

INDIANA BOARD OF TAX REVIEW
Small Claims
Final Determination
Findings and Conclusions

Petitions: 45-030-13-1-4-00004
45-030-13-1-4-00005
Petitioner: Bullseye Properties, LLC
Respondent: Lake County Assessor
Parcels: 45-12-21-453-006.000-030
45-12-21-453-005.000-030
Assessment Year: 2013

The Indiana Board of Tax Review (“Board”) issues this determination, finding and concluding as follows:

Procedural History

1. Petitioner filed petitions with the Lake County Property Tax Assessment Board of Appeals (“PTABOA”) on June 7, 2014. The Lake County PTABOA failed to hold a hearing within 180 days as required by statute. Ind. Code § 6-1.1-15-1(k). Accordingly, Petitioner filed directly with the Board on January 27, 2015. Ind. Code § 6-1.1-15-1(o).
2. Petitioner elected to have its appeals heard under the Board’s small claims procedures. Respondent did not elect to have the proceeding removed from those procedures.
3. Ellen Yuhan, the Board’s Administrative Law Judge (“ALJ”), held a hearing on March 14, 2016. Neither the ALJ nor the Board inspected the property.
4. John Yanek, certified tax representative, was sworn as a witness for Petitioner. Robert Metz, Lake County Hearing Officer, and Nicole Ooms, Ross Township Deputy Assessor, were sworn as witnesses for Respondent.

Facts

5. The subject property is a multi-tenant office and warehouse situated on two parcels located at 501-545 West 84th Drive in Merrillville. The property is considered as one economic unit.

6. For 2013, the Assessor determined the following assessments for the parcels under appeal:

Parcel	Land	Improvements	Total
45-12-21-453-006.000-030	\$437,400	\$ 705,100	\$1,142,500
45-12-21-453-005.000-030	\$239,200	\$ 11,700	\$ 250,900

Record

7. The official record contains the following:

a. A digital recording of the hearing

b. Exhibits:

Petitioner Exhibit 1: Appraisal of Jeffrey R. Vale, MAI,
 Petitioner Exhibit 2: Sales disclosure for the subject property,
 Petitioner Exhibit 3: Indiana Board of Tax Review determination,
 Pet # 18-035-13-1-5-00009, Jerry J. & Linda J.
 Terry, v. Delaware County Assessor,

Respondent Exhibit 1: Market income approach,
 Respondent Exhibit 2: IncomeWorks income approach,
 Respondent Exhibit 3: Supporting data for Income Works income
 Approach,

Respondent Exhibit 4: IncomeWorks vacancy and rental rates,
 Respondent Exhibit 5: IncomeWorks capitalization rates,
 Respondent Exhibit 6: Co-Star sale report for the subject property,
 Respondent Exhibit 7: Co-Star sale of 8900-8902 Broadway on March 29,
 2011,

Respondent Exhibit 8: Co-Star sale of 8900-8902 Broadway on November
 6, 2012,

Respondent Exhibit 9: Map showing proximity of 300 W. 89th Avenue to
 the subject property,

Board Exhibit A: Form 131 petition with attachments,

Board Exhibit B: Notice of Hearing,

Board Exhibit C: Hearing sign-in sheet,

c. These Findings and Conclusions.

Objections

8. Mr. Metz objected to Petitioner Exhibit 1 because the appraiser was not available to answer questions about the appraisal and because the appraisal was irrelevant. With regard to the appraiser's unavailability, Mr. Metz probably intended to make a hearsay objection. "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. (Ind. R. Evid. 801(c)). The Board's procedural rules specifically address hearsay evidence:

Hearsay evidence, as defined by the Indiana Rules of Evidence (Rule 801), may be admitted. If not objected to, the hearsay evidence may form the basis for a determination. However, if the evidence is properly objected to and 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 3-1-5(b). The word "may" is discretionary, not mandatory. In other words, the Board can permit hearsay evidence to be entered in the record, but is not required to allow it.

9. Petitioner Exhibit 1 is hearsay. Nevertheless, effective July 1, 2015, Ind. Code § 6-1.1-15-4 was amended to include the following language:

(p) At a hearing under this section, the Indiana board shall admit into evidence an appraisal report, prepared by an appraiser, unless the appraisal report is ruled inadmissible on grounds besides a hearsay objection. This exception to the hearsay rule shall not be construed to limit the discretion of the Indiana board, as trier of fact, to review the probative value of an appraisal report.

Ind. Code § 6-1.1-15-4(p). This statute creates an exception to the hearsay rule for an appraisal report. Accordingly, the Board overrules the objection and Petitioner Exhibit 1 is admitted.

Burden

10. 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 the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Assessor*, 805 N.E.2d 465, 468 (Ind. Tax Ct. 2003); *see also Clark v. State Bd. of Tax Comm'rs*, 594 N.E.2d 1230 (Ind. Tax Ct. 1998). A burden-shifting statute creates two exceptions to that rule.
11. First, Ind. Code § 6-1.1-15-17.2 "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.” Ind. Code § 6-1.1-15-17.2(a). “Under this section, 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(b).
12. Second, Ind. Code 6-1.1-15-17.2(d) “applies to real property for which the gross assessed value of the real property was reduced by the assessing official or reviewing authority in an appeal conducted under Ind. Code § 6-1.1-15,” except where the property was valued using the income capitalization approach in the appeal. Under subsection (d), “if the gross assessed value of real property for an assessment date that follows the latest assessment date that was the subject of an appeal described in this subsection is increased above the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase, the county assessor or township assessor (if any) making the assessment has the burden of proving that the assessment is correct.” Ind. Code § 6-1.1-15-17.2(d).
 13. These provisions may not apply if there was a change in improvements, zoning, or use. Ind. Code § 6-1.1-15-17.2(c).
 14. In any case, if an assessor has the burden and fails to meet it, the taxpayer may offer evidence to prove the correct assessment. If neither party offers evidence that suffices to prove the property’s correct assessment, it reverts to the previous year’s value. I.C. § 6-1.1-15-17.2(b).
 15. The increase from 2012 to 2013 was less than 5% and there was no evidence that the 2012 assessed value was reduced as the result of an appeal. Petitioner, therefore, has the burden of proof in this matter.

Summary of Contentions

16. Petitioner’s case:
 - a. Petitioner contends that the property is over-assessed based on an appraisal. Mr. Yanek submitted an appraisal prepared by Jeffrey R. Vale, MAI and certified general appraiser. Mr. Vale prepared the appraisal in conformance with the Uniform Standards of Professional Appraisal Practice (“USPAP”). Mr. Vale estimated the value at \$675,000 as of January 14, 2013. *Yanek testimony; Pet’r Ex. 1.*
 - b. The property sold on February 7, 2013 for \$650,000. This fact supports the appraised value of \$675,000. *Yanek testimony; Pet’r Ex. 2.*
 - c. The Board issued a determination in *Terry v. Delaware County Assessor*. In the determination, it states that effective July 1, 2015, an appraisal is not subject to the hearsay rule. In that case, which was also a 2013 appeal, the Terrys submitted an

appraisal dated December 28, 2012. The Board ruled that the appraisal did not need to be trended and was relevant to the assessment date. *Yanek testimony; Pet'r Ex. 3.*

- d. In the *Terry* case, the respondent questioned the appraiser's choice of comparables. The Board held that a certified appraiser's professional opinion was probative when compared with the respondent's opinion as to what comparables he felt the appraiser should have used. *Yanek testimony; Pet'r Ex. 3.*
- e. Petitioner determined the value for each parcel by applying the same ratio used for the assessment of each parcel and keeping the same ratio between land and improvements. *Yanek testimony.*
- f. On cross-examination, Mr. Yanek testified that he could not answer questions about the choice of comparables or adjustments made in the appraisal. He further testified that he did not have a release from either the bank or the appraiser to use the appraisal. *Yanek testimony.*

17. Respondent's case:

- a. Respondent contends that there are multiple problems with the appraisal:
 - On page 8, it states that the owner passed away in September of 2011 and part of the high vacancy rate appears to be a result of insufficient management since that time.
 - The sale of the property was a distressed sale.
 - The appraiser adjusted his land sale #1 on page 19 of the appraisal by -40% for location, but it is only four blocks away from the subject property.
 - The appraiser's sale #7 was a Service Merchandise building that was vacant for some time. It is questionable as to how it relates to the subject property.
 - Sale #8 is a shopping mall and not comparable to the subject property, which is an office building.
 - Sale #9 sold at auction on March 8, 2011, for \$672,000. It sold again on November 6, 2012, for \$1,047,000, but the appraiser did not use the later sale.
 - The appraiser's income approach is based on 42,809 square feet. There is 1,400 square feet that he did not consider.
 - The appraiser's vacancy rate is too high for the first floor and he used a different rate for the second floor.

Ooms testimony; Pet'r Ex 1; Resp't Exs. 6-9.

- b. Ms. Ooms analyzed the income information in the appraisal and created an income approach based on market information. In that approach, she used the same rent per square foot as the appraiser, but used the actual square footage of 44,209 square feet. She calculated the vacancy at 20%, even though the actual vacancy rate in Lake County is 7%. This calculation yielded an effective gross income of \$220,569. She then adjusted the expenses by removing real estate taxes and adding replacement reserves. The net operating income was \$145,718. For her capitalization rate, she

used the National Survey rate of 9% and added the tax rate of 2.5261%, for a loaded capitalization rate of 11.5261%. The value of the property based on this income approach is \$1,264,246. *Ooms testimony; Resp't Ex. 1.*

- c. Ms. Ooms also developed an income approach using IncomeWorks. In this approach, the potential gross income is calculated using the 44,209 square feet of building area multiplied by the rental rate of \$7.01 per square foot. In this approach, the vacancy rate used was 17.32%, which results in an effective gross income of \$256,230. Expenses were calculated at \$122,459 with the net operating income at \$133,771. Using the same capitalization rate, the value derived from this method was \$1,575,821. *Ooms testimony; Resp't Ex. 2.*

ANALYSIS

18. Petitioner established a prima facie case that the assessed value was incorrect. The Board reached this decision for the following reasons:
 - a. Real property is assessed based on its “true tax value”, which means “the market value-in-use of a property for its current use, as reflected by the utility received by the owner or by a similar user, from the property.” 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2); *see also* Ind. Code § 6-1.1-31-6(c). The cost approach, the sales comparison approach, and the income approach are three generally accepted techniques used to calculate market value-in-use. MANUAL at 2. Assessing officials primarily use the cost approach. MANUAL at 3. The cost approach estimates the value of the land as if vacant and then adds the depreciated cost new of the improvements to arrive at a total estimate of value. MANUAL at 2. Any evidence relevant to the true tax value of the property as of the assessment date may be presented to rebut the presumption of correctness of the assessment, including an appraisal prepared in accordance with generally recognized appraisal standards. MANUAL at 3.
 - b. 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. Dep’t of Local Gov’t Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also Long v. Wayne Twp. Assessor*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). The valuation date for a 2013 assessment was March 1, 2013. Ind. Code § 6-1.1-4-4.5(f); 50 IAC 27-5-2(c).
 - c. An appraisal performed in conformance with generally recognized appraisal principles is often enough to establish a prima facie case. *Meridian Towers*, 805 N.E.2d at 479. Here, Petitioner presented a USPAP compliant appraisal of the property prepared by Jeffrey R. Vale, a certified appraiser. Mr. Vale estimated the value at \$675,000 as of January 14, 2013. Petitioner also presented the sales disclosure form showing the subject property sold on February 7, 2013 for \$650,000. Therefore, Petitioner established a prima facie case that the assessment should be reduced.

- d. Once a 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). To rebut or impeach a petitioner's case, the respondent has the same burden to present probative evidence that the petitioner faced to raise its prima facie case. *Fidelity Fed. Sav. & Loan v. Jennings Co. Ass'r*, 836 N.E.2d 1075, 1082 (Ind. Tax Ct. 2005), 802 N.E.2d at 479.
- e. Respondent attempted to impeach the appraisal in several ways. Respondent argued that the appraiser made a questionable adjustment for location on comparable land sale #1 because it was only four blocks from the subject property. The appraiser noted in his comments for that property that its location was better than the subject property because of its visibility from a major road, Broadway Avenue.
- f. Respondent also questioned the appraiser's choice of comparable properties in the sales comparison approach. It is well within an appraiser's expertise to choose sales he deems most comparable and apply adjustments to value the differences between them. Conclusory statements that the appraiser used invalid sales are not sufficient to rebut the Petitioner's case. *See Hometowne Associates, L.P. v. Maley*, 839 N.E.2d 269, 278 (Ind. Tax Ct. 2005).
- g. Respondent argues that the appraiser used the incorrect square footage in his income approach. The appraiser noted on page 21 of his appraisal that 1,400 square feet of the building was common area. The appraiser did not include that area in his income calculation. We are not convinced that the appraiser made a mistake about the square footage of the subject property.
- h. Respondent contends the sale of the subject property was a distressed sale. The appraisal shows the sales history of the subject property. It was transferred on September 24, 2010, in an auction sale due to foreclosure, but the appraiser noted the building had more occupancy then than it has currently. The property was listed for \$1,100,000 from June 2008 to May 2009. It was listed for \$850,000 since March 2012 and, according to the appraiser, had a pending sale for \$675,000 at the time of the appraisal. The property actually sold in February 2013 for \$650,000. The fact that the property sold for \$650,000 twice in three years gives some indication that amount is the market value of the property.
- i. Respondent offered two different income approaches to value, but neither one has much credibility. In the first approach, Respondent used the appraiser's rental values per square foot but changed the square footage, the vacancy rate, and some of the expenses. Respondent included an additional 1,400 square feet in the calculation of potential gross income. Respondent did not explain how he determined the vacancy and collection loss rate or replacement reserves. *See Grabbe v. Carroll County Assessor*, 1 N.E.3d 226, 231 (Ind. Tax Ct. 2013) (upholding determination that income approach lacked probative value where taxpayer failed to provide evidence

demonstrating why 20% capitalization rate was proper). Thus, the Board is unable to determine if the calculations are representative of the local market.

- j. In addition, Respondent offered an “IncomeWorks Evaluation Report” that purports to apply a direct capitalization income approach to the subject property. This report indicates a rental income of \$7.01 per square foot, but contains no substantial basis for that conclusory number. Similarly, the report allows 17.32% for vacancy, \$2.77 per square foot for expenses, and used a capitalization rate of 9.50%.
- k. As part of making a case, “it is the taxpayer’s duty to walk the [Board] through every element of [its] analysis.” *Long*, 821 N.E.2d at 471 (*quoting Clark v. Dep’t of Local Gov’t Fin.*, 779 N.E.2d 1277, 1282 n. 4 (Ind. Tax Ct. 2002)). This requirement applies equally to an assessor bearing the burden. Here, the record contains no basis for the selection of any of the factors discussed herein, and there is no evidence that the report at issue was prepared according to generally accepted appraisal principles.
- l. Respondent’s income approach did not provide probative evidence of the subject property’s market value-in-use for the 2013 assessment. Further, Respondent failed to walk the Board through every element of the income approach analysis as required by *Long*, and did not demonstrate that it conforms to generally accepted appraisal and assessment principles. IncomeWorks may be a valid tool for delivering a calculation of value, but Respondent failed to prove it. Furthermore, a party introducing a report produced by such a software tool must also show that the underlying data used by the software is reliable with regard to the conclusion and that it constitutes probative evidence of a property’s market value-in-use.

CONCLUSION

- 19. Petitioner made a prima facie case for a reduction in the assessed value. Respondent failed to rebut Petitioner’s case with substantial evidence. In prior cases, the Board has determined the sale price of a property to be a stronger indicator of value than the appraised value, however, Petitioner requested the appraised value of \$675,000 and the Board declines to lower the value below that request.

FINAL DETERMINATION

In accordance with the above findings of fact and conclusions of law, the Board determines the 2013 assessed value should be changed to \$675,000.

ISSUED: June 13, 2016

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 not later than forty-five (45) days after 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's rules are available at <<http://www.in.gov/judiciary/rules/tax/index.html>>.