (2001 supp. – 2003 supp.).

15. The correction-of-error process did not have the same restrictive filing deadline as the general appeal procedure (and for a period, might not have had any filing deadline), but the range of errors it could be used to correct was much narrower. The correction-of-error statute identified only eight categories of errors that could be addressed:

> (1) The description of the real property was in error.
> (2) The assessment was against the wrong person.
> (3) Taxes on the same property were charged more than one (1) time in the same year.
> (4) There was a mathematical error in computing the taxes or penalties on the taxes.
> (5) There was an error in carrying delinquent taxes forward from one (1) tax duplicate to another.
> (6) The taxes, as a matter of law, were illegal.
> (7) There was a mathematical error in computing an assessment.
> (8) Through an error of omission by any state or county officer, the taxpayer was not given:
> . . .
> (C) an exemption permitted by law. . . .

I.C. § 6-1.1-15-12(a) (2011 supp.).[3] The DLGF promulgated Form 133 for use in bringing claims under the correction-of-error statute. That form referenced only challenges under subdivision (a)(6) through (a)(8).

[2] The legislature repealed Ind. Code § 6-1.1-15-1 and § 6-1.1-15-12 in 2017. 2017 Ind. Acts 232 §§ 9, 17. Procedures for appeals and for the correction of errors are now set out in Ind. Code § 6-1.1-15-1.1 -1.2 and Ind. Code § 6-1.1-15-2.1, respectively.

[3] This is the version of the correction-of-error statute that was in effect when the HOAs filed their Form 133 petitions. For purposes of this appeal, the statute was materially the same on the assessment dates. *See* I.C. § 6-1.1-15-12(a) (2001 supp. – 2003 supp.).

B. The HOAs did not raise claims that could be corrected on a Form 133 petition

16. In their original Form 133 petition to us, the HOAs alleged that their taxes, as a matter of law, were illegal, that the assessments were against the wrong person, and that taxes on the same properties were charged more than once for the same year. They now assert errors encompassing seven of the eight categories listed in the correction-of-error statute (they do not allege a claim under subdivision (a)(5)).[4] But their allegations distill into four basic claims:

> (1) That the Assessor objectively erred in assessing and taxing the common areas because some or all of the value from those common areas was reflected in the assessments of the lots in whose favor the covenants and restrictions ran;
>
> (2) That the Assessor objectively erred by using a different base rate to assess the common areas than the rate provided in the applicable land orders and neighborhood valuation forms;
>
> (3) That the assessments, as a matter of law, were illegal; and
>
> (4) That through an error of omission, the HOAs were denied an exemption under Ind. Code § 6-1.1-10-37.5

We take each claim in turn.

1. The HOAs raise only errors that require subjective judgment to correct

17. In interpreting the correction-of-error statute, the Tax Court has repeatedly held that a Form 133 petition could "remedy only errors which can be corrected without resort to subjective judgment and according to objective standards." *Muir Woods,* 36 N.E.3d. at 1213 (*quoting Hatcher v. State Bd. of Tax Comm'rs,* 561 N.E.2d 852, 857 (Ind. Tax Ct. 1990)).

[4] We assume, without deciding, that the HOAs could prosecute claims under subdivisions (a)(1) through (a)(4) before us. For errors listed under subdivisions (a)(6) through (a)(8), the correction-of-error statute contemplated review by the county PTABOA and the Board if the correction was not approved by at least two of three local officials (the county auditor, county assessor, and township assessor (if any)). But the statute did not specify what, if any, review was available if the auditor failed to correct errors under the other five subdivisions. As the Assessor points out, the Tax Court has indicated that Form 133 petitions were limited to challenges under subdivisions (a)(6) through (a)(8). *See Pulte Homes*, 43 N.E.2d at 593.

18. Under Indiana's current assessment system—which has applied since 2002 and is based on real-world evidence—valuation questions inherently require subjective judgment to resolve. *See id*. at 1213 (*quoting Wirth v. State Bd. of Tax Comm'rs*, 613 N.E.2d 874, 878 (Ind. Tax Ct. 1993); *see also, Town of St. John, et al. v. State Bd. of Tax Comm'rs*, 698 N.E.2d 399, 400 (Ind. Tax Ct. 1998) ("[A] calculation of the effect of real world evidence on an individual assessment will typically require subjective judgment . . . . The court does not foresee any opportunity to apply real world evidence retroactively by using the Form 133 process.").

19. In *Muir Woods*, the Tax Court applied that principle to a claim very similar to the one now before us—that it was an objective error to assess a taxpayer's encumbered common areas for anything more than $0. As the Court explained, "Whether Muir Woods's common area land was so encumbered that it lacked any value cannot be determined from a simple rendition of objective facts, but requires subjective judgment to analyze the impact of those facts upon value." *Muir Woods,* 36 N.E.3d at 1213; *see also Pulte Homes,* 42 N.E. 3d at 595 ("No *per se* rule exists that common areas have zero value, and therefore, any evidence produced would necessarily involve subjective judgment. . . .") (emphasis in original).

20. The HOAs try to avoid the Tax Court's holding in *Muir Woods* by couching their claim as one of double assessment or taxation. But as shown by the Form 133 petition, their underlying theory is the same: that the encumbrances deprived the common areas of some or all of their value, and that value was necessarily reflected in the assessments of the lots in whose favor those encumbrances ran.[5]

21. Even under the old system, which applied to the 2001 assessment year, the true tax value of non-agricultural land was theoretically based on market value. *Blackbird Farms Apts.,*

[5] The HOAs also argue that the Assessor waived any right to challenge their claims at this stage of the proceedings because he objected that the following interrogatory was vague: "Did the Assessor include any of the value of the Parcels, whether that value be intrinsic or extrinsic, in assessing any one of the Petitioner HOA home owners' separate property or parcels?" We disagree. Whether or not the Assessor answered the interrogatory, the HOAs' claim still boils down to how the encumbrances affected value, which is a subjective question.

LP, v. Dep't of Local Gov't Fin., 765 N.E.2d 711, 713 (Ind. Tax Ct. 2002). Thus, determining non-agricultural land value required subjective judgment. Value was not necessarily dictated automatically by a simple true-or-false finding of fact in the way that an improvement's value could be corrected by adding or subtracting a cost component, such as a fireplace. *See Bender v. State Bd. of Tax Comm'rs*, 676 N.E.2d 1113, 1114 (Ind. Tax Ct. 1997); *see also Hatcher v. State Bd. of Tax Comm'rs*, 561 N.E.2d 852, 857 (Ind. Tax Ct. 1990) ("If a fireplace exists, then it is assessed. If no fireplace exists, then its value can be subtracted from the computation."). Even if we were to find the value of land was an objective question under the old system (which we do not), that value would necessarily be tied to the land order. And the HOAs concede that the land orders (as well as the 2002 neighborhood valuation forms) specified a value of more than $0 for their common areas.

22. Indeed, the HOAs alternatively claim that the Assessor objectively erred by valuing their common areas for more than the base rates specified by the applicable land orders and neighborhood valuation forms. They point to language from *Muir Woods* as support for the notion that valuing land using a different base rate other than the rate specified in the relevant section of a land order or neighborhood valuation form was an objective error. In *Muir Woods*, the HOAs claimed the Assessor had committed a mathematical error by failing to adjust the base rate for its common-area land by 20% in accordance with the 2002 "land order."[6] Because the HOAs failed to include the land order in the administrative record, the Court explained that it could not determine whether an adjustment to the base rate was required. *Muir Woods*, 36 N.E.3d. at 1213.

23. The HOAs read that language to mean that valuing non-agricultural land at something other than what a land order or neighborhood valuation form specified constitutes an objective error. We disagree. Because the HOAs did not even bother to offer the neighborhood valuation form at issue in *Muir Woods*, the Tax Court decided the appeal

[6] Neighborhood valuation forms replaced land orders for the 2002 assessment year.

on that basis. It did not need to address the underlying question of whether such a claim constitutes an objective error. As explained above, we find that it does not.

2. There has been no judicial declaration that the HOAs' taxes, as a matter of law, were illegal

24. We now turn to the HOAs' claim that their taxes, as a matter of law, were illegal. As explained by the Indiana Supreme Court, a taxpayer could challenge the legality of its assessment under the correction-of-error process only if it first (1) availed itself of the general appeal procedure to challenge a methodology or procedure used to assess its property, and (2) obtained a favorable ruling from the Tax Court. That judicial finding would constitute a declaration that the taxes, as a matter of law, were illegal. *Lake Cnty. Prop. Tax Assessment Bd. of Appeals v. BP Amoco,* 820 N.E.2d 1231, 1236 (Ind. 2005); *see also Lake Cnty. Prop. Tax Assessment Bd. of Appeals v. U.S. Steel Corp*., 820 N.E.2d 1237, 1240 (Ind. 2005).[7] That taxpayer (and certain other taxpayers) could then file Form 133 petitions to have their assessments corrected and 17T forms to obtain refunds. *BP Amoco,* 820 N.E.2d at 1236. But the declaration of illegality had to come from a court—it could not come from an administrative agency. *Muir Woods,* 36 N.E.3d at 1212-13.

25. The HOAs do not point to any judicial declaration that assessing common areas generally, or their common areas specifically, was illegal. At most, they cite to the Tax Court's decision in *Lake of Four Seasons Prop. Owners Ass'n v. Dep't of Local Gov't Fin*. 875 N.E.2d 833 (Ind. Tax Ct. 2007). But *Lake of Four Seasons* is not a declaration that encumbered common areas should be assessed at zero value. *Pulte Homes,*42 N.E.3d at 494-95 ("Pulte's reasoning is faulty, however, because the *Lake of Four*

[7] Both *BP Amoco* and *U.S. Steel* rely heavily on an administrative regulation that, while effective for the assessment years at issue in those cases, had been repealed by the time the Court issued its decisions. Nonetheless, the Court explained, "we do not discern anything in current law that is inconsistent [with the repealed provision] or the interpretation we give it today." *BP Amoco,* 820 N.E.2d at 1234. The *U.S. Steel Court* also noted that the "legislative and regulatory scheme" required taxpayers to use the general appeal process when challenging the legality of the officials' actions. *U.S. Steel*, 820 N.E.2d at 1239. Because the legislative scheme referenced in *U.S. Steel* largely remained intact through the times relevant to this case, and the repealed regulation is consistent with that law, we are bound by the Court's holdings in those cases.

Seasons decision was based on the unique facts of that case and has no universal application.").

26. Beyond that, the HOAs contend that following our determination in *Brenwick*, the Assessor has treated common areas of planned unit developments ("PUDS") as having zero value and that the Assessor changed the pre-2006 value of PUD common areas to $0 in response to a Form 133 petition from a different taxpayer. Even if those determinations somehow had universal applicability, they did not come from a court and therefore could not serve as a declaration that the HOAs' taxes (or the taxes of any other taxpayer) were, as a matter of law, illegal.

27. Nor, for that matter, could they transform an inherently subjective valuation question into an objective one. The Assessor (and many others) may have misunderstood *Brenwick* and its import. But that does not make valuing common areas, or any other non-agricultural real property, objective. In any case, the Tax Court's later decisions in *Muir Woods* and *Pulte Homes* have cleared up any misunderstanding in that regard.

3. Failing to give the HOAs credit for a statutory exemption that was created more than 12 years after the assessment dates at issue was not an error of omission

28. That brings us to the HOAs' last claim: through an error of omission by state or local officials, they were denied credit for an exemption permitted by law. Specifically, the HOAs point to Ind. Code § 6-1.1-10-37.5, which exempts statutorily defined "common area" property from taxation. That statute was enacted in 2015, at least 12 years after all the assessment dates at issue in the Form 133 petition. *See* 2015 Ind. Acts 148 § 5. Unless the legislature expressly indicates otherwise, statutes are presumed to apply only prospectively. *New Albany-Floyd County Educ. Ass'n v. Ammerman*, 724 N.E.2d 251, 259 (Ind. Ct. App. 2000). There is nothing in Ind. Code § 6-1.1-10-37.5 to indicate the legislature intended the statute to apply retroactively. And the HOAs make no argument to support such an application. It strains credulity to argue that a local official's failure to apply an exemption that would not come into existence for another 12 years somehow qualifies as an error of omission. The HOAs argue that through her silence, the Assessor

has waived any right to contest the HOAs' claim at this stage of the appeal. We disagree. The Assessor's silence does not justify going forward with a patently frivolous claim.

IV. Final Determination

29. Despite the HOAs' creative attempts to circumvent the Tax Court's rulings in *Muir Woods* and *Pulte Homes*, they have not raised claims that were correctable on a Form 133 petition. And the time for bringing their claims under the general appeal procedure had lapsed more than a decade earlier. We therefore dismiss the HOAs' Form 133 appeal.

This 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 within forty-five (45) days of 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 Rules are available at <http://www.in.gov/judiciary/rules/tax/index.html>.