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

Petitions:	**10-039-14-1-4-00590-16**
	10-039-15-1-4-00865-16
Petitioner:	**Bushmann LLC**
Respondent:	**Clark County Assessor**
Parcel:	**10-42-03-600-167.000-039**
Assessment Year:	**2014, 2015**

The Indiana Board of Tax Review issues this determination in the above matter, and finds and concludes as follows:

Procedural History

1. The Petitioner, Bushmann, LLC, challenged its assessments for 2014 and 2015. On February 15, 2016, and March 9, 2016, the Clark County Property Tax Assessment Board of Appeals ("PTABOA") issued determinations upholding the assessments.

2. The Petitioner timely filed Form 131 petitions with the Board and elected to use our small claims procedures. On August 12, 2016, our designated administrative law judge, Gary Ricks, held a hearing. Neither he nor the Board inspected the property.

3. Milo E. Smith, a certified tax representative, appeared for the Petitioner. Brian Cusimano, appeared as counsel for the Respondent. The following people were sworn as witnesses: Smith; Ken Surface, senior vice president of the Nexus Group; and Darlene Goodman, deputy assessor.

4. The subject property is located at 5202 Highway 62 in Jeffersonville. It has a 2,880 square foot building, a detached canopy, and other improvements. It is leased to a company that operates a convenience store and gas station under the name Circle K.

5. The Assessor determined the following values for the property:

Year	Land	Improvements	Total
March 1, 2014	$1,000,000	$447,900	$1,447,900
March 1, 2015	$1,000,000	$416,900	$1,416,900

6. The Petitioner requested a total assessment of $472,200 for each year.

7. The official record includes the following:

a. A digital recording of the hearing.

b. Exhibits:

Petitioner Exhibit 1:	2013 Property Record Card ("PRC") for the subject property,
Petitioner Exhibit 2:	2014 PRC for the subject property,
Petitioner Exhibit 3:	2015 PRC for the subject property,
Petitioner Exhibit 4:	Assessment information for the subject property for 2013-2015,
Petitioner Exhibit 5:	Spreadsheet titled "Clark County 2012 sales,"
Petitioner Exhibit 6:	Spreadsheet titled "Clark County 2013 sales,"
Petitioner Exhibit 7:	Spreadsheet titled "Clark County 2014-2015 sales,"
Petitioner Exhibit 8:	Aerial photograph of the subject property's intersection with parcel lines together with PRCs for four parcels identified on the photograph,
Petitioner Exhibit 9:	*Peters v. Boone County Ass'r* slip op. 49T10-1207-TA-2432 (Ind. Tax Ct. May 14, 2015),
Petitioner Exhibit G:	PRC for 1505 Veterans Parkway, Jeffersonville.[1]
Respondent Exhibit A:	Sales disclosure form for December 17, 2015 sale of the subject property,
Respondent Exhibit B:	LoopNet listing sheet for subject property,
Respondent Exhibit C:	LoopNet printout "Jeffersonville, IN Market Trends,"
Respondent Exhibit D:	E-mails between Darlene Goodman and Ken Surface,
Respondent Exhibit E:	Mortgage, Assignment of Rents, Security Agreement, and Fixture Filing, recorded January 7, 2016,
Respondent Exhibit F:	Real Estate Mortgage, recorded January 18, 2006,
Respondent Exhibit J:	Multiple copies of Modification of Mortgage, recorded September 8, 2006.[2]
Board Exhibit A:	Form 131 petition with attachments,
Board Exhibit B:	Notice of appearance by Brian Cusimano,
Board Exhibit C:	Hearing notice,
Board Exhibit D:	Hearing sign-in sheet.

c. These Findings and Conclusions.

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[1] The Respondent actually marked this exhibit for identification but did not offer it. The Petitioner offered it instead.
[2] The Respondent identified two documents as Exhibits H and I and handed them to the ALJ. She did not offer those documents as exhibits.

Contentions

A. Summary of the Respondent's case

8. As part of the annual trending process for 2014, the Respondent increased the property's assessment from $472,200 to $1,447,900. The Respondent's office decided to increase the assessment primarily because it learned the property had been listed for sale at $3,238,000 in October 2013. According to Ken Surface, who works for the Respondent's contractor, the Respondent also relies on other data in the trending process, such as information from assessment appeals, appraisals, and buyers. Surface believed that the property was grossly under-assessed in 2013. But he believed the new value of $1,447,900 was equitable compared to the assessments of other convenience stores. *Surface testimony, Resp't Ex. A, Pet'r Ex. 2*.

9. Although the Respondent did not offer a copy of the 2013 listing sheet, she did offer a copy of a LoopNet listing from 2010. The 2010 asking price was $2,454,705, and the listing sheet reported actual net operating income of $165,693. It also included the following information about the existing tenant, Circle K, and its lease:

> One of the newer company operated Circle K convenient [*sic*] stores on the market: constructed in 2006, opened for business in November of 2006. Interior features a "Port of Jeffersonville theme." Triple net lease until 2021 with rent increases every 5 years (next jump 2011). Offered at 6.75% cap rate. Circle K owned by Alimentation Couche-Tard, BB+ credit rating. Rent schedule attached.

Resp't Ex. B. Surface speculated that the asking price jumped between 2010 and 2013 because Circle K's rent increased in 2011. *Surface testimony*; *Resp't Ex. B.*

10. On December 17, 2015, the Petitioner sold the property to 291 Lambert, LLC for $3,175,000. According to the sales disclosure form, the parties were unrelated and no personal property was included. In preparing for the hearing, Darlene Goodman, a deputy assessor, called Patrick Farris, who signed the form on 291 Lambert's behalf. Farris said that there was a lease with 11 years remaining and that an appraisal "did come back to the purchase price." He did not say 291 Lambert bought the property because of the lease's income stream, but it is unclear whether Goodman actually questioned him on that point. Farris also confirmed that the sale did not include personal property. Thus, the Respondent believes the sale was at arm's length and included only real estate. In any case, the Petitioner's recent returns reported an average of only about $110,000 in personal property. *Goodman testimony; Resp't Exs. A, D*.

11. The Respondent also offered a Mortgage, Assignment of Rents, Security Agreement and Fixture Filing ("Mortgage and Security Instrument") that she claimed was related to the sale. Under that instrument, 291 Lambert gave Alliant Credit Union a mortgage on the

subject property as well as security interests in any rents, leases, and personal property connected with the real estate. It pledged that collateral to secure a debt of $2,063,000. According to Surface, a bank would require an appraisal and would not lend that amount of money on a property worth only $400,000. *Surface testimony; Resp't Ex. E*.[3]

12. Because the sale was from December 2015, Surface trended the price back to the valuation dates at issue in these appeals. He testified that he was familiar with market trends in Clark County. He also pointed to a graph from LoopNet, which he claimed shows annual appreciation of approximately 5% during the relevant period. He used that rate to trend the December 2015 sale price to $3,050,000 as of March 1, 2015, and to $2,900,000 as of March 1, 2014. The Respondent asked for the assessments to be increased to match those trended values. *Surface testimony, Cusimano argument; Resp. Ex. C.*

13. The Petitioner primarily challenged the Respondent's methodology in determining the assessment. But simply attacking an assessor's methodology does not show an assessment is wrong. *Cusimano argument (citing Westfield Golf Practice Center, LLC v. Washington Twp. Ass'r,* 859 N.E.2d 396 (Ind. Tax Ct. 2007)). The Petitioner's witness and representative, Milo Smith, did point to sale prices and assessments for various properties in an effort to support keeping the subject property's assessment at its 2013 level. But he did not analyze how any of those properties compared to the subject property in terms of use, age, or location. And he did not know anything about the sale terms or the interests that were transferred. That type of "unfiltered" information is not probative. *Cusimano argument.*

B. Summary of the Petitioner's case

14. The Respondent did not meet her burden of proof. *Smith argument.*

15. There are three traditional methods for valuing real property: the cost, sales-comparison, and income approaches. The Respondent did not use any of those approaches. Instead, she reassessed the property based on its list price. Neither the Indiana Tax Court nor the relevant assessment regulations recognize that as a valid method for assessing real property. There is no evidence the Respondent assessed any other convenience stores or commercial properties in a similar manner. *Smith argument, Pet'r Ex. 9.*

16. Between 2013 and 2014, the Respondent changed the building's quality grade from C to B. That raised the total depreciated replacement cost for the improvements to $447,900. The undepreciated cost new was $598,400 (rounded). The Respondent also removed a negative 25% influence factor that had previously been applied to the land and increased

[3] The Respondent also offered a mortgage on the subject property from 2006 and a modification of that mortgage from 2008. The 2006 mortgage secured a loan of $600,000 while the modification secured a loan of $1,770,000. The Respondent did not explain how those documents related to the valuation dates for the 2014 and 2015 assessments. *See Surface testimony; Resp't Exs. F, J.*

the base rate from $75,000/acre in 2013 to $1 million/acre in 2014. Yet she continued to assess two other commercial properties on the same intersection using the $75,000/acre base rate. She did the same for another property just off the intersection and adjacent to the subject property. *Smith testimony; Pet'r Exs. 1-4, 8.*

17. Smith prepared a spreadsheet with sale and assessment information for commercial properties in Clark County that sold between 2012 and 2015. He looked for properties with sale prices between $500,000 and $2 million, but he focused on sales from Jeffersonville. He acknowledged that he did not know any of the sale terms or what rights were conveyed. He similarly did not adjust the sale prices or assessments to account for any differences between the properties listed in his spreadsheet and the subject property. *Smith testimony; Pet'r Exs. 5-7.*

18. The Petitioner also pointed out that the Respondent's own LoopNet graph shows average asking prices in Jeffersonville ranging from $85/sq. ft. to $118/sq. ft. of building area. By contrast, the subject property was assessed at $502 per square foot, and the asking price from the 2010 LoopNet listing was even higher. Smith could not find any other property in Clark County assessed at those levels. According to Smith, there is no way to justify assessing the subject property so much higher than comparable properties. *Smith argument.*

19. Because the Respondent failed to meet her burden of proof, the 2014 and 2015 assessments should revert to $472,200—the amount for which the property was assessed in 2013. *Smith argument.*

Burden of Proof

20. 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. Indiana Code § 6-1.1-15-17.2 creates an exception to that general rule and assigns the burden of proof to the assessor in two circumstances. Where the assessment under appeal represents an increase of more than 5% over the prior year's assessment for the same property, the assessor has the burden of proving the assessment under appeal is correct. I.C. § 6-1.1-15-17.2(a) and (b). The assessor similarly has the burden where a property's gross assessed value was reduced in an appeal and the assessment for the following date represents an increase over "the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase…" I.C. § 6-1.1-15-17.2(d). If the assessor fails to meet her burden, the assessment reverts to the prior year's assessment of record or to another value shown by probative evidence. *See* I.C. § 6-1.1-15-17.2 (b).

21. The Petitioner's assessment increased far more than 5% between 2013 and 2014. The Respondent therefore conceded she had the burden of proof. Assigning the burden for 2015 depends on how we resolve the 2014 appeal.

Analysis

22. In Indiana, 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*, I.C. § 6-1.1-31-6(c). Evidence in an assessment appeal should be consistent with that standard. For example, a market-value-in-use appraisal prepared in accordance with the Uniform Standards of Professional Appraisal Practice often will be probative. *See id.; see also, Kooshtard Property VI, LLC 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, sale information for the property under appeal, sale or assessment information for comparable properties, and any other information compiled according to generally accepted appraisal principles. *See Eckerling v. Wayne Twp. Ass'r*, 841 N.E.2d 674, 678 (Ind. Tax Ct. 2006); *see also*, I.C. § 6-1.1-15-18 (allowing parties to offer evidence of comparable properties' assessments to determine an appealed property's market value-in-use).

A. 2014 Assessment

23. The Respondent relied almost exclusively on the trended sale price from December 2015 and related listings. She is correct in asserting that a property's sale price may be compelling evidence. But that presumes, among other things, that the sale was at arm's length, the buyer and seller were typically motivated, and the property was reasonably exposed to the market. *See* 2011 MANUAL at 5-6.[4] For purposes of determining true tax value, it also presumes the sale price reflects the value of the fee simple interest in the real property and does not include other economic interests, such as contract rent from above-market leases. *See Grant County Ass'r v. Kerasotes Showplace Theatres,* 955 N.E.2d 876, 881-82 (upholding Board's decision to approach sale and rental data from sale-leaseback transactions with caution, "taking care to ascertain whether . . . they reflect real property value alone or whether they include the value of certain other economic interests").

24. Although the Respondent offered sufficient evidence for us to infer that the Petitioner and 291 Lambert negotiated at arm's length, we find that the sale price more likely than not included at least some items classified as personal property under Indiana's assessment regulations. For example, the Petitioner used the property as a convenience store that sold gasoline. Presumably, it had underground tanks that the Petitioner did not dig up and take with it. And the assessment regulations classify "underground gasoline tanks at

[4] The 2011 Manual defines "market value" as "[t]he most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self-interest, and assuming that neither is under undue duress." 2011 Manual at 5-6.

service stations" as personal property. 50 IAC 4.2-4-10; 2011 REAL PROPERTY ASSESSMENT GUIDELINES, ch. 1 at 13. Although the sales disclosure form reports that no personal property was included, commonly understood distinctions between real and personal property do not necessarily reflect the technical classifications under Indiana's assessment regulations. Nonetheless, there is little concrete evidence to suggest that personal property contributed substantially to the overall sale price.

25. But there is a much bigger problem with using the sale price as evidence of the subject property's true tax value. It is an investment property, and both the buyer and seller likely valued it based on its ability to generate income. The Respondent's own evidence shows that the Petitioner sold the property subject to a long-term lease with 11 years remaining on it. And the LoopNet listing sheet the Respondent offered was premised on the actual rent paid by Circle K, which the sheet identified as a BB+ rated tenant. Although the listing was from 2010, the Respondent did not claim that the later listings were premised on different factors. Thus, the buyer likely considered things other than the value inherent in the property itself, such as the amount and stability of the income stream in light of the contract rent and Circle K's credit rating.

26. That does not mean the sale price automatically reflected something other than the true tax value of the fee simple interest in the property. But more information is required before we can know whether it did. For example, if the actual net income reflected market rent and expenses and the extracted capitalization rate reflected typical risks for the property type, the sale price might be probative without the need for any adjustment. On the other hand, if the contract rent exceeded market rent or 291 Lambert took Circle K's creditworthiness into account, some adjustment to the sale price likely would be required before it could be used to determine the property's true tax value.

27. The Respondent offered little information on those points, and what she did offer was ambiguous. Although Farris did not say that 291 Lambert relied on the income stream from the existing Circle K lease, we do not know if Goodman even questioned him about that. Similarly, while Farris said an appraisal came "back to the purchase price," we do not know what interests were being appraised. The Respondent's reliance on the Mortgage and Security Instrument does little to support her position. Surface apparently believes that the instrument necessarily shows the lender had an appraisal valuing the property at an amount equal to or above the amount of the indebtedness. Even if that were a permissible inference, we know nothing more about the appraisal Surface posits than we know about the appraisal Farris referenced. They may have been referring to the same appraisal. In any case, the Mortgage instrument secures the indebtedness with collateral beyond just the real property.

28. The record as a whole reinforces our skepticism about relying on the sale price without further examination or adjustment. As shown by the property record card, the replacement cost new for all the Petitioner's improvements, without applying any depreciation, was $598,400 (rounded). The Respondent valued the land at $1 million,

which was over 10 times higher than she assessed other commercial property at the same intersection. That still reflects a total value ($1,598,400) of only a little more than half the trended sale price ($2,900,000).

29. Because the Respondent did not explore whether above-market rent or tenant creditworthiness affected the sale price, that sale lacks probative value. The only other attempts to justify the current assessment were Surface's vague references to assessing the subject property in a manner that was equitable with other convenience stores that sell gas. Those conclusory references have no probative weight. The Respondent therefore failed to meet her burden of proving that that 2014 assessment was correct, and the assessment must revert to the previous year's level of $472,200.

B. 2015 Assessment

30. The Respondent relied on the same evidence for 2015, and we reach the same result—the assessment must revert to the previous year's level, which we have determined to be $472,200.

Final Determination

31. Because the Respondent failed to meet her burden of proving the 2014 and 2015 assessments were correct, each assessment must revert to the previous year's level. We therefore order that both assessments be changed to $472,200.

Issued: January 5, 2017

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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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's rules are available at <http://www.in.gov/judiciary/rules/tax/index.html>.