

REPRESENTATIVE FOR PETITIONERS:

Steven & Sandra Read, Owners

REPRESENTATIVES FOR RESPONDENT:

Michael D. Boys, Marshall County Assessor
Jennifer Becker, North Township Representative

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

STEVEN & SANDRA READ,	)	Petition Nos.: 50-009-03-1-5-00005
	)	50-009-03-1-5-00006
Petitioners,	)	50-009-03-1-5-00007
	)	50-009-03-1-5-00008
v.	)	50-009-03-1-5-00009
)	
	)	Parcels: 0050019800
NORTH TOWNSHIP ASSESSOR,	)	0050019600
	)	0050017800
Respondent	)	0050017600
	)	0050017400
)	
	)	County: Marshall
	)	Township: North
	)	Assessment Year: 2003
)	

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

November 17, 2005

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

ISSUES

1. The parties presented the following restated issue for consideration by the Board:

Whether the subject properties should receive a negative influence factor

PROCEDURAL HISTORY

2. Pursuant to Ind. Code § 6-1.1-15-3, Steven and Sandra Read (the “Petitioners”), filed Form 131 Petitions for Review of Assessment (“Form 131 Petitions”), petitioning the Board to conduct an administrative review of the assessments with respect to the above referenced parcels. The Petitioners filed their Form 131 Petitions on October 21, 2004. The Marshall County Property Tax Assessment Board of Appeals (the “PTABOA”) issued its final determinations with regard to the assessments of the above described parcels on September 21, 2004.

HEARING FACTS AND OTHER MATTERS OF RECORD

3. Pursuant to Ind. Code § 6-1.1-15-4 and § 6-1.5-4-1, a hearing was held on June 22, 2005, in Plymouth, Indiana before Dalene McMillen, the duly designated Administrative Law Judge (the “ALJ”) authorized by the Board under Ind. Code § 6-1.5-3-3.
4. The following persons were sworn and presented testimony at the hearing:

For the Petitioners:

Steven F. Read, Owner
Sandra Read, Owner

For the Respondent:

Michael D. Boys, Marshall County Assessor¹

Jennifer Becker, Representative for North Township & PTABOA²

Debra A. Dunning and Pamela K. Lagenour, Marshall County Deputy Assessors, were present at the hearing, but were not sworn in and did not present testimony.

5. The following exhibits were presented:

Petitioners Exhibit 1 – A hand drawn map of the subject lots with a note from Debra Dunning to Steven Read, PTABOA summary page, and property record cards for the subject parcels #0050019800, 0050019600, 0050017400, 0050017600 and #0050017800.

Petitioners Exhibit 2 – Plat map of Additions to the Lake of the Woods.

Respondent Exhibit 1 – Aerial photograph of the subject parcels.

Respondent Exhibit 2 – North Township Assessor's response to Petitioners' issues; Authorization for Representation from Elma Konya, North Township Assessor to Jennifer Becker, Indiana Assessment Service; Sale Disclosure Form for the subject parcels, dated August 30, 2000; property record cards for the subject parcels #0050019800, #0050019600, #0050017800, 0050017600, #0050017400 & #0050019400; and Form 115 Notification of Final Assessment Determination.

Respondent Exhibit 3 – Aerial photograph and property record card for Calvin Ralston.

Respondent Exhibit 4 – Property record card for Timothy Bemish.

¹ The Marshall County Assessor did not appear as an additional party or file an appearance authorizing him to represent the Respondent. *See Ind. Admin. Code tit. 52 r. 2-3-2.* He therefore participated only as a witness.

² Ms. Becker did not comply with the rules governing practice before the Board. By purporting to represent the Respondent, North Township Assessor, at a hearing before the Board, Ms. Becker was acting as a "tax representative." *See 52 IAC 1-1-6.* Ms. Becker, however, did not submit to the Board a properly executed power of attorney from the Respondent on the form prescribed by the Board as required by 52 IAC 1-2-1. While Ms. Becker did submit a document signed by the Respondent purporting to authorize her to represent it at the hearing, that document was not notarized and did not contain much of the information required on Board's form. Nonetheless, Ms. Becker is listed as a certified tax representative and made at least some attempt to comply with the Board's administrative rules. Given those facts, and the fact that the Petitioners did not raise any issues concerning Ms. Becker's authority to represent the North Township Assessor, the Board finds that the Respondent appeared at the hearing through an authorized representative. The Board cautions the Respondent that it must appear in person or by duly authorized representative in order to offer evidence or argument in a hearing before the Board. Failure to do so in the future may result in the exclusion of evidence and argument purportedly offered on the Respondent's behalf.

6. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits:
 - Board Exhibit A – Form 131 Petitions.
 - Board Exhibit B – Notices of Hearing dated May 5, 2005.
 - Board Exhibit C – Hearing sign-in sheets.
7. The subject properties consist of five adjoining vacant parcels located on West Shore Drive, Bremen, North Township, Marshall County. Two of the properties front a road. The other three properties are located in the rear of the lots fronting the road. *See Pet'r Ex. 2; Resp't Exs. 1-2.*
8. The ALJ did not conduct an on-site inspection of the subject properties.
9. For 2003, the PTABOA determined the assessed values of the properties to be:

Petition #	Parcel #	Land Value
50-009-03-1-5-00005	0050019800	\$10,300
50-009-03-1-5-00006	0050019600	\$11,900
50-009-03-1-5-00007	0050017800	\$ 2,900
50-009-03-1-5-00008	0050017600	\$ 3,300
50-009-03-1-5-00009	0050017400	<u>\$ 3,900</u>
Total value for all parcels		\$32,300
10. On the Form 131 Petitions, the Petitioners did not specify the amounts for which they believed the subject properties should be assessed. At the hearing, the Petitioners stated that the five subject properties combined are worth \$30,000. *Sandra Read testimony.*

JURISDICTIONAL FRAMEWORK

11. The Indiana Board is charged with conducting an impartial review of all appeals concerning: (1) the assessed valuation of tangible property; (2) property tax deductions; and (3) property tax exemptions; 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 Ind. Code § 6-1.1-15. *See Ind. Code § 6-1.5-4-1(b); Ind. Code § 6-1.1-15-4.*

ADMINISTRATIVE REVIEW AND THE PETITIONERS' BURDEN

12. 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'r's*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998).
13. 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").
14. 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

Whether the subject properties should receive a negative influence factor

15. The Petitioners contend that the subject properties each should receive a negative influence factor due to restrictions on the use of those properties. The restrictions at issue stem from the proximity of the subject properties to a ditch. *Steven & Sandra Read testimony*.
16. The Respondent contends that the five subject properties are correctly assessed at a total value of \$32,300. *Becker testimony*.
17. The Petitioners presented the following evidence and argument in support of their position:

- A. The Petitioners purchased six lots, including the five lots that are the subject of this appeal, for \$55,000 on August 30, 2000. *Sandra Read testimony; see also, Resp't Ex.*
2. The Petitioners contend that the purchase price exceeded the market value of the lots. The Petitioners paid more than market value for the land because they owned a lot directly across the road and needed room to build a garage and possibly a home at a later date. *Sandra Read testimony*. The properties were not exposed to the market; rather, the Petitioners approached the seller privately to inquire if the properties were for sale. *Sandra Read testimony*.
- B. The Petitioners estimated the market value of the five lots on appeal to be approximately \$30,000 in 2003. That value would take into consideration all restrictions to the properties. *Sandra Read testimony*.
- C. The Petitioners request that the subject properties each receive a negative influence factor of ninety percent (90%). The subject properties border a county ditch. The local government enacted an ordinance (page 1072-3, section 36-9-27-33), whereby it has a right of entry over private land adjacent to a regulated drain and an extension of spoil banks beyond the right-of way. The right of entry is over and upon land lying within seventy-five (75) feet of any regulated drain. After county officials dredge the ditch, the Petitioners must remove the excess soil at their own expense. *Board Ex. A; Steven Read testimony*.
- D. Three of the five subject lots are located in the rear of the other two subject lots and another lot owned by the Petitioners that is not under appeal. Those rear lots have no value individually, because they have no access to the road and improvements cannot be constructed upon them. The Petitioners' use of all five lots under appeal is restricted due to the government's seventy-five (75) foot right of entry. *Sandra Read testimony*.

E. Two comparable lots within the same neighborhood as the subject properties receive negative influence factors. The Petitioners identified those lots as the “Ralston property” and the “Bemish property.” Both the Ralston property and the Bemish property border ditches. The Ralston property receives a negative influence factor of fifty percent (50%), and the Bemish property receives a negative influence factor of ninety percent (90%). The subject properties should be given the same consideration.

A map of the Lake of the Wood area indicates that numerous other properties also receive negative influence factors of up to ninety percent (90%). *Steven & Sandra Read testimony; Pet'r Ex. 2.*

F. Prior to the PTABOA hearing, a representative of the Respondent offered to apply a fifty percent (50%) negative influence factor to parcel 0050019800 and a thirty percent (30%) negative influence factor to parcel 0050019600. *Steven Read testimony; Pet'r Ex. 2.* The Respondent did not offer to apply a negative influence factor to the other three lots, because they already were being assessed as rear lots.

Pet'r Ex. 1; Steven Read testimony.

18. The Respondent presented the following evidence and argument in support of the current assessment:

A. The five parcels on appeal have a total assessed value of \$32,300, which is fair and consistent with the assessments of other properties in the subject area. *Becker testimony.* This purchase price supports the current assessment. *Becker argument.*

B. A sales disclosure form shows that the Petitioners purchased six lots, including the five lots under appeal, from Pomeroy Real Estate Company for \$55,000 on August 30, 2000. *Resp't Ex. 2; Becker testimony.*

C. The Petitioners’ reliance on the assessments of the Ralston and Bemish properties is misplaced. The Petitioners are correct in their assertion that the Ralston property receives a fifty percent (50%) negative influence factor based upon the presence of a

- ditch. That ditch, however, is located in the middle of the Ralston property. The Bemish property is assessed as residential excess acreage and does not receive any type of negative influence factor. *Resp't Exs. 3 & 4; Becker testimony.*
- D. The County normally does not give a negative influence factor to a property solely because the property borders on a ditch. *Boys testimony.*
19. As set forth above, the Petitioners contend that each of the subject properties is entitled to a negative influence factor because an adjacent ditch provides local government entities with rights of entry and dredging. The Petitioners claim that this significantly restricts their use of the subject properties. *Steven & Sandra Read testimony.*
20. An 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. The factor may be positive or negative and is expressed as a percentage.” REAL PROPERTY ASSESSMENT GUIDELINES for 2002 – VERSION A, glossary at 10 (incorporated by reference 50 IAC 2.2-1-2).
21. A taxpayer seeking a negative influence factor must submit probative evidence that (1) identifies the property’s deviation from the norm and (2) quantifies the effect of that deviation. *See Talesnick v. State Bd. of Tax Comm’rs*, 756 N.E.2d 1104, 1108 (Ind. Tax Ct. 2001). Market evidence may be used to quantify influence factors. *Maley*, 803 N.E.2d at 285.
22. As an initial matter, the Petitioners simply asserted that the ditch in question is subject to a local ordinance giving certain governmental officials a right of entry over and upon land lying within 75 feet of any regulated drain. *Steve & Sandra Reed Testimony.* The Petitioners did not present any evidence to show that the ditch in question is a regulated drain within the meaning of the referenced ordinance. The Petitioners likewise did not submit a certified copy of the ordinance in question. Instead, the Petitioners pointed to

one of the Form 130 petitions that they filed with the PTABOA upon which they had transcribed a portion of the ordinance. *See Board Ex. A.*

23. Even if the Board were to assume that the ditch and accompanying governmental rights of entry and dredging referenced by the Petitioners negatively impact the value of the subject properties, the Petitioners did not submit probative evidence to quantify an appropriate influence factor.
24. The Petitioners did not present any market-based evidence to quantify the effect of the ditch on the market value-in-use of the subject properties. Instead, the Petitioners pointed to negative influence factors received by other properties in the Lake of the Woods subdivision.
25. A taxpayer may establish a lack of uniformity and equality in assessment by showing that its property is assessed and taxed differently than comparable properties are assessed and taxed. *See Blackbird Farms Apartments, LP v. Dep’t of Local Gov’t Fin.*, 765 N.E.2d 711, 714 (Ind. Tax Ct. 2002) (“To challenge the base rate applied to its land under the land order, [the taxpayer] must present probative evidence that comparable properties are assessed and taxed differently.”). Thus, a taxpayer should be able to quantify an influence factor by identifying properties that are comparable to its property with respect to characteristic for which the taxpayer is seeking an influence factor, and demonstrating that those comparable properties receive an influence factor of a specified amount.
26. The taxpayer, however, bears the burden of demonstrating that the properties upon which the taxpayer bases its claim actually are comparable to the taxpayer’s property. *Id.* Conclusory statements that a property is “similar” or “comparable” to another property do not constitute probative evidence of the comparability of the two properties. *Long v. Wayne Twp. Assessor*, 821 N.E.2d 466, 470 (Ind. Tax Ct. 2005). The Petitioners, therefore, were required not only to identify other properties that are affected by their proximity to ditches, but also to demonstrate that the impact of such ditches on the

market value of those properties is similar to the impact of the ditch in question on the market value of the subject properties.

27. The Petitioners clearly failed to establish comparability between the subject properties and the numerous other properties they highlighted on their coded plat map of Lake of the Woods. Although the Petitioners asserted that the highlighted properties received negative influence factors of up to ninety percent (90%), they did not identify the basis underlying those influence factors. Those influence factors could be based on a myriad of concerns, such as the shape and size of the lots or an excessive amount of frontage. Thus, the negative influence factors applied to those properties does little to quantify the effect of the nearby ditch on the value of the subject properties.
28. The Petitioners, however, testified that two properties - the Ralston property and the Bemish property - receive negative influence factors due to their proximity to ditches. The Petitioners correctly assert that the Ralston property receives a negative influence factor of fifty percent (50%) due to its proximity to a ditch. Nonetheless, an examination of the property record card for the Ralston property reveals that the ditch in question actually runs through the Ralston property itself, rather than alongside the property, as is the case with the subject properties. *Resp't Ex. 3; Becker testimony.* Similarly, the Respondent presented a property record card for the Bemish property that does not reflect the application of any negative influence factor whatsoever. *Resp't Ex. 4; Becker testimony.* The Petitioners did not explain why they believed the Bemish property was receiving a negative influence factor. The Petitioners therefore failed to establish the comparability of the Bemish and Ralston properties to the subject properties.
29. The Petitioners also rely on the fact that a representative of the Respondent offered to apply negative influence factors of thirty percent (30%) and fifty percent (50%) to the two front lots in an effort to settle this case prior to the PTABOA hearing. The Board will not consider this evidence in reaching its decision. Settlement negotiations may not be used to prove a claim. *Dep't of Local Gov't Fin. v. Commonwealth Edison*, 820 N.E.2d 1222, 1227 (Ind. 2005); *see also* Ind. Evidence Rule 408. "[T]o allow the

Taxpayers to use the settlement would have a chilling effect on the incentive of all assessing officials to resolve cases outside the courtroom." *Commonwealth Edison*, 820 N.E.2d at 1228 (*citing Boehning v. State Bd. of Tax Comm'rs*, 763 N.E.2d 502, 505 (Ind. Tax Ct. 2001)).

30. Based on the foregoing, the Petitioners failed to demonstrate that any subject properties are entitled to receive a negative influence factor.³

SUMMARY OF FINAL DETERMINATION

Whether the subject properties should receive a negative influence factor

31. The Petitioners failed to make a prima facie case. The Board finds in favor of the Respondent.

This Final Determination of the above captioned matter is issued by the Indiana Board of Tax Review on the date first written above.

Commissioner, Indiana Board of Tax Review

³ Although the Petitioners did not expressly raise this issue, the Board notes that property used or occupied as part of a public drainage ditch, including land adjacent to such a ditch that cannot be used for farmland or any other purpose because of a need for access to the ditch, should not be assessed to an "adjacent property holder." REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A, ch. 2 at 28 (incorporated by reference at 50 IAC 2.3-1-2). The Petitioners, however, did not establish that the asserted governmental right of entry prohibits them from using portions of the subject properties for farmland or any other purpose, although they alleged that it prevents them from constructing improvements on at least some of the lots. Moreover, the Petitioners did not establish the exact location of the ditch or the precise extent to which the right of entry encroaches upon the subject properties. In fact, because the Petitioners did not present actual measurements, it is not entirely clear that the subject properties have been assessed for any portion of land that is subject to a right of entry.

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>