

**STATE OF INDIANA  
Board of Tax Review**

THOMAS C REED	)	On Appeal from the Elkhart County Property
	)	Tax Assessment Board of Appeals
	)	
Petitioner,	)	
	)	Petition for Review of Assessment, Form 131
v.	)	Petition No. 20-030-95-1-5-00178
	)	
ELKHART COUNY PROPERTY TAX	)	Parcel No. 30-11-17-102-002
ASSESSMENT BOARD OF APPEALS	)	
And the ELKHART TOWNSHIP	)	
ASSESSOR	)	
	)	
	)	
Respondents,	)	

**Findings of Fact and Conclusions of Law**

On January 1, 2002, pursuant to Public Law 198-2001, the Indiana Board of Tax Review (IBTR) assumed jurisdiction of all appeals then pending with the State Board of Tax Commissioners (SBTC), or the Appeals Division of the State Board of Tax Commissioners (Appeals Division). For convenience of reference, each entity (the IBTR, SBTC, and Appeals Division) is hereafter, without distinction, referred to as "State". The State having reviewed the facts and evidence, and having considered the issues, now finds and concludes the following:

**Issues**

1. Whether the assessment is in violation of Article X, Section I of the Indiana Constitution.
2. Whether the grade should be reduced from "C+2" to "C".
3. Whether obsolescence depreciation is warranted.
4. Whether the neighborhood rating is excessive.

5. Whether a negative influence factor for land is warranted.

### **Findings of Fact**

1. If appropriate, any finding of fact made herein shall also be considered a conclusion of law. Also, if appropriate, any conclusion of law made herein shall also be considered a finding of fact.
2. Pursuant to Ind. Code § 6-1.1-15-3, Stephen M. Hay of Landmark Appraisals, on behalf of Thomas C. Reed, filed a Form 131 petition requesting a review by the State. The Form 131 petition was filed on June 16, 1997. The Elkhart County Board of Review's (BOR) decision on the underlying Form 130 is dated June 10, 1997.
3. Pursuant to Ind. Code § 6-1.1-15-4, a hearing was held on March 31, 1998 before Hearing Officer Edward Airhart. Testimony and exhibits were received into evidence but a Final Determination was not issued on the appeal. Steven Hay represented the Petitioner. Terry Snyder and Dan Bubb represented Elkhart County. Eugene and Rebecca Inbody appeared on behalf of Elkhart Township.
4. Pursuant to Ind. Code § 6-1.1-15-5, and after proper notice, a rehearing was held on April 3, 2002 before Hearing Officer Patti Kindler. Testimony and exhibits were received into evidence. Stephen Hay appeared on behalf of the Petitioner. Cathy Searcy represented Elkhart County. Eugene Inbody and Grace Johnson represented Elkhart Township.
5. At the hearing, the subject Form 131 petition was made a part of the record and labeled Board Exhibit A. The Notice of Hearing on Petition is labeled Board Exhibit B. In addition, the following items were received into evidence:

Petitioner's Exhibit 1 – Copy of the proposed PRC with grade reduction shown (page 1), photographs of the subject property (page 2), Grade Specification Table from 50 IAC 2.2-7-6 (page 3), and photographs of typical "C" grades dwellings from 50-IAC 2.2-7-10 (page 4)

Respondent's Exhibit 1 – Exhibits presented by Petitioner at BOR hearing.

Respondent's Exhibit 2 –Additional comparable properties for which Landmark Appraisals had filed numerous Form 131 petitions within the County, resulting in Tax Court decisions (pages 1 – 8), copy of a building permit dated June 20, 1989 for the subject property (page 9), copy of a photograph of the subject's front elevation (page 10), Sales Disclosure Data for the subject property with sales date listed as 1/10/00 (page 11), and subject PRC (page 12).

6. The subject property is assessed as a residential dwelling located at 609 Amberwood Drive, Goshen, Indiana (Elkhart Township, Elkhart County).
7. The assessed values for the 1995 appeal as determined by the Elkhart County BOR are:  
Land - \$6,430                      Improvements - \$31,430.
8. The Hearing Officer did not view the subject property.
9. Mr. Hay testified that he was compensated on a contingency basis.

**Issue No. 1 – Constitutionality of the assessment**

10. Mr. Hay testified that his attorney has stated that the subject assessment violates the Indiana and the United States Constitution. Mr. Hay did not elaborate on how the assessment violates the constitutions.

## Issue No. 2 – Whether the grade factor is excessive

11. The Petitioner contends that the grade factor for the subject property should be reduced from a “C+2” to a “C” grade. *Hay Testimony*. The subject sold in 1994 for \$136,000, resulting in an A/V to sales ratio of 27.8%. *Id.* The subject again sold in 2000 for \$185,700, resulting in an A/V to sales ratio of 20%. *Hay Testimony; Respondent’s Exhibit 2-Page 11*. These ratios represent one of the highest ratios observed between assessed values and actual sales prices and indicate that the property is overvalued for assessment purposes. *Hay Testimony*.
12. The only change made to the proposed PRC is a grade reduction from “C+2” to a “C”, resulting in a reduction in the reproduction costs for the property of \$7,750. *Hay Testimony; Petitioner’s Exhibit 1*.
13. In addition, Mr. Hay submitted a copy of the grade specification table with his checkmarks and a copy of photographs of “C” grade dwellings from 50 IAC, Rule 7 – Pages 12 & 59. *Petitioner’s Exhibit 1-Page 3*. Mr. Hay asserts that the grade factor column containing the greatest number of check marks is the grade factor that should be assigned to the dwelling. *Hay Testimony*.
14. The County BOR denied the Form 130 Petition because the comparison of the sales price to A/V ratio is not listed in 50 IAC as an accurate comparison of value and no grade specification charts were submitted for the property that showed an incorrect assessment by the Township. *Searcy Testimony*. The subject property represents a larger group of over seventy (70) residential properties in the Goshen area for which Landmark filed appeals; most of those appeals have been through Indiana Tax Court with no change. *Searcy Testimony; Respondent’s Exhibit 2-Pages 2-7*.

**Issue No. 3 – Whether obsolescence is warranted**

**Issue No. 4 – Whether the neighborhood rating is excessive**

**Issue No. 5 – Whether a negative influence factor is warranted**

15. Mr. Hay did not present any evidence or testimony concerning these issues.

**Conclusions of Law**

1. The Petitioner is limited to the issues raised in the Form 131 petition filed with the State. Ind. Code § 6-1.1-15-1(e) and –3(d). See *also* Form 131 petition requiring the Petitioner to identify the specific grounds for appeal. The State has the discretion to address any issue once an appeal has been filed by the taxpayer. *Joyce Sportswear Co. v. State Board of Tax Commissioners*, 684 N.E. 2d 1189, 1191 (Ind. Tax 1997). In this appeal, such discretion will not be exercised and the Petitioner is limited to the issues raised in the Form 131 petition filed with the State.
2. The State is the proper body to hear an appeal of the action of the County pursuant to Ind. Code § 6-1.1-15-3.

**A. Indiana's Property Tax System**

3. Indiana's real estate property tax system is a mass assessment system. Like all other mass assessment systems, issues of time and cost preclude the use of assessment-quality evidence in every case.
4. The true tax value assessed against the property is not exclusively or necessarily identical to fair market value. *State Board of Tax Commissioners v. Town of St. John*, 702 N.E. 2d 1034, 1038 (Ind. 1998)(*Town of St. John V.*)

5. The Property Taxation Clause of the Indiana Constitution, Ind. Const. Art. X, § 1 (a), requires the State to create a uniform, equal, and just system of assessment. The Clause does not create a personal, substantive right of uniformity and equality and does not require absolute and precise exactitude as to the uniformity and equality of each *individual* assessment. *Town of St. John V*, 702 N.E. 2d at 1039 – 40.
6. Individual taxpayers must have a reasonable opportunity to challenge their assessments. But the Property Taxation Clause does not mandate the consideration of whatever evidence of property wealth any given taxpayer deems relevant. *Id.* Rather, the proper inquiry in all tax appeals is “whether the system prescribed by statute and regulations was properly applied to individual assessments.” *Id.* at 1040. Only evidence relevant to this inquiry is pertinent to the State’s decision.

### **B. Burden**

7. Ind. Code § 6-1.1-15-3 requires the State to review the actions of the PTABOA, but does not require the State to review the initial assessment or undertake reassessment of the property. The State has the ability to decide the administrative appeal based upon the evidence presented and to limit its review to the issues the taxpayer presents. *Whitley Products, Inc. v. State Board of Tax Commissioners*, 704 N.E. 2d 1113, 1118 (Ind. Tax 1998) (citing *North Park Cinemas, Inc. v. State Board of Tax Commissioners*, 689 N.E. 2d 765, 769 (Ind. Tax 1997)).
8. In reviewing the actions of the PTABOA, the State is entitled to presume that its actions are correct. “Indeed, if administrative agencies were not entitled to presume that the actions of other administrative agencies were in accordance with Indiana law, there would be a wasteful duplication of effort in the work assigned to agencies.” *Bell v. State Board of Tax Commissioners*, 651 N.E. 2d

816, 820 (Ind. Tax 1995). The taxpayer must overcome that presumption of correctness to prevail in the appeal.

9. It is a fundamental principle of administrative law that the burden of proof is on the person petitioning the agency for relief. 2 Charles H. Koch, Jr., *Administrative Law and Practice*, § 5.51; 73 C.J.S. Public Administrative Law and Procedure, § 128.
10. Taxpayers are expected to make factual presentations to the State regarding alleged errors in assessment. *Whitley*, 704 N.E. 2d at 1119. These presentations should both outline the alleged errors and support the allegations with evidence. "Allegations, unsupported by factual evidence, remain mere allegations." *Id* (citing *Herb v. State Board of Tax Commissioners*, 656 N.E. 2d. 890, 893 (Ind. Tax 1995)). The State is not required to give weight to evidence that is not probative of the errors the taxpayer alleges. *Whitley*, 704 N.E. 2d at 1119 (citing *Clark v. State Board of Tax Commissioners*, 694 N.E. 2d 1230, 1239, n. 13 (Ind. Tax 1998)).
11. The taxpayer's burden in the State's administrative proceedings is two-fold: (1) the taxpayer must identify properties that are similarly situated to the contested property, and (2) the taxpayer must establish disparate treatment between the contested property and other similarly situated properties. In this way, the taxpayer properly frames the inquiry as to "whether the system prescribed by statute and regulations was properly applied to individual assessments." *Town of St. John V*, 702 N.E. 2d at 1040.
12. The taxpayer is required to meet his burden of proof at the State administrative level for two reasons. First, the State is an impartial adjudicator, and relieving the taxpayer of his burden of proof would place the State in the untenable position of making the taxpayer's case for him. Second, requiring the taxpayer to meet his burden in the administrative adjudication conserves resources.

13. To meet his burden, the taxpayer must present probative evidence in order to make a prima facie case. In order to establish a prima facie case, the taxpayer must introduce evidence “sufficient to establish a given fact and which if not contradicted will remain sufficient.” *Clark*, 694 N.E. 2d at 1233; *GTE North, Inc. v. State Board of Tax Commissioners*, 634 N.E. 2d 882, 887 (Ind. Tax 1994).
14. In the event a taxpayer sustains his burden, the burden then shifts to the local taxing officials to rebut the taxpayer’s evidence and justify its decision with substantial evidence. 2 Charles H. Koch, Jr. at §5.1; 73 C.J.S. at § 128. See *Whitley*, 704 N.E. 2d at 1119 (The substantial evidence requirement for a taxpayer challenging a State determination at the Tax Court level is not “triggered” if the taxpayer does not present any probative evidence concerning the error raised. Accordingly, the Tax Court will not reverse the State’s final determination even though the taxpayer demonstrates flaws in it).

### **C. Review of Assessments After Town of St. John V**

15. Because true tax value is not necessarily identical to market value, any tax appeal that seeks a reduction in assessed value solely because the assessed value assigned to the property does not equal the property’s market value will fail.
16. Although the Courts have declared the cost tables and certain subjective elements of the State’s regulations constitutionally infirm, the assessment and appeals process continue under the existing rules until a new property tax system is operative. *Town of St. John V*, 702 N.E. 2d at 1043; *Whitley*, 704 N.E. 2d at 1121.

17. Town of St. John V does not permit individuals to base individual claims about their individual properties on the equality and uniformity provisions of the Indiana Constitution. *Town of St. John*, 702 N.E. 2d at 1040.

#### **D. Credibility of the Witness**

18. The contingency fee agreement between Mr. Hay, on behalf of Landmark, and his client goes to the weight of Mr. Hay's testimony and the documentary evidence prepared by him because he receives compensation based on the amount that the Petitioner's tax assessment is reduced. Courts agree that an expert witness whose fee is contingent upon the outcome of a case is improperly motivated and can not objectively inform the court on an issue before it. "It is the potentially adverse influence of the motivation to enhance his compensation that makes a contingent fee arrangement for an expert witness inappropriate." *City & County of Denver v. Board of Assessment*, 947 P.2d 1373, 1379 (Colo. 1997)(citing *New England Tel. & Tel. Co. v. Board of Assessors of Boston*, 392 Mass. 865, 468 N.E. 2d 263, 265 (1984)). "[A] bargain to pay compensation to an expert witness for the purpose of 'forming an opinion' is lawful 'provided that payment is not contingent on success in litigation affected by the evidence.'" *Id* (citing Arthur Linton Corbin, *Corbin on Contracts*, § 1430 (1962 & Supp. 1997)). Moreover, the Uniform Standards of Professional Appraisal Practice (USPAP) state that it is "unethical" to accept compensation that is contingent upon reporting "a direction in value that favors the cause of the client . . . [or] the attainment of a desired result." *Denver*, 947 P. 2d at 1378 (citing USPAP at 2 (1996)). *See also Wirth v. State Board of Tax Commissioners*, 613 N.E. 2d 874 (Ind. Tax 1993) (The contingent fee nature of the representative's agreement goes to the weight of the testimony).

### **E. Issue No. 1 – Constitutionality of the assessment**

19. The Petitioner did not support the allegations of constitutionality. As stated previously, though the Courts have declared the cost tables and certain elements of the Regulation constitutionally infirm, the assessment system continues under the existing rules until a new property tax system is operative. *Town of St. John V*, 702 N.E. 2d at 1043; *Whitley*, 704 N.E. 2d at 1121. No change in the assessment is made as a result of this issue. See ¶ 16.

### **F. Issue No. 2 – Whether the grade factor is excessive**

#### **1. Regulatory and Case Law**

20. The approach to valuing residential homes is primarily found in 50 IAC 2.2-7. The approach to valuing homes is the application of various models to represent typical types of construction. “A model is a conceptual tool used to replicate reproduction costs of given structures using typical construction materials.” 50 IAC 2.2-7-6. The model assumes that there are certain elements of construction defined as specifications. These specifications create an average or C grade home. *Id.*
21. “Grade” is defined as the classification of an improvement based on certain construction specifications and quality of materials and workmanship. 50 IAC 2.2-1-30.
22. Not all residences in the State are average or C grade homes. Therefore, grade factors are applied to account for differences in construction specifications and quality of materials and workmanship between the models in the Regulation and the home being assessed. *Clark*, 694 N.E. 2d at 1236, n. 6. The major grade classifications are “A” through “E”. 50 IAC 2.2-7-6 (d)(1). The cost schedules in the Regulation reflect the “C” grade standards of quality and design. The following grade factors (or multipliers) are assigned to each major grade

classification:

“A” grade	160%
“B” grade	120%
“C” grade	100%
“D” grade	80%
“E” grade	40%

50 IAC 2.2-7-6 (e).

23. Intermediate grade levels ranging from “A+10” through “E-1” are also provided for in the Regulation to adequately account for quality and design features between major grade classifications. 50 IAC 2.2-7-6 (g).
24. The determination of the proper grade factor requires assessors to make a variety of subjective judgments regarding variations in the quality of materials and workmanship and the quality of style and design. *Mahan v. State Board of Tax Commissioners*, 622 N.E. 2d 1058, 1064 (Ind. Tax 1993). The selected represents a composite judgment of the overall quality and design. *Mahan*, 622 N.E. 2d at 1064; 50 IAC 2.2-7 (f).
25. Subjectivity is used in the grading process. For assessing officials and taxpayers alike, however, the Regulation provides indicators for establishing grade. The text of the Regulation provides indicators for establishing grade. The text of the Regulation (see 50 IAC 2.2-7-6 (d)), the grade specification table (50 IAC 2.2-7-6 (b)), and graded photographs (50 IAC 2.2-7-10) all provide guides for establishing grade.

## 2. Administration of the Existing System

26. The Tax Court invalidated subjective elements of the Regulation, e.g., grade, holding that the Regulation did not contain ascertainable standards. *Town of St. John III*, 690 N.E. 2d at 388. Nevertheless, the Indiana Supreme Court and the

Tax Court did not throw out the whole system immediately. *Town on St. John V*, 702 N.E. 2d at 1043; *Town of St. John III*, 690 N.E. 2d at 398 & 99. *Whitely*, 704 N.E. 2d at 1121. Instead, the property tax system is currently administered in accordance with the true tax value system and existing law.

27. The Tax Court recognizes the difficulty in establishing whether a home has a “cheap quality interior finish with minimal built-in features” or is “devoid of architectural treatment.” *Whitely*, 704 N.E. 2d at 1119. But, the taxpayer has the responsibility to provide probative and meaningful evidence to support a claim that the assigned grade factor is incorrect. *Bernacchi v. State Board of Tax Commissioners*, 727 N.E. 2d 1133 (Ind. Tax 2000); *Hoogenboom-Nofziger v. State Board of Tax Commissioners*, 715 N.E. 2d 1018 (Ind. Tax 1999); *Whitely, supra*.

### 3. The Evidence Submitted

28. The Petitioner claims that the grade of “C+2” assigned to the subject property is incorrect. The Petitioner argues that the correct grade for the subject property is a “C”. In support of his claim, a proposed PRC reflecting the requested “C” grade pricing was submitted, along with subject photographs, copies of the Grade Specification Table and photographs of “C” grade dwellings from 50 IAC.
29. The Petitioner testified that the basis for the requested grade reduction is the purported difference between the subject’s sale price and its assessed value. The Petitioner claims that there is a 20% sales price to assessment ratio for the sale of the subject on January 10, 2000. In addition, the Petitioner claims that there is a 27.8% difference in the sales price to the assessment for a prior sale of the subject property in 1994.
30. The Petitioner did not submit any calculations to support his statements regarding the sales price to assessment ratio and how or to what degree that

ratio is indicative of an incorrect grade application for the property.

31. Assuming *arguendo*, that the sales price to assessment ratio difference represents a generally accepted method for determining the proper grade of an improvement, the Petitioner failed to indicate how his calculations result in a “C” grade for the subject property. The proposed PRC submitted by the Petitioner shows a reduction in the subject’s true tax value of \$7,750 based wholly on his proposed grade reduction from a “C+2” to a “C”. However, the Petitioner fails to provide evidence of how the sales price to assessment ratio difference is relative to the \$7,750 reduction shown on his PRC.
32. The Petitioner’s testimony regarding the sales price to assessment ratio is seriously flawed and does not warrant a reduction in assessed value in this appeal.
33. Using market value as a comparison, the Petitioner’s theory is that the subject property’s sale price is indicative that the property’s grade is excessive. Yet, Indiana’s true tax value system is based on reproduction cost calculated by way of the Regulation, 50 IAC 2.2-1-1. This system, including the use of the cost tables, remains in effect until a new property tax system is operative. True tax value does not attempt to determine the fair market value of property. The statute governing true tax value states explicitly that it is not the same as market value. Ind. Code § 6-1.1-31-6(c). The true tax value assessed against the property is not exclusively or necessarily identical to fair market value. *Town of St. John V*, 702 N. E. 2d at 1038. Thus, the evidence submitted by the Petitioner demonstrates, at best, that true tax value is not consistent with market value. This evidence is immaterial to the propriety of the assessment of the home under appeal and does not warrant a change in assessment.
34. Further, the submissions of the check-marked grade specification table and sample photographs from 50 IAC with minimal explanation do not establish that

the local assessing officials misapplied the tax system in this case. The Petitioner offered no evidence beyond his statement that the check-marked specification table and photographs should be reviewed. The Petitioner presented no discourse regarding the individual exterior and interior components of the dwelling and their relationship to the grade specification chart. “Without further explanation...the photographs of the residence and check marked grade specification table were merely conclusory statements.” *Bernacchi v. State Board of Tax Commissioners*, 727 N.E. 2d 1133, 1136 (Ind. Tax 2000.) “[C]heckmarks on the grade specification table, without further explanation, are...conclusory.” *Kemp v. State Board of Tax Commissioners*, 726 N.E. 2d 395, 401 (Ind. Tax 2000).

35. The taxpayer’s burden in the State Board’s administrative hearings is two-fold: (1) the taxpayer must identify properties that are similarly situated to the contested property, and (2) the taxpayer must establish disparate treatment between the contested property and other similarly situated properties. In this way, the taxpayer properly frames the inquiry as to “whether the system prescribed by statute and regulations was properly applied to individual assessments.” *Town of St. John V*, 702 N.E. 2d at 1040.
36. For the reasons set forth, the Petitioner did not identify any similarly situated properties or establish disparate treatment between the contested property and other similarly situated properties. Accordingly, the first prong of the two-prong burden was not met. Having failed to identify properties that were similarly situated, the Petitioner’s comparison did not demonstrate that the subject home was being treated any differently than similarly situated properties. The Petitioner did not make a prima facie case on the evidence presented.
37. For the all the reasons set forth above, the Petitioner did not submit probative evidence of an erroneous grade application. No change is made in the assessment as a result of this issue.

### **G. Conclusions on Remaining Issues**

38. Petitioner did not support these allegations in any credible way. The record is devoid of any explanation - - much less any factual predicate - - to support the error claimed. The issues were simply raised on the Form 131 Petition. No change is made in the assessment as a result of these issues.

### **H. Other Findings**

39. Several objections were made to evidence and testimony. These objections concern evidentiary procedures discussed in Ind. Code § 6-1.1-15-4. The State declines to conduct an in-depth analysis of the procedural rules as they pertain to this appeal as such an analysis would have no bearing on the outcome of this determination.

### **SUMMARY OF STATE DETERMINATIONS**

Issue – Constitutionality of Assessment – Denied

Issue – Grade Factor – Denied

Issue – Obsolescence Depreciation – Denied

Issue – Neighborhood Rating – Denied

Issue – Negative Influence Factor - Denied

The above stated findings and conclusions are issued in conjunction with, and serve as the basis for, the Final Determination in the above captioned matter, both issued by the Indiana Board of Tax Review this \_\_\_\_ day of \_\_\_\_\_, 2002.

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Chairman, Indiana Board of Tax Review