

REPRESENTATIVE FOR PETITIONER:  
Milo Smith, Certified Tax Representative

REPRESENTATIVE FOR RESPONDENT:  
Marilyn S. Meighen, Attorney

---

**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

System Capital Real Property Corp., )	Petition No.: 53-011-08-1-4-00005
)	
Petitioner, )	Parcel No.: 53-04-13-300-027.000-011
)	
v. )	
)	
Monroe County Assessor, )	County: Monroe
)	
Respondent. )	Assessment Year: 2008

---

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

---

**November 9, 2012**

**FINAL DETERMINATION**

The Indiana Board of Tax Review (the 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

### ISSUE

1. The issue presented for consideration by the Board is whether the assessed value of the Petitioner's property was overstated for the 2008 assessment year.

### PROCEDURAL HISTORY

2. The Petitioner, System Capital Real Property Corp.,<sup>1</sup> through its certified tax representative, Milo Smith, initiated its assessment appeal by filing a Form 130 Petition with the Monroe County Property Tax Assessment Board of Appeals (the PTABOA) on July 14, 2009. The PTABOA issued its determination on September 25, 2009.
3. Pursuant to Indiana Code § 6-1.1-15-1, Mr. Smith filed a Form 131 Petition for Review of Assessment with the Board on November 6, 2009, petitioning the Board to conduct an administrative review of the Petitioner's appeal.

### HEARING FACTS AND OTHER MATTERS OF RECORD

4. Pursuant to Indiana Code § 6-1.1-15-4 and § 6-1.5-4-1, Dalene McMillen, the duly designated Administrative Law Judge (the ALJ) authorized by the Board under Indiana Code § 6-1.5-3-3 and § 6-1.5-5-2, conducted a hearing on August 16, 2012, in Bloomington, Indiana.
5. The following persons were sworn and presented testimony at the hearing:

---

<sup>1</sup> Mr. Smith testified that the property record card shows that System Capital Real Property Corp. transferred the property under appeal to Archland Property I, LLC, on July 19, 2004. *Smith testimony; Petitioner Exhibit 1.* Mr. Smith, however, testified that Roland and Rachel Long are responsible for the taxes on the subject property. *Id.*

For the Petitioner:

Milo Smith, Taxpayer Representative

For the Respondent:

Judy Sharp, Monroe County Assessor  
Ken Surface, Nexus Group

6. The Petitioner presented the following exhibits:

Petitioner Exhibit 1 – Property record card for the subject property.

7. The Respondent presented the following exhibits:

Respondent Exhibit A – Property record card and photograph for the subject property,

Respondent Exhibit B – Assessment change summary sheet,

Respondent Exhibit C – Property record card, photograph, and sales disclosure form for 1921 South Walnut Street,

Respondent Exhibit D – Property record cards and photographs for 230 South Franklin Road, 2819 East Third Street, 2300 North Walnut Street, and 1919 South Walnut Street,

Respondent Exhibit E – Indiana Board of Tax Review’s Final Determination in *McDonald’s Corp. v. Bloomington Township Assessor*, Petition No. 53-005-05-1-4-00868, dated July 8, 2008.

8. The following additional items are officially recognized as part of the record of proceedings and labeled as Board Exhibits:

Board Exhibit A – Form 131 petition with attachments,<sup>2</sup>

Board Exhibit B – Notice of Hearing, dated June 20, 2012,

Board Exhibit C – Hearing sign-in sheet.

9. The subject property is a McDonald’s restaurant located at 4499 West State Road 46, Bloomington, in Monroe County.

---

<sup>2</sup> The Respondent’s counsel requested that the Form 131 petition, the Form 130 petition, and the Form 115 – Notification of Final Assessment Determination, submitted and labeled as Board Exhibit A, be incorporated as part of the Respondent’s evidence. There was no objection from the Petitioner’s representative.

10. The ALJ did not conduct an on-site inspection of the property.
11. For 2008, the PTABOA determined the assessed value of the Petitioner's property to be \$246,600 for the land and \$679,300 for the improvements, for a total assessed value of \$925,900.
12. For 2008, the Petitioner's representative requested an assessed value of \$219,200 for the land and \$556,300 for the improvements, for a total assessed value of \$775,500.

### **JURISDICTIONAL FRAMEWORK**

13. The Indiana Board of Tax Review is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property, (2) property tax deductions, (3) property tax exemptions, and (4) property tax credits that are made from a determination by an assessing official or a county property tax assessment board of appeals to the Indiana Board under any law. Ind. Code § 6-1.5-4-1(a). All such appeals are conducted under Indiana Code § 6-1.1-15. *See* Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.

### **PETITIONER'S CONTENTIONS**

14. Mr. Smith argues that the 2008 assessed value of the property under appeal was incorrect. *Smith testimony.* According to Mr. Smith, he applied the 2002 Real Property Assessment Guidelines' cost tables and the Marshall and Swift cost schedules to the buildings and paving and determined that the cost to construct a new, like structure was overstated for 2008. *Id.* Mr. Smith contends that, based on his knowledge and application of the Guidelines and cost schedules, the county's 2007 reproduction cost of approximately \$870,000 more accurately reflected the cost to construct the same structures new. *Id.* Applying depreciation to the 2007 reproduction cost of the buildings and paving and adding the land value back in, Mr. Smith determined the assessed value of the property

should be \$219,200 for the land and \$556,300 for the improvements, for a total assessed value of \$775,500 in 2008. *Smith testimony.*

15. In response to questioning, Mr. Smith admitted that he did not possess any sales information, any evidence on comparable properties in the neighborhood, or any other evidence of the subject property's market value-in-use. *Smith testimony.* Mr. Smith testified that he filed the Petitioner's appeal based on the fact that the property's assessed value increased by more than 5% from 2007 to 2008. *Smith testimony; Petitioner Exhibit 1.*

### **RESPONDENT'S CONTENTIONS**

16. The Respondent's counsel argues that Indiana Code § 6-1.1-15-17.2, concerning shifting the burden of proof from the taxpayer to the assessor when an assessment increased more than five percent from the previous assessment, does not apply to this case. *Meighen argument.* According to Ms. Meighen, the statute should be applied prospectively. *Id.* The triggering event is the assessment. *Id.* And because the assessment date following the effective date of the statute is March 1, 2012, the new statute should start applying with 2012 assessment appeals. *Id.* Thus, she argues, the Petitioner has the burden of proof to present a prima facie case that its 2008 assessment was incorrect. *Id.*
17. Similarly, the assessor argues, allowing a taxpayer to appeal its taxes without any evidence that its assessment was incorrect places an unfair burden on the county. *Sharp argument.* According to Ms. Sharp, the county places a high burden on itself. *Id.* "Every assessment in Monroe County is looked at by ten pairs of eyes, if not more." *Id.* Thus, she argues, it is unfair to make the county expend time and money defending an assessment where a taxpayer has not identified any specific error in the assessment. *Id.* Particularly in cases like the appeal at issue here where the taxpayer and the taxpayer's representative did not even show up at the PTABOA hearing. *Id.*

18. The Respondent's witness contends the Petitioner's property was assessed correctly based on the sale of a comparable property. *Surface testimony*. According to Mr. Surface, a fast food restaurant with a free-standing patio and drive-thru window located at 1921 South Walnut Street, sold on June 9, 2006, for \$1,402,492. *Id.*; *Respondent Exhibit 2*. Mr. Surface testified that at the time of the sale the property was vacant. *Id.* The new owners remodeled the interior and exterior and changed the façade, but the use of the building remained fast food restaurant. *Id.* Based on this sale, Mr. Surface concludes, the Petitioner's property, which is a fast food restaurant with a drive-thru window, is undervalued for the 2008 assessment year, rather than over-valued as the Petitioner's representative argues. *Id.*
19. Similarly, Mr. Surface argues that the assessed values of four other McDonalds restaurants in the county support its contention that the Petitioner's property's assessed value is correct for the assessment year at issue. *Surface testimony; Respondent Exhibit D*. According to Mr. Surface, the four comparable McDonalds restaurants are assessed from \$1,000,200 to \$1,225,300, while the subject property's assessed value is \$925,900. *Surface testimony; Respondent Exhibits A and D*. Again, Mr. Surface argues, these assessed values support a finding that the Petitioner's property is undervalued, rather than over-valued. *Id.*
20. Finally, Mr. Surface contends that the Board should give little weight to the Petitioner's cost analysis. *Surface testimony*. According to Mr. Surface, the Petitioner's representative used the cost tables from the Guidelines, which are based on January 1, 1999, construction costs and depreciation. *Id.* Further, Mr. Surface argues, the Petitioner's representative failed to provide any evidence supporting his land value calculation. *Id.*

## BURDEN OF PROOF

21. Generally, a taxpayer seeking review of an assessing official's determination has the burden of proving that his 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). Effective July 1, 2011, however, the Indiana General Assembly enacted Indiana Code § 6-1.1-15-17, which has since been repealed and re-enacted as Indiana Code § 6-1.1-15-17.2.<sup>3</sup> That statute shifts the burden to the assessor in cases where the assessment under appeal has increased by more than 5% over the previous year's assessment:

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.

22. Here, the Respondent's counsel argues that Indiana Code § 6-1.1-15-17.2 should not be applied retroactively. According to Ms. Meighen, the burden-shifting law should only apply to assessments that occur after the law's effective date. The Board, however, is not convinced that applying the law in this case would be a retroactive application. "While statutes are generally given prospective effect absent a contrary legislative intent, it is also true that the jurisdiction in pending proceedings continues under the procedure

---

<sup>3</sup> HEA 1009 §§ 42 and 44 (signed February 22, 2012). This was a technical correction necessitated by the fact that two different provisions had been codified under the same section number.

directed by new legislation where the new legislation does not impair or take away previously existing rights, or deny a remedy for their enforcement, but merely modifies procedure, while providing a substantially similar remedy.” *Tarver v. Dix*, 421 N.E.2d 693, 696 (Ind. Ct. App. 1981). According to the U.S. District Court in the Northern District of Indiana, “applying newly enacted procedure to a case awaiting trial in district court is not, strictly speaking, a retroactive application of the law” because the court has not yet “done the affected thing” when the new law is applied. *Brown v. Amoco Oil Co.*, 793 F. Supp. 846, 851 (N.D. Ind. 1992).

23. In *City of Indianapolis v. Wynn*, 157 N.E.2d 828, 834-835 (Ind. 1959), the Indiana Supreme Court held that a statutory amendment, which specified that evidence of certain factors would constitute primary determinants of an annexation’s merit, was a procedural amendment and therefore applied to a proceeding where the remonstrators has filed their challenge, but no hearing had yet occurred. The Court reasoned that because the amendment “changes the method of procedure and elements of proof necessary to sustain an annexation ordinance, and does not change the tribunal or the basis of any right, it must be presumed that the Legislature intended that the proceedings instituted under the [prior version of the statute] should be continued to completion under the method of procedure prescribed by the [amendment].” *Id.*, see also *Tarver v. Dix*, 421 N.E.2d 693, 696 (Ind. Ct. App. 1981) (A statutory presumption of legitimacy applied to a case filed prior to its enactment but heard after the legislation was passed because “the new legislation . . . provided a substantially similar remedy while delineating more clearly the procedure to be followed in determining and enforcing this right.”).
24. The Respondent’s counsel argues that the assessment is the “thing affected.” However, Indiana Code § 6-1.1-15-17.2 does not change the rules or standards for determining whether an assessment is correct. Nor does the statute make any change to the assessor’s duties in making assessments. Assessors are tasked with assessing property based on its “true tax value” which is defined 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.” 2002 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.3-1-2). This definition “sets the standard upon which assessments may be judged.” *Id.* Moreover, under the trending rules, property values are to be adjusted each year to reflect the change in a property’s market value between general reassessment years. Ind. Code § 6-1.1-4-4.5. Whether the assessor will have the burden of proof at trial based on how much that property’s value changes year over year should have no impact on the assessor’s obligation to value property according to its market value-in-use. In fact, the Respondent made no claim that it would have assessed the Petitioner’s property differently if the burden shifting provision had been promulgated prior to the time that the assessment was made.

25. Indiana Code § 6-1.1-15-17.2 places the burden of proof on an assessor when the assessed value of a property increases by more than five percent between assessment years. Thus, the “affected thing” would be the evidentiary hearing wherein the Board evaluates the proof offered by the parties. If the General Assembly had not intended the law to apply to pending appeals, it could have inserted language to that effect, stating that the law only applied to future assessments. This the legislature did not do. Thus, while the Board understands the burden that the new law places on assessors, the Board is nonetheless bound to apply it. Therefore, because the property’s assessed value for 2008 increased by more than 5% over the property’s assessed value in 2007, the Board finds that the Respondent has the burden of proof in this proceeding.

#### ANALYSIS

26. In Indiana, assessors value real property based on the property’s market value-in-use, 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 property or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.

27. Regardless of the method used to prove a property's true tax value, 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 March 1, 2008, assessment date, the valuation date was January 1, 2007. 50 IAC 21-3-3.
28. The Respondent's witness first argues that the Petitioner's property was valued correctly based on the sale price of a former Ritters frozen custard store, which was purchased vacant and remodeled as a Starbucks coffee shop. *Surface argument*. In making this argument, the Respondent's witness essentially relies on a sales comparison approach to establish the market value-in-use of the property. *See* MANUAL at 3 (stating that the sales comparison approach "estimates the total value of the property directly by comparing it to similar, or comparable, properties that have sold in the market.") In order to effectively use the sales comparison approach as evidence in a property assessment appeal, however, the proponent must establish the comparability of the properties being examined. Conclusory statements that a property is "similar" or "comparable" to another property do not constitute probative evidence of the comparability of the properties. *Long*, 821 N.E.2d at 470. Instead, the proponent must identify the characteristics of the subject property and explain how those characteristics compare to the characteristics of the purportedly comparable properties. *Id.* at 471. Similarly, the proponent must explain how any differences between the properties affect their relative market values-in-use. *Id.*

29. Here, Mr. Surface merely observed that the “comparable” property was a Ritters frozen custard shop before closing and being reopened as a Starbucks. However, it is not clear that a property is comparable to the subject property simply because it is a fast food restaurant. The property’s size, location, visibility, traffic and access would all play a major role in the value of a commercial property. As the Indiana Tax Court stated in *Fidelity Federal Savings & Loan v. Jennings County Assessor*, 836 N.E.2d 1075, 1082 (Ind. Tax Ct. 2005), “the Court has frequently reminded taxpayers that statements that another property ‘is similar’ or ‘is comparable’ are nothing more than conclusions, and conclusory statements do not constitute probative evidence. Rather, when challenging an assessment on the basis that the comparable property has been treated differently, the taxpayer must provide specific reasons as to why it believes the property is comparable. *These standards are no less applicable to assessing officials.*” 836 N.E.2d at 1082 (citations omitted and emphasis added).
30. The Respondent also argues that the subject property is assessed correctly based on the assessed values of four other McDonalds restaurants in the county. Pursuant to Indiana Code § 6-1.1-15-18(c), “To accurately determine market-value-in-use, a taxpayer or an assessing official may ... introduce evidence of the assessments of comparable properties located in the same taxing district or within two (2) miles of a boundary of the taxing district...” Ind. Code § 6-1.1-15-18. In support of its contention, the Respondent submitted property record cards for the subject property and the other McDonalds restaurants. But the property record cards provide no way to compare the assessed values of each of the properties. The subject property’s land value is based on \$80,000 an acre with a 125% influence factor; and the comparable properties’ land values ranged from \$375,000 an acre to \$675,000 an acre – which only supports a finding that different neighborhoods have different land values. Similarly, the building on the subject property was assessed for \$565,400; whereas the buildings on the “comparable” properties ranged from \$219,000 to \$515,700, with no explanation of how the assessor arrived at any of the values. Because the assessor chose not to apply one of the Guidelines models to any of

the properties, the Board cannot compare the assessed values of the structures. Thus, the assessed values of the other McDonalds restaurants do not support a finding that the Petitioner's property was assessed like other properties. Moreover, "the determination of whether properties are comparable shall be made using generally accepted appraisal and assessment practices." Ind. Code § 6-1.1-15-18. As noted above, a property's size, location, visibility and access all play major roles in the value of a commercial property. Thus, without evidence that the McDonalds restaurants were similarly located with similar visibility, access and traffic, simply pointing to another McDonalds' assessment is insufficient to prove the assessment was correct.

31. There is little question that, had the Petitioner had the burden of proof in this appeal, the case presented by its representative would have fallen far short of the burden to prove the Petitioner's property's assessment was in error. As discussed above, however, Indiana Code § 6-1.1-15-17.2 places the burden of proof on an assessor when the assessed value of a property increases by more than five percent between assessment years. Where the assessor fails to support the assessment at issue with probative evidence, the taxpayer has no duty to support its claims with substantial evidence unless it seeks a lower value for the property than the previous year's assessment. *See e.g. Lacy Diversified Indus. v. Department of Local Government Finance*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003) (holding that where a taxpayer with the burden fails to support his claim with probative evidence, the Respondent's duty to support the assessment with substantial evidence is not triggered).

#### **SUMMARY OF FINAL DETERMINATION**

32. The Petitioner's property's March 1, 2008, assessment increased by more than 5% over the property's 2007 value and therefore the assessor bore the burden of proving the property's March 1, 2008, assessment was correct. The Respondent failed to raise a prima facie case that the property's assessed value was correct for March 1, 2008.

Therefore the property's assessment must be returned to its 2007 value, or a total assessed value of \$775,500. The Board finds in favor of the Petitioner.

The 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

## IMPORTANT NOTICE

- 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>.**