

**INDIANA BOARD OF TAX REVIEW**  
**Small Claims**  
**Final Determination**  
**Findings and Conclusions**

**Petition:** 89-004-15-1-4-00814-16  
**Petitioner:** Cummings Properties LLC  
**Respondent:** Wayne County Assessor  
**Parcel:** 89-10-22-330-104.000-005  
**Assessment Year:** 2015

The Indiana Board of Tax Review (Board) issues this determination in the above matter, and finds and concludes as follows:

**Procedural History**

1. The Petitioner initiated its 2015 assessment appeal with the Wayne County Assessor on September 8, 2015.
2. On March 4, 2016, the Wayne County Property Tax Assessment Board of Appeals (PTABOA) issued its determination lowering the assessment, but not to the level requested by the Petitioner.
3. The Petitioner timely filed a Petition for Review of Assessment (Form 131) with the Board, electing the Board's small claims procedure.
4. The Board issued a notice of hearing on November 3, 2016.
5. Administrative Law Judge (ALJ) Joseph Stanford held the Board's administrative hearing on December 12, 2016. He did not inspect the property.
6. Certified tax representative Richard Werner appeared for the Petitioner and was sworn as a witness. Attorney Brian Cusimano appeared for the Respondent. Wayne County Assessor Betty Smith-Henson, Wayne Township Assessor Timothy G. Smith, and Bradley Berkemeier of Nexus Group were sworn as witnesses for the Respondent.

**Facts**

7. The 80-unit apartment complex under appeal is located at 4289 Round Barn Road in Richmond.
8. The PTABOA determined an assessment of \$2,580,300 (land \$197,100 and improvements \$2,383,200).
9. At the hearing, the Petitioner's representative requested a total assessment of \$1,770,700.

## Record

10. The official record for this matter is made up of the following:

- a) Form 131 with attachments,
- b) A digital recording of the hearing,
- c) Exhibits:<sup>1</sup>

Petitioner Exhibit 1:	Subject record card,
Petitioner Exhibit 2:	“2015 Real Property Assessment Appeal” analysis prepared by Richard Werner (pages 21, 23, 25 marked CONFIDENTIAL), <sup>2</sup>
Petitioner Exhibit 3.1:	Property record card for 1036 Round Barn Road, Richmond,
Petitioner Exhibit 3.2:	Property record card for Salisbury Road, Richmond,
Petitioner Exhibit 3.3:	Property record card for 2065 Salisbury Road South, Richmond,
Petitioner Exhibit 3.4:	Property record card for 205 Round Barn Road, Richmond,
Petitioner Exhibit 3.5:	Property record card for 1018 South Round Barn Road, Richmond,
Petitioner Exhibit 5.1:	Property record card for 401 North 10 <sup>th</sup> Street, Richmond,
Petitioner Exhibit 5.2:	Property record card for 1817 Chester Boulevard, Richmond,
Petitioner Exhibit 5.3:	Property record card for 125 Garwood Road, Richmond,
Petitioner Exhibit 5.4:	Property record card for 114 North 34 <sup>th</sup> Street, Richmond,
Petitioner Exhibit 5.5:	Property record card for 953 South 23 <sup>rd</sup> Street, Richmond,
Petitioner Exhibit 5.6:	Property record card for 100 South 52 <sup>nd</sup> Street, Richmond,
Petitioner Exhibit 5.7:	Property record card for 3800 South A Street, Richmond,
Petitioner Exhibit 5.8:	Property record card for 600 North Morton Street, Centerville (1 of 3),
Petitioner Exhibit 5.9:	Property record card for 600 North Morton Street, Centerville (2 of 3),
Petitioner Exhibit 5.10:	Property record card for 701 Dillon Drive, Richmond,

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<sup>1</sup> Petitioner’s Exhibits 6.1, 6.3, and 7.3 were listed on the Petitioner’s list of exhibits but were not introduced at the hearing. Additionally, the Respondent did not introduce Respondent’s Exhibits A, C, or D.

<sup>2</sup> Mr. Cusimano pointed out that several exhibits include federal tax return information from the Petitioner and that those exhibits should be marked confidential and Mr. Werner agreed.

- Petitioner Exhibit 5.11: Property record card for 600 North Morton Street, Centerville (3 of 3),
- Petitioner Exhibit 5.12: Property record card for 3735 South A Street, Richmond,
- Petitioner Exhibit 5.13: Property record card for 3823 South A Street, Richmond,
- Petitioner Exhibit 5.14: Property record card for 1310 South 18<sup>th</sup> Street, Richmond,
- Petitioner Exhibit 5.15: Property record card for 100 Cedar Cliff Road, Richmond,
- Petitioner Exhibit 5.16: Property record card for 301 North Graham Street, Cambridge City (1 of 3),
- Petitioner Exhibit 5.17: Property record card for 301 North Graham Street, Cambridge City (2 of 3),
- Petitioner Exhibit 5.18: Property record card for 301 North Graham Street, Cambridge City (3 of 3),
- Petitioner Exhibit 5.19: Property record card for 4000 South A Street, Richmond,
- Petitioner Exhibit 5.20: Property record card for 210 North 9<sup>th</sup> Street, Richmond,
- Petitioner Exhibit 6.2: Sales disclosure form for 1210 West Buena Vista Drive, Evansville,
- Petitioner Exhibit 7.1: Property record card for 600 Marsha Court,
- Petitioner Exhibit 7.2: Property record card for 1210 Visa Court,
- Petitioner Exhibit 8.1: 2014 Internal Revenue Service (IRS) Form 8825 (marked CONFIDENTIAL),
- Petitioner Exhibit 8.2: 2015 IRS Form 8825 (marked CONFIDENTIAL).
- Respondent Exhibit B: Income capitalization approach analyses of the subject property prepared by Bradley Berkemeier (marked CONFIDENTIAL),
- Respondent Exhibit E: Pages 2-64 and 2-65 from *Income Approach to Valuation* from the International Association of Assessing Officers,
- Respondent Exhibit F: Pages 485 and 486 from *The Appraisal of Real Estate*.
- Board Exhibit A: Form 131 with CONFIDENTIAL attachments,
- Board Exhibit B: Notice of hearing dated November 3, 2016,
- Board Exhibit C: Hearing sign-in sheet,
- Board Exhibit D: Notice of Appearance for Brian A. Cusimano.

d) These Findings and Conclusions.

## Contentions

### 11. Summary of the Petitioner's case:

- a) The property's 2015 assessment is too high. In an effort to prove this claim, the Petitioner offered an analysis estimating the subject property's value at \$1,770,700. Mr. Werner, the Petitioner's certified tax representative, prepared the analysis by developing the cost, sales-comparison, assessment-comparison, and income capitalization approaches to value. Ultimately, Mr. Werner assigned "all of the weight" on the sales-comparison approach to value in accordance with Indiana law. *Werner argument (citing 50 IAC 27-5-10); Pet'r Ex. 2.*
- b) Mr. Werner first developed a cost approach to value, though he did not provide extensive testimony regarding this approach. It appears he developed the land value using the extraction method, and computed a value of \$15,500 per acre, or \$152,800. Mr. Werner appears to have computed his improvement value using generally the same methodology as the Respondent, and determined an improvement value of \$2,284,900. His indicated value under the cost approach was \$2,447,700. *Werner argument; Pet'r Ex. 2.*
- c) Next, Mr. Werner developed an assessment-comparison approach. First, he "listed" the 11 other apartment complexes in Wayne County with 40 or more units. He noted that 2 of the 11 are within 2 miles of the "border" of the subject property's taxing district. He developed a "trend line" utilizing all 11 properties by graphing the value per square foot of both the improvements and the entire properties. Only two properties have a higher value per square foot than the subject property. *Werner testimony; Pet'r Ex. 2.*
- d) He made several adjustments "based upon the Guidelines and the pricing ladder." Specifically, he adjusted for "effective age based upon the depreciation, difference in grade, and the unit finish adjustment in the cost approach to adjust for additional plumbing." He also adjusted for "pavement, using the building-to-pavement ratio, for pools, and for various different improvements." Mr. Werner determined an improvement value of \$24.02 per square foot. His indicated value under the assessment-comparison approach was \$1,793,100. *Werner testimony; Pet'r Ex. 2.*
- e) Mr. Werner also developed a sales-comparison approach. Because no "valid sales" of apartment complexes with 40 or more units had occurred in Wayne County in the past five years, Mr. Werner "looked around the state for the previous year." Ultimately, he was able to find approximately 15 sales of similar-sized apartment complexes. Of those sales, he chose three: one in Kokomo, one in Jeffersonville, and one in Evansville. Mr. Werner made adjustments to these three properties for essentially the same items as he did in his assessment-comparison approach. He adjusted for size based on land-to-building ratio. He adjusted for location "based upon what would be the difference in the overall sales price if it would be located in an area with land values the same as the subject." He adjusted for age based on the Guideline's

depreciation tables. Finally, he adjusted for grade based on the “difference in grade.” His indicated value via the sales-comparison approach was \$1,770,700. *Werner testimony; Pet’r Ex. 2.*

- f) Finally, Mr. Werner developed an income capitalization approach. He prepared one value calculation utilizing actual rent and actual expenses, taking an average of the figures reported on the Petitioner’s 2014 and 2015 federal tax returns. Additionally, “replacement reserves were calculated at 80% of the cost of the buildings’ total, and their economic life.” Utilizing a capitalization rate from “RealtyRates.com” his indicated value under this approach was \$1,832,800. *Werner testimony; Pet’r Ex. 2.*
- g) Additionally, Mr. Werner performed a second income capitalization calculation as a “reality check.” While still utilizing the subject property’s actual rent, he derived expenses from “RealtyRates.com” that indicated expenses in Indianapolis are \$303 per unit.<sup>3</sup> He multiplied that figure by the “Wayne County location cost multiplier of 0.85” to calculate annual expenses of \$247,248. He computed a vacancy rate using census bureau figures for the number of vacant households in Richmond and Wayne County. His indicated value under his second income capitalization computation was \$1,837,100. *Werner testimony; Pet’r Ex. 2.*

12. Summary of the Respondent’s case:

- a) The property is correctly assessed. Nevertheless, the Respondent’s witness, Mr. Berkemeier, a property tax consultant with Nexus Group, prepared two income capitalization computations. In the first computation, Mr. Berkemeier relied on the actual income data provided by Mr. Werner. He consulted “RealtyRates.com” for a vacancy and collection loss percentage, and added an additional 1% to account for “people who live in the apartments but do not pay.” The total vacancy and collection loss of 9.9% was subtracted from the potential gross income. *Cusimano argument; Berkemeier testimony; Resp’t Ex. B.*
- b) Mr. Berkemeier utilized an expense percentage of 46.79% from “RealtyRates.com” based on the Indianapolis market for the first quarter of 2015. He also utilized a capitalization rate of 10.8%. Mr. Berkemeier noted replacement reserves were accounted for with his choice of capitalization rate. Mr. Berkemeier’s indicated value under his first income capitalization analysis was \$2,259,000. *Berkemeier testimony; Resp’t Ex. B.*
- c) Mr. Berkemeier’s second income capitalization analysis is essentially the same as his first. The only difference under his second analysis is that he utilized a capitalization rate that does not account for replacement reserves. In accounting for replacement reserves separately, he utilized the “RealtyRates.com” figure of \$362 per unit. Here, his capitalization rate “adjusted for replacement reserves” was 9.53%. Mr.

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<sup>3</sup> “RealtyRates.com” also listed an expense ratio for Indianapolis of 46.79%. Mr. Werner testified that he used the raw dollar amount in his calculation because “if rents and expenses decreased at different rates, the expense ratio would change.”

- Berkemeier's value conclusion under his second analysis was the same as the first, \$2,259,000. Granted, Mr. Berkemeier's value conclusion is lower than the current assessment, but because his value is "within 5% of the current assessment" the Board should "leave the assessment alone." *Berkemeier testimony; Cusimano argument; Resp't Ex. B.*
- d) For many reasons, Mr. Werner's value computations are flawed. In his assessment-comparison, his purportedly comparable properties are "in a rather tight range around the subject property." Some of the properties "are higher and some are lower." The subject property is a single story, while most of the properties Mr. Werner selected are two-story properties. Generally speaking, "one-story buildings cost more per square foot." *Cusimano argument (referencing Pet'r Ex. 2).*
  - e) In his sales-comparison approach, Mr. Werner incorrectly based his analysis entirely on the "square feet of the properties rather than providing a per unit analysis, which is much more relevant." He also failed to provide any rental income information for the purportedly comparable properties. Further, his analysis includes large adjustments, including a locational adjustment of over 50% for two of the three properties. His adjustments lack support. *Cusimano argument (referencing Pet'r Ex. 2).*
  - f) As to Mr. Werner's income capitalization approach, he failed to present any market rent data, so that is an unknown. Nonetheless, the actual rent is a "pretty reasonable" estimate of market rent. Additionally, the income capitalization approach is "likely the best method" to value the property. *Cusimano argument (referencing Pet'r Ex. 2).*
  - g) However, Mr. Werner's treatment of expenses is "the big question." He utilized a "raw dollar amount" adjusted by the Wayne County location cost multiplier rather than an expense ratio. Mr. Werner failed to show that is a recognized methodology. Further, this methodology applies the location cost multiplier to expenses that have nothing to do with building construction, such as operating utility costs, administrative costs, and advertising and legal costs. Moreover, his computation of replacement reserves does not comply with generally accepted appraisal principles. In utilizing the entire building cost, Mr. Werner has included more than only short-lived items such as HVAC and carpeting. Thus, his computation greatly overestimates expenses, and underestimates the value. For these reasons, the Petitioner failed to meet its burden of proof. *Cusimano argument (referencing Pet'r Ex. 2); Berkemeier argument.*

### **Burden of Proof**

13. Generally, the taxpayer has the burden to prove that an assessment is incorrect and what the correct assessment should be. *See Meridian Towers East & West v. Washington Twp. Ass'r*, 805 N.E.2d 475, 478 (Ind. Tax Ct. 2003); *see also Clark v. State Bd. of Tax Comm'rs*, 694 N.E.2d 1230 (Ind. Tax Ct. 1998). The burden-shifting statute as amended by P.L. 97-2014 creates two exceptions to that rule.

14. First, Ind. Code § 6-1.1-15-17.2 “applies to any review or appeal of an assessment under this chapter if the assessment that is the subject of the review or appeal is an increase of more than five percent (5%) over the assessment for the same property for the prior tax year.” Ind. Code § 6-1.1-15-17.2(a). “Under this section, the county assessor or township assessor making the assessment has the burden of proving that the assessment is correct in any review or appeal under this chapter and in any appeals taken to the Indiana board of tax review or to the Indiana tax court.” Ind. Code § 6-1.1-15-17.2(b).
15. Second, Ind. Code § 6-1.1-15-17.2(d) “applies to real property for which the gross assessed value of the real property was reduced by the assessing official or reviewing authority in an appeal conducted under IC 6-1.1-15.” Under those circumstances, “if the gross assessed value of real property for an assessment date that follows the latest assessment date that was the subject of an appeal described in this subsection is increased above the gross assessed value of the real property for the latest assessment date covered by the appeal, regardless of the amount of the increase, the county assessor or township assessor (if any) making the assessment has the burden of proving that the assessment is correct.” Ind. Code § 6-1.1-15-17.2(d). This change was effective March 25, 2014, and has application to all appeals pending before the Board.
16. Here, there was no dispute the assessment did not increase by more than 5% from 2014 to 2015. In fact, the assessment increased from \$2,567,300 in 2014 to \$2,580,300 in 2015, an increase of only 0.5%. The Petitioner’s representative admitted the Petitioner has the burden of proof. The burden shifting provisions of Ind. Code § 6-1.1-15-17.2 do not apply, and the burden remains with the Petitioner.

### **Analysis**

17. The Petitioner failed to make a prima facie case for reducing the 2015 assessment.
  - a) Real property is assessed based on its market value-in-use. Ind. Code § 6-1.1-31-6(c); 2011 REAL PROPERTY ASSESSMENT MANUAL at 2 (incorporated by reference at 50 IAC 2.4-1-2). The cost approach, the sales comparison approach, and the income approach are three generally accepted techniques to calculate market value-in-use. Assessing officials primarily use the cost approach, but other evidence is permitted to prove an accurate valuation. Such evidence may include actual construction costs, sales information regarding the subject or comparable properties, appraisals, and any other information compiled in accordance with generally accepted appraisal principles.
  - b) Regardless of the method used, a party must explain how the evidence relates to the relevant valuation date. *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 a 2015 assessment, the valuation date was March 1, 2015. *See* Ind. Code § 6-1.1-4-4.5(f).

- c) Here, the Petitioner relied on an “analysis” prepared by its tax representative, Mr. Werner.<sup>4</sup> In his analysis, Mr. Werner developed four approaches to value: the cost approach, the sales-comparison approach, the assessment-comparison approach, and the income capitalization approach. While his final reconciliation of value places “all weight” on the sales-comparison approach, the Board will examine all four approaches, beginning with the cost approach.
- d) Mr. Werner did not testify much regarding his cost approach to value. While he developed it, he did not indicate how or why it was relevant. Further, he placed “no weight” on this approach in his final reconciliation of value. Therefore, the Board will assign it little probative value as well.
- e) Next, the Board turns to Mr. Werner’s sales-comparison approach. *See* 2011 REAL PROPERTY ASSESSMENT MANUAL at 9 (incorporated by reference at 50 IAC 2.4-1-2) (stating that the sales-comparison approach relies on “sales of comparable improved properties and adjusts the selling prices to reflect the subject property’s total value.”); *see also, Long*, 821 N.E.2d 466, 469.
- f) To effectively use the sales-comparison approach as evidence in a property tax appeal, the proponent must establish the comparability of the properties being examined. Conclusory statements that a property is “similar” or “comparable” to another property are not sufficient. *Long*, 821 N.E.2d at 470. Instead, the proponent must identify the characteristics of the subject property and explain how those characteristics compare to the characteristics of the purportedly comparable properties. *Id.* at 471. Similarly, the proponent must explain how any differences between the properties affect their relative market values-in-use. *Id.*
- g) While Mr. Werner made adjustments to his purportedly comparable properties, he failed to adequately support those adjustments. Mr. Werner attempted to explain them to some extent, but, at best, his adjustments inappropriately mix elements of the cost approach and the sales-comparison approach. While his format may not differ significantly from that of a certified appraiser in an appraisal report, the appraiser’s assertions are backed by his education, training, and experience. When an appraiser certifies that he complied with USPAP, we can infer that the appraiser used objective data, where available, to quantify his adjustments. Here, Mr. Werner failed to provide any indication that his report complies with USPAP. Given the failure to adequately support his adjustments, the mixing of approaches, and the lack

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<sup>4</sup> The Petitioner submitted another “Property Tax Assessment Appeal Report” along with its Form 131. This report was also prepared by Mr. Werner and is dated November 11, 2015. On its face, this report includes similar information as Petitioner’s Exhibit 2. However, upon further inspection the two reports are markedly different. Most importantly, the report attached to the Form 131 specifically states it was prepared in accordance with Uniform Standards of Professional Appraisal Practice (USPAP) and lists Mr. Werner’s accreditation. Petitioner’s Exhibit 2 states neither. The Board will not speculate as to why Mr. Werner did not include this crucial information in Petitioner’s Exhibit 2. Additionally, the reports yield markedly different values when examining the various approaches to value. As the Petitioner did not introduce into evidence the report attached to the Form 131 nor did Mr. Werner testify to anything in the report, the Board will not place any weight on this report.

of USPAP compliance, the Board finds his sales-comparison approach is insufficiently reliable.

- h) Mr. Werner also developed an assessment-comparison approach. Indeed, parties can introduce assessments of comparable properties to prove the market value-in-use of the property under appeal. Ind. Code § 6-1.1-15-18(c)(1). However, Mr. Werner made adjustments similar to those in his sales-comparison approach that are generally unsupported and inappropriately based on cost-approach principles. Thus, the Board also finds his assessment-comparison approach to be insufficiently reliable.
- i) Finally, the Board turns to Mr. Werner's income capitalization approach. Mr. Werner developed two separate income approach computations. In the first, he utilized actual rent and actual expenses to calculate an indicated value of \$1,832,800. This calculation lacks any consideration of market rent or expenses. This fact alone deprives this particular computation of any probative value. See *Indiana MHC, LLC v. Scott Co. Ass'r*, 987 N.E.2d 1182, 1185-1186 (Ind. Tax Ct. 2013) (stating that the petitioner's income capitalization approach, which failed to consider any market data, lacked probative value).
- j) In his second income capitalization calculation, Mr. Werner calculated a value of \$1,837,100. In this computation, while Mr. Werner used actual rent, he did consider market expenses. Additionally, the Respondent agreed the actual rent is a "pretty reasonable" estimate of market rent. However, his computation of replacement reserves considered the entire building value rather than only the cost of short-lived items. This computation employs a methodology that does not appear to comport with generally accepted appraisal principles. Moreover, it appears to significantly overestimate replacement reserves, and consequently, significantly underestimates the value.
- k) The Board notes that Mr. Werner, while appearing as a witness, was also acting as an advocate. In his capacity as a witness he offered his own "analysis" and arguments regarding that evidence. In his role as an advocate he offered arguments against the Respondent's evidence. By stepping well outside the bounds of a typical expert witness, Mr. Werner casts doubt on his own independence. Finally, because Mr. Werner acted both as an advocate and as a witness, the Board has serious doubts about his credibility as an independent expert. For these reasons, and the various issues previously addressed, the Board finds Mr. Werner's opinion unreliable. Consequently, the Petitioner failed to make a prima facie case that the assessment should be reduced.
- l) The Board's inquiry does not end there because the Respondent offered her own income capitalization approach prepared by Mr. Berkemeier, a property tax consultant with the Nexus Group. Mr. Berkemeier considered actual rent, a fact neither party disputed was a reasonable measure of market rent. Mr. Berkemeier consulted "RealtyRates.com" to derive his vacancy rate, expense ratio, and

capitalization rate. The Petitioner offered no rebuttal to the Respondent's computation. In fact, Mr. Werner similarly relied on "RealtyRates.com" for his own computations. According to Mr. Berkemeier's analysis, the subject property should be valued at \$2,259,000.<sup>5</sup>

- m) The Respondent contends the Board should "leave the assessment alone" because Mr. Berkemeier's value is "within 5%" of the current assessment. The Respondent failed to point to anything that supports such a proposition. The Petitioner is entitled to have its assessment reduced to the amount supported by probative evidence. Here, Mr. Berkemeier's analysis is probative. According to his analysis, the property's value as of March 1, 2015, should be \$2,259,000. As such, the Board orders the assessment be reduced accordingly.

### **Conclusion**

- 18. The Petitioner failed to make a prima facie case for reducing the assessment. However, the Respondent offered probative evidence that supports reducing the 2015 assessment to \$2,259,000.

### **Final Determination**

In accordance with these findings and conclusions, the 2015 assessment must be reduced to \$2,259,000.

ISSUED: May 10, 2017

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Chairman, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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Commissioner, Indiana Board of Tax Review

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<sup>5</sup> The Respondent did not offer any evidence indicating she attempted to value the property using any of the other three approaches to value.

**- 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>>.