

REPRESENTATIVE FOR PETITIONER: Richard J. Herber, *pro se*

REPRESENTATIVES FOR RESPONDENT: Sarah Schreiber, Haller & Colvin, P.C.
Mark GiaQuinta, Haller & Colvin, P.C.

**BEFORE THE
INDIANA BOARD OF TAX REVIEW**

Richard J. Herber,)	Petition No.: 02-074-17-1-5-00484-18
)	
Petitioner,)	Parcel No.: 02-12-08-279-013.000-074
)	
v.)	County: Allen
)	
Allen County Assessor,)	Assessment Year: 2017
)	
Respondent.)	

July 23, 2018

FINAL DETERMINATION

The Indiana Board of Tax Review (Board) having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

PROCEDURAL HISTORY

1. This determination deals with the same property and assessment year as our determination for Petition No. 02-074-17-3-4-02013-17, issued July 17, 2018. In that determination we recounted the lengthy history behind these cases, which we incorporate by reference here (Paragraphs 2-5).
2. Herber filed a Form 131 petition with the Board on November 13, 2017. The appeal was attached to a separate motion filed under the cause numbers of related Form 133 appeals.

At the time, it was not recognized as a distinct filing intended to initiate a new appeal. In April 2018, the Board became aware that the parties believed there was a Form 131 appeal pending before the Board. Herber was asked by the Board's staff to provide proof of mailing. He provided that proof, and on April 20, 2018, the appeal was assigned a petition number and set for hearing. After that hearing, Herber's original filing was discovered.

3. On June 26, 2018, the Board's designated Administrative Law Judge, Andrew Howell ("ALJ"), held a hearing on Herber's 2017 Form 131 petition. Herber appeared *pro se* and Sarah Schreiber represented the Allen County Assessor. Both Herber and Eric Baca, the Chief Deputy Assessor for Wayne Township, Allen County, testified under oath.

4. Herber offered the following exhibits:

Petitioners' Ex. 1: Broker's Price Opinion prepared by Elspeth Knuth,
Petitioners' Ex. 2: Copy of property tax refund check from Allen County Treasurer.

5. The Assessor offered the following exhibits:

Respondent's Ex. 1: Spreadsheet of comparable properties prepared by Eric Baca,
Respondent's Ex. 2: Sales comparison grids,
Respondent's Ex. 3: Aerial map of area surrounding the subject property,
Respondent's Ex. 4: Aerial photo of subject property,
Respondent's Ex. 5: Aerial photo of subject neighborhood.
Respondent's Ex. 6: Property record cards for subject property and nearby properties.
Respondent's Ex. 8: Form 131 petition with attachments.

6. As discussed above, although Herber filed his Form 131 appeal in November of 2017, it did not receive a petition number until April of 2018. At the hearing, as well as in a letter sent to the Board after the hearing, Herber requested we incorporate "all my prior pleadings and motions..."¹ The Assessor objected to this request, arguing that they had

¹ Herber has filed numerous motions with the Board regarding his various appeals, including, but not limited to, motions to compel discovery, a motion for default judgment, and motions for costs.

insufficient opportunity to respond to those arguments as they would apply to Herber's Form 131 petition. Although we acknowledge that Herber intended those motions to apply to all of his appeals, including the Form 131 appeal, we agree with the Assessor that because they were filed under different petition numbers the Assessor did not have sufficient opportunity to respond. Herber's request to incorporate his prior motions and pleadings is denied. Although we note that if those motions were to be incorporated, Herber has failed to show any reason those motions should be treated differently under a Form 131 petition. Thus, we would make the same rulings as we did in the other appeals.

7. The record also includes the following: (1) all pleadings, briefs, and documents filed in this appeal; (2) all orders and notices issued by the Board or our administrative law judge; and (3) a digital recording of the hearing.

OBJECTIONS

8. Herber objected to Respondent's Ex. 2 on the grounds that some of the comparables included were on different streets than the subject property. The Assessor argued that Herber's objection goes to the weight of the evidence rather than its admissibility. We interpret Herber's objection to be to the relevance of the exhibit. An exhibit is relevant if it has *any tendency* to make a fact more or less probable. Ind. Evidence Rule 401 (emphasis added). We find this exhibit meets the low standard for relevancy. Thus, Herber's objection to Respondent's Ex. 2 is overruled.
9. Herber objected to Respondent's Ex. 3, an aerial map, on the grounds that the properties shown on the map were not comparable to the subject property. The Assessor argued that Herber's objection goes to the weight of the evidence rather than its admissibility. We again interpret Herber's objection as an objection to the exhibit's relevancy. As discussed above, the standard for relevancy is low, and we find this exhibit meets that standard. Herber's objection to Respondent's Ex. 3 is overruled.

10. Herber objected to Respondent's Ex. 8, the Form 131 petition with attachments, on the grounds that it was different from the Form 131 he filed because one of the pages had notations he did not make and there was an email that he did not attach to the original filing. The Assessor acknowledged these differences, stating that the email shows the notations were made at Herber's request. Herber has not shown this exhibit should be excluded. We also note that Herber's Form 131 petition as it was submitted to the Board is part of the record. Thus, Herber's objection is overruled. We do not rely on Respondent's Ex. 8 in reaching our determination.

11. The Assessor objected to Petitioner's Ex. 1, the broker's price opinion, on the grounds that it was hearsay. She also argued that it fell outside the hearsay exception for appraisals because it was not an appraisal. The opinion includes this statement: "This document is not an appraisal as defined by USPAP (Uniform Standards of Professional Appraisal Practice). It is not to be construed as an appraisal and may not be used as such for any purpose." *Pet'r Ex. 1* at 18. Herber argued that the "Dodd Frank Wall Street Reform and Consumer Protection Act" laid out strict standards for appraisals. In addition, he argued that it was used for his mortgage refinance. Herber has failed to show that this exhibit falls within an exception to hearsay. However, our rules allow us to admit hearsay provided it is not the sole basis for our determination. Thus, we overrule the Assessor's objection and admit Petitioner's Ex. 1 into evidence.

12. The Assessor objected to Petitioner's Ex. 2, a refund check from the Allen County Treasurer, on the grounds that it was not properly authenticated and that it was not exchanged. The Assessor did admit that "it does look like a county document." Herber responded that it was exchanged. We do not find that it should be excluded based on a failure to exchange. Regarding the objection to its authenticity, we note that the rules of evidence do not strictly apply in Board proceedings. *See* 52 IAC 2-7-2(a)(2) ("The administrative law judge shall regulate the course of proceedings in . . . a manner without recourse to the rules of evidence."). Given the Assessor's admission that it looks "like a

county document” we do not find sufficient grounds for exclusion. We do not rely on this exhibit in reaching our determination.

13. Herber objected to Respondent’s Ex. 4, an aerial photo of the subject property, on the grounds that it “can’t be authenticated” and that the GIS system from which it was pulled contains a disclaimer that “it is not 100% accurate.” The Assessor responded that it can be authenticated by Baca and that it was the best evidence available because Herber would not allow anyone on his property. As discussed above, we do not strictly apply the rules of evidence. We find the Assessor has sufficiently authenticated the document through Baca’s testimony and overrule the objection.
14. Herber objected to Respondent’s Ex. 5, an aerial photo of the subject neighborhood, on the grounds that it “can’t be authenticated” and that there were no easements or appurtenances marked on it. The Assessor responded that Baca’s testimony was sufficient to authenticate the document and that Herber’s other arguments go to the exhibit’s weight rather than its admissibility. We agree with the Assessor and overrule Herber’s objection admitting Respondent’s Ex. 5 into evidence.
15. Herber objected to Respondent’s Ex. 6, property record cards for the subject property and nearby parcels, on the grounds that it was not authenticated. We find the Assessor sufficiently authenticated the documents through Baca’s testimony and overrule Herber’s objection admitting Respondent’s Ex. 5 into evidence.

PENDING MOTION

16. Herber filed a “Motion for Costs” in which he asked the Board for costs related to copies, postage, mileage, and parking. This motion is denied.

CONTENTIONS

a. Assessor's arguments

17. The Assessor called Eric Baca, the Chief Deputy Assessor for Wayne Township in Allen County. Baca is certified as a Level III assessor-appraiser in Indiana. He developed two sales comparison approaches in which he selected comparable properties, made adjustments, and then developed opinions of value.² He stated that the adjustments were made “using the state’s cost tables.” These approaches valued the subject property at \$130,638, and \$153,300. Baca did not explain how he came to his reconciliations, nor did he certify that his valuation complied with the Uniform Standards of Professional Appraisal Practice (“USPAP”). Based on Baca’s valuation, the Assessor asked the Board to uphold Herber’s 2017 assessment of \$113,200. *Baca testimony, Resp’t Ex. 1-6.*

a. Herber's arguments

18. At the hearing, Herber made a number of claims regarding how his property was assessed in years prior to 2017. His testimony included claims that his property was reclassified from residential to commercial, that he was assessed a personal property tax on his furniture, and that he was improperly denied a homestead deduction. He also made a number of allegations about the conduct of the Assessor, the Auditor, the PTABOA, the Assessor’s attorneys, as well as various other county employees. This included alleged violations of the Federal Constitution, 42 United States Code § 1983, as well as the Indiana Code recordkeeping statutes. Herber failed to show how these claims relate to his 2017 assessment.³ *Herber testimony; Pet’r Ex. 2.*
19. Herber also presented a “Residential Broker Price Opinion” prepared by Elsbeth Knuth of Coldwell Banker Roth Wehrly Graber. It contained information about comparable sales

² Baca also testified about his interactions with Herber, including that he offered to visit and re-measure the subject property, but that Herber had refused that offer and told him he was not allowed on the property.

³ In his Form 131 petition, Herber made reference to claims regarding “appurtenances” on his property similar to the claims he made in his Form 133 appeal. He presented no substantial argument or evidence in support of these claims at this hearing. “[I]t is the taxpayer's duty to walk the Indiana Board . . . through every element of the analysis.” *Indianapolis Racquet Club, Inc. v. Washington Twp. Assessor*, 802 N.E.2d 1018, 1022 (Ind. Tax Ct. 2004). For that reason, we do not consider Herber’s claims regarding the alleged “appurtenances.”

from 2013 as well as comparable listings. It included a “Market Price” opinion for “As is 90-120 Day” of \$89,000 as of April 17, 2014. *Herber testimony; Pet’r Ex. 1.*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

20. 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). After an appeal, the 2016 assessment was changed to \$113,000. In 2017 the assessment increased to \$113,200. On that basis, the Assessor conceded that she had the burden of proof for the 2017 assessment.

21. Indiana assesses real property based on its true tax value, which does not mean fair market value, but rather the value determined under the Department of Local Government Finance’s (“DLGF”) rules. The DLGF’s 2011 Real Property Assessment Manual defines true tax value 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). Evidence in a tax appeal should be consistent with that standard. For example, a market value-in-use appraisal prepared according to USPAP often will be probative. *See id.*; *see also, Kooshtard Property VI, LLC 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, sale or assessment information for the property under appeal or

comparable properties, and any other information compiled according to generally recognized appraisal practices. *Eckerling v. Wayne Township Assessor*, 841 N.E.2d 674, 678 (Ind. Tax Ct. 2006).

22. Regardless of the method used, a party must explain how its evidence relates to the relevant valuation date. *See O'Donnell v. Dep't of Local Gov't Fin.*, 854 N.E.2d 90, 95 (Ind. Tax Ct. 2006); *see also Long v. Wayne Twp. Ass'r*, 821 N.E.2d 466, 471 (Ind. Tax Ct. 2005). For the 2017 assessment, the valuation date was January 1, 2017. *See Ind. Code* § 6-1.1-2-1.5.
23. In support of the assessment, the Assessor offered the sales comparison analyses prepared by Eric Baca. He did not certify that his valuation complied with USPAP. In contrast, the Assessor argued that the broker's price opinion offered by Herber was deficient because it was not USPAP compliant. Baca offered only conclusory explanations for how he developed his adjustments, and no explanation at all for how he developed his reconciliations. For these reasons, we find his valuation opinions unreliable. Thus, the Assessor failed to meet her burden of proof.
24. We now turn to Herber's evidence because he is seeking a value lower than the prior year's assessment of \$113,000. Although Herber provided extensive testimony about a number of grievances he had with the Assessor's office, the only valuation evidence he provided was the broker's price opinion. This opinion was dated April 17, 2014, over two and half years before the relevant valuation date. The Tax Court has found that valuation evidence must be "affirmatively related" to the appropriate valuation date. *Nova Tube Ind. II LLC v. Clark Cty. Assessor*, No. 49T10-1708-TA-00013, 2018 Ind. Tax LEXIS 12 at 17 (Ind. Tax Court May 18, 2018). Herber provided no evidence to relate this broker's price opinion to the relevant valuation date of January 1, 2017. Thus, even were we to accept that the broker's price opinion was otherwise probative, it would still be insufficient.

SUMMARY OF FINAL DETERMINATION

25. The Assessor had the burden of proof and failed to meet that burden. Herber also failed to present any reliable evidence of value. Thus, we order the 2017 assessment reverted to the 2016 assessment of \$113,000.

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

Chairman, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court’s rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days 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>>.