REPRESENTATIVE FOR PETITIONER: C. Rex Henthorn, Henthorn, Harris & Weliever

REPRESENTATIVE FOR RESPONDENT: Beth Henkel, Beth Henkel, LLC

BEFORE THE INDIANA BOARD OF TAX REVIEW

Mary K. Fisher Petitioner, v. Carroll County Assessor, Respondent.	)))))))))	Petition Nos.: 08-011-16-1-4-00485-17 08-011-16-2-8-00484-17 Parcel No.: 08-04-27-000-094.000-011 Assessment Year: 2016

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

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:

I. INTRODUCTION

1. This is the third in a series of property tax appeals involving Mary K. Fisher's harbor property. In this latest installment, Fisher claims that her property was exempt from taxation as a common area and that it was incorrectly valued for assessment purposes.

2. The legislature has provided an exemption for common areas in residential developments. While Fisher's property is burdened by a non-exclusive access easement in favor of lot

owners from a nearby subdivision, it does not meet the detailed statutory definition of common area. The statute, however, provides that otherwise non-qualifying property nonetheless must be treated as exempt when an assessor fails to respond within 30 days to notice that a property owner is claiming a common-area exemption. The notice need not be formal, but it must be clear. Fisher sent the Carroll County Assessor a letter discussing, among other things, her belief that she held her property for the benefit of others and that it was therefore exempt. But she did not mention the statute, and her claims were intermingled with references to ongoing litigation in which she sought to have the property assessed as a park. We therefore find that Fisher's letter was not sufficiently clear to render her property exempt by virtue of the Assessor's failure to respond.

3. Fisher also failed to meet her burden of proving that the property's assessment was incorrect. She offered little evidence beyond conclusory assertions by an appraiser and attorney that the recorded access easement and potential prescriptive easements burdened the property to the extent that it had no market value-in-use to the legal titleholder. Although the Assessor sought to raise the assessment, her appraiser's valuation opinion was too unreliable to support doing so, largely because he failed to offer objective support for how he quantified the easement's effect on the property's value.

II. PROCEDURAL HISTORY

4. On March 23, 2016, Fisher sent a letter with the subject line "2016 Assessment" to the Carroll County Assessor. In that letter, Fisher asserted, among other things, that she held the subject property for the benefit of lot owners from Claireview subdivision and that the property should either be exempt or be assessed as a park:

> I know we've been fighting about this for over six years but the harbor lot that's titled in my name is really held by me for the benefit of the owners of those lots in Claireview Subdivision, along with their families and guest[] as noted in the deed of the Claireview Subdivision. I know you know what I'm talking about because we've had at least five hearings and the recorded deed has been discussed in each one along with the way the lot has been used since the 1970's as a park for them and my guests.

> I truly believe this lot should be exempt or, at least, assessed as park property because that it is way it is used because it was set aside by the developer of Claireview to be shared in common and for the benefit of those lots in Claireview that didn't have access to Lake Freeman. Even though it is in my name, I can't use it in any fashion that keeps them from using to access the lake both for launching boats at the ramp and the waterfront for swimming.
>
> If you don't' agree to exempt this tract as the park for Claireview, notify me because, despite the inconvenience, costs, and worry this has caused in the past to me and those who have tried to help me, I'll likely want to ask someone besides you to look at this situation and grant my request.

Pet'r Ex. 13. The Assessor did not respond to the letter because Fisher's previous appeals were pending with the Tax Court and she did not feel it was her place to enter into any agreements while that appeal was pending. *Duff testimony.*

5. Five months later, Fisher filed a Form 130 petition and a Form 133 petition for correction of error with the Assessor. In those petitions, Fisher claimed that her property was worth $0 and qualified for exemption as a common area under Ind. Code § 6-1.1-10-37.5. In March 2017, the Carroll County Property Tax Assessment Board of Appeals ("PTABOA") issued determinations making no change to the assessment of $258,900 and denying the correction of error. Fisher responded by filing Form 131 and Form 132 petitions. She attached the Form 133 to those filings.

6. On April 4, 2018, our designated administrative law judge, Kyle C. Fletcher ("ALJ"), held a hearing on Fisher's petitions. The parties agreed that we should consider Fisher's exemption and assessment claims together. Neither the ALJ nor the Board inspected the property.

7. The following people were sworn as witnesses and testified: Mary K. Fisher; Daniel Dulin, officer, Indiana Department of Natural Resources ("DNR"); David Klenosky, treasurer, Lafayette Sailing Club, Inc.; Larry Dill, attorney; Steven Dailey, son of Mary K. Fisher; Iverson Grove, appraiser; Neda Duff, Carroll County Assessor; Gavin Fisher, appraiser.

8. The parties offered the following exhibits[1]:

Petitioner Exhibit 2:	Warranty Deed from Edwin C. Luthy *et al*. to Charles H. Ade
Petitioner Exhibit 3:	Warranty Deed from Charles Ade to Glenn D. & Delores M. Fisher
Petitioner Exhibit 4:	Aerial photograph of subject property
Petitioner Exhibit 5:	Aerial photograph of subject property
Petitioner Exhibit 6:	Beacon maps of the subject property and Claireview Subdivision
Petitioner Exhibit 7:	2010 & 2015 property record cards for the subject property
Petitioner Exhibit 8:	Harbor Agreement between Mary K. Fisher and Lafayette Sailing Club
Petitioner Exhibit 9:	Lafayette Sailing Club Articles of Incorporation
Petitioner Exhibit 10:	Appraisal report by Iverson Grove
Petitioner Exhibit 11:	January 8, 2016 memo from the Department of Local Government Finance to assessors
Petitioner Exhibit 13:	March 23, 2016 letter from Mary K. Fisher to Assessor and certified mail receipt
Petitioner Exhibit 14:	Subject property photographs – DNR boatlift
Petitioner Exhibit 15:	Subject property photograph – harbor
Petitioner Exhibit 16:	Carroll County Zoning Ordinances excerpt
Petitioner Exhibit 17:	*Fisher v. Carroll Cnty. Ass'r,* pet. no. 18-011-10-1-4-00001 (IBTR Oct. 22, 2012)
Petitioner Exhibit 18:	Sales disclosures, deeds, and Beacon printouts for comparable sales from Gavin Fisher's appraisal
Petitioner Exhibit 19:	Photograph – Calverts Dr. and 1175 West
Petitioner Exhibit 20:	Subject property photograph – entrance
Petitioner Exhibit 21:	Subject property photograph – facing west
Petitioner Exhibit 22:	Subject property photograph – facing east
Petitioner Exhibit 23:	Subject property photograph – picnic tables
Petitioner Exhibit 24:	Subject property photograph – ramp
Petitioner Exhibit 25:	Subject property photograph – ramp facing east
Petitioner Exhibit 26:	Subject property photograph – facing south
Petitioner Exhibit 27:	Subject property photograph – road facing south
Petitioner Exhibit 28:	Subject property photograph – facing north
Petitioner Exhibit 29:	Subject property photograph – seawall
Respondent Exhibit 1:	Appraisal report by Gavin Fisher
Respondent Exhibit 2:	Plat for Claireview Subdivision, recorded May 7, 1962

[1] The exhibits are not numbered consecutively in all instances. Fisher did not offer an exhibit 1 or 12 and the Assessor did not offer an exhibit 7.

Respondent Exhibit 3:	Restrictions Claireview Subdivision recorded May 7, 1962
Respondent Exhibit 4:	Beacon map of Claireview subdivision and two additional maps of Claireview subdivision
Respondent Exhibit 5:	November 16, 2017 letter from Douglas Wagner
Respondent Exhibit 6:	Carroll County zoning ordinance excerpts
Respondent Exhibit 8:	Aerial photograph of subject property with demonstrative lot lines
Respondent Exhibit 9:	Warranty Deed from Charles Ade to Glenn D. & Delores M. Fisher
Respondent Exhibit 10:	Form 132 and Form 133 petitions and attachment
Respondent Exhibit 11:	Ind. Code §§ 6-1.1-10-37.5 and 22-12-1-5
Respondent Exhibit 12:	*Fisher v. Carroll Cnty. Ass'r,* 74 N.E.3d 582 (Ind. Tax Ct. 2017)
Respondent Exhibit 13:	*Fisher v. Carroll Cnty. Ass'r*, pet. no. 18-011-12-1-4-00061 *et al.* (IBTR Nov. 20, 2015)

9. We recognize the following additional items as part of the record: (1) all filings by the parties; (2) a stipulated 2016 property record card for the subject property (labeled as Board Ex. 2), (3) all notices or orders by the Board or our ALJ; and (4) a digital recording of the hearing.

III. FINDINGS OF FACT

A. The subject property

10. The subject property contains 2.41 total acres with frontage on Lake Freeman. It also contains a harbor, so only between 1.77 and 1.9 acres are above water. An aerial photograph of the property is provided below:

Pet'r Ex. 6; *Daily testimony; G. Fisher testimony*.

11. The aerial photograph shows the outlines of platted lots from Claireview subdivision to the north and northeast of the subject property. The lots to the west of Calverts Drive (820 N.) have direct access to the lake. The lots to the east do not. Fisher's summerhouse sits on the unplatted adjacent tract immediately to the east of the subject property and faces the lake. Without the subject property, Fisher would not have access to the lake from her house. *Pet'r Ex. 6; see also, Pet'r Ex. 10 at map*.

12. The property has few improvements—a utility shed is the only improvement identified on its property record card. It also has an old, deteriorating seawall. As shown by the photograph, the property contains a road or path that begins at the property's entrance from Calverts Drive and forms a loop ending at the harbor's southeast corner, where there is a boat ramp. Fisher's witnesses referred to it as a road, but nobody testified that it was paved, and the property record card does not include any paving. Photographs make the road look more like gravel or stone, although they are not clear enough to tell for sure. For purposes of our discussion, we will refer to it as the "gravel road." *Pet'r Exs. 6, 26, 28-29; stipulated property record card; Fisher testimony; Klenosky testimony.*

B. Access easement and lease to Lafayette Sailing Club

13. Edwin Luthy originally developed Claireview. In 1970, he and Edith Luthy sold the subject property to Charles Ade. The sale included other unplatted land and several platted lots from Claireview. The deed from that sale stated that the conveyance was "subject . . . to the restrictive covenants pertaining to Claireview Subdivision . . . ." Those covenants neither refer to any property held in common for the benefit of lot owners nor create any easements. They similarly do not require lot owners to obtain approval from other lot owners before selling their lots. *Pet'r Exs. 2-3.*

14. In 1976, Fisher's late husband and his then wife, Delores M. Fisher, bought the property from Ade. The deed transferred the property "subject to the tenant's rights of Lafayette

Sailing Club through 1977." The Sailing Club is a non-profit organization that offers sailing instruction and promotes sailing, water safety, and seamanship. It uses the property for social purposes, sailing, parking cars and boats, and picnics. After the tenancy referenced in the deed expired, Fisher and the Sailing Club entered into a lease allowing the Sailing Club to use the property in exchange for providing a portable restroom facility, lawn care, trash pick-up, and any necessary maintenance. While the Sailing Club generally paid someone to mow the lawn and maintained a receptacle for paid trash pick-up, it used approximately 25-50 volunteers to do the rest of the maintenance and clean-up work, mostly during two events at the beginning and end of the season that lasted three-to-four hours each. The Sailing Club also did some work on the seawall and boat ramp. The lease further made the Sailing Club responsible to pay property taxes and maintain a comprehensive general liability insurance policy naming Fisher as an additional insured, and it gave the Sailing Club an option to purchase the property. The lease expired on December 31, 2012, but Fisher and the Sailing Club have continued the tenancy under the lease's terms. *Klenosky testimony; M. Fisher testimony; Pet'r Ex. 9.*

15. The 1976 deed also created a non-exclusive access easement in favor of some of the Claireview lot owners and the owner of one other unplatted tract, while making clear that the Fishers retained the right to put their land to lawful uses that did not interfere with that access:

> Subject also to a non-exclusive easement over, across, and upon the above-described real estate for access, by pedestrians and by autos and/or trailers with boats, to and from Lake Freeman, for the benefit of the owners of Lots 15 through 34, inclusive, and Lots 36 through 41, inclusive, in Claireview Subdivision . . . and for the benefit of Arthur L. and Donna M. Kunz, husband and wife, as owners of an unplatted tract of land . . . and their respective successors in title to said lots and lands; provided that the use of such easement by the owners of such lots and lands, their successors and assigns, and their invitees, employees, and agents, shall be entirely at the risk of such owners, their successor and assigns; that their use of the easement shall not unreasonably transfer with the concurrent use thereof by any other person lawfully upon said real estate; *and that Glenn D. Fisher and Delores M. Fisher, their successors and assigns shall have and retain the right to place any improvements upon and make any lawful use of the above described real*

estate as the owners thereof, so long as reasonable access to Lake Freeman for pedestrian traffic and for autos and/or trailers with boats is maintained.

Pet'r Ex. 3 (emphasis added).

16. Larry Dill, a local attorney with experience in real estate law and transactions, characterized the easement as a "floating easement" because it did not specify the portion of the property that easement holders could use to access the lake. But Claireview lot owners, their families, and their guests have historically used the gravel road to drive their boat trailers from Calverts Drive to the boat ramp. Dill testified that he previously owned a 22-foot boat that he towed on trailer using a 16-foot standard cab. Based on the turning radius, he did not believe that he could have gotten to and from the ramp without going down the gravel road through the middle of the property. *M. Fisher testimony; Dill testimony; Pet'r Ex. 3.*

17. Claireview lot owners also use the property to swim, fish, and picnic. They use the property year round (in winter they drive snowmobiles to the water) both day and night. In fact, Fisher can hear the engines and see flashing lights from boats launching or returning at night. *M. Fisher testimony*

18. Since 1996, Fisher has allowed people to gather on her property to watch Fourth of July firework displays. The event has grown over the years and as many as 150 people watch the fireworks from the property. Fisher also permits the Department of Natural Resources to keep a boatlift on the property. The DNR does not pay her for that privilege, and she could revoke her permission at any time. *M. Fisher testimony; Dulin testimony*.

19. Fisher does not know the identity of everyone who uses the property. People also walk, and ride bikes and golf carts across the property going from Calverts Drive to a commercial marina on the property's southern border. Some of those people, as well as some people who use the boat ramp, may not be from the lots that the easement benefits.

Dill therefore believed that people other than those identified in the recorded easement might have prescriptive rights to use the property. In his opinion, Fisher would need to address all those easement rights, both express and prescriptive, before selling the property because a buyer who wants to build on the property or a lender financing the sale would want to clear those clouds on title. Dill was not sure how to go about even identifying people with prescriptive rights. He believed that prospective buyers and lenders would also be concerned about potential liability from injury to a prescriptive-easement holder. For those reasons, he felt that the liability of owning the property exceeded its benefits. *M. Fisher testimony; Dill testimony; Pet'r Exs. 4-5, 18.*

C. The Appraisals

20. Each party hired an appraiser to value the property: Fisher hired Iverson Grove and the Assessor hired Gavin Fisher. To avoid confusion, we will refer to Gavin Fisher either by his full name or by "Gavin." Each appraiser certified that he prepared his appraisal in conformity with the Uniform Standards of Professional Appraisal Practice ("USPAP"). *Pet'r Ex. 10; Resp't Ex. 1.*

1. Grove's appraisal

21. Grove is a licensed appraiser with more than 38 years of experience. He holds SRA and MAI designations from the Appraisal Institute. Instead of providing an opinion of the property's market value-in-use in his appraisal report, however, he concluded that the property was a common area within the meaning of Ind. Code § 6-1.1-10-37.5. *Grove testimony, Pet'r Ex. 10.*

22. Grove initially reviewed the Assessor's records for accuracy and found that she had wrongly classified the property as commercial land. He determined that Fisher had a subservient interest in her property because of the deeded access easement favoring 26 other lots. Thus, he believed Fisher had only a partial interest, rather than a fee-simple interest, in the property. *Grove testimony, Pet'r Ex. 10.*

23. According to Grove, he reached his conclusion, in part, based on his review of Claireview's covenants and restrictions. But those covenants and restrictions neither mention a common area nor prohibit owners from keeping boats on their lots, although they do limit the height of boathouses. Nonetheless, Grove read the restrictions to mean, "they don't want boats" because "they want it to be a residential subdivision, so if you are going to use recreation, use the common lot." *Grove testimony; Pet'r Ex. 10; Resp't Ex. 3.*

24. Grove testified that he generally uses the sales-comparison approach to value properties with easements and conveyance restrictions. Although he looked throughout northern Indiana for sales of properties with similar circumstances, he could not find any. He did find two lakefront lots owned by homeowners' associations and held for the benefit and use of homes in their respective subdivisions. Those associations could not sell, lease, or build on the properties without consent by the subdivisions' homeowners. The properties were assessed at $0, which is what Grove believes Ind. Code § 6-1.1-10-37.5 requires. *Grove testimony, Pet'r Ex. 10.*

25. But Grove explained that assessing the property at $0 does not mean it is valueless. According to Grove, someone who buys a Claireview lot with a deeded easement in the subject property buys both a fee-simple interest in the Claireview lot and a pro-rata share of the subject property. For this reason, Grove believed the subject property's value was incorporated into the value of the subdivision lots benefitting from the access easement. Assessing and taxing the subject property would therefore result in "double dip[ping]." *Grove testimony.*

2. Gavin Fisher's appraisal

26. Gavin prepared an appraisal report valuing the property at $323,000. He is a licensed appraiser and a certified Level III Assessor/Appraiser. He has been appraising real estate for about 15 years and specializes in lakefront reassessment. *G. Fisher testimony; Resp't Ex. 1.*

27. Three factors led Gavin to conclude that the subject property was residential. First, he considered what various people used the property for: Fisher used it to access the lake from her home on the adjacent lot, lot owners from Claireview and their guests used it to access the lake from their lots, and the Sailing Club used it for its activities. Second, the property's L-1 lake-resort classification permits residential use but does not allow a commercial use, and the county's building restrictions would allow the owner to divide the property into two buildable lots with a third lot dedicated to the access easement. Gavin determined that division would be the property's highest and best use, although not its current use. Finally, while the access easement burdened the property, Fisher owned the land and could improve it without permission from the Claireview lot owners. *G. Fisher testimony; Resp't Exs. 1, 5-6, 9.*

28. Unlike Grove, Gavin did not believe the property was a common area within the meaning of Ind. Code § 6-1.1-10-37.5. It was not located in a residential development and Fisher did not own it in a fiduciary capacity. Instead, she owned the property in fee. While Gavin believed that Fisher could feasibly divide the property, he ultimately valued it as a single residential lot encumbered by an access easement. Either way, his analysis supported valuing the property as residential land. *G. Fisher testimony; Resp't Exs. 1, 8-9.*

29. Gavin considered all three approaches to value, but he ended up developing only the sales-comparison approach. He believed the income approach was irrelevant because there was no active lease, and he would not generally consider it to be income producing. He similarly viewed the cost approach as irrelevant because there were only minor improvements on the land. *G. Fisher testimony; Resp't Ex. 1.*

30. For his unit of comparison, Gavin used linear feet along the waterfront, rather than total area, because most waterfront land sells on that basis. He measured 202 linear feet of frontage along the harbor. He chose frontage along the harbor rather than along the lake because the harbor frontage reflected the most useful water access. In his view,

measuring along the lakefront would have artificially inflated his value conclusions. *G. Fisher testimony, Resp't Exs. 1, 8.*

31. To identify relevant data, Gavin looked at the Indiana regional Multiple Listing Service ("MLS") for sales along Lake Freeman. He included White County in his search because he viewed its market as similar to Carroll County. He settled on six properties located around Lake Freeman that sold between 2013 and 2015. Each had between 60 and 80 feet of water frontage. *G. Fisher testimony; Resp't Ex. 1.*

32. None of the properties was burdened by an easement like the subject property. Gavin therefore adjusted the sale prices downward by 10% to account for that difference. Although he typically adjusts sale prices by 20% to account for easements, he believed that accommodating the subject property's easement would be less burdensome given that he appraised the property as a single residential lot rather than two buildable lots. His report said nothing about how he quantified either his typical 20% adjustment or the reduced 10% adjustment. At the hearing, he testified that he based the adjustment on "years and years of analysis of looking at easements and the negative impact of value associated with easements across the land." *G. Fisher testimony; Resp't Ex. 1*.

33. Although Gavin also considered whether to adjust the sale prices to account for other factors, he ultimately decided no adjustments were warranted. Market conditions were stable, so he did not adjust for differences between the sale dates and his valuation date. Similarly, although many of the comparable lots had less total area than the subject property, he found that properties transacted entirely based on the amount of water frontage. And he could not find sufficient information on buyer motives to support adjusting sale prices to account for differences between high-banked and low-banked properties. *G. Fisher testimony, Resp't Ex. 1*.

34. The adjusted sale prices ranged from $754/front foot to $2,812/front foot, which Gavin reconciled to $1,600/front foot. While he gave weight to all the adjusted sale prices, he gave the greatest weight to those he found were most similar to the subject property,

which all had adjusted sale prices around $1,600/front foot. Gavin gave less weight to Sale 1, which sold for an adjusted price over $1,000/front foot higher than any other property, because he had nothing to explain that difference. *G. Fisher testimony, Resp't Ex. 1.*

35. When presented with the sales disclosure forms for Sale 5, Gavin acknowledged that it included three additional lots, which he described as non-buildable based on their sizes. He also acknowledged that the total frontage for the four lots was approximately three times as much as the 70 feet he used in his appraisal. The assessment information provided with those disclosure forms indicate that the actual frontage for the four lots ranged from 25 to 50 feet, for a total of 159.5 feet of water frontage (or 183 feet of effective frontage). The lots' effective depths ranged from 145 feet to 170 feet, and they were all deeper than at least two other properties (Sales 2 and 4) Gavin used in his analysis. Based on the new information, Gavin testified that he probably would not consider Sale 5. But he also testified that nothing raised in cross-examination caused him any concern. *G. Fisher testimony; Pet'r Ex. 18; Resp't Ex. 1.*

IV. CONCLUSIONS OF LAW AND ANALYSIS

A. Objections

36. Fisher made several objections. The ALJ ruled on some of those objections, and we adopt his rulings. He took others under advisement, which we now address.

37. We begin with Fisher's objection to Respondent's Exhibit 5—a letter from the executive director of the Carroll County Area Plan Commission indicating that, upon application and approval, the subject property could be divided into lots with a minimum of 6,000 square feet and developed. Fisher objected on hearsay grounds. The Assessor acknowledged the letter was hearsay, but argued that 52 IAC 3-1-5(b) allows us to admit hearsay as long as it does not form the sole basis for our final determination. We agree and overrule Fisher's objection. In any case, we do not ultimately rely on the letter in reaching our final determination.

38. Next, Fisher objected to Respondent's Exhibit 8—an aerial photograph of the subject property with lines depicting the dimensions for the lots into which Gavin believed the property could be divided. According to Fisher, showing how the parcel could be divided when it currently exists as an undivided lot is irrelevant under Indiana's market value-in-use standard. For support, she cited to *City of Lafayette v. Beeler*, 187 Ind. App. 281, 381 N.E. 2d 1287 (1978). The Assessor responded that the exhibit shows (1) Gavin's thought process in determining that the property should be valued for residential use, and (2) his measurement of the lake frontage.

39. We overrule Fisher's objection. Relevant evidence is generally admissible. Ind. Evidence Rule 402. Evidence is relevant if it tends to make a fact of consequence "more or less probable than it would be without the evidence." Evid. R. 401. "This often includes facts that merely fill in helpful background information . . . even though they may only be tangentially related to the issues presented." *Hill v. Gephart*, 62 N.E.3d 408, 410 (Ind. Ct. App. 2016). Gavin used the Exhibit 8 to help illustrate his determination that the subject property was capable of continued residential use. He did not value the property as three separate lots. Instead, he concluded that it was a single residential lot with enough space to serve the access easement without interfering too much with a buyer's enjoyment of the lot.

40. This case therefore differs from *City of Lafayette v. Beeler*, a condemnation action for an as-yet undivided tract. In that case, the property owner offered two plats showing the land subdivided into lots and the effect the condemned easement would have on those lots. The owner's appraisers valued the entire property by estimating the aggregate value of the projected lots. *Beeler,* 381 N.E. 2d at 1289-91. The Indiana Court of Appeals explained that a property owner is entitled to prove the market value of condemned land "insofar as that value is presently enhanced by the property's *adaptability* for subdivision use may be shown, but the possible future value of each prospective lot may not be proven." *Id*. at 1292 (emphasis in original). Because the parties had already conceded the adaptability of the land to residential use, admitting the contested plats would have

been merely cumulative on that point. But the jury could have misconstrued them as support for valuing the possible future uses of the prospective lots. *Id*. 1291-94. The court therefore held that the trial court had erred in admitting the plats and related testimony. *Id*.

41. This is an administrative action—not a jury trial. Thus, unlike the plats in *Beeler*, there is no potential for a jury to misconstrue Respondent's Exhibit 8 as support for valuing the subject property as separate platted lots. Instead, the exhibit simply helps illustrate Gavin's analysis of whether continued residential use of the property was feasible and how he viewed the easement's effect on the value of the property as a single residential lot.

42. Finally, Fisher objected to Respondent's Exhibit 1—Gavin's appraisal report—as well as to Gavin's testimony about the valuation opinion contained in that report. She based her objection on two grounds: (1) that the report and testimony were irrelevant because they tended to prove the property's fair market value rather than its market value-in-use, and (2) that Gavin did not choose his comparable sales based on scientific principles as required by Rule 702 of the Indiana Rules of Evidence.

43. The ALJ overruled the objection at the hearing. Because Fisher revisits the objection in her trial brief, we will explain why we adopt the ALJ's ruling. Gavin stated in his appraisal report that he was determining the property's value-in-use. He reiterated that in his testimony. He also certified that he performed his appraisal in conformity with USPAP, and the sales-comparison approach is a generally accepted appraisal methodology for determining both market value and market value-in-use. Thus, his appraisal report and testimony are relevant. As for Fisher's objection based on Evidence Rule 702, which governs the admission of expert testimony, our rules call for administrative law judges to regulate our hearing in "a manner without recourse to the rules of evidence." 52 IAC 2-7-2(a). Even if we were to assume Rule 702 applied, however, Gavin's appraisal report would still be admissible. Again, he used a generally accepted appraisal approach in valuing the property. Any disputes about the manner in

which he did so or about the reliability of his underlying data go to the weight of his opinion rather than to its admissibility.

B. Fisher's Exemption Appeal

44. As already explained, Fisher both challenges subject property's assessment and seeks an exemption. We begin with her exemption claim.

1. Fisher was not collaterally estopped from claiming that the subject property is exempt under Ind. Code § 6-1.1-10-37.5

45. The Assessor argues that Fisher was collaterally estopped from claiming that her property was exempt Ind. Code § 6-1.1-10-37.5 because the Tax Court previously decided that the property was not common area when it decided Fisher's appeal of her 2012 and 2014 assessments. Collateral estoppel bars a party from relitigating a fact or issue that was necessarily adjudicated in an earlier action. *Tofany v. NBS Imaging Systems, Inc.*, 616 N.E.2d 1034, 1037 (Ind. 1993). Because each tax year stands alone, the Tax Court has held collateral estoppel generally does not apply in property tax cases. *Miller Brewing Co., v. Ind. Dep't of State Revenue*, 903 N.E.2d 64, 69 (Ind. 2009) (*quoting Glass Wholesalers v. Ind. Bd. of Tax Comm'rs*, 568 N.E.2d 1116, 1124 (Ind. Tax Ct. 1991)). While the Court has applied the doctrine in the past, it was in the context of Indiana's previous assessment system under which property values normally rolled forward each year between general reassessments rather than being adjusted annually. *See Lindeman v. Wood*, 799 N.E.2d 1230 (Ind. Tax Ct. 2003).

46. Even aside from the general principle that each tax year stands alone, the parties did not litigate, and the Tax Court did not adjudicate, any fact or issue involved in the exemption claim now before us. Fisher did not claim an exemption under Ind. Code § 6-1.1-10-37.5 in her previous appeals, nor could she have—the statute was not passed until 2015. *See* 2015 Ind. Acts 148, § 5. Also, while the statute uses the term "common area," it is a defined term with specific elements. Thus, deciding whether the subject property met

those elements was neither relevant nor necessary to the Tax Court's decision in Fisher's previous appeals.

2. Fisher's property does not qualify as exempt common area under Ind. Code § 6-1.1-10-37.5

47. Indiana Code § 6-1.1-10-37.5 lays out detailed elements a property must meet in order to qualify as a common area:

> (a) As used in this section, "common area" means a parcel of land, including improvements, in a residential development that:
> (1) is legally reserved for the exclusive use and enjoyment of all lot owners, occupants, and their guests, regardless of whether a lot owner makes actual use of the land;
> (2) is owned by:
> (A) the developer, or the developer's assignee, provided such ownership is in a fiduciary capacity for the exclusive benefit of all lot owners in the residential development, and the developer has relinquished all rights to transfer the property other than to a person or entity that will hold title to the property in a fiduciary capacity for the exclusive benefit of all lot owners;
> (B) each lot owner within the residential development, equally or pro rata; or
> (C) a person, trust, or entity that holds title to the land for the benefit of all lot owners within the residential development;
> (3) cannot be transferred for value to another party without the affirmative approval of:
> (A) all lot owners within the residential development; or
> (B) not less than a majority of all lot owners within the residential development, if majority approval is permitted under the bylaws or other governing documents of a homeowners association, or similar entity;
> (4) does not include a Class 2 structure (as defined in IC 22-12-1-5); and
> (5) is not designed or approved for the construction of a Class 2 structure.
> The term includes, but is not limited to, a lake, pond, street, sidewalk, park, green area, trail, wetlands, signage, swimming pool, clubhouse, or other features or amenities that benefit all lot owners within the residential development.

I.C. § 6-1.1-10-37.5(a).

48. The subject property fails to meet at least two of these elements. First, it is not legally reserved for the exclusive use of Claireview lot owners and their occupants or guests. To the contrary, the 1976 deed grants a non-exclusive access easement to certain Claireview lot owners and one unplatted tract, and it expressly provides that the Fishers and their successors or assigns retain the right to use the property in ways that do not unreasonably interfere with the access easement. Second, nothing in the 1970 deed, the 1976 deed, or Claireview's recorded covenants requires Fisher to get approval from Claireview lot owners before transferring the property. Fisher points to Dill's testimony for the proposition that the easement, as well as his speculated prescriptive easements, made selling the property a practical impossibility without obtaining the easement holders' consent. But the statute does not address practicalities of sale. It instead refers to recorded legal restrictions on transfer.

3. The Assessor's failure to respond to Fisher's letter does not require treating the property as exempt common area

49. Nonetheless, Fisher argues that the Assessor's failure to respond to her March 23, 2016 letter requires the property to be treated as common area regardless of whether it otherwise qualifies. For support, she cites to subsections (d) through (g) of the statute, which provide:

> (d) Notwithstanding any other provision of this article, a common area is exempt from property taxation, provided that the common area easements and covenants restricting the use and conveyance of common areas to lot owners are recorded, and notice is provided, to the appropriate county or township assessor.
>
> (e) A county or township assessor shall designate an area as a common area after:
> (1) receiving notice as provided in subsection (d); and
> (2) determining that the area is a common area.
>
> (f) If a county or township assessor determines that the area is not a common area, or determines that the area fails to meet the requirements of subsection (d), then the county or township assessor shall send a written statement to the owner of the common area not later than thirty (30) days after receiving the notice under subsection (d). The written statement shall contain:

> (1) the specific provisions on which the county or township assessor based the determination; and
> (2) a statement that the owner of the common area shall have thirty (30) days to address the specific provisions provided in subdivision (1), and to establish the area as a common area that meets the requirements of subsection (d).
>
> (g) If a county or township assessor fails to send a written statement to the owner of a common area as required by this section, then the area for which notice was provided in subsection (d) shall be considered a common area for purposes of this section.

I.C. § 6-1.1-10-37.5(d)-(g).

50. While not entirely clear, these subsections appear to operate as an informal application process for exempting common areas from taxation. And they place a heavy burden on assessors—failing to respond timely to such applications exempts property whether or not it actually qualifies as common area under the statute. It also appears that the legislature intended the application to be informal. Unlike other exemptions where taxpayers must file written applications on forms prescribed by the Department of Local Government Finance ("DLGF"), this statute simply requires "notice" to an assessor. In a memorandum sent to assessors a little less than three months before Fisher's letter, the DLGF indicated that a letter would suffice. *Pet'r Ex. 11*.

51. But there is a difference between informal communications and communications that fail to notify an assessor of what is being claimed. As we interpret the statute, the notice referenced in subsection (d) must clearly inform an assessor that easements and covenants entitling a property to exemption under Ind. Code § 6-1.1-10-37.5 have been recorded. Our interpretation follows the guiding principle that exemption statutes shift the common burden of funding government and therefore must be strictly construed. *St. Mary's Medical Center of Evansville, Inc. v. State Bd. of Tax Comm'rs*, 534 N.E.2d 277, 280 (Ind. Tax Ct. 1989). That is particularly true here, where the provisions at issue will result in property that does not meet the basic requirements for exemption nonetheless being exempted by default.

52. With that in mind, we turn to Fisher's letter to determine whether she clearly notified the Assessor that she was claiming an exemption under Ind. Code § 6-1.1-10-37.5. We find that she did not.

53. Parts of Fisher's letter arguably come close to notifying the Assessor that she was claiming a common-area exemption under the statute. The letter referenced the 2016 assessment year. And Fisher said she believed her property should be exempt because she held it for the benefit of Claireview lot owners and their guests, and that Claireview's developer set it aside to be shared in common for their benefit. She also referenced a recorded deed, although she confusingly referred to it as the "deed of the Claireview Subdivision." In addition, the letter asked the Assessor to let Fisher know if she was refusing to exempt the property so Fisher could seek review of that decision. Finally, Fisher sent her letter not long after the DLGF had notified assessors that an exemption under Ind. Code § 6-1.1-10-37.5 could be claimed in a letter.

54. But Fisher mingled all of that with references to both past and ongoing litigation over the value of the subject property in which no exemption claim was at issue and in which Fisher sought to have the property assessed as a park. And she did not even refer to Ind. Code § 6-1.1-10-37.5 in her letter. Keeping in mind the purposes of the notice provision and our duty to strictly construe the statute, we find that Fisher's letter did not constitute "notice" under section (d). Thus, the Assessor's failure to respond to the letter did not render the property exempt by default.

C. Fisher's Assessment Appeal

55. Our determination denying Fisher an exemption does not fully resolve these appeals. Fisher also challenges her assessment.

1. Fisher had the burden of proof

56. Generally, a taxpayer seeking review of an assessment must prove the assessment is wrong and what the correct value should be. Indiana Code § 6-1.1-15-17.2 creates an

exception to the general rule and assigns the burden of proof to the assessor where (1) the assessment under appeal represents an increase of more than 5% over the prior year's assessment for the same property, or (2) the taxpayer successfully appealed the prior year's assessment, and the current assessment represents an increase over what was determined in the appeal, regardless of the level of that increase. *See* I.C. § 6-1.1-15-17.2(a)-(b) and (d). If an assessor has the burden and fails to prove the assessment is correct, it reverts to the previous year's level (as last corrected by an assessing official, stipulated to, or determined by a reviewing authority) or to another amount shown by probative evidence. *See* I.C. § 6-1.1-15-17.2(b). It does not appear that Fisher successfully appealed her 2015 assessment, which was $250,200. Her 2016 assessment was $258,900, an increase of only 3.5% (rounded). The parties therefore agreed that Fisher had the burden of proof.

2. Fisher failed to meet her burden of proving the assessment was incorrect

57. Indiana assesses real property based on its true tax value, which the 2011 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 by a similar user, from the property." 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2). A party's evidence in a tax appeal must be consistent with that standard. Various types of evidence may be probative, such as USPAP-compliant appraisals, actual construction costs, sales information for the property under appeal, sales or assessment information for comparable properties, and any other information compiled according to generally acceptable appraisal principles. *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 *See Kooshtard Property VI,* 836 N.E.2d at 506; *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). When using comparable sales to show a property's value, a party must (1) identify the relevant characteristics of the property under appeal, (2) explain how those characteristics compare to any purportedly

comparable properties, and (3) explain how any relevant differences affect the properties' market value-in-use. *Long*, 821 N.E.2d at 471.

58. Fisher relied primarily on Grove's appraisal report and testimony to support her claim that the subject property should be assessed at $0. But Grove did not offer a valuation opinion in his appraisal; he instead concluded that the property should be exempt under Ind. Code § 6-1.1-10-37.5. Valuation and exemption are two separate things. The fact that a property does or does not qualify for exemption says nothing about its value for assessment purposes. Even exempt property must be assessed. *See* I.C. § 6-1.1-2-1 ("Except as otherwise provided by law, all tangible property which is within the jurisdiction of this state on the assessment date of a year is subject to assessment and taxation for that year"); *City of Boonville v. Am. Cold Storage*, 950 N.E.2d 764, 768 (Ind. Ct. App. 2011) (explaining that while a predecessor to Indiana's general exemption statute exempted land from taxation it did not exempt it from assessment). Grove's opinion is primarily a legal conclusion, and a wrong one at that. As explained above, the property fails to meet at least two essential elements necessary to qualify as a common area under Ind. Code § 6-1.1-10-37.5.

59. In his report, Grove cited to two properties held by homeowners' associations that he claimed were exempt under Ind. Code § 6-1.1-10-37.5 but that were also assessed at $0. According to Grove, the assessments show that the value of those properties, like the value of the subject property, was reflected in the assessments of the lots within the surrounding subdivisions. Grove's opinion in that regard was almost entirely conclusory. He did not analyze the specific easements or restrictions burdening the homeowners' association properties or explain how any differences between those restrictions and the access easement burdening the subject property affected their relative values. The little information he did offer shows significant differences. For example, the homeowners' associations were legally prohibited from selling, leasing, or building on their properties without consent from the subdivisions' lot owners, whereas Fisher did not need consent from Claireview lot owners to do any of those things.

60. Dill's opinion that the subject property had zero value similarly lacks probative weight. Dill is not an appraiser. He did not comply with USPAP. And he did not show that he applied generally accepted appraisal principles in reaching his opinion. At best, his testimony tends to show that the access easement and non-permissive uses by people outside Claireview might significantly affect Fisher's ability to provide a buyer or lender with unencumbered title. Even if we were swayed by Dill's testimony on that point, it does not follow that the inability to provide unencumbered title would necessarily make the property valueless to Fisher or a similar user.

61. In any case, Dill offered little support for the propositions underlying his opinion. For example, he believed that the "floating" easement necessarily encumbered the entire property. Gavin, however, illustrated how the easement could be positioned on the property to give reasonable access to the water while still allowing Fisher or a similar user to devote the rest of the property to normal residential use. As our state Supreme Court has explained, we must construe easements in light of their purposes. *Klotz v. Horn*, 558 N.E.2d 1096, 1099-1100 (Ind. 1990). The focal point is the relationship between the dominant and servient estates, and the servient estate is burdened "to the extent necessary to accomplish the end for which the dominant estate was created." *Id*. The "titleholder of the dominant estate cannot subject the servient estate to extra burdens any more than the holder of the servient estate can materially impair or unreasonably interfere with the use of the easement." *Id*. (internal citations omitted).

62. Dill's anecdotal testimony about his own 22-foot boat may cast some doubt about Gavin's proposed positioning of the easement, but it does little to support Dill's claim that the only way for the easement holders to access the water is through the middle of the property. Gavin's proposal was based on dividing the property into two buildable lots. Treating the property as a single lot, as Gavin ultimately did, would allow for more room to position the easement in such a way that it would not unreasonably impair the purpose for which it was granted, while still allowing Fisher or another legal titleholder to use the property for residential purposes. Similarly, we find Dill's testimony regarding

potential prescriptive easements speculative for the same reasons outlined in our determination of Fisher's 2012 and 2014 appeals. *See Resp't Ex. 13*.

63. Nor do we give any weight to Fisher's claim that if she were to terminate the Sailing Club's tenancy, the costs of maintaining and insuring the property would make the cost of ownership exceed the benefits. For support, she points to the number of volunteer hours involved in Sailing Club's clean-up events. We fail to see how the work a tenant puts into enjoying the property for its own use translates to a cost Fisher would be required to bear if she did not lease the property. And Fisher does not point to any authority for the proposition that she is legally obligated to maintain the property for the benefit of the easement holders. On its face, the easement simply prohibits her from interfering with their access. Although Dill testified that Fisher's husband bought the property believing that he alone would be responsible for any maintenance to the easement, he offered no support for that bald assertion. In any case, many of the costs to which Fisher points, such as mowing the property, and repairing and maintaining the seawall, are costs that she or any similar legal titleholder would likely incur as part of their own enjoyment of the property.

64. Finally, Fisher argues that the easement burdens the entire tract and requires a 100% negative influence factor. This simply repackages arguments we have already dealt with. The case she cites to for support—*Lakes of the Four Seasons Prop. Owners' Ass'n v. Dep't of Local Gov't Fin.*, 875 N.E.2d 833, 836-37 (Ind. T.C. 2007)—belies her position. In that case, a homeowners' association offered an objective, factual basis for its claim that the property at issue—streets within a subdivision—had no value. The association (1) derived no benefit from owning the streets, (2) could not sell or convey the streets to another party, (3) generated no income from the streets, and (4) paid at least $200,000 annually to maintain them. *Id.* at 836-37. By contrast, Fisher benefits from the property because she can use it to access the water from her adjacent home, can put the property to any other use that does not interfere with reasonable access for the specified Claireview lot owners and their occupants and guests, and can sell or lease the property subject to the easement. Indeed, she leased the property to the Sailing Club with an option to buy it.

As the Tax Court explained in Fisher's previous appeals, the property therefore has at least some value. *Fisher v. Carroll Cnty. Ass'r*, 74 N.E.3d 582, 590 (Ind. Tax Ct. 2017).[2]

65. In short, the objective facts show that the property has some market value-in-use. While we agree that the access easement likely affected the property's value, Fisher offered no probative evidence to quantify that effect. She instead relied on conclusory assertions that the property lacked any independent value and instead simply increased the value of the dominant estates. She therefore failed to meet her burden of proving that her assessment was incorrect.

3. Gavin's appraisal is not sufficiently reliable to support raising the assessment

66. That does not end our inquiry, however. The Assessor asks us to raise the assessment based on Gavin's appraisal in which he applied the sales-comparison approach to value the property at $323,000.

67. Fisher challenges Gavin's opinion along several lines. Some have little merit. For example, she claims that he appraised the property for something other than its current use, which she characterizes as a park. The Tax Court rejected this argument in Fisher's earlier appeals. The property is not a park. *See Fisher v. Carroll Cty. Ass'r*, 74 N.E.3d 582, 589 (Ind. Tax Ct. 2017) (citing to various definitions of parks that incorporate government ownership). Indeed, we suspect that many of the activities Fisher claims make her property a park—such as holding picnics, swimming, fishing, and watching fireworks—also occur at residential lots with direct water access.

68. We similarly give no weight to her claim that Gavin failed to disclose a hypothetical assumption that a house could be built on the property. Gavin did not simply assume that

[2] In her response brief, the Assessor for the first time argues that Fisher is collaterally estopped from claiming that the property is a public park, or that either the access easement or Fisher's "permissive use" of the property "to all comers" has rendered it valueless. Given the Assessor's tardiness in raising the argument and her failure to develop it with specificity, we will not address it. But her general point that Fisher repeatedly seeks to litigate the same facts and issues is well taken.

a house could be built on the property—he specifically analyzed the feasibility of doing so.

69. Nonetheless, we find two other significant problems with Gavin's appraisal. First, Gavin acknowledged that he calculated the per-unit sale price for Sale 5 based on significantly less water frontage than the four lots included in the sale actually contained. That substantially inflated the per-unit price for sale property, which Gavin calculated at $1,571/front foot. Gavin's use of faulty data detracts from the reliability of his valuation opinion. When the error was pointed out to him, Gavin testified that in light of the new information, he would not have considered the sale because the size of the additional lots made them non-buildable. But he also testified that the new information did not cause him any concerns regarding his appraisal.

70. We find that response troubling. Although the lots might not have been buildable when considered separately, Gavin did not explain why that would be true for the combined lots. He testified that the MLS information referred to the property as a single buildable lot. The additional information appears to confirm that the property was buildable. Each lot from Sale 5 had an effective depth greater than at least two other lots from Gavin's appraisal. Combined, the four lots had 158.5 feet of actual frontage (and 183 feet of effective frontage). That is far more frontage than any of his other comparable properties and much closer to the subject property's 202 feet. Because Gavin thought Sale 5 was otherwise comparable to the subject property, we fail to see why he would have excluded the sale had he known that four lots were involved. To the contrary, the sale tends to show that Gavin's valuation opinion was inflated.

71. Second, Fisher argues that Gavin relied exclusively on sales of properties that were not burdened by access easements. While Gavin adjusted the sale prices to account for that fact, he offered nothing to explain how he quantified those adjustments. He simply referred to his experience that access easements generally warrant a 20% adjustment and asserted that treating the subject property as a single residential lot would decrease the

effect of the easement on the owner's enjoyment and therefore merited a mere 10% adjustment.

72. While appraisers may certainly rely on their experience in making various judgments necessary to value a property, that should not substitute for probing analysis of relevant data. One of the central issues in valuing the subject property, and *the* central issue in these appeals, is the extent to which the access easement affected the property's market value-in-use. Under those circumstances, Gavin's failure to point to any data or offer anything but a cursory analysis to support his adjustment significantly detracts from the reliability of his valuation opinion. That, coupled with Gavin's use of faulty data for Sale 5 and his troubling response about how it affected his valuation opinion, leads us to conclude that his opinion is too unreliable to support raising the assessment.

V. CONCLUSION

73. The subject property does not qualify as common area under Ind. Code § 6-1.1-10-37.5, and the Assessor's failure to respond to Fisher's unclear letter does not entitle Fisher to an exemption despite that lack of qualification. As for her assessment appeal, Fisher offered largely conclusory and speculative opinions and therefore failed to meet her burden of proving that the assessment was incorrect. Although the Assessor asks us to raise the assessment, we find her appraiser's valuation opinion too unreliable to support doing so. We therefore deny Fisher's appeals and order no change to the assessment.

ISSUED: October 31, 2018

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