BEFORE THE INDIANA BOARD OF TAX REVIEW

SYLVAN RIDGE LAKE HOMEOWNERS ASSOC.	)	
	)	Petition Nos.: *see* attached
Petitioner,	)	
	)	
v.	)	Parcel Nos.: *see* attached
	)	
MARION COUNTY ASSESSOR	)	
	)	Assessment Year(s): *see* attached
Respondent.	)	

Appeals from Determinations of the Marion County Property Tax Assessment Board of Appeals

FINAL DETERMINATION DISMISSING APPEAL PETITIONS

I. Introduction

If a taxpayer acts within Indiana Code § 6-1.1-15-1's relatively short deadline for appealing an assessment, the taxpayer may assert all grounds upon which he believes the assessor erred in valuing his property. Those appeals are filed with the Board on Form 131 petitions. Even if the taxpayer misses Ind. Code § 6-1.1-15-1's deadline, he may still appeal the assessment using a Form 133 petition. But the taxpayer may only raise objective errors; he may not challenge qualitative or discretionary decisions that require the exercise of subjective judgment.

Since the petitions at issue in these appeals, on their faces, appeared to have originally been filed well past Ind. Code § 6-1.1-15-1's deadline and to challenge only determinations requiring the exercise of subjective judgment, the Board issued an order for the Petitioner to

show cause why those petitions should not be dismissed. Rather than addressing the substance of the Board's show cause order, the Petitioner only contested the Board's authority to issue that order. Because the Board had the authority to issue such an order, and because the Petitioner's appeal petitions facially challenge only determinations that involve subjective judgment, the Board dismisses those petitions.

II. Procedural History

The Petitioner, a homeowner's association for a planned unit development ("PUD"), filed a Form 133 Petition for Correction of an Error for each parcel referenced in the attachment to this Final Determination. The Petitioner claimed that its taxes, as a matter of law, were illegal. More specifically, the Petitioner claimed that all of the parcels were common areas of the PUD and should be assessed for zero value. The Petitioners cited to *Brenwick TND Communities and BDC Cardinal Associates, LP v. Clay Twp. Assessor, et. al.* pet. nos. 29-003-03-1-5-00060 *et. al*. (Ind. Bd. Tax Rev. May 15, 2006) to support that proposition. The Marion County Property Tax Assessment Board of Appeals ("PTABOA") denied each Form 133 petition explaining that a "Common Area reduction" had been issued "per DLGF"[1] for 2006, but that the Petitioner's appeals were for years pre-dating 2006.

The Petitioner responded by filing Form 131 Petitions to the Indiana Board of Tax Review for Review of Assessment. In those Form 131 petitions, the Petitioner reiterated the claims made it its Form 133 petitions and took issue with the PTABOA's decision that *Brenwick* did not apply to assessments before March 1, 2006. The Petitioner also alleged that it was aware of at least one instance where a similarly situated PUD in Washington Township was assessed at zero value dating back to 2002 because of *Brenwick* and claimed that the "same assessor" had therefore waived its contention that *Brenwick* did not apply to the 2004 and 2005 tax years.

[1] Department of Local Government Finance.

On January 13, 2012, the Board issued an Order to Show Cause Why Petitions Should Not Be Dismissed on Grounds that They Allege Errors in Subjective Judgment ("Show Cause Order") covering all the petitions at issue in this Final Determination. The Board found that, although the Petitioner filed Form 131 petitions with the Board, that petition form is designated for appeals that are begun at the local level under Ind. Code Ind. Code § 6-1.1-15-1, and the Petitioner appeared to have waited until well past that statute's deadline to initiate its appeals. Thus, to be viewed as timely, it appeared that the Petitioner's appeals had to be treated as Form 133 petitions. To the extent that the Petitioner believed (1) that it alleged objective errors and therefore could properly bring its claims on Form 133 petitions, or (2) that it complied with the deadlines and other requirements for the general appeal process laid out in Ind. Code § 6-1.1-15-1, the Board gave the Petitioner until March 1, 2012, to file a memorandum and any other materials to support its position. The Board gave the Respondent until April 3, 2012, to file any response. On February 23, 2010, in response to the Petitioner's request for an additional 30 days to respond to the Show Cause Order, the Board extended the Petitioner's and Assessor's response deadlines to April 3, 2012, and May 3, 2012, respectively. The Petitioner and Respondent filed their respective responses on March 30, 2012, and May 2, 2012. The Petitioner then filed a reply on May 10, 2012.

Counsel for the Petitioner had also filed similar petitions for various other Marion County homeowners associations, and the Board issued similar show cause orders in those appeals. Because of the similarities in the petitions and the parties' responses to the show cause orders, the Board consolidated all of the appeals for purposes of a hearing on the show cause orders.[2] The Board held that hearing on August 29, 2012. All pleadings and documents filed in the

[2] Different counsel represented various other taxpayers from Hamilton, Hendricks, and Marion County who had filed similar appeals regarding their common areas. The responses to the Board's Show Cause Orders in those other appeals, while similar to each other, were markedly different from the responses filed by counsel for the Petitioner in these appeals. The Board therefore held a separate consolidated hearing on those other Show Cause Orders.

appeals listed in the attachment to this Final Determination, as well as all orders and notices issued by the Board or its ALJ are part of the record, as is the digital recording of the August 29, 2012 hearing.

III. Analysis

A. The Form 133 procedure is only available to correct objective errors.

As the Board explained in its Show Cause Order, there are two basic avenues for contesting a property's assessment before state and local agencies: (1) the appeal procedure under Ind. Code § 6-1.1-15-1 through -4, which for purposes of this Final Determination the Board will refer to as the "general appeal procedure," and which is prosecuted before the Board using a Form 131 petition; and (2) a more substantively restrictive procedure under Ind. Code § 6-1.1-15-12, which is prosecuted both locally and before the Board using a Form 133 petition. *See Bender v. Indiana State Bd. of Tax Comm'rs,* 676 N.E.2d 1113, 1114 (Ind. Tax Ct. 1997).

The subsections of Ind. Code § 6-1.1-15-1 that set forth the general appeal procedure's deadline for initiating an appeal at the local level have been amended several times since 2002. *See* 2004 Ind. Acts 1, § 3; 2005 Ind. Acts 199, § 6; 2006 Ind. Acts 162, § 2; 2007 Ind. Acts 219, § 38; 2009 Ind. Acts 136, § 5; *see also*, I.C. § 6-1.1-15-0.6 (codifying previously un-codified acts concerning appeals of 2002-2004 assessments). Nonetheless, in cases where a taxpayer is notified of a change in assessment (including notice via a tax bill), a taxpayer has always had to file an appeal within 45 days of that notice. *See id*. Although the deadline for appealing other assessments has varied, it has never extended past the later of following: (1) May 10; or (2) 45 days from the date of a tax statement based on the assessment and, in one year, 45 days from a county auditor's statement under Ind. Code § 6-1.1-17-3(b). *Id*. By contrast, a taxpayer seeking the Form 133 procedure's more-limited substantive relief may file a petition up to three years

after the date on which taxes for the challenged assessment were first due. *See Will's Far-Go v. Nusbaum*, 847 N.E.2d 1074, 1078 (Ind. Tax Ct. 2006).

Although the Form 133 procedure's filing deadline is more generous than the filing deadline under the general appeal procedure, the relief available on a Form 133 petition is far more circumscribed. While a taxpayer may use the general appeal procedure to address objective errors as well as errors that arise from an assessing official exercising subjective judgment, the Form 133 procedure may only be used to correct narrowly defined errors, including that "[t]he taxes, as a matter of law, were illegal." I.C. § 6-1.1-15-12 (a)(6). The Indiana Tax Court has interpreted Ind. Code § 6-1.1-15-12 to mean that the Form 133 procedure may only be used to correct objective errors; it may not be used to correct "qualitative or discretionary decisions by assessors." *E.g. Bender* 676 N.E.2d at 1115; *Hatcher v. State Bd. of Tax Comm'rs,* 561 N.E.2d 852, 857 (Ind. Tax Ct. 1990). Thus, "where the decision under review is automatically dictated by a simple true or false finding of fact, it is considered objective and properly challenged via Form 133." *Bender,* 676 N.E.2d at 1115. While most of the Tax Court's decisions have addressed claims under Ind. Code § 6-1.1-15-12(a)(7) alleging mathematical errors in how assessments were computed, the Tax Court has applied the same test to a taxpayer's claim under Ind. Code § 6-1.1-15-12(a)(6). *Rott Development Co. v. State Bd. of Tax Comm'rs,* 647 N.E.2d 1157, 1160 (Ind. Tax Ct. 1995) (explaining that "[t]he State Board is correct in its assertion that the Form 133 procedure may be used only to correct objective errors" in a case where the taxpayer alleged, in part, that its taxes were illegal as a matter of law under Ind. Code § 6-1.1-15-12(a)(6)).

The Petitioner has injected some confusion into these proceedings by using different appeal forms at the state and local levels. In appealing to the Board, the Petitioner filed Form 131 petitions, which the Board has prescribed for use in the general appeal procedure. But the

Petitioner began its appeals at the local level by filing Form 133 petitions with the Marion County Auditor. And those petitions appear to have been filed well past the general appeal procedure's deadline Thus, although the Petitioner filed Form 131 petitions with the Board, the Petitioner's appeals can be timely only if the Board treats them as Form 133 appeals. Indeed, the Petitioner apparently concedes that point.[3]

B. Under Indiana's current law governing real property assessment, using external evidence to determine a property's market value-in-use is a qualitative decision that requires subjective judgment.

After the Board decided *Brenwick*, various developers and homeowners' associations filed almost 2,000 Form 133 petitions[4] alleging that their common areas should be assessed at zero value. The post-*Brenwick* appeals present a threshold question about whether a taxpayer ay use a Form 133 petition as the vehicle to assert claims that a subdivision's common areas lack any market value-in-use because of restrictions imposed on their use and transfer. The Board finds that such claims may not be brought on a Form 133 petition.

Indiana assesses property based on its true tax value. I.C. § 6-1.1-31-6(c). For most real property, true tax value is the value determined by the Department of Local Government Finance's rules. *Id.*[5] Those rules, in turn, define 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 a similar user,

[3] At the August 29 hearing, Petitioner's counsel said the following: "We think it's highly pertinent that the 133 petitions are recognized as properly before the Board that there are no procedural defects with their filing, meaning that . . . the petitions to this Board came as a result of 133 petitions being denied locally by the Marion County PTABOA. . . ."

[4] Some taxpayers, like the Petitioner, filed Form 133 petitions at the local level but Form 131 petitions with the Board.

[5] The General Assembly has chosen to define the true tax value of certain types of property statutorily without reference to administrative regulations. For example, the true tax value of property regularly used as a golf course is "the valuation determined by applying the income capitalization appraisal approach." I.C. §6-1.1-4-42(c). *See also, e.g.*, I.C. § 6-1.1-4-39(a) (defining the true tax value of property with four or more units that is regularly used to furnish rental accommodations for 30 days or more as the lowest valuation determined by applying the cost, sales-comparison, and income capitalization approaches).

from the property." 2002 REAL PROPERTY ASSESSMENT MANUAL 2 (incorporated by reference at 50 IAC 2.3-1-2) (2009).

That has not always been Indiana's valuation standard. Under Indiana's old property tax system, true tax value was determined solely by reference to administrative regulations and bore no relation to any external benchmark. *Westfield Golf Practice Center, LLC v. Washington Twp. Assessor*, 859 N.E.2d 396, 398 (Ind. Tax Ct. 2007). That changed in response to the landmark *Town of St. John* litigation, where the Indiana Supreme Court ultimately held that the State Board of Tax Commissioners' then-existing cost schedules violated Ind. Const. Art. 10 § 1. *See State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034, 1042-43 (Ind. 1998). Effective beginning in 2002, the State Board of Tax Commissioners ("State Board"), and its successor, the Department of Local Government Finance ("DLGF") overhauled Indiana's property tax system. In doing so, they adopted market value-in-use as the standard for measuring true tax value. By adopting that standard, the DLGF incorporated an external benchmark for true tax value that includes market concepts. *See Westfield Golf*, 859 N.E.2d at 399 ("Beginning in 2002, however, Indiana's overhauled property tax assessment system incorporates an external, objectively verifiable benchmark—market value-in-use.").

Under the new system, an assessment determined using the 2002 Real Property Assessment Manual and the accompanying guidelines adopted by the DGLF (the Real Property Assessment Guidelines for 2002 – Version A) is presumed to be accurate. *See* MANUAL at 5; *Kooshtard Property VI, LLC v. White River Twp. Assessor*, 836 N.E.2d 501, 505 (Ind. Tax Ct. 2005); *reh'g den. sub nom.; P/A Builders & Developers, LLC*, 842 N.E.2d 899 (Ind. Tax Ct. 2006). A taxpayer, however, may rebut that presumption with evidence that is consistent with the Manual's definition of true tax value. MANUAL at 5. The Manual points to various types of market-based evidence, such as market value-in-use appraisals, sales information both for the

property under appeal and comparable properties, and other information compiled according to generally accepted appraisal principles. *Id.; see also, Kooshtard Property VI,* 836 N.E.2d at 506 n. 6 (describing a market-value-in-use appraisal performed in accordance with the Uniform Standards of Professional Appraisal Practice as the most effective way to rebut the presumption that a property was assessed accurately).

Using external, market-value-in-use evidence—as opposed to simply adding or subtracting pre-determined costs from assessment regulations—to determine a property's market value-in-use requires subjective judgment. The Tax Court has recognized as much, saying the following: "A calculation of the effect of real world evidence on an individual assessment will typically require subjective judgment. . . . The court does not foresee any opportunity to apply real world evidence retroactively by using the Form 133 process." *Town of St. John, et al. v. State Bd. of Tax Comm'rs,* 698 N.E.2d 399, 400 (Ind. Tax Ct. 1998).[6] Indeed, as the Tax Court has explained "[t]he valuation of property is the formulation of an opinion; it is not an exact science." *Stinson v. Trimas Fastners, Inc.*, 923 N.E. 2d 496, 502 (Ind. Tax Ct. 2010).

The valuation determinations at issue in these appeals differ materially from the types of determinations that the Tax Court has recognized as proper subjects for a Form 133 petition. The Tax Court decided those cases under the old self-referential system. For example, in *Rinker Boat Co. v. State Bd. of Tax Comm'rs*, 722 N.E.2d 919 (Ind. Tax Ct. 1999), the assessor valued

[6] Although the Indiana Supreme Court reversed a related decision from the Tax Court, the holding that the Board has cited remains legally viable. In a decision that pre-dated the decision cited by the Board, the Tax Court had found that the Indiana Constitution required the State Board of Tax Commissioners to consider "real world evidence" in property tax appeals. *Town of St. John et. al. v. State Bd. of Tax Comm'rs*, 690 N.E.2d 370 (Ind. Tax Ct. 1997). The Tax Court issued the decision that the Board has cited in order to clarify when the State Board of Tax Commissioners would have to begin considering real world evidence. *See Town of St. Johns,* 698 N.E.2d at 400. The Indiana Supreme Court ultimately reversed the Tax Court's earlier order in part, holding that there was no state constitutional right to offer "competent real world evidence" in property tax appeals. *State Bd. of Tax Comm'rs v. Town of St. Johns* 702 N.E.2d 1034, 1043 (Ind. 1998). The Supreme Court, however, did not grant review of or otherwise address the clarification decision that the Board has cited. And under Indiana's current system, parties to individual tax appeals have the right to offer the type of real world evidence that the Tax Court discussed, even if the source of that right is not the Indiana Constitution. *See* MANUAL at 5. So the language that the Board has quoted from the Tax Court's clarification order is on point and persuasive.

the taxpayer's building as having forced-air heat when it really had only unit heaters, high-intensity lighting instead of its actual florescent lighting, and more partitioning than actually existed. *Rinker Boat Co. v. State Bd. of Tax Comm'rs*, 722 N.E.2d 919, 921-23 (Ind. Tax Ct. 1999). The Tax Court found that those were objective errors, at least to the extent that the costs of the correct components could be determined from assessment regulations. *Id*.; *see also, Wareco Enterprises, Inc. v. State Bd. of Tax Comm'rs*, 689 N.E.2d 1299 (Ind. Tax Ct. 1997) (finding the following to be objective errors: (1) improperly calculating perimeter-to-area ratio, (2) failing to subtract the costs of components included in the model that was used to assess the building but that were not actually included in the building, and (3) applying the wrong depreciation table).

The Petitioner, however, has not identified any objective component of Indiana's assessment regulations that assessing officials either failed to apply or applied incorrectly. The regulations do not expressly address how to assess a subdivision's common areas, much less purport to assign those common areas any specific value.[7]

Although the Petitioner's appeal petitions cite to the Board's *Brenwick* decision, that case does not stand for the proposition that all common areas must be assessed as having zero market value-in-use. In *Brenwick*, the developers of two residential subdivisions claimed that the subdivisions' common areas should be assessed as having zero value. *Brenwick*, slip op. at 7. Because that was a question of first impression in Indiana, the Board surveyed decisions from other states. *Id*. at 12-15. Based on the majority view, which the Board found to be generally consistent with Indiana law, the Board explained:

[7] Various statutes mandate specific assessments for a small number of statutorily created land classifications. *See, e.g*., I.C. § 6-1.1-6-14 (providing that land classified as native forest, forest plantation, or wildlands shall be assessed at $1 per acre). The Petitioner does not point to, nor has the Board found, any statute that creates a separate assessment classification for common areas of a subdivision.

> [c]ommon areas within a subdivision may be so encumbered as to deprive them of any market value-in-use. Clearly, the encumbrances must be severe and the taxpayer seeking to demonstrate that real property is devoid of any market value-in-use bears a heavy burden. Nonetheless, it is a factual question.

Id. at 17. Turning to the specific evidence before it in that case, which included the specific covenants and restrictions burdening the developer's common areas and an appraiser's expert opinion, the Board concluded that the common areas lacked any market value-in-use. *Id*. at 17-23. But the Board "emphasiz[ed]" that it was basing its finding on the "unique facts" presented in that case. *Id*. at 23.

Thus, the Board did not decide that land held as common area inherently and objectively lacks any market value-in-use, but rather that based on the specific evidence before it, the particular common areas at issue in that case had zero value. The same is true for *Lakes of the Four Seasons Prop. Owners' Ass'n v. Dep't of Local Gov't Fin.*, 875 N.E.2d 833 (Ind. Tax Ct. 2007). In that case, a homeowner's association appealed from the Board's final determination upholding the assessment of streets owned by the association. The streets had been assessed at $70,290, or approximately $650 per acre. *Lakes of the Four Seasons*, 875 N.E.2d at 834. The Board rejected the association's claim that its streets should have been valued at zero. While the Board recognized that the streets were burdened with easements and other restrictions that likely affected their market value-in-use, the Board noted that the association had offered neither an appraisal nor other evidence compiled in accordance with generally accepted appraisal principles to quantify the effect of the easements and restrictions. *Id*.

In front of the Tax Court, the DLGF[8] argued that, without an appraisal, the association's claim that its streets had zero value was merely a conclusory statement. *Id*. at 836. The Tax

[8] The DLGF, through its contractor, had assessed the taxpayer's property and therefore was the respondent in the taxpayer's appeal. *See Lakes of the Four Seasons*, 875 N.E.2d at 834.

Court disagreed, explaining, "an owner's testimony as to the value of his or her property will carry probative force if it is based upon facts and not speculation." *Id*. By contrast, explained the court, if the owner fails to identify the objective bases for his opinion, that opinion gives no way for an adjudicator to assess whether it is rationally based on the owner's perceptions. *Id*. In the case before it, the Tax Court found that the association's evidence provided:

> an objective, factual basis for its opinion that its streets have no value: it derives no benefit from owning the streets (the benefit is to the individual property owners within Lakes of the Four Seasons), it cannot sell or convey the streets to another party, the streets generate no income, and the streets cost at least $200,000 annually to maintain.

Id.

Because the association's evidence sufficed to make a prima facie case, the burden shifted to the DLGF to rebut that evidence. *Id*. at 837. The DLGF responded by simply explaining that it had assessed the streets using the neighborhood valuation form and then assigned a negative influence factor, and indicated its belief that "all property has value to it." *Id*. Given the association's evidence about how the specific restrictions deprived its streets of any independent value, however, the DLGF's explanation did not show that the assessment accurately reflected the streets' market value-in-use. *Id*. The Tax Court therefore reversed the Board's determination. *Id*.

Thus, like the Board in *Brenwick*, the Tax Court relied on an un-rebutted valuation *opinion*. The Tax Court did not hold that once property is classified as the common area of a subdivision, that fact automatically and objectively dictates that the property has zero market value-in-use. And the Board cannot help but note that the taxpayers in *Brenwick* and *Lakes of*

the Four Seasons both used the general appeal procedure—not the Form 133 procedure—to bring their claims.[9]

The "2006 memorandum from the DLGF to all assessing officials" to which the Petitioner cites in its appeal petitions does not support its position any more than *Brenwick* or *Lakes of the Four Seasons* do. As discussed below, the Petitioner did not respond to the substance of the Board's Show Cause Order and therefore did not more particularly describe the memorandum. The Board, however, assumes that the Petitioner was referring to an October 2006 memorandum from the DLGF to "Assessing Officials" with the subject heading "Common Area Property Assessments." http://www.in.gov/dlgf/files/Memo_CommonAreaAssessment.pdf (last visited Dec. 4, 2012). The DLGF issued that memorandum to address questions that had been raised in light of the Board's determinations in *Brenwick* and *Lakes of the Four Seasons*. *Id*. at 1.

The memorandum first notes that, "in valuing a development, such as a condominium project, the value of the common areas would typically be included in the sales prices of the individual units." *Id*. According to the DLGF, that is particularly true when the legal description of other properties includes a percentage ownership interest in the common area. The memorandum refers to that ownership interest as a "deeded interest." *Id.* The memorandum, however, also notes that there might also be instances where common areas should be valued separately, particularly where improvements generate income or can be used by the public. *Id*. at 2.

[9] In *Lakes of the Four Seasons*, the taxpayer filed a Form 139L petition. The Board promulgated that form for appeals from DLGF determinations under Ind. Code §§ 6-1.1-4-33 and -34. Those statutes dealt with appeals generated by the 2002 general reassessment in Lake County that the DLGF performed through a contractor. Although those statutes did not entitle taxpayers to a hearing before the Lake County PTABOA, they otherwise largely mirrored the general appeal procedure. Thus, a taxpayer needed to seek an informal hearing with the DLGF's contractor within 45 days after having been given notice that the taxpayer's property had been reassessed, and if the taxpayer was unhappy with the results of that informal hearing, he needed to appeal to the Board within 30 days. I.C. § 6-1.1-4-33(g) (2004); I.C. § 6-1.1-4-34(c) (2004).

The memorandum next points to a review of case law by James F. Gossett, in which Mr. Gossett found:

> [C]ourts do seem to be carefully analyzing the fact situations in individual cases, and there may be many instances in which courts will decide that common areas have retained at least some taxable value. The degree to which restrictions on common areas are 'private' or 'public,' that is self-imposed or governmental, may have a great bearing on whether a court will find that value has been transferred.

Id. at 2. The memorandum concludes with the following advice:

> Hence, while there may not be a definitive answer in determining whether or not common area should be assessed separately or as part of the value of the individual units or lots, including the Neighborhood Factor, there are several things to consider:
>
> - Are the common areas of a development burdened with easements and other restrictions on their use and transfer to such a degree as to render those areas devoid of market value?
>
> - If it is so burdened as to deprive it of any market value, the taxpayer must prove it through competent evidence.
>
> - If there is a deeded interest in the property, the value should be reflected in the sales price and the Neighborhood Factor. If there is no deeded interest, the common area probably does not have a significant value.
>
> - 'True tax value' is defined 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.' Easements and other restrictions on the use of the property must be considered in determining the property's true tax value.
>
> - Is the Homestead Deduction being applied to non-Homestead property?
>
> - Does all property included in the area the neighborhood factor is based upon have a similar interest in the common elements?

Id.

Thus, like the Board's decision in *Brenwick*, the DLGF declined to issue any *per se* rule about valuing common-area property. Instead, the DLGF identified various factors that an assessor should subjectively review and consider in determining whether a given property has

any market value-in-use or whether the property's value is instead reflected in the values assigned to surrounding properties. Once again, that differs from type of simple, straightforward factual determinations that the Form 133 process was designed to address.

C. Because valuing land requires subjective judgment, a taxpayer may not use a Form 133 petition to challenge the base rate used to assess its property.

In its response, the Petitioner indicates that it will argue, "in the alternative, that, as a matter of law, the assessment of its common area property cannot exceed twenty (20) percent of the base rate pursuant to the 2002 land order respecting the common area parcels. *Petitioner's Response at 11*. The Petitioner, however, made no such claims in either its Form 133 or Form 131 petitions. For that reason alone, the Petitioner's arguments about "alternative" claims do nothing to show that the Petitioner has asserted objective errors that may be corrected using the Form 133 process.

In any event, even if the Petitioner's had made such an "alternative" on its appeal petitions, that claim would suffer from the same problem as the Petitioner's other claims—it challenges a qualitative determination that requires subjective judgment. Under Indiana's current assessment system, proving that a property was incorrectly assessed is not simply a function of attacking the assessor's methodology in computing the assessment; instead, the critical question is whether the assessment accurately reflects the property's market value-in-use. *See Eckerling v. Wayne Twp. Assessor*, 841 N.E.2d 674, 678 (Ind. Tax Ct. 2006). Granted, that principle arguably is in tension with many of the Form 133 claims that the Tax Court has upheld under Indiana's old assessment system, which claims might be characterized as challenges to an assessor's methodology. But the Tax Court has not overruled those decisions and the General Assembly has not amended the portions of Ind. Code § 6-1.1-15-12 upon which the decisions were based. Straightforward factual questions about whether an assessor properly applied some

objective component of the assessment regulations might therefore still be cognizable on a Form 133 petition, even under Indiana's new assessment system. For example, a taxpayer might still be able to bring a Form 133 petition to challenge an assessor's failure to subtract the easily identifiable replacement costs for components that are included in the pricing schedules for the model used to assess a taxpayer's building but that are not actually present in the building.

The Petitioner, however, does not make such a challenge. The Petitioner instead claims that a different base rate should have been used to assess the Petitioner's common areas. But that is not an objective determination under the Manual or the Real Property Assessment Guidelines for 2002 – Version A.

As the Tax Court explained in *Westfield Golf*, determining a property's true tax value under Indiana's old property tax system was inextricably entangled with how the regulations were applied, and the only way to determine the uniformity and equality of assessments was to determine whether the regulations were applied similarly to comparable properties. *Westfield Golf*, 859 N.E.2d at 398. Thus, properties within the same geographic area, subdivision, or neighborhood in a land order were presumed comparable in terms of both distinguishing characteristics and value. *Id.* at 398-99. The Tax Court, however, explained that the new system shifts the focus from examining how the regulations were applied to examining whether a property's assessment actually reflects the external benchmark of market value-in-use. *Id* at 399. Thus, the Guidelines (and neighborhood valuation forms created by applying the Guidelines) are just a starting point for an assessor to determine a property's market value-in-use. *See id.* Indeed, as the Tax Court pointed out, the Guidelines themselves recognize that "the pricing method for valuing the neighborhood is of less importance than arriving at the correct value of the land as of the valuation date." *Id.* (*quoting* REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A Book 1, ch. 2 at 16).

Although *Westfield Golf* addressed a challenge to the uniformity and equality of assessments rather than the question of whether a taxpayer may use the Form 133 process to challenge the base rate used to assess its property, the Tax Court's reasoning is on point. Determining land value is inherently subjective and is not automatically dictated by applying the base rate from a neighborhood valuation form.

D. The Board had the authority to issue the Show Cause Order, and that order did not deprive the Petitioner of due process.

In fact, other than citing to *Brenwick* and the DLGF memorandum in its appeal petitions, the Petitioner has not offered any authority or argument to support the notion that its claims involve objective errors. Instead, the Petitioner directs its arguments solely to the Board's authority to issue the Show Cause Order. The Petitioner argues that the Board acted beyond its statutory authority in issuing that order. By doing so, argues the Petitioner, the Board impermissibly advocated for the Respondent. In the Petitioner's view, the only issue that the Board may raise *sua sponte* is whether it has subject matter jurisdiction, and the question of whether a Form 133 petition asserts objective or subjective errors does not affect the Board's subject matter jurisdiction. Instead, the Petitioner characterizes that issue as being akin to an affirmative defense, such as the statute of limitations, that a defendant must plead and prove.

The Petitioner is mistaken on all counts. First, the Tax Court has recognized the ability of the Board's predecessor to *sua sponte* raise fundamental issues beyond simply whether it has subject matter jurisdiction. *Indiana C.A.P. Directors Ass'n n/k/a Indiana Community Action Ass'n v. Dep't of Local Gov't Fin.,* 797 N.E.2d 878 (Ind. Tax Ct. 2003). In that case, the Marion County PTABOA had found that the taxpayer's property did not substantively qualify for an exemption under Ind. Code § 6-1.1-10-16. *Id*. at 879. The taxpayer appealed that decision to the

State Board of Tax Commissioners.[10] Although the Marion County PTABOA had not raised the issue, the State Board held that the taxpayer's exemption application was invalid because it had not been timely filed with the PTABOA. The State Board therefore did not even address whether the property qualified for exemption under Ind. Code § 6-1.1-10-16. *Id.*

On judicial review before the Tax Court, the State Board[11] moved for summary judgment. In response, the taxpayer argued (1) that the PTABOA had waived the issue of whether the taxpayer had timely filed its exemption application when the PTABOA denied the application on its merits, and (2) that the State Board denied the taxpayer due process by raising the timeliness issue *sua sponte*. *Id*. at 881. The Tax Court rejected the taxpayer's argument, explaining that "[w]hen a taxpayer petitions the State Board to review an assessment via a Form 131, the State Board may address and correct all errors, even those *not* raised in the taxpayer's petition." *Id*. (citing *Canal Realty-Indy Castor v. State Bd. of Tax Comm'rs*, 744 N.E.2d 597, 604 (Ind. Tax Ct. 2001) (emphasis in original). Thus, the Tax Court found that the "State Board was within its authority to raise the issue of [the taxpayer's] timeliness at the hearing." *Id*.

But the Tax Court added that, when the State Board (or now, the Board) addresses an error not originally raised by the taxpayer, due process requires that the taxpayer be given an opportunity to review and rebut the Board's disposition of that issue. *Id*. The Tax Court recognized that it often may not be practical for the Board to hold another hearing, and in those instances, a taxpayer must be given an opportunity on judicial review to respond to the Board's position. *Id*. In the case before it, the Tax Court found that the taxpayer's due process rights had

[10] The Indiana Board of Tax Review is one of the successor agencies to the State Board of Tax Commissioners. Before the State Board was abolished, one of its functions was to hear appeals from determinations by county PTABOAs.

[11] Because the State Board had issued its decision before that agency was abolished, the DLGF was substituted for the State Board as a party on judicial review. *Indiana Cap Directors*, 797 N.E.2d at 878 n.1 (*citing* Ind. Code § 6-1.5-5-8). The Tax Court, however, referred to the State Board as the respondent in the body of its decision. *Id*.

not been violated because the taxpayer had been given the opportunity to fully address the timeliness issue before the Tax Court. *Id*.

The timeliness issue that the State Board raised *sua sponte* in *Indiana C.A.P. Directors* had nothing to do with the State Board's subject matter jurisdiction. Nonetheless, the Tax Court affirmed the State Board's authority to raise that issue. Further, the Board has done more to protect the Petitioner's due process rights in this case than the State Board did in *Indiana C.A. P. Directors*. Here, the Board (1) issued the Show Cause Order indicating that it might dismiss the Petitioner's appeal petitions on grounds that those petitions did not allege objective errors, and (2) gave the Petitioner an opportunity to respond. When the Petitioner asked for additional time, the Board granted it. Finally, the Board held a hearing at which the Petitioner was again given the opportunity to argue why the errors raised in its petitions were correctable under the Form 133 process.

Not only are the Board's actions proper under *Indiana C.A.P. Directors*, they also comply with analogous authority from civil cases. Many federal courts, including the Seventh Circuit Court of Appeals, have upheld a court's authority to *sua sponte* dismiss complaints under Rule 12(b)(6) of the Federal Rules of Civil Procedure for the failure to state a claim. *E.g. Ricketts v. Midwest Nat'l Bank*, 874 F.2d 1177, 1183-85 (7th Cir. 1989); *Carroll v. Fort James Corp*., 470 F.3d 1171, 1176 (5th Cir. 2006); *Wyatt v. City of Boston*, 35 F.3d 13, 14-15 (1st Cir. 1994); *see also*, 5A WRIGHT ET.AL., FEDERAL PRACTICE & PROCEDURE Civil 3d § 1357 (West 2004) ("Even if a party does not make a formal motion under Rule 12(b)(6), the district judge on his or her own initiative may note the inadequacy of the complaint and dismiss it for failure to state a claim as long as the procedure employed is fair to the parties.").

And several courts, again including the Seventh Circuit Court of Appeals, have endorsed a procedure for doing so that is strikingly similar to what the Board has done here. *See e.g.*,

Ricketts, 874 F.2d at 1185; *Wyatt v. City of Boston*, 35 F.3d 13, 14-15 (1st Cir. 1994). Thus, before dismissing a case on its own motion, a court should allow a summons to be issued and served and should give the parties both notice of the court's intention and an opportunity to respond. *Id.*

Similarly, both the Indiana Court of Appeals and various federal courts, including the United States Supreme Court, have recognized the authority of courts to enter summary judgment *sua sponte*. *E.g. Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ("Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all her evidence."); *Jones v. Berlove*, 490 N.E.2d 393, 395 (Ind. Ct. App. 1986). Once again, the key is whether the court has given the party against whom summary judgment is entered "notice and an adequate opportunity to prepare and present materials in opposition." *Jones*, 490 N.E.2d at 395 (*citing* 10A WRIGHT, MILLER, KAYNE, FEDERAL PRACTICE AND PROCEDURE: Civil 2d § 2720 (1983)).

The cases, however, explain that courts should not undertake *sua sponte* dismissals or entries of summary judgment lightly. Indeed, such actions may (1) tend to conflict with the "traditional adversarial precepts of our system of justice," (2) prejudice plaintiffs by depriving them of the opportunity to either amend their complaints or argue against dismissal, and (3) defeat the very purposes of judicial efficiency that they are designed to serve by promoting a wasteful shuttling of cases between trial and appellate courts. *Ricketts*, 874 F.2d at 1184-85. But giving prior notice and an opportunity to respond guards against those evils and allows courts, admittedly in rare and appropriate cases, to promote judicial efficiency.

That is precisely what the Board has done here. Counsel for the Petitioner filed more than 100 petitions that, on their faces, appeared to seek relief to which the taxpayers would not

be entitled under the Form 133 process. Seeking to avoid a substantial amount of unnecessary litigation, the Board therefore notified those taxpayers that it was contemplating dismissing their petitions and gave them ample opportunity to respond with legal argument and factual material to show why the petitions alleged objective errors or were otherwise colorable.

Yet the Petitioner did not even attempt to respond to the substance of the Board's Show Cause Order, opting instead to attack the Board's authority to issue the order in the first place. The closest that the Petitioner came to making a substantive response was to claim that dismissal would be inappropriate because it had not conducted discovery bearing on the issue that the Show Cause Order raised. *Response to the Indiana Board of Tax Review's Order to Show Cause Why Petitions Should Not Be Dismissed on Grounds That They Allege Errors in Subjective Judgment at 7*. But the petitions had been pending for more than a year and a half when the Board issued its Show Cause Order. And the Show Cause Order simply required the Petitioner to show that its petitions raise objective errors, something that is part of the prima facie case for any taxpayer filing a Form 133 petition. Thus, the Petitioner had ample time before the Board issued its Show Cause Order to conduct any necessary discovery. More importantly, the Petitioner never asked that the deadline for responding to the Show Cause Order be extended to allow it to conduct discovery, even though the Petitioner asked for, and was granted, an extension for other reasons.

Even after the Petitioner conducted discovery, it still chose not to share what it obtained through those efforts. Instead, the Petitioner made the following cryptic reference in its reply:

> Specifically, because the discovery responses include evidence which supports the propriety of its Form 133 Petitions, had the Petitioner elected to respond to the Show Cause Order as requested in the Order, Petitioner would not have had the benefit of such evidence, which was obtained after the deadline for Response.

Reply in Support of Petitioner's Response to the Indiana Board of Tax Review's Order to Show Cause at 5. Due process requires only that a party be given the opportunity to respond, not that the party take advantage of the opportunity.

Thus, what the Board has done differs significantly from the two scenarios that the Petitioner conjures. First, the Petitioner's failure to allege an objective error on its petitions is not akin to an affirmative defense, such as the statute of limitations, that a defendant must plead and prove. An affirmative defense is one "'upon which the proponent bears the burden of proof and which, in effect, admits the essential allegations of the complaint, but asserts additional matters barring relief.'" *Molargik v. West Enterprises*, 605 N.E.2d 1197, 1199 (Ind. Ct. App. 1993) (*quoting FMC Corp. v. Brown*, 526 N.E.2d 719, 728 (Ind. Ct. App. 1988) (opinion adopted by *FMC Cop. v. Brown*, 551 N.E.2d 444 (Ind. 1990)). As explained above, the Form 133 process only provides relief for specified grounds, such as claims that there was a mathematical error in computing an assessment or that a taxpayer's taxes, as matter of law, were illegal. And the Tax Court has interpreted those grounds as covering only objective errors. Thus, proof that an error is objective is part of the prima facie case for any claim alleged on a Form 133 petition.

Perhaps the Show Cause Order's reference to timeliness is what led the Petitioner to equate the defect in its petitions with a statute of limitations defense. But the Board discussed timeliness only in response to the Petitioner's confusing and defective method of pleading. The Board assumed that the Petitioner was seeking relief under the Form 133 procedure, given that it had filed Form 133 petitions below and that it had begun the appeal process well after the general appeal procedure's deadline for doing so. Nonetheless, because the Petitioner filed its appeals to the Board on Form 131 petitions, the Board gave the Petitioner an opportunity to show

why such petitions would have been timely under the general appeal procedure. In any case, *Indiana Cap Directors* recognizes the Board's authority to raise timeliness issues *sua sponte*.

Second, the Petitioner points to *Hometowne Associates, L.P. v. Maley*, 839 N.E.2d 269 (Ind. Tax Ct. 2005) for the proposition that the Board may not make a party's case for him. In *Hometowne*, a taxpayer that owned a scattered-site low-income housing development appealed to the Tax Court from the Board's denial of the taxpayer's claim for obsolescence. *Id*. at 271-72. To support its obsolescence claim, the taxpayer offered an appraisal report prepared by, and testimony from, a professional appraiser. *Id.* at 274-76. Rather than offering anything to impeach the appraiser's credibility or to rebut his conclusions, the assessor simply asked some open-ended questions on cross-examination and made a few conclusory assertions. *Id*. at 277-78. Nonetheless, the Board ruled against the taxpayer finding (1) that the taxpayer did not show how the alleged causes of obsolescence had caused a loss in value, and (2) that the taxpayer did not quantify the property's obsolescence. *Id*. at 278-79.

The Tax Court reversed, finding that the taxpayer had offered probative evidence on both points and that the Board's criticism of the expert's appraisal as being "flawed" or "suspicious" fell well short of the substantial evidence needed to support a final determination. *Id*. at 280. The Tax Court added, "[f]inally, and perhaps most importantly, the burden was on the Assessor, and not the Indiana Board, to rebut [the taxpayer's] prima facie case." *Id*. at 280. As the Tax Court saw it, when the assessor failed to rebut the taxpayer's case, the Board attempted to make the assessor's case for him, which was beyond the Board's statutory authority. *Id*. (*citing* I.C. 6-1.5-4-1(a)).

The Petitioner's reliance on *Hometowne* is misplaced. *Hometowne* involved efforts by the Board to impeach an expert's credibility on factual questions that the opposing party did not raise and to which the expert therefore had no chance to respond. And the Tax Court found that

the Board did so without any significant support. By contrast, the Board's Show Cause order addresses an obvious facial defect in the Petitioner's appeal petitions—their failure to allege objective errors. Also, unlike in *Hometowne*, the Board asked the Petitioner to address that apparent defect with either factual evidence, legal argument, or both. Again, the fact that the Petitioner chose not to take advantage of that opportunity is beside the point.

IV. Conclusion

Although filed with the Board on Form 131 petitions, the Petitioner brought its claims under the Form 133 procedure, which affords relief only for objective errors. The Petitioner alleged that the common areas of its subdivision had zero market value-in-use, or alternatively, that those common areas should have been assessed using a different base rate. Because those claims, on their faces, appeared to address qualitative determinations requiring subjective judgment, the Board issued a Show Cause Order giving the Petitioner the opportunity to explain why its petitions should not be dismissed. Instead of responding to the substance of that Show Cause Order, the Petitioner relied on its mistaken assumption that the Board lacked the authority to issue such an order. After fully considering the issue, albeit without any help from the Petitioner, the Board finds that the Petitioner has alleged errors that are not correctable using the Form 133 process and therefore dismisses all of the petitions identified in the attachment to this Final Determination.

Dated: _____

_____
Chairman, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

IMPORTANT NOTICE

- REHEARING AND APPEAL RIGHTS -

Within 15 days of the date of this notice, a party to the proceeding may request a rehearing before the Indiana Board. The Indiana Board MAY conduct a rehearing and affirm or modify the final determination. A petition for rehearing does not toll the time in which to file a petition for judicial review unless the petition for rehearing is granted (Ind. Code § 6-1.1-15-5)

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>.

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