

REPRESENTATIVE FOR PETITIONER:

Paul M. Jones, Ice Miller, LLP.

REPRESENTATIVE FOR RESPONDENT:

Nick J. Cirignano, Ziemer, Stayman, Weitzel, & Shoulders, LLP

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**BEFORE THE  
INDIANA BOARD OF TAX REVIEW**

CVS Corporation #6252-02	)	Petition No.:	82-020-09-1-4-07415
	)		
Petitioner,	)		
	)	Parcel No.:	12-020-34-083-047
v.	)		
	)		
Vanderburgh County Assessor,	)	County:	Vanderburgh
	)		
Respondent.	)	Assessment Year:	2009

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

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**April 12, 2012**

**FINAL DETERMINATION**

The Indiana Board of Tax Review (Board) has 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 whether the Petitioner's property is over-valued for the 2009 assessment year.

### **PROCEDURAL HISTORY**

2. The Petitioner initiated its assessment appeal by a letter to the Vanderburgh County Property Tax Assessment Board of Appeals (the PTABOA) dated April 16, 2010. The PTABOA issued its assessment determination on September 17, 2010.
3. Pursuant to Indiana Code § 6-1.1-15-1, the Petitioner filed a Form 131 Petition for Review of Assessment on September 22, 2010, petitioning the Board to conduct an administrative review of its property's 2009 assessment.

### **HEARING FACTS AND OTHER MATTERS OF RECORD**

4. Pursuant to Indiana Code § 6-1.1-15-4 and § 6-1.5-4-1, the duly designated Administrative Law Judge (the ALJ), Carol Comer, held a hearing on January 26, 2012, in Evansville, Indiana.
5. The following persons were sworn and presented testimony at the hearing:  
  
For the Petitioner:  
  
Carla D. Bishop, Meritax Property Tax Consultants, Inc.  
  
For the Respondent:  
  
Jacqueline Doty-Fox, Vanderburgh County Hearing Officer,  
D. Stephen Parker, valuation witness.
6. The Petitioner did not present any exhibits at the hearing.

7. The Respondent presented the following exhibits:<sup>1</sup>
  - Respondent Exhibit C – Sales and lease data for CVS properties,
  - Respondent Exhibit D – Market Summary of CVS properties sold in 2010,
  - Respondent Exhibit E – Sales disclosure form for Walgreens,
  - Respondent Exhibit F – Real Property Ad Valorem Report prepared by Carla D. Bishop.<sup>2</sup>
8. The following additional items are officially recognized as part of the record of proceedings and labeled Board Exhibits:
  - Board Exhibit A – Form 131 Petition,
  - Board Exhibit B – Notice of Hearing-Reschedule dated November 3, 2011,
  - Board Exhibit C – Hearing sign-in sheet.
9. On September 9, 2011, the Petitioner’s counsel filed its “Petitioner’s Motion for Determination Concerning Burden of Proof” and the Petitioner’s “Brief in Support of Petitioner’s Motion for Determination Concerning Burden of Proof.” On October 5, 2011, the Respondent’s counsel filed the Respondent’s “Objection to Motion for Determination Concerning Burden of Proof” and “Respondent’s Brief in Response to Petitioner’s Motion for Determination Concerning Burden of Proof.” The Board issued its “Order on Petitioner’s Motion for Determination Concerning Burden of Proof” on November 23, 2011, finding that the Respondent had the burden of proof in this hearing.
10. The subject property is a CVS general retail store and pharmacy located at 4480 N. 1<sup>st</sup> Avenue, in Evansville, Indiana.
11. The ALJ did not conduct an on-site inspection of the subject property.
12. For 2009, the PTABOA determined that the assessed value of the Petitioner’s property was \$644,400 for the land and \$1,135,200 for improvements, for a total assessed value of \$1,779,600.

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<sup>1</sup> The Respondent did not present an Exhibit A or an Exhibit B. The Respondent also referred to thirteen exhibits labeled “Rebuttal Exhibits,” that the Respondent chose not to submit for the record.

<sup>2</sup> Petitioner’s counsel objected to the admission of Respondent Exhibit F because, Mr. Jones argues, the Respondent did not include the exhibit in the Respondent’s evidence exchange. The exhibit at issue, however, was the Petitioner’s valuation report and, therefore, the Petitioner could not be surprised by its content. Therefore the Judge admitted the exhibit over objection.

13. For 2009, the Petitioner contends that the assessed value of its property should be reduced to its 2008 assessed value of \$1,581,000.

#### **JURISDICTIONAL FRAMEWORK**

14. 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, (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.

#### **RESPONDENT'S CONTENTIONS**

15. The Respondent contends that the assessed value of the Petitioner's property is correct for the March 1, 2009, assessment year. The Respondent presented the following evidence in support of its contention:
  - A. The Respondent's witness contends that the value of the Petitioner's property was correctly assessed at \$1,779,600 for 2009, based on the Real Property Assessment Guidelines. *Doty-Fox testimony*. According to Ms. Doty-Fox, when the subject property was built in 2003, personnel from the assessor's office visited the site and collected property data following the Guidelines. *Id.* In 2006, Ms. Doty-Fox testified, the first state-mandated annual adjustment was conducted using validated market sales of properties in the area to trend the value of the subject property. *Id.* According to Ms. Doty-Fox, the subject property's value was trended for subsequent years using the same method. *Id.*

- B. The Respondent further contends that the subject property is valued correctly based upon the sales of comparable properties. *Parker testimony*. The Respondent's witness, Mr. Parker, who is a certified general appraiser and licensed real estate broker in the Evansville area, testified that he prepared a list of comparable sales of CVS and Walgreens properties that occurred in the Midwest between 2006 and 2008. *Id.*; *Respondent Exhibit C*. Mr. Parker contends that all CVS and Walgreen stores are built to lease and investors in the market, which is a national market, are purchasing the properties for the income stream. *Id.* According to Mr. Parker, the highest sale price was in Coons Rapid, Michigan, where a CVS store sold for \$5,533,000 based on the longest term of lease available and the lowest sale price of a CVS was for \$1,836,000 based on an eight year lease. *Id.* Based on the comparable sale prices, Mr. Parker testified, he calculated the value of the Petitioner's property to be \$3,225,000. *Parker testimony*.
- C. Similarly, the Respondent argues that the subject property is valued correctly based upon the income approach. *Parker testimony*. According to Mr. Parker, he determined that market rent for the subject property on a lease basis would be approximately \$17 a square foot. *Id.* Mr. Parker testified that he used a capitalization rate of 7.5%, which he contends was the national capitalization rate at the time of the sales. *Id.* Based on these values, Mr. Parker calculated a value of \$2,292,000 for the Petitioner's property. *Id.*
- D. Mr. Parker contends that no change in the Petitioner's property's assessed value was indicated because the cost approach used by the county resulted in a value of \$1,761,000, which was the lowest of the three values. *Parker testimony*. In response to cross examination, however, Mr. Parker admitted that he did not prepare an appraisal of the subject property and that he merely concluded that the cost approach value determined by the assessor was "the most correct value for tax assessment." *Id.*
- E. Finally, the Respondent argues that the Petitioner's valuation of its property is not credible. *Cirignano argument*. In support of this argument, Mr. Cirignano called the Petitioner's tax representative as a witness. *Id.* In response to Mr. Cirignano's

questions, Ms. Bishop testified that she calculated a fee simple value for the subject property based on market rents for retail properties that had previously been leased to CVS or Walgreens. *Bishop testimony; Respondent Exhibit F*. Ms. Bishop testified that she also looked at comparable retail listings in the same area as the subject property that rented for between \$8 and \$12 a square foot. *Id.* According to Ms. Bishop, she determined that market data supported a rental rate of \$9 per square foot, which resulted in a gross potential income of \$117,828. *Id.* After deducting 1% for vacancy and 3% for management fees, Ms. Bishop testified, she calculated a net operating income of \$113,150, which capitalized at 7.6%, resulted in a value of \$1,488,800 for the Petitioner's property. *Id.*

- F. The Respondent's valuation witness, Mr. Parker, argues that the comparable properties in Ms. Bishop's report are not comparable to the subject property. *Parker testimony*. According to Mr. Parker, most of the properties used in the Petitioner's report would need significant adjustments for age, location, quality of construction and condition in order to be comparable to the CVS building at issue in this appeal. *Id.* Mr. Parker argues that the property at 5600 E. Virginia, which rents for \$12 per square foot, is the most comparable property in the report because it is similar in construction and location to the subject property. *Id.; Respondent Exhibit F*. Based on a \$12 market rent and using the same vacancy and management deductions and capitalization rate as Ms. Bishop used in her report, Mr. Parker calculated a market value of \$1,972,117 for the Petitioner's property for the 2009 assessment year. *Parker testimony*.

### **PETITIONER'S CONTENTIONS**

16. The Petitioner's counsel argues that the Respondent failed to meet its burden to prove that the property's 2009 assessment was correct. *Jones argument*. According to Mr. Jones, the Respondent's witness testified the property's assessed value of \$1,779,000 resulted from the cost approach and a trending factor obtained through market sales, but offered nothing to substantiate that value. *Id.* Further, Mr. Jones contends that Mr.

Parker offered no appraisal – only conclusory statements regarding value. *Id.* In addition, Mr. Jones argues, Mr. Parker’s income analysis and comparable sales analysis used properties that are leasebacks and leaseback sales, which are not relevant under Indiana case law. *Id.*, citing *CVS v. Shelby County Assessor*, Petition No. 73-002-07-1-4-12801 (Nov. 15, 2011), and *Grant Co. Assessor v. Kerasotes Showplace Theatres*, 995 N.E.2d 876 (Ind. Tax Ct. 2011).

#### ANALYSIS

17. 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. *See id.* A market-value-in-use appraisal prepared according to USPAP often will often be probative. *Kooshtard Property VI v. White River Township Assessor*, 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 or comparable properties, and any other information compiled according to generally accepted appraisal principles. MANUAL at 5.
18. 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). Otherwise, the evidence lacks probative value. *See id.* (“[E]vidence regarding the value of property in 1997 and 2003 has no bearing upon 2002 assessment values without some explanation as to how these values relate to the January 1, 1999 value.”). For March 1, 2009, assessment, the valuation date was January 1, 2008. *See* 50 IAC 21-3-3(b) (2009) (making the valuation date for assessments after March 1, 2005, January 1 of the year preceding the assessment date)

19. Here, the Respondent argues that the Petitioner's property's 2009 assessment was correct. In support of this contention, the Respondent presented Ms. Doty-Fox, who testified that the property was valued in accordance with the Guidelines and trended each year starting in 2006. In order to carry its burden, however, the Respondent must do more than merely assert that it assessed a property properly. *See Canal Square v. State Bd. of Tax Comm'rs*, 694 N.E.2d 801,808 (Ind. Tax Ct. 1998). Without some showing that the property's assessed value using the Guidelines reflects the property's market value-in-use for the 2009 assessment year, Ms. Doty-Fox's testimony fails to meet the Respondent's burden of proof in this matter.
20. The Respondent also argues that the Petitioner's property was not over-valued for the 2009 assessment year based on other CVS properties that were sold or leased in the Midwest. The Respondent's witness, Mr. Parker, testified that CVS properties are built to lease and purchasers acquire them for the income stream that the properties generate. Mr. Parker contends that the sale price for a CVS property is based on the length of its lease term. According to Mr. Parker, the value of the subject property for 2009 was \$2,292,000 based on his income analysis and the value of the property based on his sales comparable analysis was \$3,225,000.
21. Whether it is in the context of an appraisal or other information compiled in accordance with generally accepted appraisal principles, it is essential to be precise about the interest that is being assessed in order to stay within the proper bounds of tangible property that is subject to assessment and taxation pursuant to Indiana Code § 6-1.1-2-1. One must give careful consideration to ensure that only the value of the real estate is assessed and not some other business or investment interest. *See Grant Co. Assessor v. Kerasotes Showplace Theatres*, 995 N.E.2d 876 (Ind. Tax Ct. 2011).
22. When first reviewing this question in *Kerasotes Showplace Theatres v. Grant Co. Assessor*, Petition No. 27-023-06-1-4-00825 (July 15, 2009), the Board found the opinion in *Walgreen Co. v. City of Madison*, 752 N.W.2d 687 (Wisc. S.Ct. 2008), to be particularly persuasive. In that case, Walgreen operated under a business plan where it



worked with developers who found sites for its stores, bought out existing businesses, bought the sites, and developed the sites to suit Walgreen's needs. *Id.* at 690. Thus, Walgreen's lease payments included compensation for the developer's financing, land acquisition, construction, and development costs. *Id.* They also included the developer's profit margin. *Id.* The parties agreed that the lease terms therefore included above-market rent. *Id.*

23. In rejecting the city's position that the property's assessment should have been based on the property's contract rents, the court explained that Wisconsin assesses real property based on the fair market value of its fee simple interest. *Walgreen*, 752 N.W.2d at 701. Furthermore, Wisconsin's Property Assessment Manual provides that, when applying the income approach, an assessor must use market rent instead of contract rent. *Id.* at 695-96.<sup>3</sup> As the court noted, its view was consistent with the "nationally recognized principle" found in *The Appraisal of Real Estate* (12<sup>th</sup> Ed.):

*A lease never increases the market value of real property rights to the fee simple estate. Any potential value increment in excess of a fee simple estate is attributable to the particular lease contract, and even though the rights may legally "run with the land" they constitute contract rather than real property rights.*

752 N.W.2d at 701 (quoting THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 473 (12<sup>th</sup> Ed.)) (emphasis added).

24. The Tax Court found that "As the Indiana Board noted, while Indiana's assessment system does not value property according to its fair market value like Wisconsin's assessment system, it nonetheless does not "allow[] assessors to assess things other than real property rights for ad valorem taxation." *See Kerasotes*, 995 N.E.2d at 882, *citing Stinson v. Trimas Fasteners, Inc.*, 923 N.E.2d 496, 501 (Ind. Tax Ct. 2010) ("market value-in-use, as determined by objectively verifiable market data, is the value of a property *for its use, not the value of its use*"). "Given the uncontroverted testimony that

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<sup>3</sup> The manual and the court, however, both recognized that when contract rents fall below market rents, the value of a property's leased-fee interest likely falls below the value of its fee-simple interest. *Walgreen*, 752 N.W.2d at 700.

sale-leaseback transactions often reflect the sale of more than just real property, the Indiana Board explained that one should approach the rental data from such transactions with caution, taking care to ascertain whether the sales prices/contract rents reflect real property value alone or whether they include the value of certain other economic interests.” *Id.* The Court agreed. *Id.* “In this case, the Indiana Board found that in determining what the subject property's assessed value should be, the appraisal offered by Kerasotes was more persuasive than the appraisal offered by the Assessor. On appeal, the Assessor has essentially asked the Court to reweigh that evidence. This, however, the Court cannot do.” *Id.*

25. The Board notes that the Petitioner presented no evidence to show that the Respondent’s comparable properties’ rental rates or sales prices did not reflect the properties’ market values. However, the Respondent’s witness testified that he determined the market rent based on a leased fee basis. According to Mr. Parker, investors were purchasing the CVS properties “for the income stream.” Because both the Respondent’s sales comparison valuation and income valuation were based on sales and rent data that, by Mr. Parker’s own admission, valued the lease rather than the property, the Respondent’s valuation evidence fails to sufficiently support a finding that the Petitioner’s property’s 2009 assessment was correct. More importantly, although Mr. Parker is an appraiser, he specifically testified that he did not prepare an appraisal; rather, he merely concluded that the cost approach value determined by the assessor was “the most correct value for tax assessment.” *Parker testimony*. Thus, the Board can give little weight to either his sales comparable valuation or his income approach valuation of the subject property.
  
26. The Respondent’s witness also offered an alternative value for the subject property based on a property he contends is comparable to the subject property that was included in the Petitioner’s valuation witness’ report. But this estimate of the property’s value is similarly unpersuasive. According to Mr. Parker, he applied Ms. Bishop’s 7.65% capitalization rate and her vacancy and management rates to the \$12 per square foot rent of the 5600 East Virginia property, which resulted in a value of \$1,970,000 for the Petitioner’s property. Thus, while Mr. Parker used Ms. Bishop’s income analysis as his

starting point, he only used one of Ms. Bishop's comparable properties. Therefore, Mr. Parker's calculation seriously risks distorting Ms. Bishop's analysis. An expert's valuation analysis is not purely mathematical – one cannot simply plug in different data and automatically say what result he or she would have reached had he used that revised data. Moreover, the Board would have to find that Ms. Bishop's valuation opinion was reliable and credible, to consider a revision of her analysis to have any probative value.

27. The Respondent failed to establish a prima facie case that the subject property's 2009 assessment was correct. When the Respondent has the burden of proving the assessment is correct and fails to provide probative evidence supporting the assessment, the Petitioner's obligation to introduce substantial valuation evidence is not triggered. *Cf. Lacy Diversified Indus. v. Dep't of Local Gov't Fin.*, 799 N.E.2d 1215, 1221-1222 (Ind. Tax Ct. 2003); *Whitley Products, Inc. v. State Bd. of Tax Comm'rs*, 704 N.E.2d 1113, 1119 (Ind. Tax Ct. 1998).

### **CONCLUSION**

28. Pursuant to Indiana Code § 6-1.1-15-17, the Respondent had the burden to show that the Petitioner's property's 2009 assessment was correct. The Respondent failed to meet that burden. The Board therefore finds in favor of the Petitioner and holds that the Petitioner's property should be returned to its 2008 assessed value, or a total assessed value of \$1,581,000 for 2009.

### **FINAL DETERMINATION**

In accordance with the above findings of fact and conclusions of law, the Indiana Board of Tax Review determines that the assessed value of the Petitioner's property for the March 1, 2009, assessment date should be reduced to its 2008 assessed value.

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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, 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>.